
Independent Review of the Police and Prosecution Response to the Rehtaeh Parsons Case

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The Honourable Diana C. Whalen
Minister of Justice and Attorney General

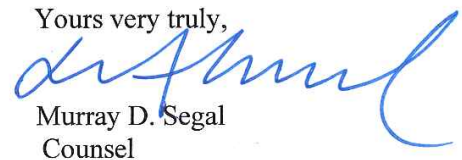
The Honourable Joanne Bernard
Minister responsible for the *Advisory Council*
on the Status of Women Act

Dear Madam Attorney General and Madam Minister:

**RE: Independent Review of the Police and Prosecution Response to the Rehtaeh
Parsons Case**

In accordance with the Terms of Reference issued on August 7, 2013, I am delivering the report resulting from my independent review of the police and prosecution response to the Parsons Case. My recommendations for improvements to the criminal justice system and related matters are included in this report. It has been a privilege to serve as independent reviewer in this matter.

Yours very truly,



Murray D. Segal
Counsel

MDS/bc

Executive Summary

Overview of Events

Rehtaeh Parsons was a vibrant and promising young woman. She had a loving and supportive family. When she experienced profound trauma in 2011 and 2012 as a result of criminal activity, they were there for her. Despite this familial support, she took her own life in April 2013.

On August 7, 2013, I was tasked with reviewing the handling of the initial investigation by the police and prosecution.

Rehtaeh was 15 years old in November 2011 when she was devastated by the circulation of an intimate photograph taken without her consent, and the bullying and cyberbullying that resulted from it. Rehtaeh al-

leged that the photo depicted a sexual assault. The day after she discovered the photo, she formed a suicide plan and came close to putting it in effect, explaining that she couldn't see another option. She sought assistance from the authorities. She described how damaging her experience and the dissemination of the photo were.

The investigation into possible sexual assault and child pornography offences took close to a year to conclude. In the course of this investigation, Rehtaeh changed schools twice, and was hospitalized for weeks following

renewed thoughts of suicide. In the end, she did not receive the support and assistance a young person in crisis required.

At the conclusion of the investigation, the police obtained advice from Nova Scotia's Public Prosecution Service. No charges were laid. Following Rehtaeh's death, the investigation was re-opened and child pornography charges were laid against two boys. The charges have since resulted in convictions.

The Review

On August 7, 2013, I was tasked with reviewing the handling of the initial investigation by the police and prosecution. The most obvious points of concern were the length of the investigation, and why child pornography charges were laid only after Rehtaeh's death. These concerns prompted questions about whether the police investigation was properly conducted, and whether the advice provided to the police by the prosecution service was appropriate. I was also asked to look into the sexual assault and cyberbullying components of the case, and whether the policies, procedures and guidelines that apply to the police and the prosecution in these areas are adequate and appropriate, while "taking into consideration the impact of technology on young people, their families, their interaction with the justice system, and police investigations."

I began the review immediately, but then halted it for over a year so as not to interfere with the criminal prosecutions. The review resumed in February 2015.

During my review, I received full access to the police and prosecution service's files, and full cooperation from all persons and institutions involved. I was therefore able to reach conclusions that are based on a firm factual foundation. The salient factual findings and conclusions are as follows.

The Findings

On November 12, 2011, 15-year old Rehtaeh and a girlfriend attended a small party at the home of a schoolmate. Everyone in attendance consumed alcohol to varying degrees. As a result, much of the ensuing evening was a blur for Rehtaeh. She nevertheless recounted to the police that at some point in the evening, sexual activity occurred with two boys, and that at one point – unbeknownst to her – one of the boys took a picture of the other boy having sexual intercourse with her while she was vomiting out the window. This photograph was eventually disseminated to students in her school and beyond, resulting in several instances of bullying and cyberbullying.

Rehtaeh provided a lengthy, non-recorded statement to the responding police officer before the case was assigned to a specialized investigator from the sexual assault unit. This did not follow proper protocol. Because Rehtaeh was a young person, she should have been interviewed only once, alongside a social worker from the Department of Com-

munity Services. Instead, the officer who first responded to the complaint unnecessarily interviewed her at length, and did so in the presence of Rehtaeh's mother, who should have been interviewed separately. Rehtaeh had to be re-interviewed by the investigator and social worker. They obtained a complete recorded statement in a manner that followed proper protocol. The error in protocol of being subjected to two detailed interviews would have had an avoidable negative impact on Rehtaeh; it also had a negative impact on the case because

In the end, she did not receive the support and assistance a young person in crisis required.

the initial statement was not obtained in conditions conducive to optimal reliability.

The matter was subsequently investigated by a police investigator from the Sexual Assault Investigation Unit ("SAIT"). While some errors were committed and the investigation took much too long (for reasons that were sometimes outside of the investigator's control), the investigator conducted a proper and thorough investigation. She made an attempt to attend at the school to interview as many students as possible about the photo. This attempt was apparently thwarted by school authorities. She obtained production orders related to several cell phone devices to gather evidence of making and distributing child pornography. She attempted to interview the four boys who attended the party. Only one agreed to submit to an interview. She planned to arrest the two main suspects for child

pornography offences, interview them and seize their cell phones. Because she had misgivings about bringing a sexual assault charge, she first sought the advice of Crown counsel on that component of the case.

After a thorough discussion with the investigator and an extensive review of the file, the Crown prosecutor came to the conclusion that there was no realistic prospect that sexual assault charges would result in convictions. While I find that more attention could have been given to the allegations surrounding the events that occurred at the window,

Child pornography charges could have been laid at the conclusion of the initial investigation.

the Crown's position, in view of the many evidentiary challenges in this case, was not unreasonable. Another Crown counsel could reasonably have chosen to prosecute the sexual

assault component of the case, but it no doubt presented a unique challenge for the prosecution.

The police investigator understood that the decision whether to lay charges was still hers to make, but in light of the Crown prosecutor's opinion, the decision not to lay charges of sexual assault was understandable.

The investigator's meeting with the Crown prosecutor about the evidence of sexual assault led to another Crown prosecutor also providing an opinion related to the child pornography offences. That prosecutor's opinion was that the child pornography offences could not be prosecuted, primarily

because it was not possible to tell from the photo itself that the persons depicted were underage. As a result, the police investigator did not proceed with the planned arrests and interviews.

The Crown's advice related to the child pornography offences was incorrect. It reflected a misunderstanding of the law as it relates to child pornography. This advice was provided by a junior Crown counsel, in consultation with a senior – now retired – Crown counsel. Following Rehtaeh's death, the Internet Child Exploitation Unit ("ICE") reviewed the file. It concluded that child pornography charges could have been laid at the conclusion of the initial investigation. That decision was based on a proper application of the law to the facts of the case.

The Response to Cyberbullying

Throughout the initial investigation, the police were not successful in promptly intervening to stop the significant harm to Rehtaeh caused by the circulation of the photograph. Indeed, the investigation failed to address the cyberbullying component of the case. The rapid, ongoing damage caused by the distribution of the photo was not alleviated in any way by the authorities' intervention. The police did consider the matter, but found no pragmatic solution. While the police did not have at its disposal many

Because of technology, the landscape has changed, and so our collective way of dealing with its fallout must change.

new tools now available to them and other authorities to address cyberbullying, certain actions could have been taken to address this urgent problem. The investigator had grounds to believe that at least some of the boys either had the photograph – child pornography – on their phones or had transmitted it. Search warrants could have been obtained to seize those devices at the earliest opportunity. Although this action would not have taken the photograph out of circulation because it had already been broadly disseminated, it would have made the student body aware that the police were taking the matter seriously and actively investigating – which would, in itself, have had an impact. More pressure should also have been brought to bear on the school to intervene or to allow the police to immediately intervene at the school.

Greater awareness about the devastation caused by cyberbullying and the many new tools now available to the police and others to address the issue may prevent similar outcomes in the future. Because of technology, the landscape has changed, and so our collective way of dealing with its fallout must change. The consequences of negative interactions between young persons are dramatically different than they used to be. The dynamics of cyberbullying are complex and its impact is so rapid and far-reaching that an array of tools is required to confront it. In particular, it is important that the existence of a criminal investigation not have the effect of preventing other authorities from intervening. There is an obligation on authorities to move effectively and expeditiously. Furthermore, the nature of the problem and its implications are such that, in many cases, the police can no longer address it solely through traditional police investigation. In the cyberbullying context, the objective may not be to conduct the perfect criminal investigation. The bullied child's needs must come first. The response must be quick. In future cases, the focus will need to be on taking action to put an immediate halt to the cyberbullying.

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Conclusion

From the moment the matter was reported to the police, they were aware that Rehtaeh was a young person in distress. The previous night, following the incident and the dissemination of the photograph, she had had suicidal thoughts and the Mental Health Mobile Crisis Team had been called in aid. The suspects were also young persons. In the circumstances, a year-long investigation was simply unacceptable. While there was copious potential evidence to gather in this case and several appropriate investigative steps inevitably

Decisive, immediate and sustained efforts need to be made to avoid similar tragedies.

took time, by its midway point, the bulk of the investigation had been completed and the investigation appeared to lose steam. The investigation should have reached its conclu-

sion sooner. To the extent that one of the main contributing factors was the investigator's workload, this issue needs to be addressed. Most importantly, investigations involving youth must be prioritized and expedited, in the same way that the courts and Crown try to expedite prosecutions under the *Youth Criminal Justice Act*.

My recommendations are set out throughout the report, and are also summarized in **Appendix D**. It will be evident from the above that the most obvious error I identified – the legal advice relating to the child pornography charges – resulted from a misunderstanding of the law. No amount of reform can entirely eradicate human error. There is no fundamental policy change that I can point to as the solution to preventing a similar outcome. Nevertheless, I have identified several areas where improvements are warranted. These improvements could help prevent a similar occurrence in the future, and address other failings or areas of concern I discerned. There is no doubt that decisive, immediate and sustained efforts need to be made to avoid similar tragedies.

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Introduction



Introduction

Rehtaeh Anne Parsons was 15 years old in November 2011 when police commenced an investigation into sexual assault and child pornography offences allegedly perpetrated against her a few days earlier. After a year-long investigation, police closed the file without laying any charges. In April 2013, Rehtaeh committed suicide. That same

My task was not to determine what happened that fateful night; it was to inquire into whether the police and prosecution properly investigated and assessed Rehtaeh's case.

month, the investigation was reopened and, in August 2013, child pornography charges were laid against two young offenders.

On August 7, 2013, then Minister of Justice and Attorney General Ross Landry ordered an independent review of the handling of the Rehtaeh Parsons case by the police and Public Prosecution Service

("PPS"). The Terms of Reference (see **Appendix A**) mandate me to determine whether the police investigation and involvement of the PPS in the case complied with all applicable training, policies, procedures and guidelines, and to determine whether those policies, procedures and guidelines are adequate and appropriate. The Terms of Reference provided that the report would be completed by April 1, 2014. At the time the review was announced, the criminal charges remained outstanding.

The Terms of Reference expressly stated that "all reasonable measures shall be taken to ensure [the review] does not impact any ongoing criminal investigation or proceeding." To properly discharge my duties, it was necessary for me to fully interview many individuals involved in the original investigation. It became clear that doing so would, in all likelihood, have an impact on the outstanding criminal proceedings. In November 2013, I therefore requested and was granted permission by then-Minister and Attorney General Lena Diab to suspend the review until the criminal proceedings were completed. The two individuals charged eventually entered guilty pleas, and the criminal proceedings ended on January 15, 2015. I recommenced my review, which culminated in this report.

The Ministerial Directive issued by then-Minister Diab on December 17, 2014, permitted the publication of Rehtaeh's name under appropriate circumstances, despite the publication ban ordered in the criminal proceedings. This Directive allows me to use Rehtaeh's name, thereby making the report more accessible and keeping her name associated with the important public debate to which this report seeks to contribute. All other youths involved in the criminal investigation into Rehtaeh's case will be referred to by way of pseudonyms, in order to protect their right to privacy and comply with the provisions of the *Youth Criminal Justice Act*, S.C. 2002, c. 1 ("YCJA").

What was the focus of the review?

My task was not to investigate the crime and determine what exactly happened that fateful night; rather, it was to inquire into whether the police and the prosecution properly investigated and assessed Rehtaeh's case.

Rehtaeh (often called "Rae" by those close to her) was a young person who all agreed had unlimited promise. Adjectives such as caring, compassionate, free spirited and free-thinker have been used to describe her. She had a great love for animals, and cared for those less fortunate. She loved science as much as the arts. Most of all, she loved her little sisters.

Rehtaeh was very well supported by a loving family in her life. Their dedication to and love for Rehtaeh are palpable. This is apparent in everything that we read and Rehtaeh's own statements to the police and social workers. The support of her family has continued after her death. This is evident in the courageous public involvement of her parents Leah Parsons and Glen Canning, in their efforts to ensure her passing not be in vain. What I hope to clarify is whether the justice system supported her, and what can be done to improve it.

What warrants particular consideration is not why charges were not laid in the first instance, but how "no charges" became "yes charges" following Rehtaeh's death. Rehtaeh's family, the public generally and, indeed, those who were charged all deserve an answer to that question. Many have also questioned the length of the original investigation and wondered what the police actually did during that time.

The Terms of Reference cover this aspect of the case, and I have endeavoured to lay out all investigative steps taken by police in the original investigation. The Terms of Reference do not relate to the steps taken once the investigation was re-opened so I only comment on those steps to the extent that they help answer the question as to why an absence of charges turned into the laying of charges.

My review also examined issues that go beyond Rehtaeh's own case and, in many respects, beyond the state of policing and prosecution in the province of Nova Scotia. For example, I was asked to look into the adequacy and appropriateness of the various Public Prosecution Service and police policies and procedures relating to sexual assault, child pornography, cyberbullying and Crown advice to police in Nova Scotia, as well as to "take into consideration the impact of technology on young people, their families, their interaction with the justice system and police investigations." The latter task is a daunting one. It relates to a difficult, complex area that has been and continues to be the subject of countless studies and reports, and the focus of much social science research. I do not have all the answers to the problem of how to properly or fully address the issue of technology and crime, and in particular cyberbullying, but I set out different approaches to the issue – many of which have emerged since and in part because of Rehtaeh's case. These approaches will be the subject of further public debate but, at the very least, they offer more than the one traditional avenue that is a police investigation. Any one of these alternative approaches might be better suited in a given case, depending on the particular circumstances of the case.

Who was involved in the review?

The review mandated speaking with and commenting on professionals. It was an examination of their skill and discretion, conducted through a lens of hindsight, and the findings should be considered in that light. Despite the impact the review could have, everyone was forthcoming, appreciating that a young person was profoundly impacted by their actions.

I include in this report (see **Appendix B**) a list of all the individuals and related institutions

Everyone, without exception, fully cooperated with the review. No one was there to protect the status quo: all were intent on knowing what can be improved.

interviewed or from whom I obtained information.

Everyone, without exception, fully cooperated with the review and provided all information requested. The institutions provided full access to any person with whom we requested to meet, as well as access to all files pertaining to this matter. I am grateful to them for having permitted

us to conduct a full and thorough review. I also note that no person or institution was there to protect the status quo: all were intent on knowing what can be improved.

How is the report organized?

The report has three parts. The first part sets out the essential facts relating to the police and Public Prosecution Service's involvement in the case.

The Halifax Region, Integrated Policing, and The Confusion of Responsibility

Halifax Region is one of only a few cities in Canada that has an integrated police system comprising, in this case, both the Royal Canadian Mounted Police ("RCMP") and the Halifax Regional Police ("HRP"). While there are some divisions along jurisdictional lines, there are also integrated investigative units that work across jurisdictional (geographical) lines, such as the one that conducted the bulk of the investigation in this case. The integrated units are composed of investigators from both agencies. While this model has much to commend it, it may lead to some confusion in the public's mind about who did what. The RCMP acted as the main spokesperson in this case given that Cole Harbour – the location where the events took place – is within RCMP jurisdiction, but this may have erroneously given the impression that the RCMP handled the entire investigation. Given the misperceptions we frequently encountered in this regard, I have endeavoured to identify the agency to which respective officers belonged.

The second part contains my analysis and conclusions relating to four key areas of concern or potential concern: (A) the initial routing of the complaint by police and the avenues that were open to them at the outset; (B) the length of the police investigation and the appropriateness of the steps that were taken; (C) the manner in which advice was obtained from the prosecution service, and the reasonableness

of that advice – both as it relates to sexual assault and child pornography; and (D) the role played by Victim Services. I highlight recommendations for improvement in these four areas as they arise.

The third part addresses initiatives that have already been taken since Rehtaeh's tragedy, and includes additional measures that could be taken. These measures relate to five different levels: the police, the Public Prosecution Service, local and community initiatives, provincial initiatives, and federal initiatives.

I wish to single out and deeply thank Christine Mainville of Henein Hutchison LLP, my exceptional co-counsel, who assisted with every aspect of the review, including producing this report. Christine's superior research, writing and policy skills alongside her valuable insights substantially contributed to the quality of the report.

Part I

Facts Relating to the Involvement of the
Police and Public Prosecution Service

Part I

Around 5 or 6 p.m. on November 12, 2011, Rehtaeh Parsons, age 15, and a girlfriend, Lucy¹, attended a small party in Cole Harbour, Nova Scotia, at the home of a schoolmate, Adam. At least three other boys known to Rehtaeh and her friend were present. All consumed alcohol to varying degrees. Rehtaeh had more than the others, and candidly admitted that much of the ensuing events were a blur.

The chronology of the police investigation and involvement of the Public Prosecution Service in the Parsons case is of central importance.

At some point in the evening, Rehtaeh was in Adam's room along with another boy, Josh. It is beyond dispute that Adam and Josh engaged in sexual activity with Rehtaeh. The issue was whether all of this activity was consensual. At one point, Rehtaeh leaned out the bedroom window to vomit. A picture was

taken by Adam – without her knowledge – of her leaning out the window, naked from the waist down. Rehtaeh's face is not visible in the photo, but her backside is shown from the waist down. The photo also depicts Josh, also naked from the waist down, standing behind her with his genital region pressed against Rehtaeh's anal genital region in a manner suggesting sexual activity. He is giving the thumbs up sign. This photo eventually began circulating among students at Cole Harbour High and beyond.

At certain points during the evening, Rehtaeh's friend Lucy made attempts to retrieve Rehtaeh from Adam's room so that Rehtaeh would return to Lucy's home with her, as originally planned. At one point, Adam and Josh also tried to assist Lucy in getting Rehtaeh to leave. Lucy witnessed some limited parts of the sexual activity between Rehtaeh, Adam and Josh. She did not witness the window incident. Ultimately, Rehtaeh informed her friend that she was too drunk and therefore wanted to stay. Lucy eventually left without her, approximately 5 to 6 hours after they first arrived.

Later in the evening, Rehtaeh was put to bed in the basement along with two other boys, Eric and Max. She has no recollection of what ensued from that point on, until she awoke in the morning next to Max (Adam's brother). Rehtaeh and the boys were fully clothed. She departed shortly thereafter. Rehtaeh was bruised on her right forearm and right hip. She had no other apparent physical injuries.

Rehtaeh could not recall how she got to Adam's room. She recalled having sex with Adam and Josh in Adam's bedroom, and at one point leaning out the bedroom window and being sick. She recalled knocking her head on

1. To reiterate, pseudonyms will be used throughout this report to refer to any young person or anyone that could tend to identify a young person, other than Rehtaeh.

the window, which brought her back a little bit and made her more aware. She recalled Adam telling Josh to pull down her pants and put his penis in her butt as she was leaning out the window. She alleged that Josh did this. She later became aware that Adam had taken a picture of this act, and that the photo was being circulated. She recalled Lucy coming into the room at some point but could not recall whether she said anything. She also recalled Eric and Max coming up to Adam's room and asking her to go down to the basement bedroom, which she did. She was almost asleep and doesn't recall what happened until she woke up the next morning and departed.

In her initial police statement, Rehtaeh does not appear² to have indicated whether the sexual activity that preceded the window incident was consensual or not. She did state that she did not know whether they asked her to have sex or not. In relation to the window incident, she indicated that they did not ask if they could do it, and she didn't recall if she told them to stop. In her second statement, she related that she felt her pants going down and tried to pull them back up, and Josh pulled them all the way down. She added that she tried to push Josh away, but it didn't work because she was being sick and her hair was getting in the way. She also indicated that the entire sexual encounter was non-consensual, that she had voiced her lack of consent and tried to push both boys off of her at some point in time.

These events were the subject matter of the complaint subsequently filed with the RCMP, which initially resulted in no charges being laid. Following Rehtaeh's death, the investigation was re-opened and child pornography charges were laid against Josh and Adam.

The chronology of the police investigation and involvement of the PPS in the Parsons case is of central importance in this review. (See **Appendix C** for a complete chronology.) The following is an overview of the significant steps taken in relation to her matter.

A. Chronology of the Police Investigation

November 2011

On Saturday, November 19, 2011, Leah Parsons filed a complaint with the RCMP in relation to an incident alleged to have occurred on November 12, 2011, which Rehtaeh had disclosed to her aunt the previous night. After RCMP Cst. Wetzell obtained very preliminary information from Leah Parsons by telephone, RCMP Cst. Kim Murphy was assigned to take the complaint. Cst. Murphy's supervisor and acting Watch Commander at the time, Cpl. Wayne Sutherland, advised her of the protocol to be followed, which included: the fact that a medical examination of the complainant might be required; that the file would be turned over to the Major Crime RCMP/HRP Integrated Sexual Assault Investigation Team ("SAIT") after the initial interview was completed; and that a joint

2. The initial police statement was not recorded. The responding officer took handwritten notes and it is therefore impossible to ascertain the exact words Rehtaeh used.

interview of the complainant would need to take place with the Department of Community Services (“DCS”).

Cst. Murphy contacted the IWK Health Centre³ to canvass whether there were any immediate steps to be taken by a Sexual Assault Nurse Examiner (“SANE”). None were required as the alleged assault had taken place more than three days earlier. Cst. Murphy also spoke with Leah Parsons. After consulting with her supervisor, it was agreed that Rehtaeh would come in to the detachment for an interview. Cst. Murphy conducted Rehtaeh’s initial police interview alongside her mother, Leah, at the Cole Harbour Detachment that same day. Only handwritten notes were taken. The interview was not video recorded. Cst. Murphy determined that Rehtaeh’s statement disclosed potential child pornography offences relating to a picture of a sexual act that had been taken and circulated, and disclosed a possible sexual assault. Cst. Murphy filed her report as required that same day.

On November 20th, the electronic file was routed from the RCMP to SAIT. This is the responsibility of the Quality Assurance Sergeant on duty, and should normally be done as soon as the officer who took the complaint has documented the file in the system. In this case, the file sat in the queue until the next day, instead of immediately being forwarded on November 19th as would usually be the case.

3. The Izaak Walton Killiam Health Centre, based in Halifax, provides health services to the Maritime provinces in relation to children’s health, mental health and addictions, and women’s and newborn health.

On November 20th, Cst. Murphy again spoke with Leah Parsons over the phone, and requested that Rehtaeh obtain “the picture” from a friend and provide it to her.

On November 21st, a hard copy of the file was forwarded from the RCMP to SAIT. Because only one of the two Non-Commissioned Officer (“NCO”)⁴ positions at SAIT was filled at the time, no NCO was on duty on Monday for the file to be assigned to an investigator.

On Tuesday, November 22nd, the file was assigned by HRP Sgt. Ron Legere to HRP D./Cst. Patricia Snair at SAIT. Sgt. Legere noted that Rehtaeh was interviewed by the responding officer without the involvement of DCS or SAIT, and that he would call that officer about that. I confirmed that he did follow through and speak with Cst. Murphy about this issue.

Because Rehtaeh was a youth, D./Cst. Snair completed a Child Welfare Referral form and sent it to DCS to request a joint interview with a child protection worker. It appears as though a Cst. Pollock from the RCMP’s Cole Harbour detachment also sent a referral form to DCS on November 22nd. DCS’s intake department immediately assigned the matter to social worker Robyn Byrne. That same day, D./Cst. Snair introduced herself to Leah Parsons as the lead investigator and advised her that a joint interview involving police and DCS was being arranged for the next day at the DCS office in Dartmouth.

4. Below the rank of Inspector.

The joint interview was set to take place on November 23rd. D./Cst.Snair began her commute to Dartmouth but, as a result of a severe snowstorm that had already caused several accidents, the roads were unsafe to travel and she was forced to reschedule the interview. The new date was November 29th. Ms. Byrne spoke with Leah Parsons to ensure that a safety plan was in place in the interim. Still on November 23rd, D./Cst.Snair sent a "Special Service Request" for pictures to be taken of Rehtaeh's wrist and hip injuries.

On November 29th, a video-recorded joint interview was conducted by D./Cst.Snair and social worker Robyn Byrne at the DCS office, and a second statement was taken from Rehtaeh. The interview lasted approximately 40 minutes. Leah Parsons did not sit in on this interview. This statement also disclosed an alleged sexual assault and child pornography offences. Rehtaeh's consent was obtained for the release of her medical information in relation to this case. Rehtaeh provided BlackBerry Messenger ("BBM")⁵ numbers for the suspects as well as the names of students who, to her knowledge, would have seen the photo. Rehtaeh also gave her cell phone to police so that the photo and any relevant messages could be retrieved by the tech crime unit. Leah Parsons was interviewed separately by D./Cst.Snair and Robyn Byrne.

5. BBM is an instant messaging service that is Internet-based and included on BlackBerry mobile devices. It allows for PIN ("Personal Identification Number") messaging and voice calls between users of BlackBerry and certain other mobile operating systems. The BlackBerry PIN is an eight-character identification number assigned to each BlackBerry device.

Immediately after, D./Cst.Snair contacted Cst. Jason Hill, the police school liaison officer for Cole Harbour High, the school that Rehtaeh and the suspects attended at the time of the incident. She asked about meeting with him and attending the school in order to interview witnesses. D./Cst.Snair believed that making arrangements through the school would facilitate the process and likely allow for a larger number of students to be interviewed. The initial intention was to "front end load" the investigation by having several investigators attend the school to identify students and obtain statements from them at the same time. This investigative technique had previously been successful at other schools.

Cst. Hill appears to have checked with school authorities but was advised that they would not allow the police investigation to be carried out on school property because the incidents did not occur at the school. Cst. Hill was also aware that the school generally requires police to contact the parents and obtain their permission if they wish to speak to a particular student. Cst. Hill made no note of who he spoke to.⁶

In response to the school's position, D./Cst.Snair set out to contact identified students individually. Given that students were in school during working hours, this process took some time. D./Cst.Snair eventually made telephone

6. Given that a separate review was undertaken with respect to the school system's response to this matter, we did not embark on an in-depth investigation of who at the school said what, or of the school's policy in this regard.

contact with the students who Rehtaeh had mentioned outside normal working hours. These students acknowledged having seen the photo. Those who had received it indicated that they did not recall how they had received it or from whom.

On November 30th, the day after the joint interview, D./Cst. Snair took Rehtaeh's phone to the tech crime unit to be analysed on an urgent basis, so that Rehtaeh could retrieve her phone quickly. The tech crime unit was able to complete the analysis in one day.

December 2011

The next day, D./Cst. Snair attended the Duffus Health Centre and obtained medical records from a Dr. Verma who had examined Rehtaeh on November 22nd and 23rd. Dr. Verma commented on Rehtaeh's emotional reaction to the events of November 12th. She observed in particular that:

[W]hen [Rehtaeh] discovered that a picture of her was sent out to all her friends, she became very anxious, angry and upset to the point that, on November 18, she spoke about not wishing to continue to live and her mother had to call the Crisis Help Line number for her. She is still having panic attacks where she becomes distraught, finds it hard to catch her breath and has chest pains. She described having these episodes happen to her at least 10 times a day lasting for a few minutes and then subsiding. She describes herself as being sad and has crying spells every day. At other times she is very angry and wants to punch someone or something. Rehtaeh has

been referred to the shared mental health care worker at our clinic and she has been given the number for Avalon Centre. I too will continue to see her to help her get through this very traumatic experience.

The physician observed a bruise on Rehtaeh's hip and a tender area on her forearm, but no other signs of physical trauma.

D./Cst. Snair also attended the offices of the Major Crime RCMP/HRP Integrated Internet Child Exploitation ("ICE") unit to discuss the child pornography aspect of the file with RCMP Cpl. Jadie Spence. Cpl. Spence provided D./Cst. Snair with information and advice about the investigation of child pornography offences. He suggested three avenues that might be available to maximize the amount of information that could be retrieved: (1) seizing the cell phones incident to arrest or pursuant to a search warrant; (2) serving a production order on Research In Motion ("RIM"); (3) and serving a production order on the relevant telecommunications service providers to potentially obtain the text messages relating to its subscribers.⁷ Cpl. Spence provided her with law enforcement guides relating to what the police technology unit can retrieve from Blackberries and the evidence RIM can provide investigators by way of production orders. Cpl. Spence also provided a template for an affidavit to obtain a search warrant to seize a mobile

7. There was a mix of different types of mobile devices and different service carriers used by the various persons involved in this case. Each carrier has systems and operations specific to them. At least one carrier at the time retained text messages sent and received, for a limited period of time.

device incidental to arrest. At this stage of the investigation, the police did not yet have the photo so D./Cst. Snair could not obtain any advice about what the photo depicted and its legal significance.

Around December 2nd, D./Cst. Snair retrieved Rehtaeh's phone from the tech crime unit and attempted to deliver it back to her at school. She attended Dartmouth High where Rehtaeh had recently transferred and informed the principal and school liaison officer of the circulating photo. She was informed at that time that Rehtaeh had changed schools again or was in the process of changing schools. She also spoke with Leah Parsons over the phone and briefly met with Rehtaeh at her home to return her phone. D./Cst. Snair also obtained the results of the phone's forensic analysis, including a copy of the photo that had been preserved on Rehtaeh's phone.

On December 7th, after reviewing the documents provided to her by Cpl. Spence, D./Cst. Snair sent an email to RIM requesting that any text messages, BBMs, emails and pictures sent to or from the Blackberries of Adam, Josh and Eric be preserved for the period of November 12 to 23, 2011. As is customary, RIM replied that they would preserve what they had for 90 days (until March 6, 2012), and would release it to the police upon receipt of a court-issued production order.

On December 13th, DCS social worker Robyn Byrne followed up with D./Cst. Snair, who advised that she still planned on interviewing many youths in the case, and that the investigation was still in its early stages.

On December 15th, D./Cst. Snair met with and took an audio statement from a central witness, Lucy, and from potential witnesses, Amanda and Lucy's mother. Lucy's mother had attended Adam's house in Cole Harbour with her daughter to pick up Rehtaeh when she learned that Rehtaeh had not come home with Lucy. On the front steps of the house, she was informed by Josh and two other boys that Rehtaeh was sleeping. Lucy again entered the house to try to get Rehtaeh to come along with them, without success.

Amanda was a friend of Rehtaeh's who had seen the photo and who was the first to tell Rehtaeh that a photo was circulating around the school. Amanda informed police that she had received the photo over BBM but could not recall who had sent it to her. She also reported what Rehtaeh had told her about what took place at Adam's home.

On December 23rd, D./Cst. Snair requested an additional "diary date" for the ongoing investigation. On January 3, 2012, Sgt. Legere granted the extension. The diary date system is a standardized process whereby investigators are periodically required to report to a superior the progress they have made and the steps to be taken, in order to be granted a time extension to continue investigating. These reports occur on regular intervals – usually anywhere between 16 and 30 days – and allow the superior some oversight on the conduct and duration of the investigation.

January 2012

On January 4th, after the holidays, D./Cst. Snair called Leah Parsons to update her on the file. On January 6th, Leah Parsons called D./Cst. Snair and advised her that Rehtaeh had received a Facebook message from one of the suspects, Josh. Josh questioned whether Rehtaeh was “taking them to court over what happened.” He indicated they had done nothing wrong or, at least, he hadn’t because he had obviously not taken the picture. The message was sent to D./Cst. Snair at her request. In the interim, D./Cst. Snair worked on drafting an affidavit in support of a production order targeting cell phone data held by RIM for the cellular phones of Josh, Adam and Eric.

On January 13th, D./Cst. Snair completed preparing the affidavit. The production order was issued that same day by a Justice of the Peace, and was served on RIM. RIM had two weeks to produce the information.

Still on January 13th, SAIT S./Sgt. Richard Lane was advised by Supt. Sykes that Leah Parsons had called and was concerned about the progress of the file. S./Sgt. Lane contacted Leah Parsons after reviewing the file and left a voicemail that the matter was being actively investigated, the investigating officer was being diligent, and they were awaiting information from an outside organization. S./Sgt. Lane subsequently spoke with Leah Parsons and indicated that he had no concerns about the speed of the investigation thus far.

On January 24th, RIM contacted D./Cst. Snair about a date error resulting from the new year on the order and requested a corrected order. On January 26th, the order was corrected, signed by a Justice of the Peace and re-served on RIM. RIM again had two weeks to comply with the order.

February 2012

On February 1st, D./Cst. Snair requested an additional diary date, indicating that she was awaiting the results of the RIM production order. Sgt. Legere returned a message from Leah Parsons who was frustrated with how long the investigation was taking. Sgt. Legere informed Leah Parsons that they were awaiting the results of “warrants” and the investigation was progressing normally. He indicated that they could not predict how long it would take and noted that Ms. Parsons appeared satisfied with this explanation.

On February 13th, RIM disclosed to D./Cst. Snair cell phone numbers, PIN numbers, names and email addresses, as well as the service providers relating to each phone targeted by the order. RIM indicated that any existing data relating to the content of written communications needed to be obtained from the respective service providers.

On February 15th, D./Cst. Snair requested confirmation from a telecommunications service provider that three cell phone numbers (for two of the suspects as well as for Rehtaeh) related to that company’s subscribers.

On February 16th, after receiving that confirmation, a further affidavit in support of obtaining a production order was prepared requesting data from the service provider for all three numbers. The order was issued and served on the service provider. Another production order was issued and served on another telecommunications service provider for a fourth number relating to a third suspect. As is customary, both had 30 days to respond to the orders.

March 2012

On March 8th, S./Sgt. Lane spoke to Leah Parsons to update her that they still did not have the required information from the cell phone providers. Ms. Parsons was understanding and simply wanted to make sure the file was still being investigated.

On March 13th, in response to the court order, the first service provider provided cell phone data including text messages for all three cell phones. The phones were registered to their respective parents but appeared to be used by Rehtaeh, Josh and Eric. On March 16th, the second service provider provided the cell phone data for Adam's phone but this did not include any text messages as this service provider did not keep that data at the relevant time.

April 2012

On April 5th, D./Cst. Snair was conducting an ongoing review of the text messages received and noted that, while they corroborated various aspects of the allegations, they did not provide any indication as to who sent or received the impugned photo. The investigator further noted that no messages "confirmed" that Rehtaeh was sexually assaulted. D./

Cst. Snair requested an additional diary date to continue the investigation. The extension was granted.

Between April 6th and April 17th, D./Cst. Snair was on vacation. Upon returning from vacation, D./Cst. Snair continued her review of the text messages.

May 2012

On May 25th, she again contacted Cst. Jason Hill, the school liaison officer for Cole Harbour High, and asked for his assistance in obtaining contact information for a student who provided the photo to Rehtaeh. Cst. Hill replied that there was no student matching the last name that was provided. D./Cst. Snair contacted Leah Parsons to obtain an alternative last name and cell phone number. Cst. Hill then provided the related contact information.

June 2012

On June 5th, D./Cst. Snair called the potential witness, Rachel, who agreed to meet the next day. D./Cst. Snair requested an additional diary date, which was later granted. On June 6th, D./Cst. Snair took an audio statement from Rachel, who indicated that she had asked Lucy for the photo because Rehtaeh wanted it for the police. Lucy then sent it to her.⁸

8. There was some suggestion that Lucy and perhaps Rachel were people who should have been investigated in respect of having possessed and distributed child pornography. I note in passing that Lucy had been an unwilling recipient of the pictures, and that both only distributed it once at the police request (this is further discussed below). Lucy also informed police that she had deleted the picture from her phone. It would therefore not have been appropriate to charge Lucy or Rachel for possession or distribution of the picture.

On June 7th, D./Cst. Snair left a voicemail for another potential witness, who was also the mother of suspects/witnesses, Max and Adam—two of the boys who were present the night of November 12th—and whose house it was. The boys' mother had also been present at the house for part of the evening.

On June 13th, a worker from Avalon Sexual Assault Centre who was assisting Rehtaeh contacted HRP Victim Services on her behalf. The matter was assigned to Victim Services caseworker, Verona Singer, who contacted Rehtaeh that same day. Ms. Singer emailed D./Cst. Snair to arrange a meeting with her and Rehtaeh in order to discuss the status of the investigation and threats Rehtaeh had recently received. Ms. Singer indicated that Rehtaeh wanted her to be present as a support person. D./Cst. Snair received the email on June 14th and a meeting was scheduled for the day after D./Cst. Snair's return from vacation. Sgt. Legere advised he would also attend the meeting.

On June 16th, D./Cst. Snair left another voicemail for the mother of Max and Adam. D./Cst. Snair was on vacation from June 17th to the 26th.

On June 27th, a meeting was held with D./Cst. Snair, Sgt. Legere, Rehtaeh, Leah Parsons, Glen Canning and Verona Singer at the police detachment in Dartmouth. Leah Parsons voiced concerns about the length of the investigation. Sgt. Legere indicated that these investigations could take up to a year to complete. There was also a discussion relating to threats Rehtaeh had received. A video interview was conducted with Rehtaeh regarding those threats, but a determination was

made that they were related to a wholly different person and had no link to the ongoing investigation. The new file was therefore assigned to patrol for investigation.

July 2012

On July 31st, D./Cst. Snair again tried to contact the mother of Max and Adam. Adam answered the phone and D./Cst. Snair advised him that she was investigating an incident involving Rehtaeh Parsons and that she would like to speak with him, his mother, Max, as well as Eric and Josh. D./Cst. Snair advised him to inform his mother and contact her to schedule a time. D./Cst. Snair requested an additional diary date to conduct those interviews.

August 2012

Upon a review of the file, Sgt. Sheldon Hynes granted the extension on August 1st.

On August 14th, D./Cst. Snair received a voicemail from Leah Parsons and returned the call but the voice mailbox was full.

On August 21st, D./Cst. Snair called the potential suspect/witness Eric and spoke with his mother. D./Cst. Snair informed her of the investigation and requested that Eric come in to provide a statement. Eric returned D./Cst. Snair's call and arranged to meet with her on August 28th.

On August 23rd, D./Cst. Snair called Rehtaeh to update her on the file but her cell phone was out of service. D./Cst. Snair contacted Glen Canning who provided Rehtaeh's new cell phone number. On August 24th, D./Cst. Snair

called Rehtaeh and updated her on the file. D./Cst. Snair later received a voicemail from Leah Parsons and tried to return the call but her voice mailbox was full. D./Cst. Snair requested an additional diary date.

On August 28th, a video interview of Eric took place at the Dartmouth police detachment. On the same day, Sgt. Legere received a voicemail from Leah Parsons and tried to return the call without success. On August 29th, D./Cst. Snair called Ms. Parsons but her voicemail was again full. Ms. Parsons left another voicemail indicating that she had been trying to reach D./Cst. Snair without success. D./Cst. Snair returned the call and left a voicemail. Ms. Parsons in turn returned that call and was updated on the file by D./Cst. Snair.

On August 30th, D./Cst. Snair received a voicemail from the mother of Max and Adam, who provided her email address and indicated this was the better way to reach her. D./Cst. Snair accordingly sent her an email correspondence advising that she was investigating a sexual assault that would have taken place at her home while she was present for a certain period of time, as well as child pornography offences. D./Cst. Snair advised that she would like to speak with her and her sons.

September 2012

On August 31st, the mother of Max and Adam agreed to meet but was unavailable until the week of September 10th. D./Cst. Snair proposed September 20th or 21st as she would be on vacation and was then required in court. The mother indicated that she would speak to her husband and get back to her.

Between September 8th and 17th, D./Cst. Snair was on vacation.

Upon her return from vacation, on September 18th, D./Cst. Snair emailed the mother to arrange a time to meet. Leah Parsons called D./Cst. Snair for an update and was advised that D./Cst. Snair was still trying to meet with the boys and their mother.

On September 19th, the mother emailed D./Cst. Snair to inform her that she declined to meet. D./Cst. Snair contacted Josh to arrange a meeting. He agreed to meet. Given that he was a youth, D./Cst. Snair advised him to discuss the matter with his parents and to call her back to arrange a time.

October 2012

On October 9th, D./Cst. Snair called Josh and left a voicemail. Josh returned the call and asked if it was mandatory that they meet. D./Cst. Snair informed him that it was voluntary at that time. He declined to meet.

On October 10th, D./Cst. Snair requested an additional diary date, which Sgt. Sheldon Hynes granted the following day. On October 12th, D./Cst. Snair called Leah Parsons and left a voicemail, advising her that she had completed the gathering of evidence and would review the file with her supervisor as well as consult with Crown counsel. D./Cst. Snair advised that it could still take weeks since the Crown office was very busy, as were the police.

On October 15th, Leah Parsons left a voicemail asking for D./Cst. Snair to call her. D./Cst. Snair returned the call but the voice mailbox was full. This phone tag repeated itself on both October 18th and October 24th. When they finally made contact, Leah Parsons asked for clarification about D./Cst. Snair's voicemail. In particular, she asked if the boys had been interviewed. D./Cst. Snair advised that she was not in a position to discuss the evidence at that time. Leah Parsons was upset that they would not know anything about the investigation aside from its outcome once it was over.

On October 26th, D./Cst. Snair again met with Cpl. Jadie Spence from ICE. They reviewed the file and agreed that they had sufficient grounds to arrest Adam and Josh for distributing child pornography, and Eric for possessing child pornography. They discussed the possibility of seizing their phones incident to arrest. Cpl. Spence indicated that a warrant would be required to search the phones once they were seized. Cpl. Spence specifically indicated that the defence of making and possessing child pornography for "personal use" – the elements of which are explained below – would not apply given that the photo was sent to third parties. D./Cst. Snair contacted the RCMP Technological Crime Unit who confirmed that they may be able to retrieve evidence of a photo having been transferred to or from a Blackberry, even if the photo had been deleted from the phone.

D./Cst. Snair consulted with her supervisor, Sgt. Legere, in order to determine next steps. In particular, a determination had to be made about whether the suspects would be arrested in relation to a charge of sexual assault. They reviewed the file and determined that, given some of the obstacles they foresaw to prosecuting the sexual assault, they should obtain the Crown's advice. They were of the view that, based on memory issues, conflicting evidence and internal inconsistencies in Rehtaeh's account, there was insufficient evidence to proceed with the laying of that charge. They however erred on the side of caution and decided to seek a second opinion from a Crown prosecutor.

At that time, the police did not believe they required the Crown's advice in respect to the child pornography component of the case. On the strength of Cpl. Spence's advice, they planned to proceed with arrests and seize the targets' phones incident to arrest.

On October 30th, D./Cst. Snair consulted with Crown counsel Shauna MacDonald in person. By the end of that meeting, it was determined that no sexual assault charges were going to be laid. Upon being apprised of the child pornography component of the case, Ms. MacDonald suggested that one of her colleagues who specialized in such matters provide the officer with advice on the point. She first sought the senior Crown responsible for child pornography and cyber offences, Craig Botterill, Q.C. As he was away, more junior counsel Peter Dostal joined the meeting with Det./Cst. Snair and Ms. MacDonald, and considered the child pornography component of the investigation. Ultimately, Mr. Dostal

advised that he required an opportunity to consult with Mr. Botterill to be able to provide proper advice.

That same day, S./Sgt. Lane returned a call from Leah Parsons who again shared her concerns regarding the length of the investigation, and complained about the attitude of the investigating officer and the fact that she was not being provided with any details of the investigation. S./Sgt. Lane advised that he would review the file and call her the next day. S./Sgt. Lane reviewed the file and discussed it with Sgt. Legere who also reviewed the file. They determined that a considerable amount of work had been done.

On October 31st, Sgt. Legere spoke with Leah Parsons and updated her on the status of the investigation. He informed her that following a Crown consultation, there was insufficient evidence to proceed with sexual assault charges, but that a senior Crown was being consulted with respect to child pornography charges.

November 2012

On November 1st, D./Cst. Snair reached out to Peter Dostal but he advised that he had not yet had a chance to discuss the matter with his superior, Mr. Botterill. On November 2nd, Sgt. Legere spoke with Leah Parsons and informed her that the Crown had yet to speak with the senior Crown. D./Cst. Snair left a voicemail for Peter Dostal. Mr. Dostal in turn left a voicemail for D./Cst. Snair, wherein he explained that the Crown would not be in a position to proceed with child pornography charges. D./Cst. Snair called Mr. Dostal for clarification and further details were provided. D./

Cst. Snair indicated on the file her interpretation that the Crown was “not willing” to proceed with charges of child pornography or sexual assault. D./Cst. Snair discussed the issue with Sgt. Legere and it was determined that no charges would be laid. Sgt. Legere indicated that he would contact Leah Parsons.

On November 13th, Sgt. Legere made three attempts to reach Ms. Parsons but her voicemail was full. On November 14th, after further difficulty in reaching each other, Sgt. Legere spoke with Leah Parsons and advised her that child pornography charges were not going to be laid. He explained how the police consulted with the Crown and why they would not proceed with child pornography or sexual assault charges. He advised that the boys’ families would be contacted and that the boys would be cautioned.

On November 16th, Leah Parsons emailed Sgt. Legere and asked that he be the one to advise Rehtaeh of the outcome of the investigation. She voiced frustration with the investigation and the investigating officer. Sgt. Legere spoke with Leah Parsons and indicated that he would prefer to tell Rehtaeh in person but he was leaving for a two-week course. They agreed that he would phone her and Ms. Parsons would be advised when this was done so that she could be there for Rehtaeh. Sgt. Legere contacted Rehtaeh and advised her that no charges would be laid. He walked her through the results of the investigation and made a note that Rehtaeh appeared to understand. Sgt. Legere emailed Ms. Parsons to confirm that he had spoken to Rehtaeh, and asked if they wished to reconnect with Victim Services.

December 2012

On December 5th, Eric's family was advised that no charges would be laid, but that their son's actions were serious. D./Cst. Snair obtained assurances from Eric's parents that they would talk to their son about this situation. The family of Adam and Max was similarly cautioned about the seriousness of their sons' actions and the concerning fact that this would have occurred while the boys' mother was present. It appears as though D./Cst. Snair also obtained assurances from Adam's parents that they would talk to their son about this. There was an unsuccessful attempt to contact Josh and his parents.

On December 7th, Josh's family was also advised that no charges would be laid but that their son's actions were serious. D./Cst. Snair obtained assurances from Josh's parents that they would talk to their son about this. D./Cst. Snair closed the file and filed a Concluding Report.

On December 11, 2012, Sgt. Mark Hobeck reviewed the file prior to its closure and indicated that it would be reopened if new information came to light.

April 2013

On April 5, 2013, Rehtaeh attempted suicide and Cst. Heidi Stevenson responded to the call. On April 8th, Rehtaeh passed away.

On April 9th, Leah Parsons received a Facebook message from Josh and corresponded with him regarding the events of November 12, 2011.

Around this time, HRP Chief of Police Jean-Michel Blais and RCMP Chief Superintendent Roland Wells met with Rehtaeh's parents to express their regrets. Leah Parsons informed them of the Facebook messages from Josh, which disclosed new information. The Chiefs promised to take a look at the file.

On April 10th, police authorities retrieved the file and provided it to ICE investigators to look over.

On April 11th, Leah Parsons spoke with D./Cst. Chris Gorman of the Integrated ICE Unit about the Facebook messages. D./Cst. Gorman captured the messages and located Josh's Facebook profile. The file was reviewed by ICE investigators and the child pornography component of the investigation was reopened. ICE Sergeant Andrew Matthews was assigned as its lead investigator.

On April 12th, Sgt. Matthews and D./Cst. Gorman met to review the file and determine immediate next steps. D./Cst. Gorman sent a preservation request to Facebook in relation to Josh's Facebook page. Facebook confirmed the preservation. D./Cst. Gorman sent a request to the National Child Exploitation Coordination Centre (NCECC) for the IP address information for Josh's Facebook account from April 8 to 10, 2013, in order to confirm that the relevant entry emanated from his computer. Police authorities issued a press release regarding the re-opening of the investigation.

August 2013

On August 8, 2013, after additional investigative steps were conducted and further information was received, distributing child pornography charges were laid against both Josh and Adam, and a charge of making child pornography was also laid against Adam.

B. Advice Obtained From the Public Prosecution Service

October 2012

On October 30, 2012, D./Cst. Snair met in person with Crown counsel Shauna MacDonald for a consultation. The two did not know each other and were put in touch only because it was known at SAIT that Ms. MacDonald had extensive experience handling sexual assault matters. While there is no firm policy or protocol to follow for obtaining Crown advice, the norm is to first contact the local Crown office. From there, the matter will either be assigned to a local Crown, or referred to specialized Crowns who are designated to provide advice in their areas of expertise. These specialized Crowns will typically be from the Special Prosecutions Unit, where Ms. MacDonald worked. Police officers may also contact a particular Crown directly, as occurred in this case. There are no Crowns “on duty” to provide advice to police. We were informed that a protocol is currently being developed between the police and Crown with respect to points of contact for advice.

In this case, an in-person meeting was arranged at which time D./Cst. Snair attended with the entire physical file. D./Cst. Snair recounted the chronology and the investigative steps taken to date. She provided Ms. MacDonald with statement summaries for Rehtaeh and each key witness. They reviewed the relevant text messages, which had been highlighted by the investigator. The meeting was interactive: Ms. MacDonald asked questions and asked to see certain documents, which D./Cst. Snair provided. Ms. MacDonald observed that D./Cst. Snair was well prepared for the meeting and was responsive to any questions that were asked. Ms. MacDonald also did not get the impression that D./Cst. Snair was looking for a particular answer, which is an impression that Crowns will at times have when they feel that the officer is only providing them with bits and pieces of the case. She advised that D./Cst. Snair did not present the case in any particular light or with any pre-conceived opinion that she shared with the Crown. The meeting was not cursory. It covered a lot of ground. D./Cst. Snair appeared to be genuinely seeking guidance and was interested in what the Crown had to say. In respect of the child pornography component of the case, Mr. Dostal’s view was also that D./Cst. Snair was making a genuine effort to conclude the investigation satisfactorily. From the Crown’s perspective, there appeared to be no agenda. D./Cst. Snair indicated that the next step was to obtain the targets’ phones.

Ms. MacDonald is a very experienced prosecutor. She has prosecuted many sexual assault cases over the past 20 years and is very knowledgeable about assessing the strengths and weaknesses of cases.

At the end of the consultation meeting, Ms. MacDonald advised D./Cst. Snair that she was of the view that there was no reasonable prospect of conviction related to the sexual assault component of the case. She set out the reasons for her opinion over the course of the meeting, which included memory/reliability issues, as well as credibility issues stemming from inconsistencies between Rehtaeh's first and second statement, between her statements and text messages she had sent, and between her statement and Lucy's statement.

Approximately an hour into the meeting, and after being provided with the photo and informed that D./Cst. Snair intended to obtain the target phones, Ms. MacDonald proposed to get her colleague Craig Botterill who specialized in cybercrime and child pornography offences, so that he could address that particular aspect of the file. Mr. Botterill was away and so Mr. Dostal – who is much more junior than Mr. Botterill but had begun specializing in these cases – was invited to join the meeting. Ms. MacDonald gave Mr. Dostal an overview of the investigation and informed him that the case would likely not proceed in respect of the sexual assault allegation. The photo was shown to Mr. Dostal, but he did not otherwise examine the file.

It appears as though the prosecutors were informed that police did not have sure evidence about who took the photo, but that this information could be deduced and likely ascertained upon obtaining the phones. There was some discussion about the possibility of seizing the phones incident to arrest and subsequently conducting a forensic analysis of the devices. These further investigative techniques were discussed but, according to D./Cst. Snair's notes, Mr. Dostal indicated he wished to consult with a more senior Crown to see whether they would be willing to proceed "prior to going ahead with any further investigation." Mr. Dostal in particular wanted to obtain Mr. Botterill's opinion as to whether the photo at hand could, in law, constitute child pornography. It is possible that there was a misunderstanding as to whether the police would nevertheless pursue their investigation in the interim. Indeed Mr. Dostal's recollection was that he informed the officer that her plan to arrest, search and interview the suspects was an acceptable one, and he believed she would still consider whether to go ahead with that plan provided she had the requisite grounds, while he sought Mr. Botterill's advice.

D./Cst. Snair was also tentatively advised that the Crown, under Mr. Botterill's leadership, generally took the position that in cases where a young person had taken a picture of him or herself, which was subsequently broadly disseminated, the matter ought to be addressed at a school or community level -- particularly because they could not prosecute every person who had sent the picture. While each case would be looked at independently, an "informal policy" or

practice appeared to have developed in these types of cases. Whether this informal policy would apply in Rehtaeh's case – where there was no suggestion that the picture had been taken by Rehtaeh herself or that she had consented to it being taken – does not appear to have been directly addressed. The portion of the meeting involving Mr. Dostal lasted approximately 10 to 15 minutes.

The next day, Mr. Dostal sent Mr. Botterill an email detailing the circumstances of the case. This email makes clear that the crux of the issue for Mr. Dostal was whether the photo could constitute child pornography. In particular, it accepts or takes for granted that: the photographer appears to be known; the involved persons are high school acquaintances; the photo clearly depicts actual or simulated explicit sexual activity; Rehtaeh could identify herself in the photo; and the photo was being circulated around the school. It also highlights that:

- ▶ There is little if any evidence of the age or identity of the victim, on the face of the photo.
- ▶ If evidence establishing the identity of the photographer could be collected by police, and it could further be established that the photographer knew he was taking a picture of sexual activity with a person under the age of 18, a charge of making child pornography may be available.

- ▶ In the circumstances, a charge would only realistically be available in relation to the photographer [this appears to be based on the assumption that it could not be proved that any other person distributing the photo would know the age of the persons depicted in the photo, simply by looking at it].
- ▶ He would like Mr. Botterill's advice as to whether they would prosecute such a charge if the evidence existed.

It is unclear whether Mr. Botterill ever received or read the email. He had no recollection of it and his advice was subsequently delivered orally, on the basis of an oral overview provided to him by Mr. Dostal. While this overview would have been similar to that laid out in the email, it cannot necessarily be assumed that Mr. Botterill had knowledge of all the facts detailed in the email.

Sometime following the meeting with D./Cst. Snair and pending Mr. Botterill's return, Mr. Dostal researched the law on the issue of whether "extrinsic facts" could be taken into account in determining that a photograph constitutes child pornography. He did not make any conclusive findings.

November 2012

Having received no response to his email, Mr. Dostal consulted with his superior Mr. Botterill upon his return. On November 2nd, upon obtaining Mr. Botterill's input, Mr. Dostal contacted D./Cst. Snair and left her a voicemail stating the following:

- He had met with Mr. Botterill.
- Mr. Botterill raised an issue that had not occurred to Mr. Dostal: that where there isn't an underlying allegation of sexual assault in relation to when the picture was taken, it would potentially avail the photographer of a "personal use defence." [This defence allows two youths who engage in lawful, consensual sexual activity to record the activity, provided it is for their own private use. Possession of the picture by those persons is lawful.⁹]
- One of the main issues from this perspective is therefore whether the photo was of an illegal or legal act as well as "what kind of knowledge of the subject there was at the time."
- Given that they are not looking at a sexual assault charge, he thinks they would be in a position "not to proceed" on a charge of child pornography.
- If the circumstances were different in terms of a sexual assault charge being laid, they would not have that issue.
- She could contact him if she wanted to discuss it further.

D./Cst. Snair called Mr. Dostal for clarification and he provided more details. According to D./Cst. Snair's notes, this final conversation focused on the following concern:

- It was not possible to determine that the persons depicted in the photo were underage simply by looking at it.

- Anyone who distributed the photo would thus have a valid defence that they did not know how old the people in the photo were.

D./Cst. Snair interpreted her communications with Mr. Dostal as an indication that the Crown would not be "willing to proceed" with charges of child pornography. She decided that conducting arrests and seizing the phones would only serve to lengthen an already-long investigation, and that it would therefore not be fair to pursue these other investigative means if it was already known that the Crown would ultimately not proceed with the charges. The file was accordingly closed.

9. This implies that the persons depicted in the recording have consented to its creation, and that the picture is only kept for their own use and has therefore not been distributed to others.

Part II

Analysis

Part II

A. The Routing of the Case

1. Was the approach to Rehtaeh's first interview appropriate?

Best practice: the joint interview protocol for young people

The RCMP has a detailed Investigative Guide to investigating sexual offences. The HRP also has a policy relating to sexual assault investigations which, among other things, touches on the responding officer's response procedure, the medical examination of sexual assault victims and the investigation of sexual assaults resulting in physical injury.

There is also an established written protocol between the police and the Department of Community Services that provides for joint (police/DCS) interviews of a child or youth under 16 years of age. According to the RCMP's Sexual Assault Manual: "In cases involving child complainants, police must notify the appropriate child protection agency and should carry out a joint investigation wherever possible." DCS is required by law to investigate allegations that children under 16 may be in need of protective services.¹⁰ This "joint investigation" policy is intended to avoid subjecting the young person to two separate interviews, which can aggravate trauma or re-victimize the

child. The HRP's "GO-Guide" (General Orders), intended for responding officers, also notes that "Statements from children (16 and younger) relative to sexual offences are only to be taken by [a] qualified member from Major Crime in conjunction with Children's Aid/Dept of Community Services."

To the extent possible, young victims should not be interviewed at all by responding officers (i.e., those who respond to calls or complaints) at the initial/preliminary investigative stage, which is intended to gather general information about the case. Responding officers are to speak to the person who first reported the allegation to obtain a description of the incident. The primary intent is to confirm: that an offence took place, the type of offense and persons involved, and the jurisdiction where the offence occurred. There are, of course, important caveats to this role: responding officers need to address any danger and should ascertain the child's condition and whether he or she is at immediate risk. They also need to do what is necessary to preserve evidence. That is not to say that there should not be any contact between the responding officer and the child: only that taking a formal statement, or formally interviewing the child, should be avoided if there is to be a joint formal interview.

10. See *Children and Family Services Act*, S.N.S. 1990, c. 5

In cases involving young victims, the information required at the very early stage of the investigation is typically gathered from a parent or other adult who has knowledge of the matter. This information is normally enough to route the file to specialized investigators at SAIT, who are trained to interview children and know how to conduct a focused interview in the most reliable way possible. The child's interview will then take place jointly between the assigned SAIT investigator and a DCS worker. This is the best practice because DCS has a legal obligation to interview the youth and a specialized SAIT investigator will have to conduct a full interview. The objective is to avoid subjecting the youth to more than one interview. However, to increase the statement's reliability, the joint interview should be conducted as quickly as possible.

This approach is not only applicable to children: it is also advisable in any case involving sexualized violence. A new course on trauma-informed responses to sexualized violence¹¹—offered to police officers in the Province in 2014 as a direct result of Rehtaeh's case—stressed that first responders should simply ascertain the bare information described above so the victim does not have to go through more interviews than required. The course, which was intended to bring consistency to HRP and RCMP practices, also reinforced that this approach should be used with children.

11. A trauma-informed response means one that avoids causing further trauma to the victim, and one that understands and is sensitive to the nature of the trauma experienced by sexual assault victims as well as the nuances in what they experience, their needs and concerns.

What happened in Rehtaeh's case?

In this case, the information provided to the responding officer was that Rehtaeh was almost 16 years old and her mother was willing to bring her to the station to be interviewed. The acting supervisor informed the responding officer that she should proceed with the interview. This was done knowing that the file would in all likelihood be routed to SAIT, at which time a joint interview would be conducted with DCS. That was contrary to policy.

In Rehtaeh's case, the general information required had already been gathered before Rehtaeh came in to meet with the responding officer and any missing piece of information could have been obtained from Rehtaeh's mother or from other family members. In fact, the RCMP's Manual specifically provides that:

The person who first reported the allegation to authorities should be one of the first people interviewed in order to determine what caused the report. ... The same information should be sought from anyone else to whom the victim made statements about the incident.

In this case, Rehtaeh's aunt, the person to whom Rehtaeh first disclosed, was not contacted by the police. The Manual further states that: "If the person reporting the offence has spoken to the victim, it is important to get as accurate and complete an account as possible about what she said." Rehtaeh's mother should have been interviewed separately from the outset in this case.

Best practices for interviewing children

Contrary to the best practice recommended in the Child Interview Course that officers take to qualify for interviewing children, Rehtaeh was interviewed in the presence of her mother. Police are trained that children should ideally be interviewed by themselves because an adult's presence may affect what the child says. As stated in the RCMP's Investigative Guide:

Whenever possible, parent/guardians should be encouraged to remain outside the interview. A child may be unwilling to upset a parent by disclosing details of the abuse or the parent may have an adverse relationship with the suspect (e.g. on-going

access dispute), and therefore that parent's presence during the police interview may jeopardize the integrity of the investigation. If parents/guardians insist on being present during the interview, they should sit out

Contrary to the best practice ... Rehtaeh was interviewed in the presence of her mother.

of sight of the child, be quiet, and not participate in the interview in any way.

There can be many other reasons for excluding parents from the child's interview, including: the children may be embarrassed to say certain things in front of a parent or other adult known to them; they may want to appease their parents; their account may be influenced by (even unintentional) non-verbal cues; or certain aspects of their

account may be omitted and other aspects downplayed or overemphasized. While it is impossible for us to know, this error may very well have had an impact in the present case. Rehtaeh's first statement may indeed be unreliable in certain respects, which may explain inconsistencies between that statement and the statement she later provided to the investigator.

What were the implications of not recording the detailed initial statement?

The approach taken in this case is concerning because Rehtaeh's initial interview was very detailed yet not recorded. The responding officer indicated at the outset that she would be asking "general questions to get the basics of the incident." Despite this declaration and the fact that, according to the officer's report, Rehtaeh was reluctant with details at first, the interview lasted over two hours. Rehtaeh was eventually forthcoming with information and much time was spent trying to find an immediate solution to the time-sensitive problem of the circulating photo. However, the statement itself was too lengthy for the circumstances in which it was taken.

Handwritten notes were taken of Rehtaeh's statement. Aside from the fact that Rehtaeh would have to recount those details twice, no one reviewing the notes has any way to know how the interview was conducted. Were leading questions used? Was any prompting required to obtain the information? Were any words put in her mouth? Handwritten point-form notes are often not a direct account of what the witness has said. In this case, some handwritten

notes were the officer's own interpretation of what Rehtaeh had said, as opposed to a verbatim rendition of what was said. For example, the officer wrote that Rehtaeh and her mother were more concerned about the photo "than the possible act itself." The officer confirmed that these were her own words and not words that Rehtaeh or her mother had used. Yet someone reading the report could believe that Rehtaeh had expressed uncertainty about whether there had been any sexual assault. Very live issues can result from ambiguities created by detailed statements being taken in an informal manner.

In this case, both the social worker and D./Cst. Snair observed that the initial report was more detailed than usual. Nevertheless, a more complete interview of Rehtaeh was required, both because DCS had a legal obligation to interview Rehtaeh and because there were only handwritten notes of the initial statement. The responding officer who took Rehtaeh's initial statement acknowledged that what she had taken was not intended to be a complete statement.

The unfortunate consequence is that police would unnecessarily subject Rehtaeh to two separate lengthy interviews. Aside from potential re-victimization and re-traumatization, this approach is problematic from an investigative perspective. It can affect the quality of the evidence, particularly when there is no complete record of the interview, and it is not conducive to obtaining the most reliable evidence. Indeed, had this proceeded to a hearing, the credibility of mother and daughter may have been unfortunately juxtaposed. Having two interviews and two statements, contrary to policy, surely had an impact on this case. Unfortunately, there is simply no way of knowing the weight to ascribe to it.

Were procedures followed?

The "joint interview" protocol appears at times to have been misunderstood. Some uncertainty may be due to the fact that officers prior to integration and RCMP detachment officers outside the Halifax region are used to handling all aspects of a criminal investigation. These officers routinely perform the tasks now conducted by SAIT in Halifax Region and may, therefore, forget

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to abide by the different procedures within Halifax Region. In this case, the responding officer had only recently returned to uniform duties after five years of other duties, and had had very little contact with the integrated system. She was concerned that any contact with Rehtaeh should be made alongside DCS and correctly consulted her supervisor about the proper protocol. The supervisor should have turned his mind to Rehtaeh's age and given the direction that, even though she had offered to come in, it was not necessary to interview her. Instead, he instructed the responding officer to have Rehtaeh come in.

While the responding officer had received the child interview training (and had in the past instructed the course), she ought not to have interviewed Rehtaeh directly at that early stage of the investigation or, at the very least, she ought not to have obtained such detailed information about the facts underlying the complaint. It is of no moment that Ms. Parsons volunteered

to bring Rehtaeh in for an interview. There was no way for Ms. Parsons to know that Rehtaeh would need to be subjected to a second interview and recount the same series of events a second time once the matter had been assigned to a SAIT investigator.

To the extent that the proper protocol was not followed on the basis that Rehtaeh was almost 16 was an error. While it is natural for police to consider the level of maturity reflected by age, the fact of the matter is that DCS had a legal obligation to get involved. This meant that Rehtaeh would be subjected to another interview. The policy ought not have been disregarded on the basis of age alone.

The unfortunate consequence is that police would unnecessarily subject Rehtaeh to two separate lengthy interviews.

We were informed that similar mistakes are not uncommon. When they occur, SAIT usually flags them and sends a reminder to the attending officer as well as to other police officers. That occurred in this case. SAIT Sgt. Legere immediately raised the issue with the responding officer. It is unclear

whether the message was also relayed to the supervising sergeant who had given the instruction. We were also informed that periodic reminders are sent to certain detachments and occasionally to all front-line officers. DCS will also inform police supervisors when they notice that the issue continues to arise, so as to provide ongoing education for police. Another way to draw officers' attention to these issues would be to create a stand-

It is apparent to us that the responding officer was trying to be helpful in the face of Rehtaeh's clear distress and the sense of urgency expressed about the circulating photo. The unfortunate result, however, may have been to aggravate her distress. The responding officer was sensitive to the fact that it would be inconsiderate not to allow Rehtaeh to tell her entire story and to advise her to "save it for later." But that difficulty can be avoided completely by not interviewing the young complainant at all at the initial information-gathering stage, in accordance with best practice. The focus at the outset should be on ensuring that supports are in place, and then proceeding in a timely way with the full interview.

alone policy with respect to cases involving young victims, which would highlight certain aspects of the protocol and Child Interview Course that apply to all investigations involving young persons.

To the extent that the proper protocol was not followed on the basis that Rehtaeh was almost 16 was an error.

What is the potential impact of these missteps on a prosecution?

The police's good-faith efforts to be helpful undermined the case to be built against the suspects, because of inconsistencies between Rehtaeh's two statements. Such inconsistencies are not uncommon given the nature of human memory – and are even

less surprising when a young person is in a distressed state of mind. While they should not necessarily be seen as undermining a person's credibility and/or reliability,¹² they cannot be ignored when assessing the strength of a case for the purpose of a prosecution.

As stated in the RCMP's Sexual Assault Manual:

The initial investigative interview of a victim is often the most important step of an investigation and ideally should be conducted by a person with the appropriate training and practical skills. Often in sexual assault cases there will be no direct, physical evidence and most likely no eyewitnesses to the incident.

The initial interview is often the primary source of evidence for conviction. ... Therefore, the quality of the evidence obtained directly from the victim often directly impacts on the final outcome of the case. Inappropriate interviewing can lead to further victimization of the complainant, an acquittal, or to charges being laid in cases where an offence has not in fact occurred. [Emphasis added.]

The Manual further states that:

Perhaps more than any other crime, the testimony of the victim is vital because it is often the primary source of evidence for conviction. The nature of the police response to the initial complaint will affect the quality of the victim's evidence and this will have a direct impact on the ultimate course of a prosecution.

12. The distinction between these two concepts is described below.

Similarly, the HRP's Sexual Assault Investigations policy provides that:

Since the initial sexual assault investigation can affect the outcome of a case, it is essential that police be aware of the complex nature of sexual assault investigations and follow appropriate procedures when conducting such investigations and responding to sexual assault victims/survivors.

The police's good-faith efforts to be helpful undermined the case to be built against the suspects.

Were the policies clear and consistent?

When examining Rehtaeh's first contact with the police, I observed some discrepancies in the applicable policies. While everyone appeared to have a similar understanding of the policies, some of the written policies were incongruent and ought to be clarified. For instance:

- ➡ HRP's "Sexual Assault Investigations" policy provides that "if the victim/survivor is a child under 16 years of age, ensure only an officer trained to interview child abuse victims/survivors or a Department of Community Services social worker conducts the interview" [emphasis added]. By contrast, the HRP's GO-Guide referenced above states that such statements "are only to be taken by qualified member from Major Crime in conjunction with Children's Aid/Dept of Community Services" [emphasis added]. Both passages refer to the first "in-depth"

interview of the child. Not only should the first specify that the officer charged with conducting the interview should be the investigator from Major Crimes, it should make it clear that the interview ought to be conducted with DCS.

➡ HRP's "Sexual Assault Investigations" policy provides that the responding officer shall "ensure the victim/survivor's

trauma is minimized throughout the investigation by obtaining basic information from the victim/survivor in a professional and sensitive manner" [emphasis added].

The policy should be clarified to state that, whenever possible, the required "basic information" should be obtained from someone other than the victim. Some

confusion may also result from juxtaposing the preceding passage with a subsequent one that requires the responding officer to "obtain as much key information as possible including, but not limited to ... any other relevant information offered by the victim/survivor. Note: where possible, the victim's statement will be obtained by the investigating officer from Major Crime." The nuances discussed above should be reflected in the policy.

➡ The RCMP's GO-Guide (General Order) for sexual assaults provides that: "Detailed statements from victim and witnesses will be required by either uniform investigator or member of Sexual Assault Integrated/Investigative Team (SAIT)"; however, that: "Statements from children (16 and

younger) relative to sexual offences are only to be taken by a member qualified in Child Sexual Assault Interviewing. These include members from each office and Major Crime. All interviews of this nature are done in conjunction with Children's Aid/Dept of Community Services."

All these policies ought to be more precise about the distinction between "basic information statements" and "formal/in depth interviews", and between the role of the investigating officer and that of the responding officer – even though he or she may have the required training to interview children.

✔ Recommendation 1

The HRP and the RCMP should revise their sexual assault and child abuse policies to be precise, clear and consistent about the proper protocol for interviewing children and youth. In particular, the initial information gathered by responding officers should not be obtained from the child, where possible and appropriate. If responding officers interview the child, they should obtain only the limited information required at that stage. The interview should ideally not be conducted in the presence of a parent or adult known to the child, unless the child requires this support.

Investigating officers should endeavour to interview the child alongside a DCS worker at the earliest opportunity.

A stand-alone Child/Youth Intervention and Interview Policy should be created, clearly setting out the protocol for police intervention in cases involving an underage victim, and to highlight key aspects of the Child Interview Course. The term "youth" as well as "child" should be used in the title and body of the protocol, to dispel any belief that it only applies to young children. Front line officers should be reminded of

The focus at the outset should be on ensuring that supports are in place, and then proceeding in a timely way with the full interview.

the protocol. Consideration should be given to other means of providing these officers with a periodic refresher, such as circulating the new protocol and highlighting it in general police courses.

2. Was the case routed to the appropriate special investigations unit?

The Parsons complaint had at least two components: a child pornography component and a sexual assault component. It was routed to SAIT (the sexual assault unit) rather than to ICE (the unit that would normally handle child pornography cases). ICE provided advice to SAIT on two occasions.

What is the role of specialized investigators when there is cross-over between files?

The RCMP's Child Pornography on the Internet Operational Manual states the following:

5.1.1. Once a complaint is determined to involve child pornography, child luring, voyeuristic recording of children or child sex tourism - travelling sex offender, the member assigned to the investigation will, after consultation with his/her supervisor, immediately contact the Division ICE Unit.

5.1.2. The detachment of jurisdiction may be required to provide investigative assistance to the Division ICE Unit or, if circumstances dictate, to assume the lead investigative role. Both entities will collaborate to determine which unit will lead the investigation and which unit will assist.

Aside from this statement, which applies between RCMP detachments and ICE units, there appears to be no policy or established practice about what should occur when, as

in this case, there is cross-over between files. While D./Cst. Snair twice consulted with an ICE investigator, there may be other similar cases where that does not occur. There

is also room to argue that ICE should have greater involvement in cases of this nature.

Some of the written policies were incongruent and ought to be clarified.

That being said, the decision to route a file to SAIT as opposed to ICE or any other investigative unit is not made by the responding officer but by the QA Sergeant.¹³ Given the two overlapping aspects of the case, the decision here was a difficult one. The sexual assault

In the course of our interviews, one allusion was made to the fact that Rehtaeh's initial statement did not clearly disclose an allegation of sexual assault. I do not find that to be a correct assertion. While Rehtaeh's second statement was more forceful in conveying that the entire sexual encounter had taken place without her consent, her first statement clearly disclosed that she did not consent to the sexual activity that occurred while she was ill and leaning out of the window. It is established in law that a person can withdraw their consent to sexual activity at any time, even during the course of a single sexual encounter.

13. The "Quality Assurance" Sergeant is the person responsible for the general quality control of a case file. By way of periodic reviews, this officer ensures that the work performed on the file is completed satisfactorily.

component of the file was viewed as the primary allegation, and the file was routed accordingly. It cannot be said that

The Parsons complaint had at least two components: a child pornography component and a sexual assault component.

the file should have been routed to a different unit. Either call would likely have been reasonable. The problem I have identified is that this case was dealt with using an “either/or” approach as opposed to combining forces. I cannot overstate the advantage of having a combination of investigators whose

specializations address both facets of the complaint throughout the investigation. In this case, it could have made a difference in the investigation of the child pornography component.

What is the value of joint/collaborative investigations?

The QA Sergeant in this case acknowledged that a file could be routed simultaneously to different investigating units if it involves two different components. It is also true that SAIT (or ICE) could engage another unit after receiving and reviewing a file. However, it appears a joint approach was never considered during this investigation and, indeed, would have been uncommon – perhaps particularly because the two allegations in this case were very much intertwined and not neatly severable.

Short of conducting a joint investigation or severing the investigation into its two components, it is good practice for specialized investigators to seek advice from other specialists in those areas that

are less familiar to them, as was done in this case. As the RCMP policy makes clear, it is also essential that ICE be advised of child pornography investigations.

The advice provided by Cpl. Spence to D./Cst. Snair was entirely accurate and very helpful to the investigation. Nevertheless, it would be easy for a novice in the area of child pornography law and technological investigations to not have a thorough understanding of the subject after only a brief consultation and an autonomous review of documentation.

Cpl. Spence wrote up the advice he provided orally and recorded it in the police’s electronic file, which would have been accessible to D./Cst. Snair. This written advice could well have helped avoid any misunderstandings and ensure that D./Cst. Snair understood the advice. While D./Cst. Snair could have gone back to this document to compare it with the erroneous advice she later received from the Crown regarding child pornography (discussed below), it is not entirely unreasonable that an officer would ultimately rely on and not seek to challenge a legally trained Crown’s advice. The bigger issue, in my view, is that she did not have the experience required in this area to permit her to challenge the Crown’s advice. An officer well versed in the area of child pornography would likely have challenged it, providing a helpful second check against potentially erroneous legal advice.

In my view, it would be a great improvement if SAIT and ICE worked together or in much closer collaboration, such that there could be greater cooperation throughout the investigation.

Many in the police hierarchy agreed that there is a strong argument to be made in

favour of specialized investigators from ICE and SAIT joining forces when a case involves two components relating to their different areas of expertise. Due to a number of factors, including technology, criminal conduct is no longer as compartmentalized as in the past. There is now a lot of overlap between various types of offences, and specialized investigative units should adapt to avoid functioning in silos.

The potential for an integrated sex crimes or special victims unit

One option is for the two units to be fully or partially integrated. The jurisdiction should seriously consider a marriage between SAIT and ICE to form a “sex crimes unit.” Such a unit could include investigations relating to child abuse as well as investigations

I cannot overstate the advantage of having a combination of investigators whose specializations address both facets of the complaint.

currently conducted by the “Vice”¹⁴ unit, forming a “vulnerable persons unit” or a “special victims unit.” Another option is to simply proceed as in other types of major crime investigations by creating a joint “task force” between two units.

In this case, the two units were not working in complete silos:

advice could be and was sought from the appropriate experts. However, short of integrating the two units or creating a joint task force, improvements can be made to the status quo. For instance, having the two units in closer physical proximity (i.e. on the same floor) is a simple solution that would inevitably lead to significant improvements. The fit between SAIT and ICE certainly seems more appropri-

Was the approach to obtaining the photo appropriate?

In this case, the child pornography aspect was recognized at the outset. The responding officer immediately flagged that police were investigating child pornography offences, and this aspect of the complaint was at the forefront of the lead investigator’s mind at all times and informed her investigative efforts.

Yet the responding officer asked Rehtaeh to try to obtain the photo to provide to the police. This request was unwise for several reasons:

- ➔ It amounted to asking Rehtaeh to commit a criminal offence or to have others commit a criminal offence by possessing or distributing child pornography – as, in fact, occurred as a result of the request.
- ➔ The request had the potential to compound a crime by leading to further uncalled-for dissemination of the photo.
- ➔ The request would not only have a re-victimizing effect, it would eventually force the officer and the victim to testify about how the police obtained the photo – an otherwise ancillary matter.
- ➔ This approach to obtaining the photo might not inspire confidence in the police.

This is not to say that having the complainant act as an agent for the police can never be done, but it should only be done in appropriate circumstances, such as when other investigative avenues have been exhausted. However, the complainant’s age and level of distress should be taken into account and, in this case, would have pointed to a different approach. Child pornography is contraband – similar to illegal drugs or weapons – and the police should be careful to treat it as such.

14. The Vice Unit investigates crimes of “morality” such as prostitution, pornography, and gambling.

ate than one between SAIT and homicide (the unit that currently shares the same floor), especially in an increasingly digital world. We

The bigger issue, in my view, is that [the investigator] did not have the experience required to permit her to challenge the Crown's advice.

we were advised that, since Rehtaeh's death, talks had begun to improve collaboration between SAIT and ICE, and that the two units have begun working more closely together.

Indeed, we were informed that, following Rehtaeh's case, there were more crossovers between SAIT and ICE files. Because ICE is a more specialized unit than SAIT,—at least as

an interim measure – ICE should take the lead on these common files and obtain SAIT's assistance. Alternatively, one investigator from each unit should work together on these cases.

✔ Recommendation 2

An integrated “sex crimes unit” should be created or there should be closer collaboration between SAIT and ICE on investigative files that touch on both their areas of expertise. Joint task forces should be created when appropriate. ICE and SAIT should be located in closer physical proximity to facilitate exchanges of information and advice, and investigators should be encouraged to work collaboratively and share information.

15. Criminal harassment doesn't apply to every case of harassment. It can apply to threatening conduct or repeated communications directed at someone, but only where this conduct reasonably causes the victim to be afraid for his or her safety (or the safety of someone known to them), and only where the offender knows that the victim feels harassed (or is reckless about it).

3. Was the approach to addressing cyberbullying appropriate?

The cyberbullying component of this case was not ultimately addressed. In other words, no one succeeded in putting a stop to the photo's continued dissemination and to the damage it was causing.

Because no individual instance of the cyberbullying Rehtaeh suffered appears to have amounted to criminal harassment, there were no applicable criminal offences—other than the child pornography offences—that directly addressed this aspect of her distress.¹⁵ As a result of this case and that of Amanda Todd in British Columbia, Parliament recently made distributing or making available an intimate image without consent a criminal offence.¹⁶ The problem here was not that there was no available offence that could result in opening a criminal investigation: possessing or distributing the photo was criminal. Yet that fact did not translate into the police having the tools to stop the photo's circulation. It had been disseminated rapidly among the students at Rehtaeh's school and beyond.

What are the challenges of addressing cyberbullying?

Society is in its infancy in addressing cyberbullying – in terms of measuring it and the types of harm it causes, identifying ways to address it and determining whether the tools currently being used are effective. The police have made great strides in keeping pace with evolving technology and

16. Section 162.1 of the *Criminal Code*

have been very successful using social media as an investigative tool. Police representatives we interviewed agreed that skills aren't the issue: the expertise is there and available—although more resources likely need to be invested to resolve staffing and structural issues. For instance, lengthy training is required to become a certified tech crime specialist, and these specialists are constantly in training to keep up to date. As a result, extra bodies are required to meet the demand. Not all tech specialists need to be trained police officers: civilians are being recruited to do tech crime analysis and provide other forms of technological support, which will no doubt help ease the burden on tech crime units.

Still, the public's priority has often been traditional crime, and the growing problem of cyberbullying and other types of cybercrime has only recently been recognized. As a result, fewer resources have been invested in tech crime. The significant public attention now being given to these issues has been instructive to police and to the state – particularly regarding the urgency of the problem and the devastation it can cause. Indeed, what distinguishes cyberbullying from traditional forms of bullying is its immediacy and potential permanency, which exacerbate the harm caused to the victim. Because this greater damage happens so rapidly, society has acknowledged the need to intervene in ways not generally used when young

17. MacKay, A. Wayne, Respectful and Responsible Relationships : There's No App for That (The Report of the Nova Scotia Task Force on Bullying and Cyberbullying) (February 29, 2012)

persons engage in traditional bullying. But how to intervene effectively in the face of such immediate harm of vast proportions is the difficult issue.

It was quickly apparent to the responding officer that Rehtaeh's most pressing concern was understandably to stop the photo from circulating. The responding officer

made genuine efforts to find a solution to the problem, but to no avail. The police's inability to do anything immediate about the photo discouraged Rehtaeh to the point that she walked out of the initial police interview and did not return.

Yet, Rehtaeh was not the first to suffer in this way. In 2011, before the events in this case, Nova Scotia created a Task Force on Bullying and Cyberbullying ["the Task Force"]

in the wake of a series of youth suicides in the province. In February 2012, the Task Force issued a lengthy report¹⁷ on the issue—before the police investigation in the Parsons case was complete. It included several recommendations, many of which have since been implemented.

It would be a great improvement if SAIT and ICE worked together.

Criminal conduct is no longer as compartmentalized as in the past.

There is now a lot of overlap between various types of offences, and specialized investigative units should adapt.

Certain additional things (described below) could have been done to put a stop

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closely together.*

to the cyberbullying. However, given the limited tools available at the time to shut down electronic communications and erase information that is out in the digital universe—as well

as the lack of recognition that these cases can no longer be looked at through the lens of a traditional police investigation—it is difficult to condemn the police for failing to find a quick solution.

What were the challenges of working with the school?

Through no fault of their own, the police's attempt to interview as many youths as possible at the school about

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cyberbullying.*

the photograph failed. However, I believe that some support at a higher level could have helped convey more forcibly to school authorities that child pornography

was being disseminated throughout the school, that the police were actively investigating, and that it was important that either police or school authorities speak to the student body.

This action might have helped to at least temper the bullying, create awareness and prompt those students who still had the photo to delete it or turn it over to police.

According to the Task Force, the school authorities' frequent caution about intervening in certain cases of cyberbullying was primarily a result of uncertainty surrounding their jurisdiction¹⁸ when cyberbullying doesn't necessarily occur "on school grounds." The Task Force made several recommendations relating to the education system's response to bullying and cyberbullying. As a result, Nova Scotia's *Education Act* was amended to clarify that schools can intervene when the cyberbullying occurs off school grounds if it "significantly disrupts the learning climate of the school."¹⁹ Our understanding is that, as a result of this and other clarifications, schools have been more proactive in cases of cyberbullying.

Some work has also been done to clarify how schools and police interact. We were informed that there is a lot of mystique around police investigations from the schools' perspective: school authorities are loathe to act when they are aware of an active criminal investigation, because they do not want to influence the evidence or prejudice the investigation. At the same time, they are apprehensive about allowing police to conduct criminal investigations on school property (at least when the incident did not occur at the school), as this may not be conducive to the learning environment. Although these are fair concerns, they are likely overstated. I will address these concerns as well as the steps taken to date in the last section of this report.

18. *Ibid.*, at pp. 51-52 and 65.

19. *Education Act*, S.N.S., 1995-96, c. 1, s. 122

What distinguishes cyberbullying from traditional forms of bullying is its immediacy and potential permanency.

grey area: there are no stand-alone manuals, policies, protocols or clear guidelines they are asked to follow. There is also some tension between the general police view that matters occurring inside the

In my view, there should be guidelines about how to involve schools and school liaison officers in ways that go beyond creating awareness by talking to students about cyberbullying. The role of school liaison

officers is, indeed, a school should, at least as a first step, be addressed by the school liaison officer and the view of some schools and police officers that school liaison officers should not handle any matters touching on criminal investigations. Whatever the proper approach, clarification is needed.

The police's inability to do anything immediate about the photo discouraged Rehtaeh to the point that she walked out of the initial police interview.

helped in this case?

In the aftermath of this case, a lot of thinking has gone into effective strategies to address the oft-recurring problem of cyberbullying. Much of this work has been done outside the criminal justice sphere. Many of these methods comple-

Would non-criminal measures against cyberbullying have

Addressing the problem of cyberbullying requires a multi-pronged approach with a strong focus on education and prevention. The problem is serious. Prof. MacKay's²⁰ report helpfully highlights the following aspects of bullying and cyberbullying that require greater awareness:

- ➔ Contrary to traditional forms of bullying, cyberbullying is "non-stop bullying": it may begin at school but it follows the victim home and into their bedroom. There is nowhere left to feel safe.
- ➔ The nature and scope of bullying has been forever changed by technology: it is more insidious than ever before and exposes everyone to potential vulnerability.
- ➔ The immediacy and broad reach of modern electronic technology has made bullying easier, faster, more prevalent and crueler than ever before.
- ➔ In particular, cyberbullying invades the home where children normally feel safe, and can reach the victim at all times and in all places: it is constant and inescapable, and thus particularly insidious.
- ➔ The cyber-world provides bullies with a vast unsupervised public playground, which challenges our established methods of maintaining peace and order. It crosses jurisdictional boundaries, is open for use 24 hours a day, seven days a week, and does not require simultaneous interaction.

- ➔ Because senders of electronic taunts or hate mail can't see the reaction of the recipient, they can be oblivious to the hurt they have caused.
- ➔ The immediacy of online transactions encourages impulsive acts with no thought to consequences, a behaviour pattern that is already common in many youth. Peer pressure may further promote harmful deeds that unfortunately have instant and powerful impact with no effective retraction possible.
- ➔ Anonymity allows people who might not otherwise engage in bullying behaviour the opportunity to do so with less chance of repercussion.
- ➔ Some young people fail to comprehend the public nature, extensive reach and long-lasting implications associated with online communications.
- ➔ Bullying causes serious physical and emotional injury, with potential long-term costs for personal health, professional success and social and emotional stability.
- ➔ Some young victims choose suicide as their way out.

ment the criminal justice system; others are an alternative to it. I will discuss some of these methods later in the report. Here, I will address if and how non-criminal measures could have fit into the system's response to Rehtaeh's situation.

In my opinion, the public and police alike should look for creative solutions to the problem of cyberbullying outside the traditional police investigative approach. The cultural context has shifted. Powerful technology has been placed in the hands of adolescents who are not great self-regulators and who lack impulse control. Years ago, adolescent mistakes could quickly be forgotten. Today, that is no longer the case. Because the consequences of adolescents' conduct are different, the rules must be different. The justice system has an obligation to respond to the way our world changes, and to address this new phenomenon.

There is concern that some options mentioned in this report may undermine a police investigation, whose ultimate goal is to ascertain if charges ought to be laid. However, I think this concern is overstated. Police investigations adapt to the circumstances that present themselves. It is valid to be concerned that school authorities or other public authorities not act as an agent for the police, but there is little concern to be had if the school or other public authorities take action for their own purposes, for their own reasons and pursuant to their own powers.

In a small number of cases, non-criminal responses to cyberbullying may have an impact on the criminal investigation.

20. MacKay, *supra*, at pp. 10-12

Schools can intervene when the cyberbullying occurs off school grounds if it “significantly disrupts the learning climate of the school.”

to ensure accountability, personal safety and the protection of the public.

This case and others have already successfully raised awareness of the issue.

Concerns about interfering with a potential criminal investigation should rarely, if ever, justify not taking other appropriate measures.

tions. While there will always and should always be a place for the traditional police investigation and criminal prosecutions, which can be valuable tools for reducing crime, we should not lose sight of the fact that they are only one set of tools. We must accept their limitations and embrace alternative solutions.

However, concerns about interfering with a potential criminal investigation should rarely, if ever, justify not taking other appropriate measures. In the rare cases where outside intervention may be fatal to a criminal prosecution, there are other ways than prosecution

to ensure accountability, personal safety and the protection of the public. These awareness efforts should continue. But the problem also requires other solutions that fall outside the framework of a traditional police investigation. The criminal prosecution of individuals should not be the be-all and end-all of solu-

Examples of non-criminal measures

In particular, I think of the CyberSCAN initiative that Nova Scotia’s Department of Justice developed pursuant to the *Safer Communities and Neighbourhoods Act*, S.N.S. 2006, c. 6. This unit – composed of non-police investigators employed by the province – will investigate allegations of cyberbullying and intervene if warranted. They have a host of mea-

There should be guidelines about how to involve schools and school liaison officers in ways that go beyond creating awareness.

sures (described later in this report) at their disposal to stop bullying while, at the same time, raising awareness among cyberbullies and the public.

New federal legislation also allows a court to impose a recognizance order (or “peace bond”) to prevent a person from distributing or making available an intimate picture without consent, where there are reasonable grounds to believe that someone will commit this offence.²¹ This new legislation allows a judge to issue a warrant to seize copies of a recording, a publication, a representation or any written material, if there are reasonable grounds to believe that it constitutes an intimate image. The seizure of this material can then lead to its forfeiture.²² The law also includes measures aimed at facilitating the removal of intimate images from the Internet. A court can compel the custodian of a computer system to produce intimate images stored on their system, to identify the person who posted the images,

Powerful technology has been placed in the hands of adolescents who are not great self-regulators and who lack impulse control.

and to delete them from the system.²³

I also think of the protection order regime created by Nova Scotia's *Cyber-safety Act*, S.N.S. 2013, c. 2. Victims of cyberbullying can seek orders from the courts to put an end to the bully-

ing. The same legislation creates the tort of cyberbullying, which allows a person to sue a cyberbully for damages or an injunction. I will describe some of these new options in more detail in the last section of this report. My point here is that, by all accounts, the circulating photo and related bullying is the aspect that truly affected Rehtaeh the most, because it prevented her from moving forward. The photo kept resur-facing and she was constantly on edge because it was impossible to tell when and where it would appear. One way or another, this problem has to be addressed. The new non-criminal measures that have since been introduced could have helped solve this problem.

Some police forces across the country are using another avenue: they are sending a formal caution to young persons who have either been in possession of or distributed child pornography. Given the fact that many people, in particular young persons, do not realize the extent of the damage they are causing or recognize they are handling child pornography, this is a very worthwhile approach. It also recognizes that, in certain circumstances, the criminal law can be a highhanded way of addressing a problem. The caution letter or email identifies the illegal image that the person is said to have handled and informs them that:

- ➔ it is considered child pornography and is illegal to possess
- ➔ there are serious penalties for this offence
- ➔ they must permanently destroy the image and not distribute it
- ➔ they must advise the officer that they have done so
- ➔ they must forward the letter or email to anyone to whom they have sent the image
- ➔ they will be prosecuted if they are found to possess the image or distribute it from that point forward.

21. Sections 162.1 and 810 of the *Criminal Code* ; Bill C-13, *Protecting Canadians from Online Crime Act*, S.C. 2014 c. 31.

22. Section 164 of the *Criminal Code*

23. Section 164.1 of the *Criminal Code* ; Bill C-13, *supra*. If a person is convicted of having distributed or made available intimate images without consent, the court can also order them to compensate the victim for expenses incurred to remove the images from the Internet or other digital network: see s. 738(1) of the *Criminal Code* and Bill C-13, *supra*.

There are other ways than prosecution to ensure accountability, personal safety and the protection of the public.

were. They were important to bring people to account and to deter the persons involved as well as others from

My discussion of these other approaches to cyberbullying should not be taken to mean that criminal prosecutions under the then-existing laws were not warranted in Rehtaeh's case: I believe they

committing similar offences. Ultimately, however, criminal prosecution could not provide any relief to Rehtaeh's most pressing problem. Even if child pornography charges had been laid at the conclusion of the initial investigation, it would not have undone the damage which had already been and continued to be done by the circulating photo and the related cyberbullying. Had the solutions that now exist been available when she first went to police for help, she may well have welcomed them.

Sample Caution Letter

I am Detective ***** of the ***** Police Service, Internet Child Exploitation Unit. You are receiving this email because you have possessed and/or forwarded a child pornographic image. This image is of a nude teenaged girl sitting cross-legged on a bed. The subject line of the email was or may have been in your case, "*****". This, and any image of a person under the age of 18 years engaged in explicit sexual activity or the focus of which is their sexual organs or anal region, is a Child Pornographic Image and is illegal to possess or distribute in Canada and most of the world. The minimum penalty for possession of a Child Pornographic image is 90 days in jail. The minimum penalty for the distribution of a Child Pornographic image is 1 year in jail. Possession and Distribution of Child Pornography is a serious criminal offence and will be prosecuted as such.

You are receiving this email as a caution and one and only warning regarding the possession and distribution of the image in question. You must stop any and all forwarding of this image and must permanently delete and destroy any copies you have of this image. If you have forwarded this image to anyone please forward this email to those same people. If you are unclear as to why you have received this email contact me at the phone number below. Each of your email addresses and names have been added to ***** Police Service Report ***** as being formally cautioned regarding the possession and distribution of this Child Pornographic image. If you are found to be in possession or having distributed this image in any way from this point forward you will be prosecuted. You must reply to this email confirming your understanding of this caution. If you do not reply to this email, I or a police officer in your area will contact you personally to ensure your understanding and compliance.

- Drafted by D./Cst. David West from the Sault Ste. Marie Police Service

Some police forces are sending a formal caution to young persons who have either been in possession of or distributed child pornography.

In my view, there is also a gender component that cannot be ignored in the context of certain forms of cyberbullying: cyberbullying in relation to girls must be differentiated from the cyberbullying that takes place in respect of boys. While both can be utterly destructive,

it will surprise few that girls and women are sexualised and objectified in a way that boys and men generally aren't. To the extent that they are treated differently, the response to sexualised forms of cyberbullying directed towards women and girls must be approached with heightened attention. Just as with sexual assaults, the sexual victimization of women and girls by way of cyberbullying "is an assault upon human dignity and constitutes a denial of any concept of equality for women."²⁴

✔ Recommendation 3

More efforts should be made to make both the general public and key institutions, such as the police and schools, aware of novel ways to address cyberbullying. The police along with other authorities and stakeholders, such as the Department of Education and the Department of Justice representatives from the CyberSCAN Unit, should develop a "cyberbullying" protocol that

would identify in which instances to use these new alternatives. The protocol should be designed with a view to flexibility and acknowledge that various approaches can be used simultaneously.

Given the kind of damage that cyberbullying can rapidly cause, the protocol should state that if police investigators have the requisite grounds to prevent further instances of cyberbullying or to seize images or electronic devices used to commit cyberbullying-type offences, they should consider obtaining a recognizance order or seizing the images or devices in a timely way. They should at all times consider interim remedies to promptly put an end to the cyberbullying.

The role of police liaison officers within schools should be clarified, in particular as it relates to their involvement in criminal investigations and their interactions with police investigators.

24. *R. v. Osolin*, [1993] 4 S.C.R. 595, at p. 669

B. Length and Appropriateness of the Police Investigation

1. Applicable police training, guidelines, policies and procedures

Checks on the length and duration of an investigation

Police endeavour to conclude investigations in a timely way. As the HRP's Case Management Policy makes clear: "All files shall be investigated thoroughly adhering to the principles and components of the case management process and shall be concluded in a timely fashion. When the complexity of a file or the existence of extenuating factors prevents a Lead Investigator from concluding a file in an expedient fashion, it shall be the responsibility of the Lead Investigator to maintain regular contact with the victim/complainant and to update him/her as the case status changes."

In cases that do not warrant further investigation after the initial police response because it is unlikely the case will be solved, the policies provide for an early case closure process. For example, the HRP's Case Management Policy provides for quality assurance case screenings, where decisions are made whether to continue the investigation and expend further investigative resources on the case. The quality assurance personnel exercises control over the quality and amount of investigative effort, and determines whether the case warrants assignment of investigative resources.

As briefly described above, a diary date system also exists for supervisors to monitor the progress of all ongoing investigations to ensure that cases are being diligently investigated and that appropriate resources are devoted to the case. Extensions must regularly be requested and are granted so long as the investigation is in progress and steps are being taken. Although every 30 days is typical, there are no pre-set times for these reviews to take place. The default time period will depend on the nature of the investigation and the QA Sergeant's own practice. Time periods will be adapted depending on the case's progress and the next steps being taken or considered. We observed that the reviews occurred quite frequently, and close tabs were kept on the investigation.

During these periodic reviews (also called Quality Assurance reviews), the supervisor ensures that investigative reports are being prepared and that the investigation is being conducted in a diligent manner. Supervisors may also be consulted at any time during the investigation for advice and investigative support, as occurred in this case. Toward the end of an investigation, if charges are to be laid, the supervisor will generally ensure that the evidence meets the standards for prosecution and that the evidence gathered supports the officer's conclusion.

Traditionally, police investigators have discretion on how to conduct their investigations. Quality Assurance reviews are therefore not focused on assessing the propriety of the particular steps taken by the investigator. I view this as being entirely appropriate given the particular nature of every investigation, the details of which will generally only be known to the

investigator. For example, no two sexual assault investigations are alike. Investigators can and, as this case demonstrates, do seek advice when required in determining how to conduct their investigations. There was a sufficient degree of oversight in this case. This issue was not a cause for concern.

The HRP's policy also provides that: "When assigning cases of a complex or time-consuming nature, supervisors shall consider the availability of a Lead Investigator to conclude the file within a reasonable time period bearing in mind any anticipated extended leave and/or absences from regular duty by the investigator." That was not the issue here. We were informed that SAIT is a very busy unit and that every investigator is assigned a heavy caseload. Other investigators in the unit would likely have experienced the same time constraints as the investigator in this case.

Training

As for training, D./Cst. Snair appears to have followed the normal course for training by Halifax Regional Police investigators. We will use her case to illustrate the training received by the typical SAIT investigator. She received the basic police training in 2003, and spent five years on patrol duties. In 2008, she took a criminal investigations course (level 2 Investigators course), which included training in such areas as search warrants, interviewing and interrogations, and quality investigations. She spent three years as a school resource officer as part of the school liaison program, and joined SAIT in August 2011. SAIT was her first assignment as an investigative officer. At the outset, she took the required week-long course on interviewing children, offered jointly with the Department of Community Services.

She was only given the opportunity to take a course on investigating sexual assaults after the completion of the investigation in Rehtaeh's case and after Rehtaeh's death. She did subsequently complete this week-long course, which was offered by the Ontario Police College. Another course touching on sexual assault victims was put on by the Avalon Sexual Assault Centre subsequent to and as a direct result of Rehtaeh's death. In June 2013, a senior Crown also provided training to SAIT investigators on the issue of drunkenness and consent. Additional training was subsequently provided to SAIT investigators on such topics as victim services, trauma-informed response to sexualized violence, victim blaming, legal issues relating to sexual assault investigations, the power of language (how the words used to document a crime can impact the case), and sexual assault investigations generally. We understand that police have made strides to ensure meaningful training is provided to SAIT investigators annually. The HRP has also made sexualized violence one of its top priorities.

***SAIT
investigators
do not typically
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technology-
related training.
In this day and
age, tech crime
should be part of
the basic training
that all officers
receive.***

While these are helpful improvements, I recommend that such courses about the particularities of sexual assault investigations be provided to SAIT investigators upon being assigned to that unit. The RCMP's Investigative Guide to Sexual Offences

in fact explicitly acknowledges that “the investigation of sexual offences requires that police officers have a certain level of expertise. Although excellent training initiatives in this area exist in Canada, there is still a problem of accessibility and availability.” This gap exists despite the RCMP’s Operational Manual which states that: “Divisions will ensure members receive adequate training in sexual assault investigations and have continual access to resource and training material.” It is important that sufficient specialized training be provided to investigators newly assigned to SAIT at the outset, and that it be maintained through ongoing training.

I note also that SAIT investigators do not typically receive any technology-related training. In this day and age, tech crime should be part of the basic training that all officers receive upon becoming police officers. While it is unreasonable to expect that most investigators will acquire the skill level that ICE investigators or tech crime analysts have, all officers should have a basic understanding of this new policing reality.

✔ Recommendation 4

Upon being assigned to SAIT or as soon thereafter as practicable, investigators should receive training specific to sexual assault investigations and to victim responses to sexual violence. Consideration should be given to creating a buddy system or assigning a mentor to officers who are new to SAIT. Investigators should also develop a tentative overall investigative plan to be discussed with and reviewed by a superior at the outset of the investigation. This value-added step should be integrated into the current quality assurance system, to make it less pro forma.

Crown prosecutors who handle sexual assault cases should also receive more training about sexual violence and responses to sexual violence, with a particular focus on trauma-informed responses.

The general training received by all officers at the police college should include a course on policing and technology, and regular updates on any new capabilities should be provided to all officers. All Crown prosecutors should also be trained in this area.

2. Were the investigative steps appropriate and were they taken diligently?

The investigation was more thorough than the typical sexual assault investigation.

Overall, the way the investigation was conducted in this case was thorough and proper. In fact, the investigation was more thorough than the typical sexual assault investigation, which will often come to a close after obtaining the complainant’s statement and obtaining or attempting to obtain a statement from the suspect(s). The scope of an investigation depends on what if any further evidence might be available. This case was unusual in that, because of the presence of other individuals at the house (and in the room) and the social media involved, a significant amount of evidence about the circumstances surrounding the alleged offences was potentially available. While that is quite unusual for sexual assault cases, there is

no doubt that it is becoming more common given the increasingly ubiquitous nature of social media, which is a valuable investigative tool for police. The child pornography component of the case, including the evidence required about the photo's subsequent circulation, also made this investigation more complex than the typical sexual assault case. In fact, because of the technological aspect, child pornography investigations tend to be more protracted than sexual assault investigations.

While ironic, it is likely true that had there not been more information to investigate, the suspects would have been charged with sexual assault on the sole basis of Rehtaeh's statement(s). That

This case was unusual in that a significant amount of evidence about the circumstances surrounding the alleged offences was potentially available.

is not uncommon in sexual assault cases. Corroboration or confirmation of allegations is not required by law and, in many cases, such corroboration is not available. Police generally do not shy away from laying charges in those types of cases. But police have to work with what is available to them: they have a duty to obtain evidence that

can shed light on what happened in any given case. They are encouraged to seek corroboration of any allegations made, if that evidence exists. For instance, the RCMP's Investigative Guide states that:

[I]n sexual abuse cases there is often little or no direct physical evidence to support the victim's allegations. In too many cases, investigators find no corroborating evidence, primarily because they have restricted their definition of "evidence". Classic evidence such as DNA, hair and fibres, while prevalent in popular television shows, is often unavailable in real life situations. By broadening their definition of "evidence" to include anything that might corroborate the complainant's story, investigators can often discover key elements to support the victim's account of the events. [Emphasis added.]

When there is additional evidence, gathering it will affect the length of the investigation. When there is no such evidence, police must and do make a determination based on what they have.

With these preliminary comments in mind, I will address certain specific aspects of the investigation and the interaction between the police and Rehtaeh's family that have been of some concern. I will then examine the overall length of the investigation and consider whether it was justified or explicable.

Did the police communicate effectively with the complainant and her family?

Leah Parsons was a parent in survival mode. Her child was traumatized, and the family was in crisis. Understandably, she wanted answers, and she needed them quickly.

A family in crisis will be confronted with a difficult reality: certain police investigative techniques take time. For a good case to be brought to court, investigations must be conducted diligently and not rushed. This fact can be exasperating for parents and children who do not have the luxury of time. In these circumstances, the most important thing that can be done – although it won't accelerate the pace of the investigation – is to establish a good line of communication between police and the family. Unfortunately, in this case, communication appears to have broken down, causing the family much aggravation.

However frustrating it may be, the reality is that officers are not at liberty to discuss their investigations – even with victims. They are required to protect the information they gather during an investigation. While they can share limited information at times, the kind of information that was requested from the investigating officer in this case – primarily whether the males had been interviewed yet, why not and when that would be done – was not something the investigator was at liberty to discuss. Nevertheless, *the way* the limits of what can be discussed is communicated is of utmost importance.

The police should convey to complainants or their families *why* they aren't at liberty to discuss investigative steps, including: the risk

of information getting back to the suspects and compromising the investigation; and the investigator has to scrupulously appear to be neutral and objective.

In practice, investigators face the difficult task of learning to communicate with both hands tied behind their backs. Some struggle to manage the disconnect between their empathy for the complainant and family and their inability to share information.

The police should convey to complainants or their families why they aren't at liberty to discuss investigative steps.

The investigating officer in this case did not in any way strike us as an uncaring individual. Quite the reverse: she appeared very caring and empathetic, and was clearly devastated by the turn of events and by Rehtaeh's death. Yet the family felt that the investigating officer – who was initially supportive and approachable – quickly became condescending and dismissive.

I think it is fair to say that Leah Parsons was an assertive and demanding parent, which is entirely understandable given the crisis she faced. Her child was suffering, so she was on everyone's case demanding answers. Unfortunately, the investigating officer had a heavy caseload and was pressed for time to investigate her cases. The result was significant friction between the two.

Several other factors may have contributed to the break-down of communications and loss of trust between the investigating officer and the family—including the fact that the investigating officer was initially very keen to bring the culprits to justice,

In this case, communication appears to have broken down, causing the family much aggravation.

investigative intentions, which didn't pan out for a variety of reasons. As a result, Ms. Parsons (and Rehtaeh) had certain expectations that were not met.

While investigators should explain to the complainant what will happen next, they should "not make any promises about future developments that [they] cannot keep."

boys last, after the rest of her investigation was conducted. What remains the subject of disagreement is whether the investigator told Ms. Parsons at the outset that she would arrest the boys. If this communication occurred, it likely had the effect of heightening expectations at too early a stage in the process. I cannot say what exactly was said given the different versions of events, but I

and subsequently appeared to lose some of that drive as she encountered obstacles in the case. Ironically, the loss of trust may have been a result of the investigating officer offering *too much* information about her initial

It is beyond dispute that, at the outset of the investigation, the investigator expressed to Rehtaeh and her mother a determination to go after these boys. She was very much ready to investigate and lay charges in the event they were warranted. She did inform both Rehtaeh and her mother that she would be talking to the

can state that these kinds of assurances should not be given. The RCMP's sexual assault manual explains that, while investigators should explain to the complainant what will happen next, they should "not make any promises about future developments that [they] cannot keep."

The same thing can be said about the investigator's initial stated intention to attend at the school to interview students or speak to the student body. It is unclear with what level of certainty this intent was expressed, but the plan to go to the school was certainly understandable and expressed. When this approach turned out to be not feasible and the information was not relayed back to the family, they were left to wonder what if anything was being done with the investigation.

As stated in the HRP's sexual assault policy, "Officers in charge of sexual assault investigations shall maintain consistent contact with the victim/survivor throughout the entire process." Further, during the initial contact, "police procedure" and "legal processes" must be explained to the victim.

The HRP's Case Management policy similarly provides that: "It is the responsibility of the Lead Investigator to keep the victim/complainant and important witnesses informed of the case status as it changes." This type of communication is intended to fulfill several goals, including: (a) providing a statement of the police action; and (b) placing a responsibility on the victim to consider what additional information may exist that would be useful to the police. Investigators must be sensitive to the

fact that it is a natural reaction for a victim or parent in crisis to demand answers. They must also be aware that families are trying to navigate a system that is entirely unfamiliar to them. However, the level of communication skills required to support a family in crisis can be a lot to ask of individuals who have gone into the business of policing. Police are not trained to be good communicators and support persons. While all officers should acquire basic communication skills and law enforcement

A better solution might be to have a support person who can act as an intermediary between the complainant and police.

agencies can and should endeavour to help them improve those skills, the reality is that not all officers will excel at communications. What may be one officer's strength will be another's weakness. In light of the fact that police investigators are already over-burdened

with other tasks, a better solution might be to have a support person who can act as an intermediary between the complainant and police. Having such an intermediary would benefit both parties.

While the investigator in this case clearly understood that the family was pressing for the investigation to proceed more quickly, she was less aware of the extent of Rehtaeh's crisis or that it was the basis for the sense of urgency. Having someone else who can focus on the relationship between the two parties and take the time required to communicate would greatly alleviate the potential for misunderstandings and miscommunications.

In my view, police-based victim services are the most well positioned to assume this role. They have a proximity to and familiarity with police work that few outside the police world have. They also have the sensitivity and communication skills required. Because they understand the nature of police work, they have the advantage of being able to provide input into what the officer is doing or saying. Because they know how to convey certain concerns to police and highlight considerations that would be relevant to them, they are the perfect conduit to communicate with police on the complainant's behalf.

This type of resource is available to complainants once charges are laid and cases are before the court, but – except in particular circumstances such as domestic violence cases – they generally are not offered at the investigative stage of the criminal justice process. HRP's Victim Services (VS), for instance, focuses on victims of domestic violence. VS is a support unit comprised of civilian employees and volunteers who work with police members to provide services to victims of crime. They can provide emotional support and referral information to victims, and can be present during the taking of a statement or any other gathering of information by the police. They are both proactive and reactive. In other words, while they will respond to a request for assistance from a police officer or victim, they will also screen police reports and reach out to victims.

A new federal Bill of Rights²⁵ for victims came into force on July 23, 2015. While it is still too early to foresee the impact of this new legislation on the criminal justice system, some of its provisions are relevant to this case. The Bill's preamble is particularly relevant because it provides that: "victims of crime and their families deserve to be treated with courtesy, compassion and respect, including respect for their dignity"; and "it is important that victims' rights be considered throughout the criminal justice system." The "criminal justice system" is defined to include "the investigation and prosecution of offences in Canada".²⁶

In respect of a victim's "right to information", the Bill specifically provides that a victim²⁷ has the right, on request, to information about "the criminal justice system and the role of victims in it," "the services and programs available to them as a victim," "their right to file a complaint for an infringement or denial of any of their rights under this Act," and "the status and outcome of the investigation into the offence".²⁸ The Act requires every federal department, agency or body involved in the criminal justice system to have a complaints mechanism that has the power to make recommendations to remedy any infringements.²⁹

Moreover, the Act provides that: "Every victim has the right to convey their views about decisions to be made by appropriate authorities in the criminal justice system that affect the victim's rights under this Act and to have those views considered."³⁰ One of those rights protected in the Act, is "the right to have reasonable and necessary measures taken by the appropriate authorities in the criminal justice system to protect the victim from intimidation and retaliation."³¹

Given the Act's status, these measures will likely cause some change in the landscape of how police officers (and indeed Crown Attorneys) interact with victims.

Despite VS's focus on domestic violence, it did intervene in this case when Rehtaeh and a community-based worker from the Avalon Sexual Assault Centre reached out to them. Their intervention was most helpful. They were able to get the police's attention, convene a meeting and obtain certain answers for Rehtaeh and her family. Verona Singer, who attended the meeting along with the family, was very committed to assisting in

any way she could. VS remained available to facilitate contacts with the police if required but – because Rehtaeh had already connected with Avalon and received support from them – they did not continue to be involved. Nevertheless, Ms. Singer agreed that if Victim Services could obtain additional resources and wasn't so taxed with domestic violence cases and other workload, there would be a benefit to them playing an expanded role

25. *Canadian Victims Bill of Rights*, S.C. 2015, c. 13. The Act has a quasi-constitutional status: see s. 22

26. *Ibid.*, s. 5

27. Defined in section 2 of the Act as "an individual who has suffered physical or emotional harm, property damage or economic loss as the result of the commission or alleged commission of an offence."

28. Sections 6 and 7

29. The Act recognizes that when the complaint relates to a provincial department or agency, the complaint must be filed in accordance with the laws of the province. The victim may nevertheless rely on the rights as set out in the Act.

30. Section 14

31. Section 10

in cases like this one. Following Rehtaeh's death, VS advocated for a more responsive role for them in sexual assault cases and met with SALT supervisors to develop a policy. I discuss the proposed expanded

role for Victim Services in more detail below.

Investigators must be sensitive to the fact that it is a natural reaction for a victim or parent in crisis to demand answers.

more time and attention than police officers may be able to provide. Rehtaeh's family told us that it would have been a great help to them to have someone with the time and knowledge to explain the nature of the investigative process and

Involving an intermediary is not to say that there ought not to be any communication between investigators and complainants or their family. However, families in distress require

to be their point of contact. Having access to someone who is responsive, has the time and ability to listen, can act as a liaison between families and police, and can help them understand the pre-charge process, can avoid unnecessary

frustrations. Given most people's unfamiliarity with the police world, this role is important at the investigation stage and not only once charges are laid.

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frustrations. Given most people's unfamiliarity with the police world, this role is important at the investigation stage and not only once charges are laid.

✔ Recommendation 5

Police services should assess whether police-based victim services can be expanded to cover sexual assault investigations and other crimes involving serious violence. Police officers who may come into contact with victims of sexual violence should be made aware of the availability of victim services to facilitate communications with complainants and their families, and be encouraged to make appropriate referrals to and use of these services.

Was the voluntary approach to interviewing suspects appropriate?

Deciding at which point in time to conduct suspect interviews or interrogations has traditionally been a matter of investigative discretion. There is no police investigation template that applies to every case. Not only does each case differ, but investigators have their own styles and approaches. Many investigators prefer to build their case before zeroing in on their target and confronting them with the accumulated evidence. There are many advantages to proceeding in this fashion, and disadvantages to conducting a police interview or interrogation too hastily. It is a tried and true method of investigation that avoids a situation where officers are at a disadvantage because they have insufficient information in their arsenal. Such a disadvantage can lead to mistakes and jeopardize the investigation. This method of choice is so prevalent that the RCMP's Investigative Guide provides that "Investigators should gather as much information as possible prior to the interrogation" [emphasis added]. D./Cst. Snair therefore proceeded correctly by holding off on interviewing the suspects.

Another relevant question is whether interrogations should have been conducted in this case instead of proceeding with voluntary interviews. An “interrogation” is usually conducted “when the investigator reasonably believes that a suspect is responsible for a particular offence” and is more “accusatory”

An important consideration in this case is that the suspects were youths. Special rules apply to the questioning of young persons under the YCJA.

or “confrontational” than an interview.³² But the distinction should not be misunderstood: suspects always have the right to remain silent and not provide any statement to police. The difference is that a person being interrogated is usually under arrest and not free to go. They can, therefore, be sub-

jected to an attempt by police to elicit a statement from them.

An important consideration in this case is that the suspects were youths. Special rules apply to the questioning of young persons under the YCJA. The Act provides that “parents should be informed of measures or proceedings involving their children.”³³ It also provides that a statement made by a young person to a police officer in circumstances where the officer has reasonable grounds for believing that the young person has committed an offence is not admissible in evidence against the young person if the officer has not advised the young person of his or her right to consult a parent (or other adult), and given the youth a reasonable opportunity to do

so. The statement must also be made in the presence of an adult person that the youth has consulted, unless he or she chooses otherwise.³⁴ In general, police must notify a parent when they intend to interview a young person, and it is commonplace for them to do so. Finally, like any person, the young person is under no obligation to provide a statement to police, and must be advised of this right.

The RCMP’s Investigative Guide sets out these special rules relating to the questioning of young persons “who are arrested, detained or under reasonable suspicion of having committed an offence.” Before taking a statement, the officer must explain to the young person that he or she has the right to consult a parent or in the absence of a parent, any other appropriate adult, as well as the right to consult a lawyer. The young person also has to be advised that they have the right to have a parent, any other appropriate adult or a lawyer present when the statement is made.

While these rules do not mean that interviews must take place on a voluntary basis, it is common for police when dealing with youth to start by requesting them to come in voluntarily to provide a statement. This does not preclude police, in the event the young person refuses to come in voluntarily, from subsequently arresting and bringing him or her in to be questioned on a non-voluntary basis. In this case, the investigating officer decided to

32. RCMP Investigative Guide

33. Section 3 of the YCJA

34. Section 146(2) of the YCJA. These elements must be proved beyond a reasonable doubt for the statement to be admissible at trial: see *R. v. L.T.H.*, [2008] 2 S.C.R. 739, 2008 SCC 49, at para. 34

first proceed on a voluntary basis, but intended to resort to arrests if the youth refused to come in voluntarily. That was appropriate. Ultimately, as a result of the consultation with the Crown, the suspects were not arrested or subjected to an interrogation.

Making a request for a voluntary statement can often be more productive: people may be more inclined to cooperate if they are not under arrest, even though they still need to be cautioned when they are under investigation. This approach paid dividends in one instance in this case. However, I note that one potential investigative avenue available as a result of Eric's voluntary statement was not pursued: given that he had come in voluntarily to provide a statement, he may also have voluntarily provided his cell phone to police for analysis if that had been asked of him. The investigative officer did not make this request, which was a missed opportunity.

Was the decision to not immediately seize the phones appropriate?

Questions were raised about why the suspects' mobile devices were not seized in the first place, and concern was expressed that relevant information on the devices could be deleted.

First, police require reasonable grounds to believe that an offence has taken place to obtain a warrant to seize devices³⁵, or to proceed to an arrest and seize the phones incident to arrest. It is not unusual to conduct other available investigative steps before resorting to the search and seizure of items from the targets of the investigation themselves, in particular if the search is to take place incident to an arrest.

As for the concern that by waiting, relevant information might well be deleted, the reality is that much of the information on an electronic device, even if deleted, can be retrieved through a forensic analysis of the device by tech crime specialists. While there is no guarantee that deleted information can be retrieved and it is possible the device itself

will be lost or discarded in the intervening period, the fact remains that the police must conduct some modicum of an investigation before applying to the courts for authorization for more intrusive techniques like the search and seizure of a cellular phone. In this case, D./Cst. Snair consulted ICE about the information on the phones and believed that she would be able to obtain it directly from RIM or the service providers. (I address the fact that this belief was not entirely correct below.) While Cpl. Spence advised her that the best way to maximize the amount of information

While proceeding cautiously might make sense from a traditional police investigation perspective, it may not be well suited to the new realities of technology and the substantial damage that can be caused by cyberbullying.

35. As well as reasonable grounds to believe that the particular device contains something that will afford evidence of the offence, or that the device itself is "offence-related property," or is intended to be used for the purpose of committing certain offences against the person.

that could be retrieved would be an approach involving *both* a search of the devices and the production of information from RIM and the telecommunications service providers, it was not unreasonable to begin with one of the two methods and subsequently assess whether the second was also required.

Even if the photo has already been broadly disseminated, seizing the phones may go some way in deterring the practice in the future.

Some investigators may well have undertaken to seize the phones at an earlier point in the investigation, but it cannot be said that the investigator's approach was wrong (subject to the missed opportunity of requesting Eric's phone

when he voluntarily attended to provide a statement to police, as described above).

My comments here should be considered in light of earlier ones above regarding the need for police investigators to actively address the cyberbullying aspects of a case. One ancillary advantage of seizing the phones quickly (with a proper search warrant) in a case like this is to attempt to prevent the photo from being disseminated. Even if the photo has already been broadly disseminated, seizing the phones may go some way in deterring the practice in the future. While proceeding cautiously might make sense from a traditional police investigation perspective, it may not be well suited to the new realities of technology and the substantial damage that can be caused by cyberbullying.

With the benefit of hindsight, it would have been beneficial and expeditious to seize the phones (by way of a search warrant) at an earlier point in the investigation.

On a go-forward basis, promptly seizing electronic devices is an important avenue to consider in any case involving cyberbullying. The police need to be seen to be moving quickly because that has an impact in and of itself. If it is not possible in the context of the police investigation (e.g. because the police have not accumulated the requisite "grounds to believe" that an offence has taken place and that evidence of that offence will be obtained by seizing a particular device), then alternative solutions should be considered. I address this issue later in this report in discussing the work of the new CyberSCAN Unit, a Nova Scotia Department of Justice initiative aimed at countering cyberbullying.

3. Was the length of the investigation appropriate?

There is no denying that this was a lengthy investigation. It will always seem even longer from the perspective of a young person and family in crisis. Although investigations are not conducted in ideal conditions, and there were several valid explanations for large parts of the delay, I have concluded that the delay in this case was too long and that certain aspects of the investigation should have progressed more quickly.

The delay was not the result of a lax investigator or one who was not committed to bringing the file to completion. The investigation initially proceeded at a reasonable and consistent pace. Until late in the investigation, there were no unreasonable periods of inactivity. While there were some fumbles – sometimes due to circumstances beyond the investigator's control, sometimes due to her lack of expertise in the area of child pornography and technology – this was a diligent investigation handled by a diligent investigator.

The average duration of an investigation of this nature depends on too many variables to be determined with any accuracy. Some cases rest on a single statement, given the absence of any other witnesses and the absence of technological evidence or what is in legal terms called “real evidence” (DNA or other forensics, for instance). In other cases, a lot of evidence is or may be available and police have a duty to look into it as part of their investigation.

While blame cannot necessarily be laid at the investigator's feet, a year-long investigation when a youth is in crisis is too long. We must examine the key factors that affected the length of this investigation to see whether improvements can be made.

I will also state at the outset that cases involving youth victims should affect the timeline of the investigation.

Child abuse cases should generally be prioritized over adult sexual assaults.

The delay was not the result of a lax investigator.

At the very least, there should be an effort to expedite or give priority to investigations involving youths in crisis. My recommendation takes into account the child's particular vulnerabilities, and the fact that a young person's recollection of events will be more greatly affected by the passage of time than it will be for the typical adult. This fact may make prosecution more difficult. For many of the same reasons that the YCJA mandates promptness in dealing with court cases involving youthful offenders³⁶, I believe an expedited investigation is also warranted for cases involving youthful complainants.

36. This includes the requirement that the criminal justice system emphasize “the promptness and speed with which persons responsible for enforcing this Act must act, given young persons' perception of time”: section 3 of the YCJA.

The PPS's Practice Note on "Sexual Offences" provides that "Crown Attorneys should endeavour to ensure that sexual offences are dealt with expeditiously," "[i]n order to minimize the stress and anxiety of victims and to avoid deterioration of memories."³⁷ Similarly, a recent PPS Practice Note provides that, in child pornography cases involving young of-

A year-long investigation when a youth is in crisis is too long.

fenders, "[w]hether or not substantial time has passed from the moment of creation, possession or transmission of the alleged child pornography to the time when

charges may be laid, is a relevant consideration" when assessing whether it is in the public interest to prosecute the case. Given that the YCJA requires a timely response to unlawful activity and Crown Attorneys have an obligation to prosecute cases involving youth or sexual offences expeditiously, the necessary implication is that police investigations involving sexual offences, and in particular young persons, must proceed in a timely fashion.

I do recognize that police investigators are regularly called upon to respond to emergencies and must give those calls priority (e.g. an immediate response may be required for the safety of a person or to protect evidence). I also recognize that there are inherent time requirements in any investigation. Nevertheless, an effort should be made to prioritize investigations involving youth.

✔ Recommendation 6

Police should prioritize investigations involving young persons – both as potential targets and/or complainants or victims – over cases involving adults. Investigations involving persons in crisis should also be prioritized over cases that do not have a similar urgent component.

What were the explanations for the delay?

Technological complexities

One period of delay was arguably caused by the investigator's misunderstanding of the technology.

Following her initial meeting with Cpl. Spence, the investigator was under the misapprehension that the order targeting RIM would produce BBM text messages (Rehtaeh had indicated that BBM was the main messaging service used) and would, therefore, produce evidence of the photo being distributed – if that evidence existed. In fact, while RIM could provide the user logs relating to BBM messages (i.e. who sent a message to whom), RIM could not retrieve their content. RIM could, however, provide the content of email messages, provided they had not been deleted from the user's phone and they were within RIM's retention period for this information. In this case, however, email correspondence does not appear to have been the chosen mode of communication.

37. Nova Scotia Public Prosecution Service, Crown Attorney Manual: Prosecution and Administrative Policies for the PPS, "Sexual Offences" – Practice Note, at p. 2. See the following link for a copy of this manual, including all applicable directives and practice notes:
http://novascotia.ca/pps/crown_manual.asp

While Cpl. Spence provided the correct information, it is not unusual that officers will misunderstand fast-developing technology that is unfamiliar to them. The RIM handout produced by the RCMP in this case explained what could be retrieved in relation to BBM, but did so by reference to what could be retrieved in relation to “Pin to Pin” Logs. Suffice it to say that the guide was not as clear as it could have been, at least not to an investigator without the relevant technological background.

This problem would be resolved if there were closer cooperation between ICE and SAIT, or if they were an integrated unit. Given how ubiquitous technology and social media have become, all officers should have a basic understanding of how they can be used as investigative tools. It is impossible to ask that all officers understand the intricacies of what can be retrieved from each device or service provider but greater efforts should be made to provide basic training on these topics.

Despite the misunderstanding, the RIM production order was a necessary first step to obtain the cell phone numbers for the target phones. Rehtaeh had only been able to provide the investigator with BBM numbers. Cell phone numbers and service provider information were required to subsequently pursue production orders for the particular service providers. Those production orders were useful to the investigation because text messages could be obtained from at least one of the main service providers. This information could advance the investigation so, ultimately, this investigative step did not cause unnecessary delay.

There is no doubt that when technology is involved in a case, a multi-stage and time-consuming process may be required to obtain the desired information. The targeted companies or organizations require time to retrieve the information, which often involves a complex process. There is a high demand by law enforcement agencies for information in the hands of Internet and cell phone service providers, who must also ensure that they are respecting their own legal obligations in the face of such requests.

All officers should have a basic understanding of how technology and social media can be used as investigative tools.

The sequential approach to interview requests

While I find no fault in having, at least as a first step, invited the suspects to provide a statement, there was no investigative reason to arrange for these statements in sequential order, as opposed to issuing simultaneous requests. In other words, there was no reason to await one response prior to trying to make contact with another, as was done in this case.

The investigator did not disagree and indicated that these contact attempts were made in sequential order as a result of workload constraints, rather than a strategic investigative approach. Even if all the requests had been made at once, the suspects would likely not have responded or come at once. These practical restrictions are unfortunate as

This [interview] phase in the investigation resulted in a delay of approximately four months, which is unacceptable.

this phase in the investigation resulted in a delay of approximately four months, which is unacceptable. The investigation appears to have lost steam as it was nearing completion. This should not be allowed to happen in circum-

stances where youths are involved and where a child and family are in distress.

Workload

A number of police officers we met with expressed concern about the workload of SAIT investigators. We were informed that, at any given time, a SAIT investigator will have approximately 20 files that are actively being investigated. To take D./Cst. Snair as an example, she started with SAIT in August 2011, at which time she was assigned 3 files. In September, she was assigned 7 new files in addition to the ones that were still ongoing. In October, she was assigned 4 new files, and in November – when Rehtaeh’s case came in – she received 7 new files.

continued to see unusually high numbers until February 2012. The SAIT unit was also short-staffed over the course of 2012. While we were informed that this did not impact the Parsons investigation in any significant way – in particular because this file was often given priority because Ms. Parsons was maintaining constant pressure on the police to expedite the investigation – there is no doubt that the workload issue needs to be addressed.

SAIT investigators must also regularly help their SAIT colleagues on their own files. For example, two investigators are typically required to interview a suspect. The unit works as a team and that is how it should be.

Moreover, at the time, SAIT investigators were regularly drawn on to assist with homicide investigations or other special projects when these required additional human resources. When such requests came in, SAIT investigators were expected to drop what they were working on and assist their colleagues from homicide. This de facto way of proceeding was facilitated by the otherwise insignificant fact that the two units are located on the same floor of the Criminal Investigative Division (“CID”) building. It appears as though the homicide unit was also particularly busy around the time of the Parsons investigation.

The SAIT unit drew a record number of new files in November 2011, when the Parsons complaint came in, and

We are informed that this practice of taking SAIT investigators away from their own files has ceased “when at all possible.” The issue was already being raised regularly with senior management at the time. The problem had been recognized, but no solution identified. It appears as though Rehtaeh’s case prompted this welcome change in police practice.

Nevertheless, DCS reported that officers are still regularly too busy to sometimes attend for joint interviews because they have to attend to other urgent matters. Because DCS has statutory time-constraints within which their interview of a child at risk must take place, they must proceed with the interview without police and will report back to police as required. This of course does not follow the joint protocol. Increased and continued attention should be given to this resource issue.

Other considerations

In many cases, charges will be laid prior to completing an investigation, and the investigation continues after the laying of the charge. This approach did not occur in this case because a charging decision had not been made until the investigation was concluded. This decision depended on the outcome of the investigative avenues that were being pursued, and so could not have been made earlier. This, in my view, is another explanation for the lengthy delay in this case.

Much of the frustration experienced by Rehtaeh and her family stemmed less from the delay itself than from the lack of information they had about the inves-

tigative process and the explanations for the delay. The need for improvements in communication were discussed above.

Finally, the delay until the investigation reached a conclusion would also have been more acceptable if intervening measures had been taken to address the cyberbullying that flowed from the circulating photograph.

At any given time, a SAIT investigator will have approximately 20 files that are actively being investigated.

✔ Recommendation 7

SAIT should be sufficiently resourced so that investigators can complete their investigations in a timely manner. SAIT should be a last resort for additional human resources that may be required to assist with other matters such as homicide investigations.

4. Closing the file

D./Cst. Snair continually sought advice from her superiors regarding next steps. Given that the sexual assault component of this case was a difficult one, SAIT wanted a second opinion prior to concluding the case without laying charges. They decided to seek the Crown’s advice on that component. It appears that the police properly understood the distinction between the Crown and the police roles. They did not abdicate their responsibility for charging to the Crown. The advice sought amounted to getting a second opinion in a case where there was

uncertainty. This is good practice.

The investigating officer intended to pursue her investigation of the child pornography allegations by proceeding to arrest and interview the suspects, and seize their phones at the same time.

Getting a second opinion in a case where there was uncertainty ... is good practice.

She cannot be faulted for not having done this prior to obtaining the Crown's advice in respect of the sexual assault charge, given that suspects have the right to be informed of the

reasons for their arrest upon being arrested. Before proceeding with the arrests, it was responsible to determine whether they were also still being investigated for sexual assault, and whether she intended to charge them with that offence.

Ultimately, obtaining the Crown's advice in respect of the sexual assault charges led to advice also being provided in respect of the child pornography charges. D./Cst. Snair in the end followed this advice. As I will discuss in more detail below, she cannot be faulted for having done so.

According to the HRP's Case Management policy, the QA Sergeant is ultimately responsible for determining "if all necessary follow-up work activity has been completed and the case can be closed." In this case, again having regard to the Crown advice, it cannot be said that police should have pursued the investigation of the child pornography allegations and proceeded to arrest and interview the suspects or seize their phones.

All four boys and their families were cautioned. The YCJA in fact mandates that a warning or caution be considered by the police before deciding to commence judicial proceedings against a young person.³⁸ Once the cautions were issued, the file was closed in accordance with the applicable file closing process.

38. Section 6 of the YCJA indeed provides as follows: 6. (1) A police officer shall, before starting judicial proceedings or taking any other measures under this Act against a young person alleged to have committed an offence, consider whether it would be sufficient, having regard to the principles set out in section 4, to take no further action, warn the young person, administer a caution, if a program has been established under section 7, or, with the consent of the young person, refer the young person to a program or agency in the community that may assist the young person not to commit offences.

C. Crown Advice

Many officers find guidance in being able to consult with Crown prosecutors in respect of laying charges. The PPS often welcomes these consultations because they can avoid the laying of charges in cases where the Crown may have concerns about the case, or they can cause the case to be shored up prior to the laying of charges. Still, the roles of the Crown and police are distinct, and should not be misunderstood.

I will first set out the respective roles of the police and the Crown as it relates to the initiation of a prosecution and consider whether these roles were respected in this case. I will then consider whether the procedure that applies to Crown prosecutors when providing advice to the police was properly followed. Finally, I will consider the content of the advice to determine whether it was legally sound, and limited to what Crown prosecutors can properly consider in giving that advice.

1. What are the respective roles of the police and the Crown in the decision to charge?

Prosecutorial discretion and the “realistic prospect of conviction”

In Nova Scotia, as in several other Canadian provinces, the police are responsible for laying charges and the Crown then decides whether to proceed with them. These separate decisions are made on different standards. The police officer makes a determination as to whether there are *reasonable grounds to believe* the suspect committed the offence, whereas the “evidential threshold” for whether the Crown will continue or terminate proceedings is whether there is a “*reasonable*” or “*realistic*” *prospect of conviction*. If the Crown

Different provinces may formulate this threshold slightly differently. For instance, Ontario’s Crown Policy Manual describes the “reasonable prospect of conviction” threshold as follows:

This standard is higher than a “prima facie” case that merely requires that there is evidence whereby a reasonable jury, properly instructed, could convict. On the other hand, the standard **does not** require “a probability of conviction,” that is, a conclusion that a conviction is more likely than not.³⁹

The “realistic prospect of conviction” threshold that Crown prosecutors in Nova Scotia are expected to apply, is described as follows:

[The test] requires an evaluation of how strong the case is likely to be when presented in court. The prosecutor is required to find that a conviction is more than technically or theoretically available – the prospect of displacing the presumption of innocence must be real. More than a prima facie case is required. As pointed out by the Law Reform Commission of Canada, it would be wrong to clog the courts with prosecutions that an experienced prosecutor fully expects to fail, simply because a prima facie case exists.⁴⁰

39. Ontario Ministry of the Attorney General, Crown Policy Manual, *Charge Screening* (March 21, 2005) at pp. 1-2 [emphasis added]

40. Nova Scotia Public Prosecution Service, Crown Attorney Manual: Prosecution and Administrative Policies for the PPS, *The Decision to Prosecute (Charge Screening)*, at pp. 3-4 [emphasis added]

concludes that there is a realistic prospect of conviction, they must go on to consider whether the public interest is best served by prosecuting the case.

The Directive provides that there will need to be, at the very least, “sufficient, reliable evidence with probative value to satisfy the court that any conviction based on the evidence was reasonable” and “if, having regard to the amount and nature of the evidence, the prosecutor concludes that an acquittal is clearly more likely than a conviction, the case should not be prosecuted.”⁴¹ While formulated differently, the threshold appears to be fairly similar to Ontario’s. The following passage in Nova Scotia’s Directive, however, may imply that a prosecution may not be warranted in circumstances where the prospect of conviction is not “more likely” than an acquittal:

Also included may be that relatively small number of cases that are “borderline” – cases in regard to which the prosecutor, after reviewing the evidence in the manner described below, is not able to determine whether or not a conviction or an acquittal is more likely. This might occur, for instance, where the prosecution case is essentially sound, but there are flaws, the impact of which is difficult to assess. Other cases may have strong and weak aspects that are so closely balanced that the outcome cannot be predicted with confidence. Prosecutors should consult with supervisors and experienced colleagues in regard to the decision to prosecute such cases.⁴²

The Directive does not set out what ultimate threshold the “supervisors”

or “experienced colleagues” ought to apply in “borderline” cases. This ought to be clarified. Specifically, it should be made clear whether the threshold is simply that a conviction is “more than technically or theoretically available” or whether a conviction must be “more likely than not.”

Whatever the case may be, the Directive makes clear that this threshold “differs significantly” from that which may be used by the police in laying a charge.⁴³ The Directive thus specifically addresses the issue of Crown advice being provided prior to laying a charge, as occurred in this case:

The prosecutor may also offer an opinion as to whether or not the available evidence as described by the investigator is capable of providing reasonable grounds for a belief that a suspect has committed an offence. It must be emphasized, however, that it is the belief of the investigator and not the prosecutor that is crucial to the laying of an Information. It is the investigator who decides whether or not charges are to be laid. For that reason, in these circumstances it would be prudent for the prosecutor to refrain from expressing a personal opinion as to the guilt or innocence of the suspect.⁴⁴

41. *Ibid.*, at p. 4 [emphasis added]

42. *Ibid.*, at p. 4

43. *Ibid.*, at p. 3

44. *Ibid.*, at p. 3

The Crown Directive on “Providing Advice to the Police” similarly includes the following principles and suggested practices in light of Nova Scotia’s sharp demarcation between who lays a charge and who prosecutes it:

- ⦿ In difficult cases, police officers may be inclined to seek what amounts to practical direction from the Crown rather than pure legal advice. In particular, police officers may seek a decision from the Crown as to whether sufficient grounds exist to lay a criminal charge. If a charge has not yet been laid, the Crown can give only legal advice.⁴⁵
- ⦿ It is important to leave the decision whether to charge up to the police. This emanates from principles established by the United Kingdom and adopted by the Royal Commission on the Marshall Prosecution, subsequently reiterated in the Martin Committee Report.⁴⁶ This is because of the desire for mutual independence between investigative and prosecutorial powers, which is seen as indispensable to the fairness of the process.⁴⁷
- ⦿ The Crown’s advice at the pre-charge stage is advisory in nature, not directive. It would be inappropriate for a Crown to instruct police to discontinue an investigation.⁴⁸
- ⦿ For solicitor-client privilege purposes, the purpose or objective of the meeting should be clear to all participants.
- ⦿ All participants should clearly understand which decisions are to be made by the police and which are to be made by the Crown. All should understand that, generally, legal advice given by the Crown is not binding on the police.⁴⁹

The “Decision to Prosecute” Directive adds the following comments specific to advice relating to the decision to charge:

Where reasonable grounds exist to support a criminal charge but the Crown concludes that there is no realistic prospect of conviction, it is appropriate to advise police, that, although the police may determine that reasonable grounds exist, and while the decision to lay the charge rests with the police, absent a material change in the available evidence, the charge laid will be withdrawn by the Crown and the reasons for the withdrawal placed on the record.

The Crown’s letter should clearly indicate that the Crown is providing a legal opinion only and that the legal opinion is not binding on the police. It may be useful to reiterate the fact that the decision to lay a charge or to not lay a charge continues to rest with the police because it is the person who lays the information who must believe on reasonable grounds that the named person has committed the offence.⁵⁰

45. Nova Scotia Public Prosecution Service, Crown Attorney Manual: Prosecution and Administrative Policies for the PPS, *Providing Advice to the Police*, at p. 7

46. *Ibid.*, at pp. 3-4

47. Report of the Attorney General’s Advisory Committee on *Charge Screening, Disclosure, and Resolution Discussions*, (Queen’s Printer for Ontario, 1993) [Martin Committee Report], at pp. 37-39. This was a seminal undertaking that was led by a preeminent justice of his time, and that involved many participants across the justice sector.

48. *Providing Advice to the Police*, *supra*, at p. 4

49. *Ibid.*, at p. 5

*The investigator
in this case
at all times
understood that
the decision
whether to charge
was hers to make.*

This passage envisions an assessment by the Crown of the realistic prospect of conviction ahead of the laying of a charge. When providing their opinion to the police in that regard, the Directive provides that “[w]

here circumstances permit, prosecutors should also discuss with the investigating police officers the reasons for not continuing with a charge. It is possible that a case can be strengthened after first presented to the prosecutor and, where practical, this opportunity should be provided. In appropriate cases, the prosecutor can direct additional investigation.”⁵¹

Of note, the Directive reminds prosecutors of the importance of exercising their discretion to determine whether a charge should proceed or be terminated: “Declining to exercise this important discretion is likely to be just as destructive to the administration of justice as making inappropriate decisions.”⁵² The Directive refers to minimizing the risk of prosecuting innocent persons and to the need to effectively utilize finite justice resources.⁵³

In a well-known case emanating from Nova Scotia, the Supreme Court of Canada had the opportunity to comment on the pre-charge relationship between the Crown and police. It observed that certain provinces such as British Columbia, Quebec and New Brunswick have a Crown pre-charge screening system, pursuant to which the Crown

approves the laying of charges. Thus, despite acknowledging the need for a separation between police and Crown roles and the importance of preserving the Crown’s objectivity, the Supreme Court indicated that different provinces have implemented this principle in various ways and that the important point is that the Crown’s independence, objectivity and fairness be preserved *at every stage of the process*.⁵⁴ It specifically observed, with respect to Nova Scotia’s system, that “while the Marshall Report speaks of a distinct line between police and Crown functions, it is one that may be drawn conceptually and figuratively, through conscious practice, rather than literally by the act of laying charges.”⁵⁵

The nature of prosecutorial discretion – the discretion exercised by the Attorney General and his agents in determining whether and what to prosecute – was also discussed in that case. Recognizing the fact that assessing the prospect of conviction in a given case is an area of discretion where reasonable people may differ, it underscored the deference that is owed to that assessment. The Court spoke in this way about “the broad scope traditionally and properly afforded to prosecutorial discretion:”

Courts are very slow to second-guess the exercise of that discretion and do so only in narrow circumstances. In *R. v. Beare*, [1988] 2 S.C.R. 387, for example, the Court noted that a

50. Decision to Prosecute, *supra*, at p. 8 [emphasis added]

51. *Ibid.*, at p. 14

52. *Ibid.*, at p. 10

53. *Ibid.*, at p. 10

54. See *R. v. Regan*, [2002] 1 S.C.R. 297, 2002 SCC 12, at paras. 64-66, 71, 83 and 89

55. *Ibid.*, at para. 68

system which did not confer a broad discretion on law enforcement and prosecutorial authorities would be unworkable, per La Forest J., at p. 410:

Discretion is an essential feature of the criminal justice system. A system that attempted to eliminate discretion would be unworkably complex and rigid. Police necessarily exercise discretion in deciding when to lay charges, to arrest and to conduct incidental searches, as prosecutors do in deciding whether or not to withdraw a charge, enter a stay, consent to an adjournment, proceed by way of indictment or summary conviction, launch an appeal and so on.

See also: *R. v. Power*, [1994] 1 S.C.R. 601; *Smythe v. The Queen*, [1971] S.C.R. 680, at p. 686; *R. v. T. (V.)*, [1992] 1 S.C.R. 749; and *R. v. Lyons*, [1987] 2 S.C.R. 309, at p. 348.

Still, the corollary to these extensive discretionary powers is that they must be exercised with objectivity and dispassion.⁵⁶

Were the differing Crown and police roles respected in this case?

In my opinion, the investigator in this case at all times understood that the decision whether to charge was hers to make. She indicated that she would not normally seek advice in a case that is “clear cut.” In difficult cases, and as the Crown Directives envision, she would seek advice and then make a decision, bearing in mind the advice. In

my view, the motivation for the Crown consultation was proper.

In respect of the sexual assault allegations, the investigator did not believe she had sufficient evidence to lay charges but wanted a second opinion. The Crown opined that there was no realistic prospect of conviction. The Crown did not offer an opinion as to whether there were sufficient grounds to lay a charge. Nevertheless, it was reasonable not to lay charges in the face of the Crown’s opinion that there was no realistic prospect of conviction.

In respect of the child pornography allegations, it had been the investigator’s intention to pursue other investigative leads prior to obtaining a Crown’s opinion (if she then deemed the opinion necessary), as is the preferable course. A combination of factors ultimately led to obtaining this advice ahead of time. Following her preliminary meeting with the junior Crown, the investigator determined that she would await the Crown’s final advice and continue with her investigation if the Crown indicated that child pornography charges were possible.

After receiving this final advice, the investigator took away from it that if charges were laid, the Crown would not proceed with them, no matter what further evidence was obtained: pursuing other investigative leads would be pointless. Indeed, the Crown’s view regarding the irrelevance of “extrinsic” evidence also explains why the investigator was not prompted

56. *Regan, supra*, at paras. 166-68, per Binnie J., in dissent but not on this point.

by the Crown to pursue them. D./Cst. Snair discussed the matter with her supervisor, and they determined that

The practical effect of the advice was that there would be no point to pursuing any further investigative steps.

it would not be in the interest of the victim to lay a charge that would not be proceeded with in court. The investigation therefore came to an end.

Similarly, from the Crown prosecutors' perspectives, I view the pre-charge

advice that was provided as properly falling within the confines of "advice." No directions or instructions were given to the investigator. The practical effect of the advice was that there would be no point to pursuing any further investigative steps. However, at no time did the Crown instruct the investigator not to proceed with the arrests/interrogations or seizure of the phones. The junior Crown indicated that he never intended to preclude the investigator from pursuing the investigation and never told her not to, but he recognized it would be logical to expect that she would not pursue it after obtaining the opinion he provided.

The junior Crown checked with his superior to see "whether [they] would prosecute such a charge if the evidence existed." He concluded from the senior Crown's opinion, and reported back to the investigator, that "there was no reasonable prospect of conviction arising out of the photo and lack of supporting evidence." Given that he had not undertaken a review of the file and

was not in possession of all the relevant facts as it related to the "supporting evidence", this was too conclusory an opinion (that was ultimately based on erroneous assumptions). Where Crowns have not themselves conducted a thorough review of the file and where they, therefore, cannot be confident they have a complete understanding of the case, it is important that they set out their understanding of the facts or the factual assumptions that underlie their opinion.

The final question is whether the Crown was correct in resting its opinion on the "realistic prospect of conviction" threshold as opposed to the lower threshold that applies to the police. In particular, in respect of the child pornography charge, it appears as though there was a general consensus (at least up to obtaining advice from the more senior Crown) that the investigator did have reasonable grounds to believe that child pornography offences had been committed. However, as the PPS Directive makes clear, the Crown can come to a conclusion that reasonable grounds exist but that there is no realistic prospect of conviction, and convey this opinion to the police. While the caution that the Directive recommends the Crown give to the investigator in those circumstances was likely not explicitly given in this case, I am satisfied that both parties were very much aware of their differing roles and thresholds.

One might then ask whether the investigator, facing a lower threshold, ought to have nevertheless proceeded with the charge in the face of the Crown's opinion on the absence of any realistic prospect of conviction. The reality is that,

while the investigator's decision must remain unfettered in that regard, it would be highly unusual for an officer to proceed with the laying of a charge when the Crown has effectively advised that the charge will be withdrawn "absent a material change in the available evidence." Laying a charge would cause needless emotional anguish and expense to all involved, and would unnecessarily burden the system with a charge that police and Crown know will not be prosecuted. The Supreme Court has recognized that "efficiencies which are gained by pre-charge screening ... protect the repute of the justice system, not only the personal interests of the accused." It added: "Complainants also benefit from a single decision to proceed with or avoid laying charges, rather than having to deal with the stress and publicity of a charge and then face the appearance that they have made a spurious accusation if the charge is later withdrawn."⁵⁷

✔ Recommendation 8

The PPS Directive on Providing Advice to Police should be amended to require that, in cases where the Crown prosecutor opines that there are insufficient grounds to lay a charge or that there is no realistic prospect of conviction—and unless the prosecutor has himself or herself undertaken a thorough review of the file, the factual assumptions that underlie the opinion should be set out for the police investigator.

The PPS Directive on the Decision to Prosecute should clarify that the "realistic prospect of conviction" threshold involves a determination that a conviction is "more than technically or theoretically available" and, in the event of uncertainty on that point, the

Crown prosecutor should consult with supervisors and experienced colleagues.

2. Was proper procedure followed in the process for obtaining Crown advice?

I note that there is no indication of "Crown shopping" (i.e. looking for a "sympathetic ear") in this case. D./Cst. Snair had no previous relationship with Ms. MacDonald. A colleague recommended that she contact Ms. MacDonald because of her extensive experience with sexual assault investigations during her years conducting general prosecutions. I also understand that Ms. MacDonald is not a Crown who shies away from recommending a charge and prosecuting in appropriate circumstances. Ms. MacDonald subsequently went to find Mr. Dostal, with whom D./Cst. Snair never had any previous encounters.

The internal consultation

D./Cst. Snair brought along the entire file to the meeting with the prosecutor. There is no indication that her presentation of the case was slanted in any way that would drive a particular answer or outcome. The meeting lasted approximately 1 hour. D./Cst. Snair and Ms. MacDonald went through the salient details of various witness interviews including Rehtaeh's interviews, as well as the relevant text messages. Given that the investigation was an integrated one, the information reviewed covered both the sexual assault and the child pornography aspects of the investigation. The meeting was

57. *Regan, supra*, at para. 84

therefore substantial and not hurried. After Mr. Dostal joined the meeting, approximately 15 minutes were spent reviewing and discussing the case with him. This review of the file was not as thorough as it ought to have been, but Mr. Dostal appears to have grasped the central facts.

By referring the aspect of the case that was less familiar to her to a more specialized Crown, Ms. MacDonald exercised good judgment. Similarly, Mr. Dostal exercised proper caution by deciding to consult with a more senior Crown when he felt he was outside of his comfort zone. One of the PPS Directives provides that “the experience of other counsel is a valuable resource that should be readily utilized.”⁵⁸

However, the nature of this internal consultation will vary: “When the factors to be considered are more finely balanced, there is likely to be a fuller discussion, an exchange of views and, perhaps, the giving of advice or instructions. A more formal case conference may be convened by the Chief Crown Attorney for complex, significant cases.”⁵⁹ In respect of internal consultations within the PPS, the Directive also provides that a “note to file” of consultations that took place should be prepared.⁶⁰ None of this was done in this case. In particular, the consultation between Mr. Dostal and Mr. Botterill was not optimal: no notes were taken and the discussion does not appear to have been as full as it ought to have been. This is demonstrated by the fact that Mr. Botterill had close to no recollection of it, and by all appearances had little understanding of the underlying facts.

58. The Decision to Prosecute (Charge Screening), *supra*, at p. 11

59. *Ibid.*, at p. 12

60. *Ibid.*, at p. 13

Documenting the advice

The PPS’s Directive on Providing Advice to the Police sets out a relatively formal approach to giving advice. The Directive to Crown prosecutors explains that there is a need for a formal approach and for documenting the advice, “particularly when the advice relates to a specific case.”⁶¹ In addition to the advice provided, Crowns are supposed to document the circumstances in which it was given and the basis for the advice.⁶²

The Directive also recommends that the advice be set out in correspondence to the requesting officer.⁶³ This is explained as follows: “The advice given by the Crown will likely be recorded by the recipient in his or her police notebook. To ensure that the advice given by the Crown is not misunderstood or misconstrued, the Crown should also keep a record of the advice given.”⁶⁴ The Directive provides for an alternative: “If the advice is given in a face-to-face meeting and a letter containing the advice is not being prepared, it may also be useful to read the officer’s notes or to have them read back before the advice-giving meeting concludes.”⁶⁵ Even if only a mere outline of the advice given, the memorialized advice “should include the facts provided by the police and relied upon by the Crown.”⁶⁶

The Directive further sets out the following comments in relation to advice that is specific to the charging decision:

- (1) The Crown should require the police to provide an occurrence or incident number, and a full written

investigative brief that will form the foundation for the Crown's advice. If no brief is provided, detailed notes should be made of the facts related by the police and any potential exhibits which were adduced or referred to by the police.

- (2) Where feasible, the Crown should reply in writing. If a written reply is not feasible or practical in the circumstances, the Crown should prepare and retain a memorandum of the advice given and the information and material provided by the police which was relied upon by the Crown. ... The written reply or memorandum should address whether there are, in law, grounds capable of supporting specific criminal charges based on the evidence contained in the investigative brief or the information which has otherwise been provided by the police.
- (3) When replying by letter, it is prudent to set out the legal test for determining whether the threshold for laying a criminal charge has been met.⁶⁷

In fact, the PPS has a form that was specifically developed for the purpose of recording advice provided to the police.⁶⁸

This form was not filled out at the relevant time in this case. Moreover, the two Crown prosecutors did not

make any notes of their meeting with the investigator, and their advice to the officer was not put in writing. No PPS file was created on the Parsons matter. The Crown prosecutors were asked to record their recollection of the advice after the matter came to light as a result of Rehtaeh's death. It was not immediately known who in fact had provided the advice, and what the advice was.

We were informed that this is by no means an uncommon occurrence. The culture that has developed between Crown prosecutors and police is generally informal: advice is provided in courthouse hallways, over the phone or in other settings. Crowns try to be helpful and will provide advice upon request, even though they are not in a position to record it or don't have the time to do so. This way of functioning is no doubt very useful and efficient for police, who may not otherwise bother seeking advice on more minor points if the process is overly formal. There are certainly practical difficulties in following the Directive, and it has come to be viewed as a best practice—not one that must be followed in every case. Nevertheless, there is good reason for

The two Crown prosecutors did not make any notes of their meeting with the investigator, and their advice to the officer was not put in writing.

61. Providing Advice to the Police, *supra*, at p. 1

62. *Ibid.*, at pp. 1 and 4

63. *Ibid.*, at p. 4

64. *Ibid.*, at p. 6

65. *Ibid.*, at p. 6

66. *Ibid.*, at p. 5

67. *Ibid.*, at p. 7

68. *Ibid.*, at p. 6 and Appendix A to the Directive

the policy. In this case, for instance, setting out the advice relating to the child pornography charges could have made a difference in two ways:

- ▶ First, it would have provided the prosecutor with an opportunity to think through the advice and ensure that the reasoning was logical and legally tenable. It likely would have clarified the thought process that led him to his conclusion and revealed any reasoning errors in the analysis.
- ▶ Second, providing the advice in writing to the investigator would have gone a long way in avoiding any misunderstanding as to the basis for the opinion and whether the Crown had a sufficient grasp of the evidence gathered to date as well as the evidence that could potentially still be gathered. The investigator may have realized that the Crown's opinion rested largely on the fact that the photographer's identity was uncertain (an element that was ascertainable). If the advice is based on a misconception, the investigator would be able to catch it and correct any misunderstanding that may affect the opinion. The opinion would also have been clearly laid out for the investigator in a way that may have prompted her to contrast it with the earlier opinion provided by Cpl. Spence and identify any potential errors.

This is not to say that advice should never be given to police without strictly adhering to the Directive. But the policy must be taken more seri-

ously. We understand that this has since been re-emphasized by the PPS, but that it has not necessarily led to a change in practice. If abiding by the policy is unrealistic given the already-heavy workloads, then a realistic

but responsive approach to the above concerns should be reflected in the policy. For instance, the policy could state that notes should be made as soon as possible after the consultation or that, at the very least, a brief endorsement of the advice provided

must be kept on file. Alternatively, the policy could distinguish between certain types of offences or certain types of advice. In particular, it may be wise to require that, in any case where the Crown's opinion is that there is no reasonable prospect of conviction or that the case should not proceed, the basis for this opinion be indicated in writing and, ideally, forwarded to the police to avoid any misunderstandings. It is clear that either the practice or the policy must be adapted.

It is clear that either the practice or the policy must be adapted.

If abiding by the policy is unrealistic, then a realistic but responsive approach to the above concerns should be reflected in the policy.

✔ Recommendation 9

The PPS's Directive on Providing Advice to the Police should be amended to be realistic in its application, while remaining responsive to its underlying rationales. The amended Directive should include the following:

- Ⓢ A Crown "file" should be created for every case in which advice is provided to the police. This could be done in electronic form.
- Ⓢ A brief endorsement or notation in the Crown file should minimally be done in every case where advice is provided.
- Ⓢ This documentation should be done as soon as possible after the consultation.
- Ⓢ The advice should be more reliably and thoroughly recorded in cases involving certain types of more serious offences and certain types of advice, such as advice relating to the laying of charges.
- Ⓢ Where the Crown opines that there is no realistic prospect of conviction or there are insufficient grounds to lay a charge, the basis for this opinion should be put in writing and forwarded to the police on request.

The PPS's management should reinforce to Crown prosecutors the need to abide by this Directive.

3. Was the advice on the sexual assault allegations proper and legally sound?

(A) The law on sexual assault, consent and capacity to consent due to intoxication

As stated in the RCMP Manual: "A sexual assault occurs whenever there is sexual contact without the consent of the person being touched. While consent may be communicated orally or by physical actions, the absence of consent creates the offence. There is not strictly speaking a necessity for a complainant to indicate her unwillingness to participate in the sexual activities, and certainly there is no need to physically resist unwanted sexual contact." The Manual also correctly specifies that: "There is no defence of implied consent."

However, the notion of consent may often be misunderstood because it does not have one single meaning in law.

Consent

In criminal law, “consent” means “the voluntary agreement to engage in the sexual activity in question.”⁶⁹ The notion, however, involves a different analysis depending on

The notion of consent may often be misunderstood because it does not have one single meaning in law.

what the Crown is seeking to prove. When the Crown seeks to prove the act underlying the charge, the only thing that will matter is the complainant’s state of mind that she did not consent to the sexual activity at the time it occurred. It will not matter whether the lack of consent was expressed or not. The *actus reus* is established if the complainant did not in fact consent to touching that occurred.

However, to prove the accused’s intent to commit the act, the Crown must show that the accused knew that the complainant did not consent – or was reckless or wilfully blind to the lack of consent. The complainant’s words or actions will be relevant to that determination.⁷⁰ Unless there is independent proof that the accused knew the complainant was not consenting (such as an admission by the accused, or an irresistible inference from the circumstance), the court will assess whether the complainant in any way expressed that she was not consenting to determine whether it has been proved beyond a reasonable doubt that the accused intended to commit the act. In some instances, consent for the purpose of the *intent* analysis will be deemed not to exist:

To be legally effective, consent must be freely given. Therefore, even if the complainant consented or her conduct raises a reasonable doubt about non-consent, circumstances may arise which call into question what factors prompted her apparent consent. *The Code* defines a series of conditions under which the law will deem an absence of consent in cases of assault, notwithstanding the complainant’s ostensible consent or participation.⁷¹

When consent is deemed not to exist

The *Criminal Code* provides that “no consent is obtained” in any of the following circumstances:

- ▶ the complainant is incapable of consenting to the activity
- ▶ the complainant expresses, by words or conduct, a lack of agreement to engage in the activity or
- ▶ the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.⁷²

In other words, the accused will not be able to claim that he believed the complainant was consenting where she was incapable of consenting or where she expressed a lack of consent.

69. See s. 273.1 of the *Criminal Code*

70. See the comments of the Supreme Court of Canada in a seminal sexual assault case, *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, at paras. 48-49

71. *Ewanchuk*, *supra*, at para. 36

The difficult line to be drawn is where impairment of the capacity to consent becomes incapacity to consent.

For example, a person may be “incapable of consenting” to the sexual activity due to intoxication with drugs or alcohol. The difficult line to be drawn is where *impairment* of the capacity to consent becomes *incapacity* to consent. Incapacity has a precise meaning in law but it is not always clear when a person reaches the point of being *incapable* of consenting. Lowered inhibitions would not be sufficient; being unconscious, insensate or “passed out” from the effect of alcohol would.⁷³ Where the line lies in between those two states is often difficult to ascertain.

To have the requisite capacity, a person must have the “minimal ability” “to understand and agree (or not agree) to engage in the sexual activity in question.”⁷⁴ The person “must understand the sexual nature of the act and realize that he or she could choose to decline to participate.”⁷⁵ If the person still has the ability to communicate, will that necessarily be indicative of an operating mind that is able to consent? Is coherence the threshold? What of the person who is conscious but may not be in a position to *truly* understand or assess the significance of his or her actions? This has long been a live issue before the courts. The Supreme Court most recently expressed the test in these terms:

Section 273.1(2)(b) provides that no consent is obtained if “the complainant is incapable of consenting to the activity.” Parliament was concerned that sexual acts might be perpetrated on persons who do not have the mental capacity to give meaningful consent. This might be because of mental impairment. It also might arise from unconsciousness: see *R. v. Esau*, 1997 CanLII 312 (SCC), [1997] 2 S.C.R. 777; *R. v. Humphrey* 2001 CanLII 4806 (ON CA), (2001), 143 O.A.C. 151, at para. 56, *per* Charron J.A. (as she then was). It follows that Parliament intended consent to mean the conscious consent of an operating mind.⁷⁶

72. Section 273.1(2)(b), (d) and (e) of the *Criminal Code*

73. This should be distinguished from a subsequent “blackout”. A loss of memory or a “blackout” is not necessarily evidence that there was no consent: according to at least one decision on the issue, unless expert evidence is adduced to give it meaning, it is generally only evidence that the witness cannot testify as to what happened during a particular period. It may, however, “be circumstantial evidence which, when considered with other evidence in a case, may permit inferences to be drawn about whether or not a complainant did or did not consent or whether she was or was not capable of consenting at the relevant time”: *R. v. J.R.* (2006), 40 C.R. (6th) 97 (Ont. S.C.), at paras. 17-20

74. *R. v. J.R.*, *supra*, at para. 41, referencing *R. v. Jensen* (1996), 106 C.C.C. (3d) 430 (Ont. C.A.) at 437

75. *R. v. J.R.*, *supra*, at para. 42, citing *R. v. Siddiqui*, [2004] B.C.J. No. 2690 (S.C.) at para. 55. See also *R. v. Patriquin (M.A.)*, 2004 NSCA 21, cited in *R. v. J.R.*, *supra*, at para. 41

76. *R. v. J.A.*, 2011 SCC 28, [2011] 2 S.C.R. 440, at para. 36 [emphasis added]

A person can consent to certain sexual activities with a person but not with others, and can withdraw consent at any point in time.

This passage might suggest that the line is closer to unconsciousness, in particular given how difficult it is to assess a person's level of impairment. In a 1997 dissenting opinion, however, the now-Chief Justice of the Supreme Court also focused on "the absence of communicative ability." She described a lack of capacity to consent or refuse "because of unconsciousness or incoherence," and referred to an inability "to communicate consent" because of unconsciousness or incapacitation.⁷⁷ "Incapacity" is thus broader than unconsciousness. The person "must be able to understand the risks and consequences associated with the activity to be engaged in."⁷⁸ However, the test is not "whether [the person] would have made the same decision if she had been sober."⁷⁹

In my opinion, indications that a young person is intoxicated to the point of being ill and being effectively unable to transport themselves or physically move about as they wish, even though they are able to communicate in a somewhat coherent manner, should factor into the analysis. Still, this will always remain a grey zone, informed by all of the surrounding circumstances and particular facts of a case. While not required as a matter of law, expert evidence will often help determine "where the line is crossed into incapacity."⁸⁰

Consent can be withdrawn

A person can consent to certain sexual activities with a person but not with others, and can withdraw consent at any point in time. The Supreme Court recently held as follows in a case where the complainant was entirely unconscious but had provided her consent in advance and in anticipation of being unconscious:

Parliament requires ongoing, conscious consent to ensure that women and men are not the victims of sexual exploitation, and to ensure that individuals engaging in sexual activity are capable of asking their partners to stop at any point.

...

The definition of consent for sexual assault requires the complainant to provide actual active consent throughout every phase of the sexual activity. It is not possible for an unconscious person to satisfy this requirement, even if she expresses her consent in advance. Any sexual activity with an individual who is incapable of consciously evaluating whether she is consenting is therefore not consensual within the meaning of the *Criminal Code*.⁸¹

77. *R. v. Esau*, [1997] 2 S.C.R. 777, at paras. 71 and 73 [emphasis added]

78. *R. v. J.R.*, *supra*, at para. 41, citing *R. v. A.A.* (2001), 155 C.C.C. (3d) 279 (Ont. C.A.)

79. *R. v. J.R.*, *supra*, at para. 43

80. *R. v. Cedeno*, 2005 ONCJ 91, cited in *R. v. J.R.*, *supra*, at para. 43

81. *R. v. J.A.*, *supra*, at paras. 3 and 66 [emphasis added]

However, as stated in section 273.1(2) (e) of the *Code*, once the complainant “expresses, by words or conduct, a lack of agreement to continue to engage in the activity” (after consent has been given to engage in sexual activity), there is no longer – from the accused’s perspective – any more consent obtained.

Defence of mistaken belief in consent

An accused may also raise “a defence of mistake of fact which removes culpability for those who honestly but mistakenly believed that they had consent to touch the complainant.”⁸² This defence can be raised on the basis of the Crown’s case (i.e. it does not require that the accused testify), but the accused will have to show that he took reasonable steps to ascertain that the complainant was consenting, in the circumstances known to him at the time.⁸³ The defence will succeed if the evidence shows that the accused believed the complainant “effectively said ‘yes’ through her words and/or actions.”⁸⁴ The defence is effectively a denial of the required intent.⁸⁵

(B) The advice relating to sexual assault was justifiable

While I have some reservations – detailed below – about the consideration afforded to the events that took place at the window, I have concluded that the Crown’s advice on the sexual assault component rested on the correct legal principles and was in accordance with the substantive requirements of the Directives set out above. There is no indication that the Crown prosecutor misapplied the law on sexual assault to the facts of this case.

While a single unconfirmed witness statement can very much sustain a charge of sexual assault, as readily acknowledged by the Crown in this case, all evidence gathered by the police must be taken into account in deciding whether a charge ought to be laid. Here, even though there was a photo that corroborated the sexual assault allegation, there were also other pieces of evidence that detracted from it or weakened the case to the point where, although there likely were sufficient grounds to believe that a sexual assault occurred, there was quite arguably no realistic prospect of conviction.

There is no indication that the Crown prosecutor misapplied the law on sexual assault to the facts of this case.

82. *Ewanchuk, supra*, at para. 42

83. Section 273.2(b) of the *Criminal Code*

84. A clear explanation for the defence is the following:

In order to cloak the accused’s actions in moral innocence, the evidence must show that he believed that the complainant communicated consent to engage in the sexual activity in question. A belief by the accused that the complainant, in her own mind, wanted him to touch her but did not express that desire, is not a defence. The accused’s speculation as to what was going on in the complainant’s mind provides no defence.

For the purposes of the mens rea analysis, the question is whether the accused believed that he had obtained consent. What matters is whether the accused believed that the complainant effectively said “yes” through her words and/or actions.

Ewanchuk, supra, at paras. 46-47 [emphasis added]

85. *Ewanchuk, supra*, at para. 44

The sexual assault advice mainly related to the strengths and weaknesses of the case and how that might affect the decision to charge.

The sexual assault advice mainly related to the strengths and weaknesses of the case and how that might affect the decision to charge. The PPS's Directive entitled "The Decision to Prosecute (Charge

Screening)" provides guidance to Crown prosecutors as to what should or should not be considered in assessing a case's realistic prospect of conviction. While this assessment would usually take place *after* the laying of a charge, similar considerations would apply to pre-charge advice, which the Directive also contemplates.

Assessments of credibility and reliability

The Directive provides that the Prosecutor can make credibility assessments but should only do so if the strength or weakness of the case is not clear-cut or the circumstances otherwise warrant doing so:

When the strength or weakness of case (*sic*) is not obvious, the prosecutor must be prepared to look beneath the surface of the statements made by witnesses. In doing so, it is not intended that the prosecutor usurp the role of the court. Assessments of the credibility or capacity of a witness must be based on objective indicators e.g. incontrovertible evidence that a witness is mistaken or lying. Assessments of the more nebulous matters such as demeanor,

or whether evidence has "the ring of truth", must be left to the trial court.⁸⁶

This may involve asking the following questions, as set out in the Directive:

- Ⓢ Does it appear that a witness is exaggerating, or that his or her memory is faulty, or that the witness is either hostile or friendly to the accused, or may be otherwise unreliable?
- Ⓢ Has a witness a motive for telling less than the whole truth?
- Ⓢ Are there matters which might properly be put to a witness by the defence to attack his or her credibility?
- Ⓢ Based on objective indicators, what sort of impression is the witness likely to make?
- Ⓢ How is the witness likely to stand up to cross-examination?
- Ⓢ If there is conflict between eyewitnesses, does it go beyond what one would expect and hence materially weaken the case?

Prosecutors "must also guard against having their decisions in regard to the strength of a case or the prospects of conviction hinge upon dubious generalities such as 'juries always believe children' or 'juries never convict police officers'."

86. *Ibid.*, at p. 6

87. *Ibid.*, at p. 6

88. *Ibid.*, at pp. 5-6

In this case, the Crown pointed to both reliability and credibility issues, which are different concepts that should be explained. Credibility has to do with a witness's *veracity*, while reliability has to do with the *accuracy* of the witness's testimony. As explained in a recent case from the Ontario Court of Appeal:

Accuracy engages consideration of the witness's ability to accurately

- i. observe
- ii. recall and
- iii. recount

events in issue. Any witness whose evidence on an issue is not credible cannot give reliable evidence on the same point. Credibility, on the other hand, is not a proxy for reliability: a credible witness may give unreliable evidence: *R. v. Morrissey* (R.J.) (1995), 22 O.R. (3d) 514 (C.A.), at 526.⁸⁹

Ultimately, the Crown identified significant reliability concerns as well as conflicting evidence that could impact credibility. She was entitled to consider these as part of her analysis. The evidence in this case was not clear-cut. In considering these factors, she relied on objective indicators such as text messages and witness statements that contrasted with Rehtaeh's statements as well as the internal inconsistencies between Rehtaeh's two police statements. While it is not up to the Crown to resolve these contradictions and inconsistencies, they can properly take them into account in considering the prospect of conviction. That is what occurred in this case.

For instance, the Crown considered the following elements (in no particular order):

- ▶ the inconsistencies between Rehtaeh's first and second statement to the police⁹⁰
- ▶ the inconsistencies between Rehtaeh's statement and Lucy's statement⁹¹
- ▶ the inconsistencies between Rehtaeh's statements to the police and text messages she sent to various persons⁹²

89. *R. v. H.C.* (2009), 244 O.A.C. 288, *per* Watt J.A., at para. 41. Another explanation for the distinction is the following from *R. v. Morrissey* (1995), 22 O.R. (3d) 514 (C.A.), at p. 526, *per* Doherty J.A.:

Testimonial evidence can raise veracity and accuracy concerns. The former relate to the witness's sincerity, that is, his or her willingness to speak the truth as the witness believes it to be. The latter concerns relate to the actual accuracy of the witness's testimony. The accuracy of a witness's testimony involves considerations of the witness's ability to accurately observe, recall and recount the events in issue. When one is concerned with a witness's veracity, one speaks of the witness's credibility. When one is concerned with the accuracy of a witness's testimony, one speaks of the reliability of that testimony. Obviously a witness whose evidence on a point is not credible cannot give reliable evidence on that point. The evidence of a credible, that is, honest witness, may, however, still be unreliable.

90. For instance, the sequence of events, and whether she had expressed her absence of consent. Of particular concern was the evolution from having little memory of the events to having a detailed recollection of her efforts to express a lack of consent and resist the sexual activity.

91. Most significantly, Lucy described the portion of the sexual activity that she witnessed as being, by all appearances, consensual. She was able to describe this sexual activity in detail.

92. For instance, Rehtaeh sent text messages to various friends or family indicating that she had screwed up, that she did a stupid thing, that Lucy was very upset with her because she had an interest in Josh and had told Rehtaeh not to do anything with him, that she made a mistake and regretted it, and that she wanted the police process to speed up for people at school to know that she wasn't "a slut." When asked whether she agreed to sex or whether she remembered anything, she responded that she didn't remember anything.

- Ⓢ the fact that, due to her intoxication at the time, Rehtaeh had little to no recollection of large components of the evening, and an imperfect recollection of those components that she did recall⁹³
- Ⓢ the suggestion that what prompted Rehtaeh's delayed disclosure indicated a potential motive to lie.⁹⁴

While each of these elements could have been explained away – and, therefore, should not be seen as being insurmountable obstacles to a prosecution or a conviction – the accumulation of factors in this case was problematic to the prosecution. Again, both the credibility and reliability concerns raised by the Crown prosecutor were not fanciful or based on personal opinion, but rather grounded on some objective facts collected by the police. These primarily went to the Crown's ability to prove lack of consent to the sexual activity at the time in question. The Crown did consider the issue of Rehtaeh's capacity to consent due to intoxication. However, she concluded that the *degree* of impairment at relevant times would be practically impossible to prove. She also took the view that the other evidence collected by the police was indicative of Rehtaeh having had the capacity to consent.

Consideration of defences

The Directive also provides that, when considering the realistic prospect of conviction, "a limited consideration of defences" is permissible. The prosecutor is obligated to consider "both the inculpatory evidence and the exculpatory evidence." However only those defences "which are plainly open to the accused or which have come to the attention of the prosecutor" should be considered.⁹⁵

In relation to the sexual assault charge, the mistaken belief in consent defence is "simply a denial of *mens rea* [intent]." ⁹⁶ As indicated above, it does not require the accused to testify, and can be founded on the Crown's case. It is a defence that regularly arises, which could be said to have been "plainly open" to the accused even if they did not provide a statement or testify. It was not wrong to consider the evidence that would support such a defence.

93. Aside from the various aspects of the evening that Rehtaeh did not recall, she indicated, with respect to the events in the bedroom, that it was all blurry and what she recalled were only "flashes." She also indicated that she didn't remember "the small detail."

94. A delay in disclosing or reporting a sexual assault would not in itself be a proper consideration, but what was taken into account here was not the fact of the delay, but the events that ultimately prompted the report to be made (i.e. the surfacing of the picture).

95. *Ibid.*, at p. 5

96. *Ewanchuk, supra*, at para. 44. Unlike most other defences, it is thus closely intertwined with the elements of the offence that the Crown must prove.

In particular, the Supreme Court has accepted that an accused can have an honest but mistaken belief in consent where the complainant is incapable of consent because she is intoxicated, unless the person is intoxicated to the point of unconsciousness⁹⁷. In other words, it is only where the complainant is “intoxicated to the point of unconsciousness” that the defence of mistaken belief in consent would find no application and could not be considered by a jury. That is not to say that the defence will necessarily be accepted when the complainant is intoxicated to a lesser degree than “to the point of unconsciousness.” However, the defence is generally permissible in such circumstances, and can properly be considered when assessing the “realistic prospect of conviction.”

While the Crown properly considered the defence, she was of the view that there was no realistic prospect of conviction even if the defence failed. In other words, her conclusion did not turn on whether or not the defence could show a mistaken belief in consent, but rather primarily rested on the fact that the Crown would not be able to prove beyond a reasonable doubt that there was no consent.

Myths and stereotypes: the focus on the complainant

Rehtaeh’s family got the impression that the police focused on Rehtaeh and her character as opposed to the alleged offenders. This mainly stemmed from the perception that the police and Crown had unfairly scrutinized Rehtaeh’s statements – to police and others – and her text messages. The reality is that the police must look at all

of the circumstances and facts collected. Ultimately, a conviction will rest in large part on the complainant’s evidence. An investigator would not be competent if they did not concern themselves with its reliability and credibility. Their job is to investigate the allegations. Typically the police are investigating the strength of the allegations, even though it may at times appear as though they investigating the complainant. As explained above, the RCMP’s Investigative Guide encourages investigators to seek out any evidence that might corroborate the complainant’s account. It adds: “Because the victim may be the Crown’s only witness, inquiries into her reliability may be necessary, particularly if police are unsuccessful in acquiring any corroborative evidence to support the accusation. Police inquiries may yield information pertinent to trial issues of capacity to testify, trial credibility and impact of the offence on the victim (which can be used at sentencing).”

It is true that there often appears to be more a focus on the complainant’s account in the context of sexual assault investigations than in other types of cases. In some cases, as the Investigative Guide observes, this is a function of the fact that the complainant’s account is the only available evidence in support of the charge, given that most sexual assaults take place in private. There is no denying, however, that myths and stereotypes have played a role in the investigation and prosecution of sexual assaults and continue to exist. Victim blaming is unfortunately very much a live issue in the criminal justice system. But, in most cases, the focus on the complainant’s account is not an

97. *Esau, supra*, at para. 24. This passage confirms that whether “incapacity” can result from a state that is lesser than unconsciousness is a grey area in the law.

attempt to discredit or blame them, but rather to locate evidence to support their statement or demonstrate that it stands uncontradicted. The intent is to strengthen – not weaken – the statement’s probative value. Ultimately, however, it is an attempt to discharge the investigator’s duty to get to the truth of an allegation.

I have previously alluded to the fact that it is not uncommon for a barebones investigation to take place in sexual assault cases and that, sometimes, the

less investigation is conducted, the more likely it is that the investigation will result in charges being laid. That was perhaps why the investigator appeared confident at the outset that arrests would be taking place: Rehtaeh’s statement was in itself sufficient for that to occur. But this approach to investigating sexual

There is no denying that myths and stereotypes have played a role in the investigation and prosecution of sexual assaults and continue to exist.

assault cases is changing in the context of electronic communications and social media. More evidence – whether confirmatory or not – is available to police and will allow them to uncover the facts. I would certainly not encourage less investigation. If deficiencies with a case are identified at an early stage in the process, it is better for everyone – including the complainant – to address them at the outset. Obtaining the text messages in this case, for instance, could very well have provided incriminating statements

from the suspects. As it turned out, this part of the investigation also found messages that detracted from Rehtaeh’s consistency, even though they were certainly subject to interpretation and had to be read in context. The messages would, nevertheless, be one factor among many assessed by anyone with a view to prosecuting. Had that been the only factor, I have no doubt that the case would have resulted in sexual assault charges being laid. But the decision not to proceed in this case was, in light of an accumulation of factors, one that could reasonably be made.

We must remain vigilant about the fact that complainants in sexual assault cases have historically been perceived as less credible than complainants in other types of offences, and that myths and stereotypes have played a role in unfairly undermining a complainant’s credibility. But resisting the common misconceptions about sexual assaults cannot preclude allegations from being properly and fairly investigated. In this case, I did not see any obvious reliance on myths and stereotypes in the investigation and Crown assessment of the case.

Legislation has long ago been passed to eradicate the “twin myths” about a complainant’s credibility and the likelihood of consent based on her prior sexual history. As explained by the Supreme Court of Canada:

The main purpose of the legislation is to abolish the old common law rules which permitted evidence of the complainant’s sexual conduct which was of little probative value and calculated to mislead the jury. The common law permitted questioning on the prior sexual conduct of a complainant without proof of relevance to a specific issue in the trial. Evidence that the complainant had relations with the accused and others was routinely presented (and accepted by judges and juries) as tending to make it more likely that the complainant had consented to the alleged assault and as undermining her credibility generally. These inferences were based not on facts, but on the myths that unchaste women were more likely to consent to intercourse and in any event, were less worthy of belief. These twin myths are now discredited. The fact that a woman has had intercourse on other occasions does not in itself increase the logical probability that she consented to intercourse with the accused. Nor does it make her a liar.⁹⁸

Despite this legislation, these as well as other myths and stereotypes⁹⁹ about sexual assault complainants still exist in our criminal justice system today. While great strides have been made over the years to eliminate the problem, there is no denying that the system is not perfect. Underreporting, undercharging and low conviction rates continue to be a problem.¹⁰⁰ Discriminatory beliefs impact each of these steps. As observed by a former Supreme Court justice, the insidious nature of these beliefs make them difficult to eradicate: “Like most stereotypes, they operate as a way, however flawed, of understanding the world and, like most such constructs, operate at a level of consciousness that makes it difficult to root them out and confront them directly.”¹⁰¹ We must nevertheless continue to fight against these stereotypes. The training that has been instituted by police in respect of how a person who has been subjected to trauma might respond to it, is a welcome contribution.

98. *R. v. Seaboyer; R. v. Gayme*, [1991] 2 S.C.R. 577, at para. 23 [emphasis added]

99. For a list of stereotypical conceptions about women and sexual assault, see the reasons of Justice L’Heureux-Dubé in *Seaboyer, supra*, at pp. 592-605

100. This appears to be particularly the case in Nova Scotia : see Nova Scotia Advisory Council on the Status of Women, *Sexual Assault in Nova Scotia : A Statistical Profile* (May 2009) at pp. 2, 10

101. *Seaboyer, supra*, per L’Heureux-Dubé J. (dissenting in part)

It is true that some text messages¹⁰² and other statements could be given differing interpretations, and that more allowance could arguably have been given to that fact and to the fact that Rehtaeh was a young person who provided her first statement in sub-optimal conditions and in circumstances where it was not properly recorded. What young persons text or post to their friends on social media should also be considered in context. In many respects, social media as a forum is not particularly conducive to candour. People don't necessarily mean what they say. Young people are often less than truthful in their inter-

In this case, I did not see any obvious reliance on myths and stereotypes in the investigation and Crown assessment of the case.

actions with their peers. Authenticity is not always a hallmark of adolescence. Teenagers are often insecure and easily influenced. Therefore, the sentiments Rehtaeh expressed to various persons over social media had to be looked at with this reality in mind.

However, factoring these issues into the analysis does not appear to have stemmed from the types of myths and stereotypes that should be avoided; Rather, they were a necessary component of any realistic analysis of whether a conviction could be achieved.

One point of concern is that the Crown suggested it struck her as odd that Rehtaeh appeared more concerned about the photo than the sexual assault. In my view, this consideration (which,

to be fair, played little if any role in the overall analysis) was unfounded. First, it is possible that Rehtaeh was most concerned about the photograph *because* it depicted a sexual assault. Regardless, the photograph would understandably cause a person – particularly a young person – much angst given its lasting nature. The dissemination of an intimate picture is a very intrusive thing. Rehtaeh's concern about the photo ought not to take away from the legitimacy of her conviction that she had been taken advantage of sexually.

The difficulty prosecuting sexual assault cases

There is no doubt that the Crown's approach was informed by the fact that sexual assault allegations are notoriously difficult to prosecute. Factoring in that consideration was not in and of itself wrong. As stated in the Martin Committee Report:

Crown counsel, in determining the future of a prosecution, should do more than ascertain the existence of evidence capable of making out each of the necessary elements of the offence. The Committee agrees with the Law Reform Commission that prosecutorial experience can and should be brought to bear on a case. Such experience is an important resource, that ought to be well utilized in a system where

102. There were many text messages sent to different groups of persons, including friends, family, acquaintances, and even some of the suspects. In some, Rehtaeh diminishes what occurred on the evening in question. In others, she laughs off the photograph.

discretion is so necessary, and where the consequences of the discretionary decisions to be made are so weighty. Since the Committee is of the view that some assessment of the credibility of witnesses, the admissibility of evidence, and a consideration of likely defences is both desirable and necessary, the Committee is, therefore, also of the view that a higher threshold standard than a prima facie case is necessary to institute or continue a prosecution.¹⁰³

In Nova Scotia, for instance, acquittal rates for sexual assaults are generally higher than acquittal rates for other violent offences.¹⁰⁴ I have also already commented on the state of undercharging in the province compared to other provinces. That systemic issue may be the larger defining problem, and is one that warrants attention. The province's sexual assault strategy, described below, may offer important solutions to this issue.

What is the right call?

I wish to add that my conclusion should not be taken to mean that the same call should necessarily be made in a similar case. Some prosecutors may reasonably have chosen to proceed with this case. Certain factors set this case apart from other cases involving sexual assault allegations that I think should have factored more prominently both in the decision whether to charge and in the advice provided to police. I would qualify my opinion as follows.

Both the police and prosecution looked at the sexual assault charge in terms of the event as a whole. The entire evening was seen as a single incident, and the file was analysed in terms of whether there was sufficient evidence "as a whole." This made evidence that there may have been at least some consensual sexual activity carry significant weight in the analysis. Yet, as explained above, the law is clear

that consent can be withdrawn at any time. It should remain at the forefront of the police and the Crown's mind that the "whole" should not be the sole focus in instances where a sexual assault is alleged, considering the fact that consent can be withdrawn or be-

come invalid over the course of a single sexual encounter. Determinations as to whether there is a reasonable prospect of conviction should not be made on the basis that a complainant will likely be disbelieved in court because there was consent to initial sexual activity. That is a common occurrence and cases have been – and should be capable of – succeeding despite this fact.

Certain factors set this case apart from other cases involving sexual assault allegations that I think should have factored more prominently

103. Martin Committee Report, *supra*, at p. 61

104. Sexual Assault in Nova Scotia : A Statistical Profile, *supra*, at pp. 16 and 18

While it was fair to consider the entire sequence of events to determine whether there was a reasonable prospect of conviction in respect of any part of the sexual conduct, in my view the allegations relating to the events that took place at the window had to be carefully scrutinized. Rehtaeh herself focused in on the “window” component and there was independent evidence (the photo) of that part of the interaction. The photograph arguably portrays a victim unable to give legally effective consent. The evidence on that aspect of the evening was stronger and much less vulnerable to issues of credibility and reliability than the evidence related to earlier events.

The Crown observed that she would have focused in on the “window inci-

The allegations relating to the events that took place at the window had to be carefully scrutinized.

dent” if Rehtaeh’s account had been that she consented up to that point; but Rehtaeh had stated that she did not consent to any of the sexual activity. I agree that the Crown’s conclusion, taking into consideration all the surrounding

circumstances, was within the range of reasonable decisions. Indeed, even if more attention had been afforded to the events that took place at the window, a charge focusing on that single aspect would have been challenging given the legal and evidentiary issues already identified. In particular, the Crown is correct that a conviction cannot be grounded on a version of events to which no one has testified. Even though it would be

possible to construct a version of events that would resolve most of the inconsistencies in this case, that is not the version that Rehtaeh related to the police. This case was different than one where the complainant simply does not recall what occurred¹⁰⁵ – or one where the complainant relates that she was incapable of consenting. Instead, it was one where, on the one hand, Rehtaeh admitted that she didn’t recall much and, on the other hand, she provided a detailed version of events that was incompatible with other evidence. Rehtaeh also stated that she voiced her lack of consent on multiple occasions, including at the window. As a result, it would be challenging for a Crown to make the case that she lacked the requisite capacity to consent. If a person is able enough to expressly refuse consent, he or she is presumably able enough to provide it. Although the person may simply have “come to” at a certain point in time and expressed a refusal to consent, while otherwise lacking capacity, these elements could indeed be insurmountable for a successful prosecution.

105. For an example of sexual assault convictions being entered on the basis of circumstantial evidence emanating from a complainant’s testimony, despite the fact that she largely could not recall what had taken place due to a blackout resulting from the consumption of drugs and alcohol, see *R. v. J.R.*, *supra*. I cite this case simply to demonstrate that loss of memory is not fatal to a sexual assault prosecution.

Still, even if the analysis had to turn on whether the Crown could prove that Rehtaeh did not in fact consent, it is possible that a judge or a jury could have accepted her account of the window portion of the evening beyond a reasonable doubt. Notwithstanding any credibility issues, it stands to reason that a person who is ill or in distress is unlikely to consent to sexual activity. Any touching for a sexual purpose that occurs in those circumstances would raise serious questions. Considering the fact that Rehtaeh was physically ill—as well as the added strength brought by the photo—this discrete component of the evening could have been given more attention.

There were at least two considerations that increased the public interest in prosecuting the case; however, the public interest in proceeding can only be considered once a determination has been made that there is a reasonable prospect of conviction. I do not suggest that the Crown should be faulted for not having highlighted these considerations. Nevertheless, these features are worth highlighting, if only for consideration in a future case.

➤ First, the allegation involved two boys, and a direction by one of the boys as to what to do to Rehtaeh, in circumstances where she was undeniably ill and intoxicated. Thus, the allegation involved disrespectful treatment of a degrading nature. The public has a clear interest in denouncing and addressing this type of anti-social and destructive behaviour.

➤ Second, this case could be set apart because of how destructive it was for Rehtaeh. She was undoubtedly experiencing a lot of suffering from these events. It is unclear to what extent this suffering was conveyed to the police and to the Crown. However, the fact that she was a particularly vulnerable young person who was suffering psychological harm to the point where emergency services were contacted the night she disclosed the events to her family and she was subsequently hospitalized for several weeks at the IWK Health Centre (in March 2012) was relevant to the public interest in prosecuting the case.

Indeed, as stated by the Martin Committee, it is proper to consider the circumstances, the attitude

and the interests of the victim in assessing the public interest in conducting a prosecution.¹⁰⁶

The Committee observed that victims may bring a variety of views to a prosecution and so it is important for the Crown to canvass those views, without permitting them to con-

It stands to reason that a person who is ill or in distress is unlikely to consent to sexual activity.

106. Martin Committee Report, *supra*, at p. 83. The Marshall report also states that factors to consider in determining whether the public interest requires a prosecution include “the attitude of the victim of the alleged offence to a prosecution,” and “the likely effect of a prosecution on public order and morale”: The Royal Commission on the Donald Marshall, Jr., Prosecution, Digest of Findings and Recommendations, December 1989, at p. 33

trol the prosecution.¹⁰⁷ The Committee also made the important point that prosecutors should not overlook the fact that “a prosecution may be important and meaningful for a victim even if there is ultimately an acquittal.”¹⁰⁸ Indeed, the Committee observed that, while considerations relevant to the victim can’t justify a prosecution in the absence of a reasonable prospect of conviction, they “are worthy of careful consideration when assessing the public interest in a prosecution that has met the threshold test. The Committee, therefore, observes that victim/witness co-ordinators and other victim support organizations have a very important function to fulfill in assisting victims to express these views, and in assisting victims to understand that these views are important to the administration of criminal justice.”¹⁰⁹

The PPS’s Practice Note on Sexual Offences also states that “the prosecution of sexual assault offences requires the utmost skill and professionalism on the part of the prosecutor, and heightened sensitivity to the needs and circumstances of the victim.”

It is not for me to determine what exactly happened on November 12, 2011, nor to indicate whether I would have made the same call in relation to laying the charge or prosecuting the matter. I am particularly mindful that it is easy to judge with the benefit of hindsight. My mandate, as it relates to this aspect of the case, is only “to determine whether the advice given to police by the Public Prosecution Service in the Parsons matter complied with all appropriate training, policies, procedures and guidelines,” and to make recommendations with respect to these policies and guidelines.

While more consideration should have been given to the possibility of a prosecution in

relation to “the window” component of the sexual activity and while another Crown could have reasonably decided to prosecute that component of the case, I am of the view that the Crown’s decision is an understandable one. The content of the advice she provided discloses no clear legal or reasoning error. The decision was a reasonable one, an honest one and the product of care and deliberation by a seasoned and respected prosecutor.

The decision was a reasonable one, an honest one and the product of care and deliberation by a seasoned and respected prosecutor.

107. Martin Committee Report, *supra*, at p. 85. This is yet another reason why a victim-support person is important in the context of a police investigation. While too early to tell, the new Victims’ Bill of Rights referred to above might also bring about some changes in the process to be followed when a determination is made as to whether a prosecution should be initiated.

108. *Ibid.*, at p. 84

109. *Ibid.*

Was the sexual assault component looked at again?

New information that surfaced following Rehtaeh's death prompted the re-opening of the child pornography investigation. After the police conducted other interviews on the child pornography aspect of the case, the possibility of re-examining the sexual assault component was considered. Advice was obtained from Ontario's Ministry of the Attorney General. While we were not made privy to that opinion and did not request it -- as it is privileged and falls outside my mandate -- we understand that it did not recommend laying sexual assault charges because of the absence of any reasonable prospect of conviction. This recommendation would in part have been based on the fact that, due to Rehtaeh's death, her statements would now be considered hearsay (an obstacle to admissibility as she is not here to be cross-examined). It would also -- independently -- have been based on the other factors considered by the Nova Scotia Crown, including the reliability issues, the contradictory statements and the text messages.

✔ See Recommendation 4.

4. Was the advice on the child pornography allegations proper and legally sound?

(A) *The law relating to child pornography offences*

A visual representation that shows a person who is under the age of 18 (or is depicted as being under 18) engaged in or depicted as engaged in explicit sexual activity is child pornography.¹¹⁰

The issue in this case appears to have primarily turned on whether it must be apparent from the visual representation *itself* that the person is under 18. There is no doubt that, if the person depicted is under 18, the photo or other visual representation is child pornography. Section 163.1(1)(i) only requires that the person shown in the picture be under 18 or depicted as being under 18.

From an evidentiary standpoint, however, a conviction could not be obtained if a person is found to be in possession of child pornography and it cannot be inferred by simply looking at it that the photo constitutes child pornography. Without more, there would be no evidence that the person knew they were in possession of child pornography.

110. The visual representation also constitutes child pornography if its dominant characteristic is the depiction, for a sexual purpose, of a sexual organ or the anal region of a person under 18: Section 163.1 of the *Criminal Code*

The operative phrase is: “without more.” If there is other evidence that the person in possession of the photo knows that the person depicted in the photo is under 18, even if this is not apparent from the photo itself, the knowledge requirement is satisfied. In other words, if the person who takes the photo or distributes it knows who is in the photo and how old that person is – no matter whether the person’s identity or their age is apparent from the photo – the essential element of knowledge can be proven. It is also important to keep in mind that any offence can be proven by way of circumstantial evidence.¹¹¹

The issue doesn’t arise in most child pornography cases because the pic-

tures are self-evidently child pornography. In many cases, child pornographers collect a substantial number of pictures and, to facilitate prosecution, the police or the Crown will select only those that are obviously child pornography.

There is, there-

fore, little jurisprudence that directly addresses the issue. However, the language of the *Criminal Code* and the traditional rules of evidence clearly permit “extrinsic” evidence to inform the analysis. Evidence is evidence. If there is evidence of knowledge, it doesn’t matter whether it emanates from the picture itself or not.

From a policy standpoint, it would be indefensible if it could be proven, without a doubt, that a person knew they had in their possession a sexual depiction of a 15-year-old yet that person could be acquitted simply because the victim arguably looked older. Child pornography charges do not only apply to cases where the person is clearly pre-pubescent. While those cases are easier to prosecute, they do not constitute the line where child pornography offences are drawn. The line is drawn at 18. It will always be difficult to tell from a photo whether a 17-year old is in fact 17 or 18. That does not matter where the person knows or believes the person depicted to be underage. If that were not so, it would be practically impossible to ever prosecute individuals in relation to child pornography depicting a 16, 17 or 18 year old, despite it being a criminal offence. That is not the law.

(B) Informal Crown policy or practice

It appears as though an informal practice had developed at the PPS where cases involving the distribution of photos among youth would not be prosecuted—at least when the picture was taken with consent—on the basis that the issue ought to be addressed at a school or community level. There were suggestions that such occurrences are so prevalent and the photos distributed to such a large group of people that it would overwhelm the court system if all these cases were prosecuted.

111. *R. v. D.G.*, 2015 ONCA 113 and *R. v. Rowe*, 2011 ONCA 48 are two child pornography cases where evidence extrinsic to the representation was relied on by the courts. While these decisions were not rendered until after the events in issue here, they are included to prove the point. I do not think it was ever a legally contentious issue.

This practice or informal policy emanated from the senior Crown who had conduct of such matters for several years, and it formed part of the junior Crown's preliminary advice to police. The police did not have any such policy.

While there may well be some merit to the idea that young persons should not be prosecuted for child pornography offences in such contexts, in my view some consideration ought to have been given to the fact that this was not merely a case of loss of control over an intimate photo that was initially taken voluntarily. Because it involved an allegation of an intimate photo being taken both without the subject's consent and knowledge as well as an allegation that it depicted a sexual assault, it was much more serious.

In fairness, the "policy" was by no means a blanket one. It did have regard to the particular circumstances of a given case. According to the senior Crown, the "policy" would, for instance, take into account: evidence of malice on the part of the youth who sent the picture, that person's level of maturity and if he or she could appreciate the damage they were causing; whether the picture was taken by the youth depicted in the picture or with his or her consent; and any suggestion that the picture depicted a potential sexual assault.

The junior Crown appears to have put great weight on the fact that the sexual assault component of the case would likely not be prosecuted. But this does not take away from the fact that, on all accounts, Rehtaeh did not consent to being photographed and, in fact, did not know a picture had been taken of her at the time.

It may not have been entirely clear to the Crown that the investigation had revealed that the picture had not been taken voluntarily. The investigation did reveal that Rehtaeh did not know about the photo's existence until several days after it was taken, but this factor doesn't seem to have been discussed at the meeting with the junior Crown. It also appears possible that the junior Crown understood the informal "policy" to have a more general application than intended.

Still, many would agree that charging youths with child pornography-related offences is an unintended use of the *Criminal Code's* child pornography provisions. While there is a valid debate to be had on

In this case it was possible to identify those individuals "most responsible" for the photo's circulation: the photographer and the initial distributor(s).

that issue, the question no longer needs to be decisively answered in light of the new criminal offences relating to distributing or making available intimate images without consent.¹¹² While the child pornography offences remain available in cases like this one, these new offences would cover most instances where young persons distribute images of a sexual nature without consent, and they are arguably a better way of addressing

112. Section 162.1 of the *Criminal Code* ; Bill C-13, *supra*, S.C. 2014 c. 31. Upon conviction, section 162.2 also permits a judge to prohibit or restrict the use that the offender can make of the Internet or other digital networks. Section 164.2 allows for the property used in the commission of the offence to be forfeited.

cases where all involved are youth. I expect that as a result of these new provisions, the PPS's informal policy will have changed.

There is no doubt that the photo in this case “constituted” child pornography.

It appears as though an additional concern for both the Crown and police was the fact that, based on the evidence gathered, the distribution of the photo was so widespread that it would be difficult to prosecute only some of the students involved. I have great difficulty accepting this line of reasoning. It is a staple of Crown and police work that they focus only on a sub-group of individuals warranting prosecution. In this case it was possible to identify those individuals “most responsible” for the photo’s circulation: the photographer and the initial distributor(s).

To be clear, this consideration was not the determining factor in whether or not to lay any charges in this case; nor was the Crown’s “informal policy.” Consideration was given to at least focusing on the person or persons responsible for taking the picture. This is where an error was made as to the applicable law.

(C) The advice relating to child pornography was incorrect

Whether the Crown could prove that the photo “constituted child pornography”

The “Decision to Prosecute (Charge Screening)” Directive addresses the issue of Crown advice prior to the laying of a charge. It sets out some of the contours of the advice that can be provided as follows:

In certain cases, investigators may find it useful to consult with a prosecutor prior to the initiation of a prosecution. When this occurs, it is appropriate for the prosecutor to give legal advice in regard to such matters as the admissibility of proposed evidence, the elements of particular offences, the propriety of investigative techniques, and criminal procedure.¹¹³

That was the nature of the advice provided in this case. Indeed, the child pornography advice mainly turned on the elements of the offence and whether “extrinsic” evidence would be admissible to prove these elements. However, the advice itself was erroneous.

There is no doubt that the photo in this case “constituted” child pornography. Rehtaeh – not to mention the other boy depicted in the photo – was underage and “depicted as” engaged in sexual activity. Theoretically, a valid discussion could have been had about whether the Crown could prove that it was child pornography, as it related to the makers or distributors of the photo. But the discussion instead stumbled on the former proposition.

113. The Decision to Prosecute (Charge Screening), *supra*, at p. 2. [emphasis added]

The junior Crown did (correctly) initially indicate to the investigator that one available option was to explore a charge of “making” or “attempting to make” child pornography, because the obstacles relating to whether the photograph “constituted” child pornography would not apply to the photographer who knew the subjects were underage. He expressed some reservations about that avenue, given that he believed it might require a statement from someone in the room – other than Rehtaeh. This comment appears to have been based on the misapprehension that Rehtaeh had not identified or had not been able to identify who had taken the picture. A discussion also occurred about arresting the suspects in order to seize their phones, which the Crown endorsed on the qualification that the arrests be *bona fide* and based on the required grounds to believe, and not only done for the purpose of seizing the phones (as is correct in law).

The junior Crown’s email to the senior Crown also indicates that his initial instinct was correct. He accurately suggests that it would be hard to prove the photo is child pornography on its own, *but if the possessor, accessor or maker has additional knowledge making them aware that the image depicts child pornography, charges can be considered.* He wrote: “If the officer could collect evidence establishing the identity of the photographer and the knowledge that they were taking a picture of sexual activity with a person under the age of 18, then a charge of making [child pornography] may be available.”

It appears as though it was unclear to both the junior and senior Crown that there

was evidence of who the photographer was. The investigator would have conveyed that she had evidence of who the photographer was, but also that this evidence was inconclusive. She would nevertheless have indicated that she expected to be able to confirm who it was by seizing the suspects’ phones. The investigator believed that Rehtaeh’s statement would not be determinative because she had not been aware that a picture was taken: her statement that Adam had taken the picture was thus a deduction and might not hold up in court.

In my view, the investigator underestimated the strength of that deduction. Rehtaeh was at all times consistent that the only two boys in the room

through the duration of the sexual activity were Josh and Adam. Lucy’s statement corroborated that. No one claimed that any other person entered the bedroom during this time. The clear deduction is that the person who was not in the picture was the one taking the picture.

In addition, the police reports make it clear that the investigator was at least aware that Josh had sent a text message to an unknown person, indicating that “[Adam] took that pic and sent it to [Eric]”. Lucy had also stated that Josh (who was depicted in the photo) sent her the photo.

The real problem here was the fact that the Crown took the view that contextual or “extrinsic” evidence could not be taken into account to prove the case. This is simply not the law.

The investigator believed (I think correctly) that these facts provided her with sufficient grounds to arrest Josh and Adam, and seize their cell phones.

These were critical pieces of information and the full picture could have been laid out for the Crown. Because the photo was not necessarily child pornography “on its face,” the Crown prosecutors needed to be made aware of – or inquire into – any evidence that the photographer and any person who distributed the photo knew who at least one of the persons in the photo was and how old that person was. It was important to have a clear understanding that, in this case, the photographer certainly knew who he was taking a picture of and all the students involved attended the same school and would, therefore, have known that Rehtaeh and the other person depicted in the photo were underage. This was not a case where the only admissible “extrinsic” evidence was that Rehtaeh could identify herself in the photo as being under 18. That would not suffice to prosecute someone who could not themselves have known that. But here, there *was* evidence that the person who took the picture and initially distributed it *knew* who it depicted, and knew they were underage.

The investigator also informed the Crowns that she had had difficulty gathering evidence of who had distributed the photo. While this was true, the investigator had Lucy’s statement. In addition, two other text messages (among a mountain of them, to be fair) appear to have been overlooked. In one of these messages, Josh informs Rehtaeh that he sent the photo to Lucy. In another, it can easily be

inferred that Josh is sending the photo to another schoolmate. Upon reviewing the file, the new investigators on the case pursued this lead and interviewed the schoolmate. These messages ultimately helped lead to the charges that were laid against Josh, to which he pleaded guilty.

The junior Crown’s impression upon leaving the meeting was that they had brainstormed about what could be done with the case – including arrests and seizing the phones, and looking at a charge of making or attempting to make child pornography – and that he would be obtaining advice on whether the photo could constitute child pornography: a question that he viewed as necessary to determine whether charges of distribution or possession could also be contemplated. He indicated that he needed to consult with a senior colleague on the point, and would defer to his opinion.

As a result of his consultation with the more senior Crown, the analysis reverted back to focusing on whether the photo itself “constituted child pornography.” Indeed the two Crowns discussed whether this could be proved through extrinsic evidence, and the senior Crown’s answer appears to have been an unqualified “no.” He was of the view that the photograph needed to speak for itself (at least in relation to a charge of possession or distribution).

When the junior Crown raised the possibility of pursuing a charge of *making* child pornography, the senior Crown apparently dismissed that possibility not only on the basis that the evidence appeared to be lacking, but also on the basis of the “personal use defence.” It is possible that there was some misunderstanding on this point. The senior Crown may not have properly understood the facts, because it ought to have been plain and obvious that the defence could not apply in this case. The defence was unavailable at the very least because the photo had been distributed to third parties, and because it had been taken without Rehtaeh’s consent. Both these facts were certain.

Even aside from the fact that the defence had no application to this case, it was not one that could be considered as being “plainly available” to the potential accused. This was not a case where the police ought not charge based on the mere unsubstantiated possibility of such a defence being invoked. It should not have entered into the analysis and was thus incorrectly raised by the senior Crown. The junior Crown does not appear to have thought through its application to the facts of this case at the time, and simply relayed the opinion back to D./Cst. Snair. However, as further detailed below, although the issue was pointed out, it is not what carried the day nor did it weigh heavily in the analysis. In other words, this was an error without much consequence.

In light of the senior Crown’s confirmation that the elements of child pornography needed to be proved without resorting to circumstantial evidence, the junior Crown also did not

seek to clarify what if any such evidence was available. Had that not been the basis for their conclusion, I trust that the right questions would have been asked so as to make an informed decision based on all the evidence. But what the Crown did or did not know about the “extrinsic” evidence the police collected became irrelevant in their mind when they believed that it could not be taken into account in any event. That is where the mistake lay, and that is the essential factor that drove the Crown’s opinion in this case.

The Crown referred to a decision from the Supreme Court of Canada¹¹⁴ that it interpreted as dismissing the suggestion that child pornography can be legal in one person’s hand and illegal in another. This was articulated as one of the bases for stating that “constructive child pornography” does not exist in law. But that conflates the issue of whether a picture “is” child pornography with the issue of whether it can be proven that a particular person knew that it was child pornography and, thus, can be held criminally responsible for having possessed, created or distributed it. There is no doubt that, if a picture meets the definition provided for in the *Criminal Code* (as it does here), it will always “constitute” child pornography, no matter whose hands it’s in.

Ultimately, “what went wrong” in relation to the original child pornography investigation in this case does not so much rest on policy deficiencies or other structural problems. While improve-

114. *R. v. Sharpe*, 2001 SCC 2

ments can always be made—and I endeavour to provide some guidance in that regard—the case truly took a wrong turn as a result of a mistake as to the law.

Directive already provides that the advice “must reflect sound knowledge of the law.”¹¹⁵ It is no doubt sound policy for a junior Crown,

in the face of uncertainty, to go to a more senior and specialized Crown for advice. Unfortunately, the senior Crown just happened to be wrong in this case.

The law is a complex affair and mistakes in its interpretation will occur. Crown prosecutors are only human. There is no “policy” that could be created to avoid that. But there are ways to minimize mistakes by creating additional safeguards. For instance, the involvement of a specialized ICE officer in this case

What changed? Why were charges laid after the determination that there would be no charges?

As I have indicated, the legal advice provided was erroneous. So, when new information came to light following Rehtaeh’s death – and prompted the re-opening of the investigation – investigators quickly determined that a charge could have been laid based on the original evidence.

This “new information” was a message from Josh to Leah Parsons following Rehtaeh’s death, which included information about who the photographer was. This strengthened the evidence the police already had.

Text messages already in the file were identified as disclosing a potential witness who had received a picture she did not want. This potential witness was contacted by the new investigators, which ultimately led to one of the distributing charges that were subsequently laid. The new lead investigator on the file readily admitted that he had both the benefit of hindsight and the advantage of looking at the file through the lens of his experience with child pornography cases at ICE. Other than this text message lead, nothing jumped out to me, at least, as something that could have been done but wasn’t done as part of the initial investigation.

The subsequent investigation corroborated D./Cst. Snair’s indications that the youths who were interviewed about the photo could not recall in any concrete way who had showed it to them. This aspect of the re-investigation, therefore, did not result in sufficient information to substantiate any charges—in the same way they did not in the original investigation.

115. *Ibid.*, at p. 2

There are ways to minimize mistakes by creating additional safeguards.

(as recommended above) would have assisted as the officer would likely have pushed back on the Crown's legal opinion. And, of course, increased training will also always be valuable.

✔ Recommendation 10

There should be more Crown counsel available to prosecute ICE cases, and these Crown counsel should receive increased training in this highly specialized area.

D. Victim Services and Other Resources

Victims appear to be well served once charges are brought to court. Much like in other jurisdictions across the country, victims of any type of offence can access court services geared at explaining and offering support throughout the court process. These services can include accompanying the person to court when he or she is required to testify. In Nova Scotia, these services are offered by the Department of Justice's Victim Services.

The issue that needs to be addressed is what, if any, services are available to help victims navigate the police investigation phase of the process which—as this case demonstrates—can be lengthy and difficult to understand. Some police agencies do offer this type of service, albeit on a reduced scale.

1. What services were available for the family during the investigation?

In this case, HRP Victim Services ("VS") was available to provide services to Rehtaeh and her family.¹¹⁶ Verona Singer responded to Avalon's call for assistance and was available to help to a greater extent if required. Her intervention in this case mattered.

VS's mandate has historically focused on domestic violence cases, which are automatically routed to them by police. The bulk of their resources are devoted

116. The RCMP also has a victim service that serves the bulk of the province, and my comments and recommendations also apply to this service.

Investigators did consider at the outset any support services Rehtaeh might require.

to being proactive in those cases. Nevertheless, VS does respond to any other request for victim assistance. In non-domestic cases that are not automatically

routed to them, police officers will typically make referrals to VS when deemed appropriate. VS would not turn these persons away. However, many officers informed us that they were very much aware that VS focuses its limited resources on domestic cases, so they do not frequently make other recourse to the service.

Rehtaeh and her family were only directed to VS by Avalon, a community-based resource, after several months of frustration mainly resulting from lack of communication about the investigative process. While officers along the way considered referring Rehtaeh to VS, all noted that she had already accessed community-based services so there was less or no need for VS's intervention. It is important to note that VS's mandate is to provide information and make referrals to appropriate outside agencies. They do not offer ongoing counselling services themselves, but they can refer persons to services relating to counselling, general health, mental health and housing. It is understandable that, in the circumstances, VS was not seen as having any residual role to play.

As a result, VS did not intervene in this case other than to act as a facilitator between the Parsons family and the police investigators after Avalon reached out to them on Rehtaeh's behalf. They

arranged a meeting between police and the family, and a VS representative attended the meeting. The family had the opportunity to ask questions about the status of the investigation, which the police answered to the extent possible. Based on this meeting, the VS representative considered that Rehtaeh would be well served by police. Because Rehtaeh was already engaged with Avalon, VS also did not see a need to be involved after this meeting—although they remained available to facilitate communications with police again if necessary.

2. Who is best suited to help families navigate the criminal justice system?

It should be noted that investigators *did* consider at the outset any support services Rehtaeh might require. The responding officer told Rehtaeh's mother that they should reach out to the IWK if any suicidal thoughts returned. When the meeting to obtain a full statement was pushed back, DCS ensured that there was a "safety plan" in place. Following the full interview, the investigator and DCS again ascertained that Rehtaeh was receiving support from her family, and that she knew who to reach out to if she had further thoughts of suicide.

The Parsons family required ongoing information about the investigative process and navigating the criminal justice system, which VS is in a perfect position [to provide].

What has since come to light is that the Parsons family required ongoing information about the investigative process and navigating the criminal justice system, which is not a topic that Avalon is best equipped to address.¹¹⁷ VS, on the other hand, is in a perfect position when it comes to demystifying the system, and can assist by providing ongoing informa-

tion in a way that the police investigators may not have the time or aptitude to do. As demonstrated by this case, they also have a direct line to police investigators who will lend an ear if VS comes calling.

Since Rehtaeh's death, VS determined that they needed to be more responsive in all cases involving sexualized violence. In short order, VS met with SAIT and both welcomed a more active role by the former in relation to sexual assault investigations. VS's aim is to become systematically informed of sexualized violence cases in the same way they are informed of domestic violence cases, and to become involved in these cases as required.

We were informed that a relationship has since continued to develop between VS and SAIT. VS is notified of files relating to sexualised violence and makes initial contact with the victim. VS representa-

tives frequently accompany them for their interviews and meet with SAIT investigators. Aside from offering support, they endeavour to assist victims by providing them with information and making referrals to outside agencies. As of our most recent communications with VS, they had applied for a grant to hire a navigator, who would help walk people through the system. This is precisely what Rehtaeh's family required. However, VS currently does not have the resources it requires to be systematically involved in these cases on more than a reactive basis.

Rehtaeh and her family were only directed to VS after several months of frustration.

I have already referred above to the new Victims' Bill of Rights, which includes information-sharing provisions in respect of the police investigative stage. To comply with this new legislation, police agencies and victim support units may require an additional influx of resources. As per my earlier recommendation, I believe that police-based victim services are better positioned than most to fulfill many of the legislation's goals related to the investigative stage of the process.

✔ See Recommendation 5.

117. Note that at one time, Avalon did have a "legal support advocate" available to provide information and support to victims of sexual violence who had laid a complaint with police or planned to do so, but this position was cut for lack of funding in or around 2012. We understand that the position or a similar one has again been created in recent time.

Part III

Steps Taken Since the Parsons Case
and Additional Recommendations

Part III

Many steps have been taken since – and often as a direct result of – the Parsons case. I comment on some new measures and initiatives, but I don’t purport to be exhaustive. Nor do I comment on measures that were the subject of earlier reviews relating to this case, specifically those related to education and mental health.

A. Police

1. Strengthening the Sexual Assault Investigation Team

SAIT and ICE should become integrated or at least work much more collaboratively when there is cross-over between their areas of specialization.

As a result of the Parsons case, police recognized at least two gaps in the sexual assault investigation team related to workload and training. First, SAIT is a heavily burdened unit and requires additional resources to lessen investigators’ heavy caseloads. While additional resources can be hard to come by, the po-

lice have endeavoured to put an end to taking SAIT staff away from their duties to assist other investigative units such as homicide. Second, senior management recognized that SAIT investigators

require additional training in the area of sexual assault. The intention is to continue to administer the trauma-informed response course to newcomers to SAIT. I also recommend that officers being assigned to the unit receive other training opportunities—in particular a course on sexual assault investigations.

There was also broad agreement that SAIT and ICE should become integrated or at least work much more collaboratively when there is cross-over between their areas of specialization – although this issue has yet to be addressed.

A cybercrime unit would offer investigative support to other investigative units.

Beyond establishing greater proximity between sex-crime units such as SAIT and ICE, police authorities—in conjunction with the province—could consider creating a cybercrime unit that specializes in any investigation involving a cybercrime aspect. This type of specialization is in high demand and an inevitable component of policing in areas that reach far beyond offences of a sexual nature. For example, the mandate of the Calgary Police Service’s “Cybercrime Support Team”, which became operational in 2013, is to be “responsible for Cybercrime investigations with a focus on supporting investigations with a cybercrime element as well as crimes in-

volving computers, networks and the internet.” In other words, the team doesn’t supplant specialized investigative units such as SALT or ICE – whose expertise is also required; it offers investigative support to these units, including in cases of cyberbullying. It appears as though the model is geared towards first securing digital evidence and attempting to source the location of offenders, then transferring the file to the appropriate investigative unit.

✔ Recommendation 11

The police should explore the creation of a cybercrime support unit with a broad mandate to be involved in

any investigation that requires this expertise.

(See Recommendation #2.)

2. The Hybrid Hub: multi-agency coordination to help at-risk youth

Nova Scotia recently created the RCMP Youth Intervention and Diversion Program, branded by some as the “Hybrid Hub.” The police are central participants in this program, which brings a number of agencies together to identify and intervene with youths considered to be “at risk.” At-risk youths include those at risk of engaging in anti-social or criminal conduct as a result

The History of the Hybrid Hub

The program, which came out of a 2011 advisory committee to stop at risk youths falling through the cracks, involved the RCMP, government departments, the Mi’Kmaq Legal Support Network and Capital District Health Authorities in its development. It targets any youth (between the ages of 12 and 17) in crisis or on the verge of crisis who may require supports. The goal is to identify youth who present with issues that require a response from more than a single agency. Each youth receives a risk assessment, which is followed by an action plan—all of which is coordinated by a multi-agency committee of professionals or “Hub.”

The program is based on better partnerships and information sharing among agencies and services. It builds on already-existing youth intervention programs, such as the Restorative Justice Program, the Schools Plus Program and the Mi’Kmaq Legal Support Network. While the program gives particular attention to diverting Aboriginal youth, pre-charge, away from the criminal justice system, the focus is on preventing crime and other anti-social behaviours and ensuring a young person’s social development by get the youth to the right services in a timely fashion. This integrated service delivery model involves greater collaboration between four key government departments: Health and Wellness, Education and Early Childhood Development, Community Services and Justice. Because it does not have a specific point of attachment, such as the young person’s school, the committee is well adapted to offer ongoing assistance even to youth who frequently move house or change schools.

of factors such as poverty, learning difficulties, lack of parental engagement or a history of conduct disorder in early childhood; it also includes those who are in a similar situation by reason of isolation, having been victimized or mental illness. While the original model was meant to identify criminogenic risk factors, these risk factors are generally the same as social development risk factors. Nova Scotia's model is intended to encompass a broader range of crises than those that point to criminal behaviour, which means that someone in Rehtaeh's position might have been helped by this program.

There are several entry points into a "Hub," including referrals from the police, schools and child services. The program uses an evidence-based "risk-screening tool" to identify youth who might be in need of assistance. It is also consent-based: the Hub obtains a parent's or legal guardian's consent to share information related to the young person among agencies. This consent-based approach addresses the type of frustrations experienced by Rehtaeh's parents: in a state of crisis, they wanted information to be shared and for different agencies to come together to provide a coordinated, effective response to helping their daughter.

When the program identifies a youth "at risk", it organizes a case conference with all program partners, including the school board, police and other agencies such as mental health, housing, addictions, family support and Family and Child Services/Community Services – depending on the young person's needs. Agencies share information and assess the appropriate responses. A plan

is devised and each agency is charged with addressing a particular risk factor. The group periodically reconvenes to assess progress. The goal is to reduce the risk factors at least until they are manageable.

To date, the Risk Screening Tool Training has been provided to RCMP employees and employees of partner agencies such as the Department of Education and Early Childhood Development (Schools Plus), and the Department of Justice (Restorative Justice Program). As part of an overall crime prevention and reduction strategy, the Hub also forms part of Halifax District RCMP's operational goals for 2014-2015.

There are currently eight Hub committees accepting referrals across the province, each serving a community. Several more are planned, and the intention is to roll out the program in both RCMP and HRP jurisdictions.¹¹⁸

The importance of a coordinated response

Rehtaeh's case highlighted the absence of a cohesive, comprehensive response by police, the school system, victim assistance services and mental health services to her and her family's crisis. In particular, no immediate steps were taken to deal with the circulating photo and the damage it was causing. If a Hub had been in place, it could have made referrals to the new CyberSCAN unit,

118. Note that many of the Hybrid Hub's principles are already being followed by the HRP's Community Response Officers. Nevertheless, increased ability to share information is required to achieve a truly effective strategy.

tried to address related mental health issues and any anti-social behaviours, and provided targeted suicide prevention services.

Other cases have also demonstrated the weaknesses of systems that work in silos. They have shown that it is insufficient to direct someone to other services or inform them that they are available. The services required in any given case – especially when dealing with youth – need to be brought to the individual, provided it is done with their or a parent's/guardian's consent.

I understand the RCMP has also been in discussions with various external agencies – including Schools Plus, Probation Services, Health Services, Youth Outreach Programming, school principals, Boys & Girls Club, and the IWK—to identify gaps in resources. These types of inter-agency conversations are important to provide integrated services to youth and their families.

✔ Recommendation 12

The “Hybrid Hub” should continue its expansion throughout the province. It should be viewed not only as a way of diverting potential offenders from the criminal justice system, but in general as a way of providing assistance to youths who are in crisis.

3. Collaboration between schools and police

In response to the report of Nova Scotia's Task Force on Bullying and Cyberbullying, changes were made to the *Education Act*, clarifying when schools can intervene when cyberbullying occurs off school grounds. Some work has also been done to clarify how schools and police interact.

In its “Response to the Canadian Centre for Child Protection's Response and Recommendations to the External Review of the Halifax

Regional School Board's Support of Rehtaeh Parsons”, the Action Team on Sexual Violence and Bullying put in place by the then-Minister for the Advisory Council on the Status of Women, indicated that the following steps were being taken:

The Department of Education and Early Childhood Development will continue to work with school boards to seek legal clarification on and to establish a common understanding of the roles and responsibilities of parties involved in external investigations. Department staff are working with school boards and the Department of Justice to develop operational procedures for co-operation and information sharing among agencies to help resolve

Rehtaeh's case highlighted the absence of a cohesive, comprehensive response by police, the school system, victim assistance services and mental health services to her and her family's crisis.

investigations in a timely manner.

The importance of clear language in laws and guidelines

The Action Team's response also notes that amendments to the *Education Act* did clarify that principals "will co-operate with any ongoing investigations that involve students at their school." The legislation also clarifies the instances where schools have a duty to act, including those related to bullying and cyberbullying. It is important for schools to act on these obligations irrespective of any ongoing criminal investigation. However, I continue to have some concern that school authorities will be left to wonder what the legislation means by "cooperation," and how they ought to navigate the murky waters of the interplay between their interventions and police investigations. I understand that this legislative amendment was intended to ensure that schools would cooperate with the CyberSCAN Unit. In my view, the direction should be explicit. Clear guidelines should be developed to identify the parameters of school and police investigations and interventions.

It is important for schools to act on these obligations irrespective of any ongoing criminal investigation.

Canadian Centre for Child Protection's recommendation that "[a] clear understanding of the roles and responsibilities of the school when an external investigation (whether by police, child welfare, and the like) involving

one or more of its students is needed, for both incidents that occur outside of the school environment and within the school."

I would like to underscore the importance of this recommendation. As indicated above, there is uncertainty, confusion and inconsistency in approach between schools and police. There is little sharing of information because of privacy concerns. School authorities are sometimes apprehensive about getting involved in incidents that the police are investigating for fear of impeding the investigation. They are also apprehensive about allowing police to conduct investigations on school property, when the incident did not begin at the school. How police and schools collaborate -- and to what extent such collaboration is appropriate -- requires clarity.

For instance, the Canadian Centre for Child Protection observed that the uncertainty surrounding “what actions a school should or even could take while a criminal investigation that involves a student is underway ... seems to have impacted administrators’ decisions around what information, if any, was to be shared: between schools; within the school attended by students directly involved (alleged victim, alleged offender, and potential witnesses); as well as decisions about the actions schools needed to take to:

- Ⓢ Address the trauma Rehtaeh had experienced;
- Ⓢ Deal with the students involved in the alleged sexual assault;
- Ⓢ Record any interventions or interactions;
- Ⓢ Address the dissemination of the image of the incident among students; and
- Ⓢ Address the cyberbullying that ensued.”

It is important that there be concrete guidelines about how schools are to respond to each of these potential concerns. As the Centre also recommended, these guidelines should include “providing guidance on how to potentially carry out a parallel internal investigation within the scope of the school environment.” They should also be developed in conjunction with police and Crown representatives, so that they can work through any concerns surrounding the creation of evidence, and the thorny issue of schools acting as agents for the police.

I also wish to make the following observations on the school’s newly clari-

fied jurisdiction to intervene in respect of matters that have a significant impact on the learning environment. This was a central recommendation of the Task Force on Bullying and Cyberbullying,

which took the view that schools *do* have the jurisdiction to deal with bullying or cyberbullying conduct where it is “detrimental to the school climate, broadly defined.”¹¹⁹ I agree with this recommendation. This jurisdiction is particularly important in the case of cyberbullying, given that “what makes [it] so pervasive and damaging is its lack of boundaries.”¹²⁰ I believe a broad interpretation should be given to the new language introduced in the *Education Act* in response to the Task Force’s report.

A broad interpretation should be given to the new language introduced in the Education Act.

119. The Report of the Nova Scotia Task Force on Bullying and Cyberbullying, *supra*, at pp. 51 and 65

120. *Ibid.*, at p. 52

I understand that principals and school staff have asked for “clear direction” on what is meant by conduct that “significantly disrupts the learning climate of the school.” Definitions are important as ambiguous language might lead schools to abstain from intervening in cases where there ought to be an intervention. If, upon review, experience shows that the language isn’t sufficiently broad for schools to intervene when warranted, consideration should be given to broadening it. For example, I am unsure whether the new clarifications would have made any difference in Rehtaeh’s situation: my understanding is that, while school authorities – and the school liaison officer – were aware a picture was circulating, they did not perceive any impact on the learning environment. The provision should, at the very least, be taken to mean that intervention is warranted when the “learning environment” of even a single student is affected,¹²¹ and when there is a significant risk that the learning environment will be disrupted if the incident is not addressed.

If, despite the direction provided by the new language, school authorities continue to be wary or have liability concerns, one option proposed by a US commentator is to consider a contractual approach, whereby schools “reserve the right to discipline for off-campus actions that intend to affect a student’s in-school safety and well-being.”¹²²

What is the appropriate role for a school liaison officer?

There is uncertainty about the role that school liaison officers should play as an intermediary between school authorities and police investigators. There is no comprehensive protocol in place about their role. Some expressed concern about school liaison officers being involved in investigating students, for fear of undermining the trust that needs to be maintained between them and the student body.

Many of these concerns are warranted, and the issue should be debated to see whether solutions can be identified. At the very least, a consistent and certain approach—one on which everyone can rely—would result in realistic expectations that can drive the actions of both school officials and police. In particular, I see a role for school liaison officers in relaying information to other school liaison officers when students transfer schools. In their preventative role, they ought to flag concerns about

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121. That was certainly the case for Rehtaeh. I do acknowledge, however, that the circumstances of this case were unusual in that Rehtaeh had already transferred out of the school by the time authorities were aware of the situation. If that had not been the case, I expect that there would have been – indeed there should be – an intervention.

122. Christa Miller, *Cyber Stalking & Bullying – What Law Enforcement Needs to Know*, April 2006

a potentially vulnerable student, so that the officer at the next school can keep an eye out for the student. Any obstacles relating to sharing information can be overcome.

For example, I note a recent “Information Sharing Guideline” that applies to SchoolsPlus and its Department and Agency Partners¹²³ since November 1, 2013. The Guideline provides for a single consent form to be signed by the youth and/or parent or guardian (depending

This Guideline is of interest beyond SchoolsPlus, because it relates to the concerns outlined about information sharing between schools and police—especially as not all students participate in the program. Guidelines of this nature help delineate the

boundaries of information sharing between various institutions, which are necessary to ensure that information is shared in an effective and timely way that best assists youth. They are also essential to the delivery of integrated or coordinated services and to greater collaboration between different entities. Because the sharing of personal or private information must comply with privacy requirements,

it is important to obtain clarity on what can or cannot be shared, and in what circumstances it can be shared.

I see a role for school liaison officers in relaying information to other school liaison officers when students transfer schools. In their preventative role, they ought to flag concerns about a potentially vulnerable student.

There is uncertainty about the role that school liaison officers should play as an intermediary between school authorities and police investigators.

on the child’s age) to allow for sharing information relating to the program. It also makes clear in what circumstances consent is not required, and the boundaries that apply even when the sharing of information is permitted. In relation to the police, the student (or substitute decision maker) can provide

his or her consent to the sharing of information between SchoolsPlus and the RCMP or police, as it may relate to “the development, implementation and review of a comprehensive service plan or SchoolsPlus programs, or in accordance with the provisions of the *Youth Criminal Justice Act*.”

123. The Nova Scotia Departments of Education and Early Childhood Development, Health and Wellness, Justice, and Community Services, as well as the Nova Scotia District Health Authorities, Nova Scotia School Boards, and the IWK Health Centre.

About SchoolsPlus

SchoolsPlus is an integrated service delivery for students within schools in the province. The services provided, which involve both governmental and non-governmental agencies, are intended to help students and families navigate various systems and resources. Services can be as simple as assisting a student with after-school or summer programming, or as complex as liaising with other agencies to address a complex array of needs by developing a “comprehensive service plan” and monitoring the student’s progress.¹²⁴

✔ Recommendation 13

The Department of Justice and the Department of Education together should ascertain whether the cyberbullying-related provisions included in the *Education Act* in 2013 are sufficient to address a scenario like the one that occurred in the Parsons case. If they are not, the language should be amended to broaden their application. The two departments should also canvass whether principals and school staff have received enough guidance on how to interpret and apply the new provisions.

The role of police liaison officers should be clarified both in terms of their tasks and responsibilities and in terms of their interactions with (a) police investigators when there is an active criminal investigation involving a student or

students, and (b) police liaison officers in other schools.

Information-sharing guidelines should be established between schools and police outside of the SchoolsPlus program.

B. Public Prosecution Service

1. New Practice Note on “Sexting’ Offences”

On April 23, 2013, as a direct result of this case, the PPS issued a new Practice Note to its prosecutors relating to “Sexting’ Offences.” The Note applies when a young person or adult sends (or posts online) sexually explicit messages that can include pictures (the Note defines this as “sexting”). It also addresses the particular case of “sexting” that involves child pornography. The Note is focused on factors that should be considered when Crown prosecutors are approached by police for advice on possible criminal proceedings related to sexting, and determining whether sexting-related charges should be prosecuted. The Note was drafted before the new offences relating to the handling of intimate images without consent came into effect. The policy considerations it sets out mainly relate to the prosecution of child pornography offences in a “sexting” context.

124. It should be noted that the Department of Education is also a participant in the Hybrid Hub program described above. The Hybrid Hub is distinguishable from SchoolsPlus in particular in that it provides an increased level of support for youth with greater needs, and it is not anchored in the school system.

Realistic prospect of conviction

As explained above, before deciding to prosecute a case, prosecution services across Canada are required to consider whether there is a “realistic prospect of conviction” and whether the prosecution is “in the public interest.” As with all types of criminal charges, the sexting/child pornography Practice Note makes clear that “it has never been the policy of any modern prosecution service to prosecute every case in which reasonable grounds or a prima facie case exist. The PPS has an obligation to use finite resources responsibly.

A core function of a Crown Attorney is to determine on a principled basis which, if any, of the possible charges should be brought before the courts.”

As a direct result of this case, the PPS issued a new Practice Note to its prosecutors relating to “Sexting” Offences.”

With respect to the realistic prospect of conviction, the Note indicates that the prosecutor should

consider whether there is “sufficient evidence to establish who made the picture, who published the picture or who has had possession of the picture ... [or] ... who has transmitted the picture, made it available to others, distributed the picture or possessed it for any of these purposes.”¹²⁵ It observes that images are generally created and transmitted through computers, and that “Crown Attorneys should not be intimidated by the technology relating to the creation and transmission of these images. Proof of possession or transmission

125. Nova Scotia Public Prosecution Service, Crown Attorney Manual: Prosecution and Administrative Policies for the PPS, “Sexting” Offences – Practice Note, at p. 3

126. *Ibid.*

by a particular person may be amenable to proof with the assistance of a technician and/or routine Production Order.”¹²⁶

In terms of proving that the person depicted in an image is under the age of 18, the Practice Note explains that, while this may be apparent from the image itself, reference will usually be made to evidence that is independent of the picture: “This might include comments

from those involved in the taking of the picture, including comments from the person who is actually depicted. Often, the persons involved in sexting are known to each other and may be classmates. In this

The fact that the person is underage does not need to be apparent from the picture itself.

circumstance, the age of the person depicted would be readily known.”¹²⁷ The Note makes it clear that the fact that the person is underage does not need to be apparent from the picture itself.

Personal use defence

As for considering defences that are plainly open to an accused person, the Note explains the “personal use defence” and is clear that “[t]ransmission of the picture to other persons, or possession by other persons continues to be an offence.”¹²⁸ It does not, however, make it clear that, in order for that defence to apply, the person or persons depicted in the picture or recording must have consented to its creation.

127. *Ibid.*

128. *Ibid.*, at pp. 3-4.

Public interest considerations

The Note also addresses the public interest considerations that all Crown Attorneys must consider when deciding whether to pursue a prosecution. It states:

[Assessing the public interest] involves a careful study of all of the circumstances of the sexting, including the number of images, how explicit the images were, whether the persons depicted knew the pictures were being taken, and the number of persons to whom the images were sent. It may also be important to know whether or not the person possessing the child pornography actively sought the images, or if delivery was unsolicited. ...

A key consideration in considering whether or not to prosecute someone for transmitting child pornography is the motivation for transmitting the image. If there is evidence indicating an intention to embarrass, harass, intimidate, blackmail or humiliate another person, the public interest would usually require prosecution. Conversely, the absence of a malicious motive would weigh against prosecution. It is often difficult, however, to isolate the intended consequences from the actual consequences. By their nature, electronic images lend themselves to uncontrolled and unanticipated forwarding to other recipients. Further, the re-transmission of the images may be accompanied by added malicious or hurtful comments not found on the original message. It is difficult to measure the extent to which the

harmful results were intended by the first sender of the message, and how much harm could have been foreseen.

In assessing the motivation and culpability of a young person, careful consideration must be given to the young person's level of maturity and life experience.¹²⁹

I agree that these sorts of considerations should factor into the analysis. Criminal child pornography charges can be a very high-handed way of addressing the case of a youth who makes, distributes or possesses child pornography. When there is an absence of malice—and barring other aggravating circumstances—it is likely wise to withhold such a prosecution.

I agree that these sorts of considerations should factor into the analysis. Criminal child pornography charges can be a very high-handed way of addressing the case of a youth who makes, distributes or possesses child pornography.

129. *Ibid.*, at p. 4

The Note adds that “[t]he attitude and wishes of the apparently innocent persons involved in the sexting should also be considered in deciding whether or not charges should be laid.”¹³⁰ As I have already indicated, I agree that this consideration should be taken into account when considering the public interest in prosecuting.

The Note also mentions the YCJA and the presumption that extrajudicial measures like cautions are adequate when dealing with young offenders who have committed non-violent offences and who have not previously been found guilty of an offence—along with the proviso that malicious motives could render such measures inadequate.¹³¹

The critical importance of training for Crowns

Finally, the Note recognizes that child pornography “is a complex and evolving area of the law.” It reinforces that “a Crown Attorney must be sure of the elements of any possible offences” and recommends that for “those who do not prosecute child pornography cases on a regular basis, it would be prudent to review current case law in this regard. Crown Attorneys are strongly encouraged to consult with colleagues who are experienced in pornography prosecutions to help ensure that the current legal position is clarified, and that a consistent approach is taken. Certain counsel in the Special Prosecutions Branch have extensive expertise and experience in this area of the law.”¹³²

Having said that, the PPS has had difficulty filling one of its ICE prosecutor po-

sitions with experienced counsel. While we understand that the position has recently been filled, the PPS has a lesser level of experience in child pornography matters today than it did at the time of these events. While this practical reality outside the service’s control, the PPS should make every effort to give its specialized prosecutors the opportunity to take more training in this area at the earliest opportunity and on an ongoing basis. It is our understanding that the newest recruit has yet to be trained and the only other ICE prosecutor continues to carry an extremely heavy caseload.

The PPS should make every effort to give its specialized prosecutors the opportunity to take more training in this area at the earliest opportunity and on an ongoing basis.

The Crown prosecutor who ultimately provided the child pornography advice in this case has since had the opportunity to reconsider his position and his understanding of the law. He has followed the week-long ICE course offered by the Ontario Crown Attorney’s Association (his first opportunity to receive training in this field); he has had the opportunity to exchange views with colleagues

130. *Ibid.*, at p. 5

131. *Ibid.*, at p. 5. Note that at least one court in Nova Scotia has recently held that possessing child pornography is an inherently violent offence: see *R. v. C.N.T.*, 2015 NSPC 43. If this becomes established law, extrajudicial measures will not be available for this type of offence and the Note will need to be amended accordingly.

132. *Ibid.*, at p. 2

He acknowledges that, had he had the benefit of this training and the Practice Note when he provided advice in this case, he would have had more tools at his disposal to make the appropriate call.

from other provinces who practice in the same area; and he has since been apprised of recent case law that supports the view on “extrinsic evidence” set out in the Practice Note. He acknowledges that, had he had the benefit of this training and the Practice Note when he provided advice in this case, he would have had more tools at his disposal to make

the appropriate call.

In my view, the new Practice Note is a helpful addition to the guidance provided by the PPS to its prosecutors. However, I recommend that certain aspects of the Note be clarified.

✔ Recommendation 14

The “Sexting” Offences Practice Note should make clear that, for the “personal use defence” to apply, the person or persons depicted in the picture or recording must have consented to the picture or recording being created.

The Practice Note should be updated to reflect the fact that extra-judicial measures for young offenders may not always be available given the finding by at least one court in the province that even possessing child pornography can constitute a “violent offence” pursuant to section 2 of the YCJA, because there

may be a substantial likelihood of psychological harm: see *R. v. C.N.T.*, 2015 NSPC 43.

The Practice Note should also be updated to account for the new federal legislation that introduced alternative cyberbullying-type offences related to sharing intimate images without consent. The Note should make it clear when it is appropriate to proceed with child pornography charges as opposed to non-consensual sharing of image charges, and where both can be said to apply.

Similarly, the Practice Note should reference the new civil tools created pursuant to the *Nova Scotia Cyber-safety Act* and *Safer Communities and Neighbourhoods Act* (see below), and indicate that these should be resorted to in appropriate cases.

The Practice Note’s title should be amended to make its broader content clear. In light of the new cyberbullying-related provisions, an appropriate title might be “Cyberbullying Offences, Child Pornography and the Distribution of Intimate Images Without Consent.” The contents of the Note should also include a mention of some of the forms that cyberbullying can take, such as revenge porn and cyberstalking, and indicate how those fit into the new legal framework.

Amendments to policies, directives and practice notes should occur on a proactive, rather than reactive, basis.

Part of the reason the “Sexting” Offences Practice Note became outdated so quickly is that the PPS does not have a dedicated Crown or Crown department responsible for reviewing new legislation and jurisprudence, and devising policies or revising existing policies as required by ongoing developments in the law. Amendments to policies, directives and practice notes should occur on a proactive, rather than reactive, basis. For example, Bill C-13 includes new tools such as measures to facilitate the removal of images from the Internet. This type of information should be disseminated to prosecutors as soon as practicable.

✔ **Recommendation 15**

The PPS should create a position or charge an existing position with the responsibility for keeping the PPS’s policies, directives and practice notes up to date, based on legislation, jurisprudence, other events or incidents, and general needs.

2. Tracking advice and other resource needs

Through no one’s fault, there was considerable delay in finding a suitable candidate to fill one of the PPS’s two cybercrime positions after the senior Crown’s retirement. Even now that the position has been filled, it seems unlikely that these two positions are sufficient to respond to the demand of child

exploitation and cybercrime prosecutions across the province.

Because of the lack of a centralized case information and management system to help track trends and resource needs within the PPS, it is difficult to paint an accurate picture of the varying workloads of prosecutors across the province and

know where budgets would best be allocated. This deficiency has been recognized time and time again dating back to 1994. The recommendation for a computerized case management system was made in the Ghiz/Archibald Report of 1994, the Nova Scotia Auditor General Report of 1996, the Kaufman Report of 1999, the Waters’ Report of 2010 and the Director of Public Prosecutions’ own MacIntosh Report to the Attorney General in 2013. We understand that, to date, no budget has been allocated for the study and development of such a system for the PPS. While the PPS does have computerized information systems, these do not have the capacity to gather and analyze case processing effectiveness and efficiency at a level to enable enhanced management or reporting. The PPS has no information technology professionals on staff that could develop such a plan. Such a system could also be used to record pre-charge advice provided to the police (see recommendation #8).

While the PPS does have computerized information systems, these do not have the capacity to gather and analyze case processing effectiveness and efficiency at a level to enable enhanced management or reporting.

✔ Recommendation 16

Funding should be allocated to the PPS to develop a centralized case information and management system that, at a minimum, is able to track all cases handled by the PPS and in which the PPS intervenes. Such a system could also be used to record the advice prosecutors give to police, in a manner that accords with Recommendation 9.

The PPS should also strive to train its ICE prosecutors as quickly as possible, and to ensure their caseload is manageable and allows for ongoing training—given the rapidly evolving nature of technology and the law in this area.

C. Provincial Initiatives

1. Department of Justice

The premise and promise of the Cyber-safety Act and CyberSCAN unit

The *Cyber-safety Act*, S.N.S. 2013, c. 2 and the related CyberSCAN investigative unit are the most novel and directly responsive solutions to what was arguably the most time-critical aspect of Rehtaeh's torment: getting ahead of the damaging photograph that was circulating like wild-fire among her peers.

The Act defines cyberbullying as “any electronic communication through the use of technology¹³³ ... typically repeated or with continuing effect, that is intended or ought reasonably be expected to cause fear, intimidation, humiliation, distress or other damage or harm to another person's health, emotional well-being, self-esteem or

reputation, and includes assisting or encouraging such communication in any way.”

About the *Cyber-safety Act*

Introduced on April 25, 2013, the *Cyber-safety Act* allows for victims of cyberbullying to seek a protection order from a Justice of the Peace. Protection orders can be issued to stop the bullying by prohibiting contact with the person being bullied, prohibiting or restricting the use of electronic communications, prohibiting or restricting Internet access or confiscating electronic devices such as computers, cell phones or other mobile devices. These orders are valid for one year and, if disobeyed, can result in a fine or jail term being imposed on the cyberbully. Resort to a protection order can be had even though the name of the cyberbully is unknown. Several persons have already resorted to this process and, in many of these cases, a protection order was issued by the presiding justice.¹³⁴

133. This includes “computers, other electronic devices, social networks, text messaging, instant messaging, websites and electronic mail”.

134. I note that at least two court challenges to the legislation's constitutionality have been initiated. In addition, the Supreme Court of Nova Scotia has revoked a protection order, on the basis of a purposive interpretation of the legislation: see *Self v. Baha'i*, 2015 NSSC 94. I will not comment on the legal challenges as they are for the courts to adjudicate. The outcome of these cases and of any other such challenge will need to be monitored, with a view to making any required amendments to the legislation, while still attempting to achieve its worthy purpose.

The Act also authorizes civil actions for damages or an injunction against cyberbullies – including against those who spread damaging material, even if they did not initiate the cyberbullying. In the case of minors, parents can be held liable for damages. When the victim is a minor, the parents can take action on their child’s behalf. These measures are important because they provide new civil options to victims and their families, instead of relying solely on the police to pursue criminal action.

Most importantly, the state now has a broader role to play outside the criminal law realm. Victims are not left to their own devices and can obtain the state’s assistance without laying a criminal complaint. The CyberSCAN unit, composed of non-police investigators, has been created under the authority of the Department of Justice’s Director of Public Safety.¹³⁵ The unit will investigate complaints of cyberbullying and can resort to a series of measures to intervene in a case where the bullying is substantiated. For example, the unit may try to stop the cyberbullying by speaking to everyone involved, including schools and families. The primary goal is an informal resolution of the matter.

The unit can also send warning letters and request Internet service providers to discontinue certain electronic communication services. It can obtain a court order aimed at identifying cyberbullies whose identities are not known. Pursuant to the Act, it can also apply to a Justice of the Peace for a prevention order, with the same available measures that exist for the protection order described above. In

cases where a crime may have been committed, the unit will make a referral to police for criminal investigation. The unit does not only target youths: reports of cyberbullying can also involve adult victims. Anyone can file a complaint with the unit -- not just the victim or target of the cyberbullying.

Aside from ICE training and interviewing courses, CyberSCAN investigators have received training to help them develop the skills to use the Internet as an investigative tool. There are also plans for investigators to pursue training in online investigation techniques at the Canadian Police College in Ottawa. In my view, the RCMP and HRP should also consider the added value these recognized courses might have for their own specialized investigators.

With the Cyber-safety Act, victims are not left to their own devices and can obtain the state’s assistance without laying a criminal complaint.

135. See amendments to the *Safer Communities and Neighbourhoods Act*, S.N.S. 2006, c. 6

The CyberSCAN investigative unit became operational in September 2013 and, since then, it has reviewed over 500 cases. Referrals have been made by parents and guardians, schools, police, Victim Services and, of course, people who report being cyberbullied. Approximately one third of these cases have been resolved successfully using the unit's informal resolution process; others have been resolved by sending a warning letter to the respondent. In only two instances has the unit had to resort to a court order. This approach has proved effective in stopping cyberbullying; it has also raised public awareness – getting out the word that this type of social citizenship will not be tolerated.

As part of their work, unit investigators have forged effective working relationships. They have developed protocols with several international social media companies and Internet service providers to preserve evidence of cyberbullying. They have also been able to assist with many complaints by having offensive cyberbullying material and intimate images removed from public websites and domains. The CyberSCAN unit has found that companies will often assist without the need for a court order.

They have also worked with education representatives to develop information-sharing protocols. As a result, complaints have been coming from within the school system. Schools are using the unit as a resource and, at the schools' request, many presentations have been given to students. Investigators will often follow up on a cyberbullying complaint by giving a presentation at the school involved. The unit has been particularly sensitive to immediately responding to emerging crises occurring at a school as a result of cyberbullying or intimate images being shared.

For the Halifax District RCMP, raising awareness of the CyberSCAN unit is one of its top three operational priorities for 2014-2015. Several presentations have been given to both RCMP and municipal police officers, and these will continue. The training includes tips on all types of cybercrime investigations; as well as how to distinguish cases that fall under CyberSCAN's mandate from those that are criminal in nature and should be investigated by the police.

The CyberSCAN unit came about in response to a gap: situations where cyberbullying caused significant

torment and damage, yet did not amount to harassment, child pornography or any other criminal offence. Faced with these incidents, schools usually managed them using their code of conduct, which wasn't enough to address the bigger problem. I believe the unit has shown a lot of promise to fill this gap. However, in my view, what should not occur is to fail to make the unit's resources available to a victim of conduct that falls within its mandate, but that also falls within the scope of the criminal law. This concern is particularly valid in light of the new broader offences of distributing or making available intimate images

without consent. In Rehtaeh's case, for instance, the matter could be and was criminally investigated by the police. But that did little to assist her with the cyberbullying she experienced.

Collaboration between the CyberSCAN Unit and police investigators

An oft-cited concern is how to put a stop to cyberbullying without impeding an ongoing criminal investigation. I believe this concern is overstated. Two separate tracks can run simultaneously: first, a civil track whose goal is to erase the damage to the extent possible; and second, the possibility of recourse to the criminal law. The first response is immediate and not intended to interfere with anything.

In instances where the concern about riding two horses is valid, there may be times when putting an end to the bullying must be the priority. While the place where that line should be drawn is not entirely clear, I am hopeful that, in many cases, the criminal and civil investigative units can work alongside each other and cooperate to an extent that will not jeopardize the criminal investigation. Just as the CyberSCAN unit can refer cases to the police, police should refer cases to the unit wherever appropriate. Of course, many of the tools at the disposal of the CyberSCAN unit are also now within the police's arsenal. Police investigators should not hesitate to have recourse to these measures, whether in conjunction with a criminal investigation or not.

Even beyond the criminal aspect of Rehtaeh's case, the CyberSCAN unit could have assisted. There were many instances, on Facebook and in other places, where people called her names because of the photograph

or related rumours. These comments didn't threaten her security in the criminal harassment sense, but they tormented her. The advantage of the unit is that it can approach any person involved in cyberbullying (a broad definition under the Act) and not just the original in-

stigator. Any person who forwards or posts another person's cyberbullying tactics can be subject to the unit's measures. The more people the unit approaches – even if they are only peripherally involved – the faster the message will get out that the behaviour is unacceptable and won't be tolerated. It is also less controversial for CyberSCAN investigators than criminal investigators to be engaged with a school. In a case such as Rehtaeh's, there may be room to delineate respective roles for each unit: for instance, where the criminal investigation is focused on the instigators of the circulating image, it may not hamper the investigation to have the CyberSCAN unit approach the broader circle of people disseminating the image or aggravating the situation.

In many cases, the criminal and civil investigative units can work alongside each other.

I particularly want to underscore these initiatives because they focus on what must be done once cyberbullying has been reported to the authorities. Much good has been done since this case by raising awareness, developing preventative measures, creating anonymous reporting tools within schools and launching a “Speak Up” campaign to address bullying and cyberbullying. But the problem in Rehtaeh’s case related more to the

Rehtaeh did speak up. She did seek help. She did report. And yet her crisis was not resolved. The system did not have adequate tools to help her.

time of these events.

✔ Recommendation 17

In those cases where the cyberbullying conduct may be criminal in nature, the CyberSCAN Unit and the police should agree to work together to ensure there is a prompt investigation and a strategy to protect the alleged victim from further acts of bullying. To achieve these goals, the CyberSCAN Unit and the police should define the parameters of their respective work to meet these goals, determine how best to interact and identify ways to co-exist and run parallel investigations, when necessary.

2. Advisory Council on the Status of Women

Action Team on Sexual Violence and Bullying

On April 11, 2013, in the wake of Rehtaeh’s death, the Province appointed then-Minister Marilyn More to coordinate its immediate response to the events that led to her death, and also “to recommend longer-term actions to deal with sexual violence, bullying and cyberbullying, youth mental health, substance abuse, and changing societal norms and relationships.” An Action Team put in place developed short-term initiatives, such as the Sexual Assault Awareness Month, as well as the longer-term improvements set out in the Action Team’s “Progress Report and Transition Plan” dated August 20, 2013.

This report sought to identify means to improve “responses to sexual violence incidents by our justice, social services, health and educational systems for improved supports for victims/survivors of all ages and their families.”¹³⁶ It recognized some of the issues identified here, related to conflicting mandates and privacy and information sharing, and called for better coordination and collaboration among agencies and public service providers.

136. *Ibid.*, at p. 3

The report is noteworthy in its effort to go beyond the more obvious issues of sexual violence and bullying to address the underlying “attitudinal and behavioural issues” that have arisen as a result of “shifting sexual norms.” In response to the need “to look for ways to promote more positive attitudes and behaviours among youth”, the report proposes a “holistic and integrated approach to prevention that focuses on the causes and contributors that can result in complex social issues such as sexual violence, bullying and suicide.”¹⁴⁷

I wholeheartedly agree that the true solution to the problem lies in the evolution of societal norms related to sexual assault specifically, and gender equality more broadly. The Advisory Council on the Status of Women reported to us that they have perceived a change in attitude since the Parsons matter. These issues have also received greater attention recently because of incidents at two Nova Scotia universities.¹³⁸ The government’s coordinated strategy on sexual violence is a very positive step in trying to shift norms.

3. Department of Community Services

Coordinated Response to Sexual Violence

In June 2015, the provincial government released a report entitled: *Breaking the Silence: A Coordinated Response to Sexual Violence in Nova Scotia*. This report outlines some strategic actions the province will undertake over the next two years to respond to the issue of sexual violence.

- ⑤ First, in terms of public education, awareness and prevention, the province committed to establish a public

awareness committee, tasked with creating a public education campaign and developing resources. The province intends to develop training materials on sexual violence and a provincial training network. It will also invest in a “Prevention Innovation Fund” to support the expansion of best practices, research and better use of technology to a large network of groups, organizations and marginalized populations.

- ⑤ Second, the province hopes to improve services and supports to victims of sexual violence. It proposes to offer specialized training and apply new technology to ensure that immediate support is available to victims, and to coordinate and build on existing community-support networks. It also plans to expand the Sexual Assault Nurse Examiner (SANE) program to certain areas of the province, and increase funding for three sexual assault centres.
- ⑤ Third, from a policy perspective, the province has established an interdepartmental committee to review and align sexual violence policies and processes with a view to supporting prevention and providing support services. The Department of Justice is represented on this committee. The province will also review its funding for support

137. Progress Report and Transition Plan, *supra*, at pp. 2 and 4

138. See the following reports that have resulted from these two incidents: *Report of the Task Force on Misogyny, Sexism and Homophobia in Dalhousie University Faculty of Dentistry* (June 26, 2015), available at <http://www.dal.ca/content/dam/dalhousie/pdf/cultureofrespect/DalhousieDentistry-TaskForceReport-June2015.pdf>; and *Promoting a Culture of Safety, Respect and Consent at Saint Mary’s University and Beyond: Report from the President’s Council* (December 15, 2013), available at <http://www.smu.ca/webfiles/PresidentsCouncilReport-2013.pdf>

services in order to improve access and ensure an equitable distribution of services across gender, age, ability, income and geographical lines.

As the report states, this strategy is “just the beginning.” The province should remain committed both to this strategy and to pursuing its efforts to challenge deep-rooted social norms to promote healthy behaviours and relationships.

I do not want to appear to be diminishing the work of other governmental departments – such as the Department of Health and Wellness, which has done work on suicide prevention, the Department of Education and Early Childhood, which continues to lead the province’s bullying and cyber-bullying strategy, and Communications Nova Scotia, which launched a campaign on the need to get consent before sexual activity – that have also done good work in areas where needs were identified as a result of the Parsons and other similar cases. My point is not to provide an exhaustive list of the various initiatives that exist, but to draw attention to certain novel or creative solutions.

There is no doubt that this case has improved linkages between Education and various other departments or agencies such as Health, Justice and Community Services. Such cooperative approaches are no doubt beneficial to youths and their families.

Conclusion



Conclusion

This is a tragic case that resulted in the loss of a spirited life. The system did not work the way it should have. In particular, it failed to adapt to or respond quickly enough to a cultural context steeped in new technologies. The problem is complex. My observations and recommendations are meant to provide some guidance, so that other victims who reach out for help do not suffer in the same way.

Was the decision not to lay sexual assault charges appropriate?

I concluded that the decision not to lay any sexual assault charges was within

A teenage girl was sexually objectified in a dehumanizing way. Instead of intervening to help someone in a vulnerable state, two other young persons decided to treat her as a prop.

the realm of reasonable decisions given all the circumstances. However, my conclusion should not be seen as an acceptance of what took place. Whether the evidence could support a successful criminal prosecution does not end the matter. What took place on November 12, 2011, in the Eastern Passage bedroom was wrong on many levels. Even those

parts of the facts that are not in dispute are not acceptable. A young person's integrity, dignity and privacy was violated in a degrading manner. A teenage girl was sexually objectified in a dehumanizing way. Instead of intervening to help someone in a vulnerable state, two other young persons decided to treat her as a prop.

It is important for me to stress that, in the future, a similar case which does not suffer from the same array of issues would almost certainly warrant the laying of charges. Reliability issues that are due to the heavy consumption of alcohol are not in and of themselves a sufficient basis to avoid laying a charge. Similarly, inconsistencies, even of the scope that existed in this case, are not in and of themselves a sufficient basis to avoid laying a charge. It was the accumulation of issues listed by the Crown (set out above) that made her decision one that could reasonably be made.

Did the system respond appropriately to the cyberbullying?

In my review, I have concluded that, in any future case and in light of the new

Its unforgiving nature leaves little time to ponder; it calls for immediate action.

avenues available, authorities must take timely action to stop cyberbullying. While we are still in the early stages of fully understanding the phenomenon, we are now keenly aware of the rapid devastation it can cause. The traditional way of doing things will no longer suffice.

As one representative from Nova Scotia's Advisory Council on the Status of Women said, "Individuals have needs that need to be met before the various systems' needs are met." I agree. A successful criminal prosecution is not necessarily the most pressing objective. There is an urgent need to adapt and react differently in the face of the rapid harm social media can cause. Its unforgiving nature leaves little time to ponder; it calls for immediate action.

Cases that involve young persons and persons in crisis – regardless of whether they involve cyberbullying – should be prioritized and investigated much more promptly than happened in this case. While I found that no one portion of the delay was inexplicable, the overall delay was simply unacceptable.

Was the decision not to lay child pornography charges appropriate?

Finally, I have concluded that charges of child pornography ought to have been laid at the conclusion of the initial police investigation. The charges laid after Rehtaeh's death against two individuals resulted in convictions. New evidence gathered after Rehtaeh's passing was of minimal impact. Yet no charges were initially laid. A main question that prompted this review was, why?

While I found that no one portion of the delay was inexplicable, the overall delay was simply unacceptable.

The explanation for the failure to lay charges is straightforward and does not lend itself to any magical solution. To put it simply: this was a case of human error. The initial response should have been positive. It was negative because of a misunderstanding of the law. The negative response became a positive one following Rehtaeh's passing, because the case was examined again and the mistake was identified. There was no fundamental systemic problem, just a single, unfortunate error—one that any recommendation in this report will be unlikely to prevent. The criminal justice system "is human and therefore fallible."¹³⁹ In some cases, it fails accused persons; in others, victims of crime. While we should always strive to improve the system, er-

139. *United States v. Burns*, [2001] 1 S.C.R. 283, 2001 SCC 7, at para. 115, citing *R. v. Mattan*, [1998] E.W.J. No. 4668 (QL) (C.A.)

*To put it simply:
this was a case
of human error.
There was no
fundamental
systemic problem
—just a single,
unfortunate error.*

rors are inevitable. Despite its flaws, a system that allows for the exercise of human discretion is still better than one wholly dependent on a formulaic application of rules that drive a set result.

Nevertheless, my review recommends

improvements to the justice system. I hope that they are practicable and concrete so they can be implemented in a timely manner. In particular, I believe that implementing a policy to prioritize police investigations involving youth and persons in crisis is one of the most pressing recommendations. Merging or creating greater proximity between the Integrated Sexual Assault Investigation Team and the Integrated Internet Child Exploitation Unit should also be a priority. Had an investigator who specializes in child pornography offences been more closely involved in this case, the Crown prosecutors' erroneous advice would very likely not have had the same impact. An experienced investigator is an important check against the inevitability of the occasional piece of wrong advice on the part of the Crown, just as the Crown is an important check against erroneous calls made by the police.

We are aware that the review process, as well as the publicity surrounding Rehtaeh's case, has been difficult on some of the central participants. I wish to state that, whatever mistakes were made in this case, I saw only good faith on the part of all participants. Rehtaeh's parents understandably feel devastated by the loss of Rehtaeh. They

Two convictions resulted from the criminal complaint made in this case. Whatever aspect of justice this salvaged, it came much too late. Too late for Rehtaeh, who was deeply affected by the cyberbullying that she suffered – which was not resolved in a timely way. Too late for a child in distress, who had to wait close to a year for the police investigation to offer her an answer. Too late for someone who never got to see justice being served, because the justice system's initial response to her complaint was an unjustified "no."

have often expressed their hope that, for the next young person, the justice system will do better. That promise to Rehtaeh has guided this report.

Appendices



Appendix A: Terms of Reference

Nova Scotia Department of Justice: Parsons Case Independent Review

In accordance with my authority as the Minister of Justice and Attorney General, and my responsibility for the prosecution service and the administration of justice within the Province, as well as Section 7 of the *Police Act*, S.N.S., 2004, c. 31 and Section 6 of the *Public Prosecutions Act*, S.N.S. 1990, c. 21, I am ordering and authorizing an independent, external review.

Purpose

- The Department of Justice will engage an out-of-province independent expert in the areas of policing and prosecutions to conduct a review.
- The purpose of the review is to focus on the police and the Public Prosecution Service's handling of the Parsons case, the related policies and procedures, and to result in recommendations for improvements to the justice system,
- The review shall respect the principle of prosecutorial discretion, and all reasonable measures shall be taken to ensure it does not impact any ongoing criminal investigation or proceeding.
- The review shall take into consideration the impact of technology on young people, their families, their interaction with the justice system, and police investigations.

Scope/Responsibilities:

The scope of the review is as follows:

- To determine whether the police investigation into the Parsons matter complied with all training, policies, procedures and guidelines in place at the time of the investigation;
- To determine whether the policies, procedures and guidelines for police regarding investigations of allegations of sexual assault, child pornography, and other offences related to cyberbullying are adequate and appropriate;
- To determine whether the length of time taken to conduct the police investigation in the Parsons matter was appropriate, and if not, to determine how investigations could reasonably be expedited in similar cases;

- To determine whether the advice given to police by the Public Prosecution Service in the Parsons matter complied with all appropriate training, policies, procedures and guidelines established by the Public Prosecution Service;
- To determine whether the policies and guidelines of the Public Prosecution Service regarding advice to police when the police request such assistance are adequate and appropriate;
- To determine whether the complementary but distinct roles of the police and the Public Prosecution Service were understood and respected;
- To make recommendations on any of the preceding matters.

Reporting

The independent out-of-province expert shall report his or her findings and any recommendations based on his or her analysis in a written report to the Minister of Justice and the Minister responsible for the Advisory Council on the Status of Women. In writing the report, the expert will respect personal privacy concerns.

The expert shall provide regular updates to the Ministers, and the written report will be provided to the Ministers by April 1, 2014, or sooner if practicable.

The report shall be a matter of public record.

I hereby order that Murray Segal, LLB, BCL, shall conduct the review.

DATED this 7th day of August, 2013, Halifax Regional Municipality, Province of Nova Scotia.

Ross Landry
Minister of Justice and Attorney General

Appendix B:

Timeline

Date	Investigative Step or Other Occurrence
2011	
Nov. 12 (Sat.)	Date of making child pornography incident and alleged sexual assault
Nov. 14 (Mon.)	Rehtaeh attends school
Nov. 15-16	Rehtaeh doesn't attend school
Nov. 17	Rehtaeh learns about picture through a friend. Rehtaeh retrieves her belongings from the school for her transfer. Students calling her names.
Nov. 18	Rehtaeh no longer registered at Cole Harbour High School Rehtaeh reaches out to her mother and aunt. Mental Health Mobile Crisis Team called by family
Nov. 19 (Sat.)	Complaint by Leah Parsons to the RCMP RCMP Cst. Kim Murphy is dispatched to take the complaint Initial interview of Rehtaeh conducted by Cst. Murphy at Cole Harbour Detachment. Handwritten notes, not recorded
Nov. 20	File routed from RCMP to Major Crime RCMP/HRP Integrated Sexual Assault Investigation Team (SAIT) Call between Cst. Murphy and Leah Parsons. Cst. Murphy requests that Rehtaeh obtain the photo from a friend and provide it to her
Nov. 21	Hard copy of file forwarded from RCMP to SAIT
Nov. 22	RCMP forwards electronic ViCLAS (Violent Crime Linkage Analysis System) book to SAIT File assigned by Sgt. Ron Legere to HRP D./Cst. Patricia Snair at SAIT Sgt. Legere notes that Rehtaeh was interviewed by the initial investigator without the involvement of the Department of Community Services (DCS) or SAIT, and that he will call that investigator in regards to this D./Cst. Snair completes the Child Welfare Referral form and sends to DCS to request a joint interview with a child protection worker DCS intake receives referral from D./Cst. Snair at 10:30 a.m. and assigns matter to social worker Robyn Byrne Leah Parsons is advised that D./Cst. Snair is lead investigator and a joint interview is being arranged for the next day at the DCS office in Dartmouth Rehtaeh now registered at Dartmouth High School

Nov. 23	Robyn Byrne advised that joint interview will take place today at DCS' offices Joint interview is rescheduled at D./Cst. Snair's behest as a result of snow-storm. D./Cst. Snair began commute to Dartmouth but roads are unsafe to travel from Halifax to Dartmouth. New date scheduled for November 29th through Leah Parsons Robyn Byrne speaks with Leah Parsons to ensure safety planning in interim. Advised that Rehtaeh has changed schools D./Cst. Snair sends "Special Service Request" for pictures to be taken of injuries to Rehtaeh's right wrist and right hip
Nov. 29	Video recorded joint interview is conducted and second statement from Rehtaeh is taken by D./Cst. Snair at DCS office in Dartmouth. Medical release is obtained. Rehtaeh provides names of students who would have seen the picture to her knowledge and BBM numbers for the suspects Social worker Robyn Byrne is present for the interview Leah Parsons interviewed separately by D./Cst. Snair and Robyn Byrne
Dec. 1	D./Cst. Snair attends Duffus Health Centre and obtains medical records from Dr. Verma who examined Rehtaeh on November 22 and 23 D./Cst. Snair attends Major Crime RCMP/HRP Integrated Internet Child Exploitation (ICE) office to discuss child pornography aspect of file with Cpl. Jadie Spence Cpl. Spence provides information about the investigation of child pornography offences. D./Cst. Snair is also provided with documents relating to what the technology unit can retrieve from Blackberrys; what evidence Research In Motion (RIM) can provide investigators by way of production orders; and a police template for an Information to Obtain a Search Warrant to seize a mobile device incidental to arrest.
Dec. 7	D./Cst. Snair sends email to RIM requesting that any text messages, BBMs, emails and pictures sent to or from the Blackberrys of Adam, Josh, and Eric be preserved for the period of November 12 to 23, 2011 RIM replies that they will preserve what they have for 90 days (until March 6, 2012) and will release it to police upon receipt of a production order
Dec. 15	D./Cst. Snair meets with and takes audio statement from central witness Lucy D./Cst. Snair meets with and takes audio statement from potential witness Amanda D./Cst. Snair meets with and takes audio statement from potential witness, mother of Lucy
Dec. 23	D./Cst. Snair requests additional diary date for ongoing investigation
2012	
Jan. 3	Extension granted by Sgt. Legere
Jan. 4	D./Cst. Snair calls Leah Parsons to update her on the file

Jan. 6	Leah Parsons calls D./Cst. Snair to advise that Rehtaeh has received a Facebook message from Josh. D./Cst. Snair requests that the message be emailed to her. Rehtaeh sends the message to D./Cst. Snair
Jan. 12	Rehtaeh no longer registered at Dartmouth High School
Jan. 13	D./Cst. Snair completes the preparation of an Information to Obtain a Production Order for RIM in order to obtain the cell phone data for the cellular phones of Josh, Adam and Eric Production Order is issued by a Justice of the Peace and served on RIM. RIM has two weeks to produce the information S./Sgt. Richard Lane advised by Supt. Sykes that Leah Parsons called and is concerned about progress of the file. S./Sgt. Lane contacts Leah Parsons after review of file and leaves voicemail that it is being actively investigated, that the officer in charge is being diligent, and that they are awaiting information from outside organizations S./Sgt. Lane speaks with Leah Parsons and indicates he has no concerns about the speed of the investigation thus far
Jan. 24	RIM contacts D./Cst. Snair about a date error on the Order and requests a corrected Order
Jan. 26	Order corrected, signed by Justice of the Peace and re-served
Feb. 1	D./Cst. Snair requests additional diary date – indicates she is awaiting results of RIM Production Order Sgt. Legere returns message from Leah Parsons who is frustrated with the length of time the investigation is taking. Sgt. Legere informs Leah Parsons that they are awaiting the results of warrants and the investigation is progressing normally. He indicates that they cannot predict how long it will take. He notes that Ms. Parsons appears satisfied with this explanation.
Feb. 2	Rehtaeh now registered at Prince Andrew High School
Feb. 13	Response received from RIM: D./Cst. Snair receives cell phone numbers, PIN numbers, names and email addresses as well as service provider relating to each phone Data relating to the content of any written communications must be obtained from the respective service providers
Feb. 15	D./Cst. Snair requests confirmation from a telecommunications service provider that 3 cell phone numbers (for 2 suspects as well as Rehtaeh) relate to subscribers of this service provider. The service provider confirms this
Feb. 16	Production Order prepared requesting data from the service provider for all 3 numbers. Order issued and served on the service provider. Production Order prepared for another service provider for a fourth number relating to third suspect, issued and served on this service provider
Feb. 22	Cpl. Marion Fraser reviews file. Notes that submission of information to ViCLAS is noted on file but none received by ViCLAS Unit. Asks for it to be forwarded for input of data and quality control

March 6	D./Cst. Snair forwards required information to ViCLAS
March 8	S./Sgt. Lane speaks to Leah Parsons to update her that they still do not have the required information from the cell phone providers. Ms. Parsons was understanding and simply wanted to make sure the file was still being investigated
March 9	Submission to ViCLAS completed. Cpl. Fraser requests that information be submitted in a timely fashion in the future
March	Rehtaeh attends the Emergency Department of the IWK Health Centre. Remains there for 5 weeks
March 13	First telecommunications service provider provides cell phone data including text messages for all 3 cell phones (used by Rehtaeh, Josh and Eric)
March 16	Second telecommunications service provider provides cell phone data for Adam's phone but this does not include text messages as this service provider did not keep that data at the relevant time
April 5	D./Cst. Snair reviews text messages received from from the telecommunications service provider. Text messages corroborate various aspects of the allegations but do not provide any indication as to who sent or received the picture. Investigator further notes that no messages "confirm" that Rehtaeh was sexually assaulted D./Cst. Snair requests an additional diary date to continue investigation
April 6-17	D./Cst. Snair on vacation
April 10	Extension granted by Sgt. Bruce Briers as investigation is still ongoing
April 20	Rehtaeh discharged from IWK; exchanges between IWK and Prince Andrews re: education plan for her return to school
May 25	D./Cst. Snair contacts Cst. Jason Hill, school liaison officer for Cole Harbour High, and asks him to try to get contact information from the school for potential witness Rachel, the person who would have provided the picture to Rehtaeh. Cst. Hill replies that there is no student with the matching last name D./Cst. Snair contacts Leah Parsons to obtain alternative last name and cell phone number. Cst. Hill provides related contact information
June 5	D./Cst. Snair calls potential witness Rachel who agrees to meet the next day D./Cst. Snair requests additional diary date
June 6	D./Cst. Snair takes audio statement from Rachel. Indicates she asked Lucy for the picture because Rehtaeh wanted it for the police. Lucy sent it to her
June 7	D./Cst. Snair contacts potential witness Linda, the mother of suspects/ witnesses Adam and Max. Leaves voicemail
June 12	Extension granted by S/Sgt Mark McKinley
June 13	Worker from Avalon Sexual Assault Centre who is assisting Rehtaeh contacts Victim Services on behalf of Rehtaeh. Case assigned to HRP Victim Services case worker Verona Singer. Rehtaeh is contacted and advised of this the same day

	Verona Singer emails D./Cst. Snair to arrange a meeting with her and Rehtaeh in order to discuss the status of the investigation and threats Rehtaeh would have recently received. Ms. Singer indicates that Rehtaeh would like her to be present as a support person
June 14	D./Cst. Snair receives email and meeting is scheduled for the day after D./Cst. Snair's return from vacation. Sgt. Legere advises he will also attend the meeting
June 16	D./Cst. Snair leaves new voicemail for Linda, mother of Adam and Max
June 17-26	D./Cst. Snair on vacation
June 27	Meeting between D./Cst. Snair, Sgt. Legere, Rehtaeh, Leah Parsons, Glen Canning and Verona Singer at Dartmouth police detachment. Leah Parsons voices concerns over the length of the investigation. Sgt. Legere indicates these investigations can take up to a year to complete. Discussion relating to threats Rehtaeh has received Video interview conducted with Rehtaeh regarding these threats. Determination made that the threats are unrelated to this investigation. File assigned to patrol for investigation
July 31	D./Cst. Snair again tries to contact mother of Adam and Max, but Adam answers the phone. D./Cst. Snair advises that she is investigating an incident involving Rehtaeh Parsons and would like to speak with him, his mother, Max, as well as Eric and Josh. D./Cst. Snair advises him to inform his mother and contact her to schedule a time D./Cst. Snair requests an additional diary date to conduct these interviews
Aug. 1	Sgt. Sheldon Hynes reviews file and grants extension
Aug. 14	D./Cst. Snair receives voicemail from Leah Parsons. Returns call but voicemail is full
Aug. 21	D./Cst. Snair calls potential suspect/witness Eric and speaks with his mother D./Cst. Snair informs her of the investigation and requests that Eric come in to provide a statement Eric returns D./Cst. Snair's call and arranges to meet on August 28th
Aug. 23	D./Cst. Snair calls Rehtaeh to update her on the file but her cell phone is out of service. D./Cst. Snair contacts Glen Canning who provides Rehtaeh's new cell phone number
Aug. 24	D./Cst. Snair calls Rehtaeh and updates her on the file. D./Cst. Snair later receives a voicemail from Leah Parsons and tries to return the call but voicemail is full D./Cst. Snair requests an additional diary date
Aug. 28	Video interview of Eric at Dartmouth police detachment Sgt. Legere receives voicemail from Leah Parsons and tries to return call without success

Aug. 29	D./Cst. Snair calls Leah Parsons but voicemail is full. Leah Parsons leaves another voicemail indicating that she's been trying to reach D./Cst. Snair without success. D./Cst. Snair returns call and leaves a voicemail. Leah Parsons returns call and D./Cst. Snair updates her on the file
Aug. 30	D./Cst. Snair receives a voicemail from mother of Adam and Max who provides her email address. D./Cst. Snair sends email correspondence advising she is investigating a sexual assault that would have taken place at her home while she was present for a certain period of time, as well as child pornography offences. D./Cst. Snair advises she would like to speak with her and her sons
Aug. 31	Linda agrees to meet but is unavailable until the week of September 10th. D./Cst. Snair proposes September 20th or 21st as she will be on vacation and is then required in court. Linda indicates she will speak to her husband and get back to her
Sept. 8-17	D./Cst. Snair on vacation
Sept.	Rehtaeh is registered at Citadel High School for the new semester and resides with her father. Glen Canning discussed the issues Rehtaeh was dealing with at length with the school
Sept. 18	D./Cst. Snair emails Linda to arrange a time to meet Leah Parsons calls D./Cst. Snair for an update. D./Cst. Snair advises she is still trying to meet with the boys and their mother
Sept. 19	Linda emails that she declines to meet D./Cst. Snair contacts Josh and asks to meet. He agrees. D./Cst. Snair advises him to discuss the matter with his parents and to call back to arrange a time
Oct. 9	D./Cst. Snair calls Josh and leaves a voicemail. Josh returns the call and asks if it is mandatory that they meet. D./Cst. Snair informs him that it is voluntary at this time. He declines
Oct. 10	D./Cst. Snair requests an additional diary date
Oct. 11	Extension granted by Sgt. Sheldon Hynes
Oct. 12	D./Cst. Snair calls Leah Parsons and leaves voicemail advising that she has completed the gathering of evidence and will review the file with supervisor as well as consult with the Crown. D./Cst. Snair advises that it could take weeks since the Crown office is very busy, as are the police
Oct. 15	Leah Parsons leaves voicemail asking for D./Cst. Snair to call her. D./Cst. Snair returns call but voicemail is full
Oct. 18	Leah Parsons leaves voicemail asking for D./Cst. Snair to call her. D./Cst. Snair returns call but voicemail is full
Oct. 24	Leah Parsons leaves voicemail asking for D./Cst. Snair to call her. D./Cst. Snair returns call but voicemail is full

Leah Parsons calls back and asks for clarification about D./Cst. Snair's voicemail. Ms. Parsons asks if D./Cst. Snair has interviewed the boys. D./Cst. Snair advises that she is not in a position to discuss the evidence at this time. Leah Parsons is upset that they won't know anything until it's over and hangs up on D./Cst. Snair

Oct. 26	D./Cst. Snair meets with Cpl. Jadie Spence from ICE. They review the file and discuss how they have sufficient grounds to arrest Josh and Adam for distributing child pornography, and Eric for possessing child pornography. They discuss the possibility of seizing their phones incident to arrest. Cpl. Spence indicates that a warrant will be required to search the phones once they are seized Cpl. Spence specifically indicates that the personal use defence doesn't apply given that the picture was sent to third parties D./Cst. Snair contacts the RCMP Technological Crime Unit and is advised that they may be able to retrieve evidence of a photo having been transferred to or from a Blackberry, even if the photo has been deleted from the phone
Oct. 30	In person consultation with Crown counsel Shauna MacDonald and Peter Dostal. At the end of the consultation meeting, Ms. MacDonald advises D./Cst. Snair that she is of the view that there is no reasonable prospect of conviction in relation to a sexual assault charge Regarding potential child pornography charges, D./Cst. Snair is advised that although there may be sufficient grounds to arrest and seize the phones, Mr. Dostal wishes to consult with a more senior Crown about whether the Crown would proceed with charges of child pornography in the circumstances of this case S./Sgt. Lane returns a call from Leah Parsons. Ms. Parsons shares her concerns regarding the length of the investigation, the attitude of the investigating officer, and the fact that she is not being provided with any details of the investigation. S./Sgt. Lane advises that he will review the file and call her the next day S./Sgt. Lane reviews the file and discusses it with Sgt. Legere who also reviews the file. They determine that a considerable amount of work was done
Oct. 31	Sgt. Legere speaks with Leah Parsons and updates her on the status of the investigation. He informs her that following a Crown consultation, there is insufficient evidence to proceed with sexual assault charges, but that a senior Crown is being consulted with respect to child pornography charges
Nov. 1	D./Cst. Snair contacts Peter Dostal but he advises that he has not yet had a chance to discuss the matter with his superior, Craig Botterill
Nov. 2	Sgt. Legere speaks with Leah Parsons to inform her that the Crown has yet to speak with the senior Crown D./Cst. Snair leaves a voicemail for Peter Dostal. Mr. Dostal leaves a voicemail with D./Cst. Snair explaining that they are not in a position to proceed with child pornography charges

	D./Cst. Snair calls Peter Dostal for clarification and further details are provided D./Cst. Snair indicates on the file that the Crown is not willing to proceed with charges of child pornography or sexual assault. Sgt. Legere is advised and will contact Leah Parsons
Nov. 13	Sgt. Legere makes three attempts to reach Leah Parsons but voicemail is full
Nov. 14	Message received from Leah Parsons. Sgt. Legere attempts to call Leah Parsons but voicemail is full Sgt. Legere reaches Leah Parsons and advises her that no child pornography charges are going to be laid. He explains how police consulted with the Crown and why they would not proceed with child pornography or sexual assault charges. He advises that the boys' families will be contacted and that the boys will be cautioned
Nov. 16	Leah Parsons emails Sgt. Legere and asks that he be the one to advise Rehtaeh of the outcome of the investigation. She voices frustration with the investigation and the investigating officer Sgt. Legere speaks with Leah Parsons. He indicates that he would prefer telling Rehtaeh in person but he is leaving for a 2-week course. They agree that he will phone her and Leah will be advised when this is done so that she can be there for Rehtaeh Sgt. Legere advises Rehtaeh that no charges will be laid. He walks through the results of the investigation and indicates that Rehtaeh appeared to understand Sgt. Legere emails Leah Parsons back to confirm that he has spoken to Rehtaeh, and asks if she wishes to reconnect with Victim Services
Dec. 5	Eric's family advised that no charges will be laid but are informed of the seriousness of their son's actions. D./Cst. Snair obtains assurances from Eric's parents that they will talk to their son about this Family of Adam and Max advised that no charges will be laid but is also cautioned and informed of the seriousness of their sons' actions and that this occurred while Linda was present Unsuccessful attempt to contact Josh and his parents
Dec. 7	Josh's family advised that no charges will be laid but are informed of the seriousness of their son's actions. D./Cst. Snair obtains assurances from Josh's parents that they will talk to their son about this D./Cst. Snair closes file and files Concluding Report
Dec. 11	Sgt. Mark Hobeck reviews file prior to closure. Indicates that it will be re-opened if new information comes to light
2013	
Jan. 11	Rehtaeh no longer registered at Citadel High School and returns to live with her mother Leah Parsons in Dartmouth
February	Rehtaeh is registered at Prince Andrew High School for 2nd semester

March	Rehtaeh no longer registered at Prince Andrew High School
Apr. 5	Rehtaeh attempts suicide. Cst. Heidi Stevenson responds to the call
Apr. 8	Rehtaeh passes away
Apr. 9	Facebook messages sent by Josh to Leah Parsons
Apr. 10	Police file reassessment begins
Apr. 11	Leah Parsons provides Facebook messages received from Josh to D./Cst. Chris Gorman of ICE D./Cst. Gorman locates Josh's Facebook profile File reassessed and child pornography component of the investigation is reopened Sgt. Andrew Matthews (ICE) assigned as lead investigator
Apr. 12	Victim Services reviews file but determines that there is no one to refer to its services given that Rehtaeh has passed away Sgt. Matthews and D./Cst. Gorman meet to review the file and determine immediate next steps
April-August	Ongoing police investigation and new witness statements obtained
Aug. 8	Distribution of child pornography charges laid against Josh Making and distribution of child pornography charges laid against Adam
2014	
Sept. 22	Adam convicted of one count of making child pornography pursuant to a guilty plea
Nov. 13	Adam receives a one-year conditional discharge
Nov. 24	Josh convicted of one count of distributing child pornography pursuant to a guilty plea
2015	
Jan. 15	Josh receives a suspended sentence and one year of probation

Appendix C:

Persons Contacted

List of organizations, institutions, agencies and persons interviewed or contacted for the purpose of this report

1. Halifax Regional Police

(a) Senior Management
Chief of Police Jean-Michel Blais
Deputy Chief Bill Moore
Supt. Jim Perrin

(b) Supervisors
S./Sgt. Richard Lane (SAIT)
S./Sgt. Fred Priestly (ICE)
Sgt. Ron Legere (SAIT)
Sgt. Mark Hobeck (SAIT)
Sgt. Andrew Matthews (ICE)
Sgt. Michael Strickland (ICE)

(c) Investigators and officers
Cpl. Jadie Spence (ICE)
D./Cst. Patricia Snair (SAIT)

(d) Victim Services
Dr. Verona Singer, Coordinator

2. Royal Canadian Mounted Police

(a) Senior Management
Commander Brian Brennan
Assistant Commissioner Alphonse MacNeil
Chief Supt. Roland Wells
Insp. Trish MacCormack

(b) Community Policing & Crime Prevention / Hybrid Hub / School Liaison Program
Insp. Dan Murchison
Insp. Rick Shaw, Atlantic Youth Intervention & Diversion
S./Sgt. R. Scott MacDonald
Sgt. Craig Smith
Cpl. Greg Church

(c) Supervisors, investigators and officers
Cpl. Wayne Sutherland
Cst. Kim Murphy
Cst. Jason Hill

3. Nova Scotia Public Prosecution Service

Martin E. Herschorn, Q.C., Director of Public Prosecutions
Denise Smith, Q.C., Deputy Director of Public Prosecutions
Adrian Reid, Q.C., Deputy Director of Public Prosecutions (former)
Andrew Macdonald, Chief Crown Attorney, Special Prosecutions
Craig Botterill, Q.C., Special Prosecutions (retired)
Shauna MacDonald, Special Prosecutions
Peter Dostal, Special Prosecutions

4. Department of Community Services

Deputy Minister Lynn Hartwell
Sylvie Ouellet, District Manager
Robyn Byrne, Social Worker

5. Department of Justice

Minister Ross Landry
Minister Lena Diab

Roger Merrick, Director, Public Safety Division (CyberSCAN Unit)
Robert Purcell, Executive Director, Public Safety Division (CyberSCAN Unit)

6. Advisory Council on the Status of Women

Minister Marilyn More
Stephanie MacInnis-Langley, Executive Director
Jeannie Flynn, Director of Policy

7. Department of Education and Early Childhood Development

Nancy Pynch-Worthylake, Senior Executive Director, Public Schools
Don Glover, Director, Student Services

8. Avalon Sexual Assault Centre

Irene Smith, Executive Director

9. Family of Rehtaeh Parsons

Leah Parsons and Jason Barnes
Glen and Krista Canning

Appendix D:

Recommendations

✔ Recommendation 1

The HRP and the RCMP should revise their sexual assault and child abuse policies to be precise, clear and consistent about the proper protocol for interviewing children and youth. In particular, the initial information gathered by responding officers should not be obtained from the child, where possible and appropriate. If responding officers interview the child, they should obtain only the limited information required at that stage. The interview should ideally not be conducted in the presence of a parent or adult known to the child, unless the child requires this support.

Investigating officers should endeavour to interview the child alongside a DCS worker at the earliest opportunity.

A stand-alone Child/Youth Intervention and Interview Policy should be created, clearly setting out the protocol for police intervention in cases involving an underage victim, and to highlight key aspects of the Child Interview Course. The term “youth” as well as “child” should be used in the title and body of the protocol, to dispel any belief that it only applies to young children.

Front line officers should be reminded of the protocol. Consideration should be given to other means of providing these officers with a periodic refresher, such as circulating the new protocol and highlighting it in general police courses.

✔ Recommendation 2

An integrated “sex crimes unit” should be created or there should be closer collaboration between SAIT and ICE on investigative files that touch on both their areas of expertise. Joint task forces should be created when appropriate. ICE and SAIT should be located in closer physical proximity to facilitate exchanges of information and advice, and investigators should be encouraged to work collaboratively and share information.

✔ Recommendation 3

More efforts should be made to make both the general public and key institutions, such as the police and schools, aware of novel ways to address cyberbullying. The police along with other authorities and stakeholders, such as the Department of Education and the Department of Justice representatives from the CyberSCAN Unit, should develop a “cyberbullying”

protocol that would identify in which instances to use these new alternatives. The protocol should be designed with a view to flexibility and acknowledge that various approaches can be used simultaneously.

Given the kind of damage that cyberbullying can rapidly cause, the protocol should state that if police investigators have the requisite grounds to prevent further instances of cyberbullying or to seize images or electronic devices used to commit cyberbullying-type offences, they should consider obtaining a recognizance order or seizing the images or devices in a timely way. They should at all times consider interim remedies to promptly put an end to the cyberbullying.

The role of police liaison officers within schools should be clarified, in particular as it relates to their involvement in criminal investigations and their interactions with police investigators.

✔ Recommendation 4

Upon being assigned to SAIT or as soon thereafter as practicable, investigators should receive training specific to sexual assault investigations and to victim responses to sexual violence. Consideration should be given to creating a buddy system or assigning a mentor to officers who are new to SAIT. Investigators should also develop a tentative overall investigative plan to be discussed with and reviewed by a superior at the outset of the investigation. This value-added step should be integrated into the current quality assurance system, to make it less pro forma.

Crown prosecutors who handle sexual assault cases should also receive more training about sexual violence and responses to sexual violence, with a particular focus on trauma-informed responses.

The general training received by all officers at the police college should include a course on policing and technology, and regular updates on any new capabilities should be provided to all officers. All Crown prosecutors should also be trained in this area.

✔ Recommendation 5

Police services should assess whether police-based victim services can be expanded to cover sexual assault investigations and other crimes involving serious violence. Police officers who may come into contact with victims of sexual violence should be made aware of the availability of victim services to facilitate communications with complainants and their families, and be encouraged to make appropriate referrals to and use of these services.

✔ Recommendation 6

Police should prioritize investigations involving young persons – both as potential targets and/or complainants or victims – over cases involving adults. Investigations involving persons in crisis should also be prioritized over cases that do not have a similar urgent component.

✔ Recommendation 7

SAIT should be sufficiently resourced so that investigators can complete their investigations in a timely manner. SAIT should be a last resort for additional human resources that may be required to assist with other matters such as homicide investigations.

✔ Recommendation 8

The PPS Directive on Providing Advice to Police should be amended to require that, in cases where the Crown prosecutor opines that there are insufficient grounds to lay a charge or that there is no realistic prospect of conviction—and unless the prosecutor has himself or herself undertaken a thorough review of the file, the factual assumptions that underlie the opinion should be set out for the police investigator.

The PPS Directive on the Decision to Prosecute should clarify that the “realistic prospect of conviction” threshold involves a determination that a conviction is “more than technically or theoretically available” and, in the event of uncertainty on that point, the Crown prosecutor should consult with supervisors and experienced colleagues.

✔ Recommendation 9

The PPS’s Directive on Providing Advice to the Police should be amended to be realistic in its application, while remaining responsive to its underlying rationales. The amended Directive should include the following:

- A Crown “file” should be created for every case in which advice is provided to the police. This could be done in electronic form.
- A brief endorsement or notation in the Crown file should minimally be done in every case where advice is provided.
- This documentation should be done as soon as possible after the consultation.
- The advice should be more reliably and thoroughly recorded in cases involving certain types of more serious offences and certain types of advice, such as advice relating to the laying of charges.
- Where the Crown opines that there is no realistic prospect of conviction or there are insufficient grounds to lay a charge, the basis for this opinion should be put in writing and forwarded to the police on request.

The PPS’s management should reinforce to Crown prosecutors the need to abide by this Directive.

✔ Recommendation 10

There should be more Crown counsel available to prosecute ICE cases, and these Crown counsel should receive increased training in this highly specialized area.

✔ Recommendation 11

The police should explore the creation of a cybercrime support unit with a broad mandate to be involved in any investigation that requires this expertise.

✔ Recommendation 12

The “Hybrid Hub” should continue its expansion throughout the province. It should be viewed not only as a way of diverting potential offenders from the criminal justice system, but in general as a way of providing assistance to youths who are in crisis.

✔ Recommendation 13

The Department of Justice and the Department of Education together should ascertain whether the cyberbullying-related provisions included in the *Education Act* in 2013 are sufficient to address a scenario like the one that occurred in the Parsons case. If they are not, the language should be amended to broaden their application.

The two departments should also canvass whether principals and school staff have received enough guidance on how to interpret and apply the new provisions.

The role of police liaison officers should be clarified both in terms of their tasks and responsibilities and in terms of their interactions with (a) police investigators when there is an active criminal investigation involving a student or students, and (b) police liaison officers in other schools.

Information-sharing guidelines should be established between schools and police outside of the SchoolsPlus program.

✔ Recommendation 14

The “Sexting” Offences Practice Note should make clear that, for the “personal use defence” to apply, the person or persons depicted in the picture or recording must have consented to the picture or recording being created.

The Practice Note should be updated to reflect the fact that extra-judicial measures for young offenders may not always be available given the finding by at least one court in the province that even possessing child pornography can constitute a “violent offence” pursuant to section 2 of the YCJA, because there may be a substantial likelihood of psychological harm: see *R. v. C.N.T.*, 2015 NSPC 43.

The Practice Note should also be updated to account for the new federal legislation that introduced alternative cyberbullying-type offences related to sharing intimate images without consent. The Note should make it clear when it is appropriate to proceed with child pornography charges as opposed to non-consensual sharing of image charges, and where both can be said to apply.

Similarly, the Practice Note should reference the new civil tools created pursuant to the Nova Scotia *Cyber-safety Act* and *Safer Communities and Neighbourhoods Act*, and indicate that these should be resorted to in appropriate cases.

The Practice Note's title should be amended to make its broader content clear. In light of the new cyberbullying-related provisions, an appropriate title might be "Cyberbullying Offences, Child Pornography and the Distribution of Intimate Images Without Consent." The contents of the Note should also include a mention of some of the forms that cyberbullying can take, such as revenge porn and cyberstalking, and indicate how those fit into the new legal framework.

✔ **Recommendation 15**

The PPS should create a position or charge an existing position with the responsibility for keeping the PPS's policies, directives and practice notes up to date, based on legislation, jurisprudence, other events or incidents, and general needs.

✔ **Recommendation 16**

Funding should be allocated to the PPS to develop a centralized case information and management system that, at a minimum, is able to track all cases handled by the PPS and in which the PPS intervenes. Such a system could also be used to record the advice prosecutors give to police, in a manner that accords with Recommendation 9.

The PPS should also strive to train its ICE prosecutors as quickly as possible, and to ensure their caseload is manageable and allows for ongoing training—given the rapidly evolving nature of technology and the law in this area.

✔ **Recommendation 17**

In those cases where the cyberbullying conduct may be criminal in nature, the CyberSCAN Unit and the police should agree to work together to ensure there is a prompt investigation and a strategy to protect the alleged victim from further acts of bullying. To achieve these goals, the CyberSCAN Unit and the police should define the parameters of their respective work to meet these goals, determine how best to interact and identify ways to co-exist and run parallel investigations, when necessary.