Translated from the original French

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| R. c. A.E. | 2023 QCCQ 4664 |

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| COURT OF QUÉBEC | | | | |
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| CANADA | | | | |
| PROVINCE OF QUEBEC | | | | |
| DISTRICT OF ABITIBI | | | |  | |
| LOCALITY OF CHIBOUGAMAU | | | |
| “Criminal and Penal Division” | | | | |
| No.: | 170-01-000031-210 | | | |
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| DATE: | May 19, 2023 | | | |
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| PRESIDING: THE HONOURABLE PIERRE LORTIE, J.C.Q. | |  |  | |
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| **JUDGMENT**  ***KHELAWON* APPLICATION** | | | | |
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#### ORDER

1. The Court rendered an order pursuant to section 486.4 of the *Criminal Code* [*Cr.C*.] that any information that could identify the complainants shall not be published in any document or broadcast. For ease of understanding, the version of the judgment given to the parties contains the names of those concerned and the designation of places. The public version filed in the case databanks will be redacted.

#### DESIGNATIONS

1. Several people involved in this case have the same family name. To avoid confusion and for ease of reading, the Court has used several first names. No discourtesy is intended.

#### INTRODUCTION

1. The accused, 33 years old, is charged with sexual offences against three complainants who were under the age of 16 years at the time. They are:
2. X [X], his stepdaughter, currently 15 years old;
3. Y [Y], his daughter, currently 6 years old;
4. Z [Z], X’s friend, currently 16 years old.
5. The offences are summarized below:[[1]](#footnote-1)

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| --- | --- | --- | --- |
| **Complainant** | **Count**  **Offence**  ***Cr. C.* section**  **Age at time of offence** | **Place** | **Date (between)** |
| X | Count 1  Sexual interference  151(a)  8 and 13 years | Town A  Town B  Town C | January 1, 2016  November 30, 2020 |
|  | Count 2  Invitation to sexual touching  152(a)  10 and 11 years | Town B | January 1, 2018  December 31, 2018 |
|  | Count 3  Exposure  173(2)(a)  13 years | Town B | November 23, 2020  December 1, 2020 |
|  | Count 4  Making sexually explicit material available  171.1(1)(b)(2)(a)  13 years | Town C | August 1, 2020  December 1, 2020 |
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| Y | Count 3  Exposure  173(2)(a)  4 years | Town B | November 23, 2020  December 1, 2020 |
| Z | Count 5  Sexual interference  151(a)  11 and 12 years | Town B | December 1, 2018  June 1, 2019 |
|  | Count 6  Invitation to sexual touching  152(a)  11 and 12 years | Town B | December 1, 2018  June 1, 2019 |

1. During a *voir dire*, the prosecution sought to have the following evidence admitted in evidence to establish the truth of their contents:
2. X’s statements to her grandmother J. W. [J. or the grandmother] in October 2019 [the statements].
3. X’s verbal statement to the police, videotaped on December 7, 2020.
4. X and her mother, who live in Town A, twice failed to attend Court at Town D, even though summoned by the police.
5. The prosecution claims that X cannot testify because she is stressed and traumatized. The prosecution argues that the criteria of necessity and reliability developed by the Supreme Court in *Khelawon*[[2]](#footnote-2) are met. This is an exception to the hearsay rule.
6. The accused formally objects to this request and submits that the two criteria are not met. He noted the danger of admitting this evidence without an opportunity to cross-examine.

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#### ISSUE

1. Are X’s statements and her videorecording admissible in evidence under the principled exception to the hearsay rule based on necessity and reliability?

#### RELATIONSHIPS BETWEEN THE PLAYERS

1. To properly understand this case, it is helpful to describe the relationships between the people involved.
2. F. N. [F.], born in 1988, is J.’s daughter. They are both Indigenous members of the Algonquin Nation.[[3]](#footnote-3)
3. At one time, F. had a relationship with D. W. [D.]. They had a daughter, X, born in 2007.
4. D. committed suicide around 2010.
5. F. then started a relationship with the accused. They had a child, Y, born in 2016.
6. X and Z went to the same school in Town B and became great friends.

#### LANGUAGE

1. The accused is an Anglophone who understands French, but with some limitations.
2. During the Court hearings, an interpreter was present via Teams to orally translate consecutively the testimony given in French by Z, the grandmother, and the two police officers. X’s taped version in French had been previously transcribed and translated into English.
3. The accused retained the services of a Francophone lawyer, who required the interpreter’s help for certain segments in English. After being informed, the accused waived his right to a trial in English and stated that he wanted his Francophone lawyer’s mandate to continue.[[4]](#footnote-4)

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#### ESSENTIAL CHRONOLOGY

1. To properly understand the debate, it is helpful to describe the main facts chronologically:

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| --- | --- |
| January 1, 2016 | Start of alleged acts against X  (until December 1, 2020) |
| December 1, 2018 | Start of alleged acts against Z  (until June 1, 2019) |
| October 2019 | X’s statements to her grandmother J. |
| November 23, 2020 | Start of alleged acts against Y  (until December 1, 2020) |
| December 7, 2020 | X’s video interview with police officer Stéphanie Tremblay |
| December 8, 2020 | Z’s video interview with the police officer |
| December 9, 2020 | Accused’s statement to the police |
| March 9, 2021 | Charges |
| July 12, 2022 | Start of trial  Adjournment |
| September 9, 2022 | Case management conference |
| February 13, 2023 | Continuation of trial   * Witness heard: Z   *Khelawon* *voir dire*   * Witnesses heard: J., Officer Louis Compartino, Officer Stéphanie Tremblay |

1. These elements will be discussed in detail.

#### CONDUCT OF THE TRIAL

1. The case was initially scheduled for July 12, 2022, in a special division in Town D, and was expected to last five days.
2. On July 12, however, the Court postponed the hearing.
3. First, there was a misunderstanding on whether the trial would be held in English or in French. This required a review of important judgments rendered by the Court of Appeal[[5]](#footnote-5) in cases where the prosecution and the defence adopted different positions. The issue was resolved at a case management conference on September 9, 2022.
4. Second, X did not show up. The prosecution then announced that it would be presenting a *Khelawon* application regarding the statements and video recording, which required some preparation.
5. A new special division was created on February 13, 2023.

#### Z’s testimony

1. On February 13, 2023, the Court viewed the video recording taped on December 8, 2020, in which Z gave her version to Officer Stéphanie Tremblay. The recording lasts one and a half hours. After the hearing,[[6]](#footnote-6) a written transcript was ordered along with an English translation.
2. Basically, Z described her friendship with X and the visits to her home. She sometimes found herself alone with the accused, who took advantage of the situation to touch her buttocks (about five times) and grab a breast (once). He also offered to [translation] “finger” her. Z added that X was also touched by the accused.
3. After viewing the video, Z adopted the contents of the video recording and was cross-examined by counsel for the accused. This procedure is consistent with section 715.1 *Cr. C.,* as admitted by the accused.[[7]](#footnote-7)
4. During her testimony in Court, Z was accompanied by a support dog (Stella), supervised by Officer Richard Ayotte of the Sûreté du Québec in Rouyn-Noranda.
5. During the cross-examination, counsel for the accused attacked the reliability of her story concerning the alleged acts (precise description, frequency, place, etc.).

#### *VOIR DIRE* EVIDENCE

1. As X did not attend the trial, a *voir dire* was held on the prosecution’s *Khelawon* application.
2. The evidence is summarized as follows.

#### The grandmother’s testimony

1. The grandmother lives in the Algonquin community ([Nation A]) of [Community A].
2. She is F.’s mother and X’s grandmother.
3. She testified that X was very affected by her father’s suicide. Other relatives also committed suicide.
4. She has a good relationship with X, who trusts her.
5. In October 2019, X came to visit her for a few days while cultural activities were taking place.
6. At some point they found themselves together in a car. X started to cry and said that she was tired of living, that she wanted to die. Her grandmother asked her what was going on. X answered that the accused tried to abuse her when they were both at home. It happened when F. was not at home. Once, the accused got out of the shower naked and approached her, trying to attract her. Another time, the accused tried to touch her between the legs. X said that when she wanted to go to the convenience store, the accused offered her money if he could touch her.
7. She showed her grandmother a photo of the accused sticking his tongue out, as if he was trying to [translation] “seduce” her.
8. X was crying when she described these incidents. The grandmother also started to cry.
9. They went into a sweat lodge to cleanse themselves.
10. The grandmother than spoke to a worker at the local health centre and told F..
11. She testified that X is having problems at school and is drinking. The young girl also has problems concentrating.
12. The grandmother feels that this situation is causing X enormous stress, which explains why she did not attend Court.
13. It is also difficult for F., who supports the family and works to earn an income, to attend.

#### Testimony of Officer Louis Compartino

1. He is the investigator in X’s file.
2. Before the trial scheduled for July 12, 2022, he spoke to X and to F. to make sure that they would attend in Town D. They live in Town A. He was very surprised that they were absent in July.
3. He then tried unsuccessfully to contact X.
4. On September 6, 2022, he spoke to F.. She said that it was too stressful for X to attend Court.
5. The officer said that they could use a support dog, which F. welcomed.
6. He made seven calls and sent an email to confirm her presence in Court. He also left messages.
7. In January 2023, he received confirmation from F. that they would both attend Court.
8. He made another call on Friday, February 10, to explain the importance of attending. She answered that she would try, but that it was complicated.
9. On Monday morning, February 13, he called but could not contact F..
10. F. and X did not attend the trial.

#### Testimony of Officer Stéphanie Tremblay

1. The officer met with X for the video recording on December 7, 2020, that lasted approximately 1 hour and 40 minutes.
2. She has been specially trained for this type of interview.
3. In her work, she uses the [translation] “Investigative interview guide for child or victim witnesses” called the “NICHD Guide”.[[8]](#footnote-8)
4. One of the essential elements is to avoid leading questions to avoid contaminating the witness.
5. One of the usual questions is [translation] “tell me everything, from beginning to end”.
6. In X’s case, the recording stemmed from a report to the DYP pursuant to a multisectoral agreement (DYP, DCPP, police).
7. The officer had never met X before the recording.
8. At the start of the interview, she established the following: [translation] “If I ask you a question and you don’t know the answer, tell me: “Stéphanie, I don’t know”. Okay? I want you to tell me only about what you know or remember. Okay, X? And if I tell you things that are false, so, that are not true, you have to tell me ...”. [[9]](#footnote-9) They did a practice exercise.
9. Plus: [translation] “It’s really important that you tell me the truth today about the things that actually happened to you”.[[10]](#footnote-10)
10. According to police practice, X was not under oath during the recording.

#### X’s video recording

1. The Court viewed the video recording of X taped on December 7, 2020. It also has the written transcript.
2. It can be summarized as follows.
3. In the introductory discussion, X said that she is uneasy when she is around other people, for example, at school sports activities.[[11]](#footnote-11)
4. The officer asked X why they were having this meeting. She spontaneously answered: [translation] “Oh! It, it’s because of... like the touchings”.[[12]](#footnote-12) It started in Town A and happened several times. It involved the accused.[[13]](#footnote-13)
5. Sometimes, [translation] “he slapped the buttocks”.[[14]](#footnote-14)
6. With respect to the incident in Town A, she said that they were playing Xbox. [translation] “It started when I was sleeping next to him, we were watching a movie. I fell asleep and he, like, put his hand inside then, he... he kept moving down. After that, I woke up and I left. Well, I like moved to the other side...”.[[15]](#footnote-15) At first, he was holding her. She added that he put his hand [translation] “inside my underwear”,[[16]](#footnote-16) between her legs.[[17]](#footnote-17) She was very uneasy. Her mother was not there when it happened. Y was not yet born.
7. Another time, at his camp in Town C, the accused lay down in the bed next to F. and X. He put his hand on X’s neck. She felt an [translation] “energy”, as if he wanted to go further.[[18]](#footnote-18)
8. Another time, in Town B, when she was 11 years old, [translation] “he told me to sit down. So, I sat down. He told me...like, he wanted my hand, so I gave him my hand, but he...like, he forced my hand a bit, but I also forced my hand. Like, I wanted...I knew he wanted me to touch his private parts like...and everything. But me, I...like, I also forced with my hand so he couldn’t direct me. Then he told me that it was okay, not to be afraid or anything. ... But it didn’t...like, I wasn’t comfortable, so I still forced my hand. Then I...I removed my hand and went to my bedroom”.[[19]](#footnote-19)
9. X used the words [translation] “each time he tried”,[[20]](#footnote-20) suggesting that this happened several times. She always said no. Angry, the accused refused to give her money for the convenience store.
10. She also saw him masturbating on the sofa, with his boxer shorts pulled down.
11. Recently (last Monday), the accused was in the kitchen in his boxer shorts and changed in front of X and Y, who was 4 years old. The accused was naked for a few seconds.[[21]](#footnote-21)
12. Once, in Town A, [translation] “I asked if I could go to the convenience store and he said, like, if I wanted to go to the convenience store, I had to..like...well, he wanted to lick, like, my privates”.[[22]](#footnote-22) Angry, he refused to let her go to the convenience store or use his tablet.
13. The accused also showed X a movie on his cellphone. According to her: [translation] “It was a guy recording like...like a girl who was...like...sucking him”.[[23]](#footnote-23) The accused was masturbating while watching the movie.
14. As a result of all this, [translation] “I was really uncomfortable. I felt like unsafe, uneasy, stressed, traumatized”.[[24]](#footnote-24)
15. X told her grandmother (J.) everything. She is the person she trusts the most. When she told her about it, they were both driving in the [Community A].

#### Z’s testimony

1. To support the reliability of X’s testimony, the prosecution wanted to file at the *voir dire* Z’s testimony at trial. The accused objected. The Court took the objection under reserve.

#### The accused’s statement

1. On December 9, 2020, the accused gave a written statement to the police, drafted in English. It is admitted that this statement was free and voluntary and complied with his constitutional rights.[[25]](#footnote-25)
2. The prosecution filed this statement in evidence during the *voir dire*,[[26]](#footnote-26) to bolster the reliability of X’s recording.
3. The accused acknowledged that he was alone with X for three weeks while F. was in therapy for her drinking problem. She sometimes slept with him when she was afraid. Other times, he was alone with her either at the house or the chalet.
4. He knows that X told her grandmother about the alleged touchings of the vagina. He said: “... I don’t remember doing that, maybe I put my hand there when I was sleeping”.[[27]](#footnote-27)
5. There was an Xbox in Town A.
6. He remembers an incident at his camp in Town C when, around midnight, he was masturbating on the sofa in the living room while watching pornography on his cellphone. X came into the living room because she was thirsty. She saw what the accused was doing.
7. Another time, X came into the bedroom when the accused and F. were kissing. He said: “Ske killed the mood again, we stop”.
8. On another occasion, X saw him getting out of the shower with a towel. She might have seen him naked because she was watching him closely when he turned around.
9. Moreover:

Q : Did you ever touch X breast, butt or vagina area?

R : I slap her butt, but I don’t caress her, with a towel to. I did it often. F. did that too. But X ask F. that she don’t want slap to her butt anymore, we were in Town D when she ask that, 2-3 years ago.

1. Questioned about the alleged sexual touchings of X, or invitations, the accused answered “No, never”.

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#### ANALYSIS AND DECISION

1. The Court must determine whether X’s statements to her grandmother and her video recording can be filed in evidence at the trial without her having attended Court. The accused objects to the prosecution’s *Khelawon* application.
2. Is this hearsay?
3. In *Khelawon*, the Supreme Court set out the two defining features. First, the out-of-court statement is adduced in evidence to prove the truth of its contents. Second, the absence of a contemporaneous opportunity to cross-examine the declarant. These two features are present here. The statements and video recording therefore constitute hearsay.
4. The general rule is that this evidence is inadmissible even if relevant because it is difficult to test its reliability.
5. However, such evidence may be declared admissible according to the principled approach supported by indicia of necessity and reliability.[[28]](#footnote-28)
6. Admissibility is determined by a judge on a *voir dire* and the onus is on the person who seeks to adduce the evidence to establish these criteria on a balance of probabilities.[[29]](#footnote-29)
7. The Court will examine both criteria in turn.

#### Necessity

1. This criterion is founded on society’s interest in getting at the truth and on the interests of justice of admitting evidence that would otherwise be lost.[[30]](#footnote-30) It is based on the unavailability of the testimony, not the witness.[[31]](#footnote-31) It is given a flexible definition:[[32]](#footnote-32)

[36] Necessity ... should not be approached on the basis that the case must fit into a preordained category. It is a matter of whether, on the facts before the trial judge, direct evidence is not forthcoming with reasonable effort. The reasons for the necessity may be diverse – ranging from total testimonial incompetence to traumatic consequences to the witness of testifying.

1. There is no absolute rule. Necessity may be proved by extrinsic evidence or arise from the circumstances.[[33]](#footnote-33)
2. Merely being uneasy is insufficient to establish necessity. However, for example, it is sufficient where there is evidence that a child who is already traumatized will be even more so if examined by strangers in an unusual setting. The judge does not require proof of actual harm.[[34]](#footnote-34)
3. In this light, is the criterion of necessity met here?
4. It is clear that X’s testimony is necessary to establish the facts supporting the charges. There is no alternative solution.
5. The first indicator of the problem is the failure to attend Court two times (July 2022 and February 2023), despite a formal summons.
6. The Court notes from the grandmother’s testimony that X is very affected by this situation, and even said that she might kill herself. She continues to be shaken by the suicides of her father and other relatives. The grandmother added that her granddaughter’s behaviour has changed. She now has issues at school and is drinking. She has problems concentrating.
7. This testimony is consistent with that of Officer Compartino, who reported that X was overly stressed about attending Court.
8. Moreover, the officer contacted the mother several times, followed up many times, and offered to provide a support dog. All in vain.
9. In her video testimony, X said she was uneasy being around other people. She referred to the stress and trauma caused by this situation.
10. But there is more.
11. The prosecution asks the Court to taken into account, by analogy, the *Gladue*[[35]](#footnote-35) factors developed by the Supreme Court to assess the criterion of necessity with respect to a young Indigenous girl.
12. This argument requires some context.
13. In 1996, the Royal Commission on Aboriginal Peoples[[36]](#footnote-36) described the extremely different perceptions of Aboriginal people on the administration of justice.
14. The same year, Parliament amended the *Criminal Code* to include in section 718.2(e) on sentencing, “all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.”[[37]](#footnote-37) That provision was part of the general reform of the Code focussing on restorative goals.
15. In 1999, the Supreme Court in *Gladue*[[38]](#footnote-38) noted that this provision is designed to ameliorate the serious problem of overrepresentation of aboriginal people in prisons, and to encourage sentencing judges to have recourse to a restorative approach to sentencing. The Court developed a method that considers the unique systemic factors and the appropriate types of procedures by considering innovative practices. Judges are asked to take judicial notice of the systemic factors and of the priority given in aboriginal cultures to a restorative approach. They must consider the “perspectives of aboriginal people or aboriginal communities”[[39]](#footnote-39) as well as alternatives to incarceration.[[40]](#footnote-40) If there is no alternative to incarceration, the length of the term must be carefully considered.[[41]](#footnote-41)
16. Strictly speaking, section 718.2(e) *Cr. C.* and *Gladue* concern Aboriginal offenders.
17. However, that case refers to “the greater problem of aboriginal alienation from the criminal justice system”.[[42]](#footnote-42)
18. In 2019, the Supreme Court in *Barton*[[43]](#footnote-43) dealt with the principles underlying the *Gladue*[[44]](#footnote-44) analysis in a case involving a non-Aboriginal accused charged with murdering an Indigenous sex worker. The Court noted in general the violence against Indigenous women and girls who endure biases in the justice system.[[45]](#footnote-45)
19. Doyle J. of the Alberta Provincial Court in *JNB*[[46]](#footnote-46) agreed with this logic in a case involving an Indigenous woman, a presumed victim of conjugal violence, refused to attend Court to testify against her spouse. The prosecution sought authorization to enter in evidence the complainant’s earlier statement to the police. The judge held that the criterion of necessity was met, relying primarily on *Barton* and the National Inquiry into Missing and Murdered Indigenous Women and Girls. That inquiry records the distrust of a system that has historically disadvantaged women.[[47]](#footnote-47)
20. Moreover, the *Public Inquiry Commission on relations between Indigenous Peoples and certain public services in Québec* [Viens Commission] documents the difficulty women have testifying. Very often, they do not feel safe in a system they do not understand and that is foreign to them. On top of their fear of being stigmatized by their peers, they are often terrified of telling their story to a group of people they do not know.[[48]](#footnote-48) Judges assigned to Indigenous justice matters are well aware of this reality.[[49]](#footnote-49)
21. The combination of all these elements explains X’s absence in Court. It is not a refusal to cooperate or indifference.
22. For all these reasons, the Court concludes that the necessity criterion is met.

#### Reliability

1. To start, as authors Vauclair and Desjardins mention, this exercise concerns threshold reliability rather than ultimate reliability of evidence. This stage concerns indicators of reliability whereas ultimate reliability, if any, will be assessed later.[[50]](#footnote-50)
2. Threshold reliability is met when the evidence is sufficiently reliable to overcome the dangers arising from the difficulty of testing it.[[51]](#footnote-51)
3. Reliability concerns the person who made the statement (X in the recording), not the person who repeats it and who may be cross-examined (grandmother about the statements).[[52]](#footnote-52)
4. In *Bradshaw*,[[53]](#footnote-53) the Supreme Court stated the following: “The hearsay dangers can be overcome and threshold reliability can be established by showing that (1) there are adequate substitutes for testing truth and accuracy (procedural reliability) or (2) there are sufficient circumstantial or evidentiary guarantees that the statement is inherently trustworthy (substantive reliability)”.[[54]](#footnote-54)
5. As the Court of Appeal stated in *Guzoraky*,[[55]](#footnote-55) the dangers associated with hearsay may be excluded one way or the other. The wording chosen by the Supreme Court confirms that it is not necessary to prove both procedural and substantive reliability.
6. In short, procedural reliability and substantive reliability are not mutually exclusive and the factors relevant to one can complement the other.[[56]](#footnote-56)
7. Procedural reliability is established when there are adequate substitutes for testing the evidence. Substitutes for traditional safeguards include a video recording of the statement, the presence of an oath, and a warning about the consequences of lying.[[57]](#footnote-57)
8. Substantive reliability is established if it is inherently trustworthy. To determine this, the trial judge can consider the circumstances in which it was made and evidence (if any) that corroborates or conflicts with the statement.[[58]](#footnote-58) This standard does not require that reliability be established with absolute certainty. Rather, the trial judge must be satisfied that the statement is so reliable that contemporaneous cross-examination of the declarant would add little if anything to the process. Substantive reliability is established when the statement is made under circumstances which substantially negate the possibility that the declarant was untruthful or mistaken.[[59]](#footnote-59)
9. What is the situation here?
10. With respect to procedural reliability, this is a taped interview. In addition, the officer had never met the child before, to avoid the risk of contaminating the witness. She instructed her on the importance of telling the truth and making corrections if necessary. X herself spontaneously raised the topic of the touchings.[[60]](#footnote-60) There are no leading questions. At this stage, all this provides guarantees of reliability especially since the officer represents an authority figure for X.
11. The grandmother testified under oath before the Court and was cross-examined on the statements.
12. As to substantive reliability, X’s version shares the following similarities with those of:
13. The grandmother: the alleged acts that occurred when the mother was absent; the description of certain touchings between the legs; a form of blackmail (e.g.: not allowed to go to the convenience store); taking his towel off when he got out of the shower.
14. The accused (his statement to the police): He spoke about the Xbox game and movies; he said that he might have touched the private parts but that if it happened, it was an accident; he admitted masturbating while watching pornography; X could have seen him naked when he got out of the shower; he slapped the buttocks.
15. Z: The description of the touchings (particularly the buttocks) and invitations to touch him; context of watching movies; the fact that the accused took advantage of times he was alone with the young girls; the form of blackmail in the event of a refusal. Z also described X’s call for help at 3 a.m. and her confidences about the touchings.
16. In *J.D.* rendered in 1996,[[61]](#footnote-61) the Court of Appeal determined that at the *voir dire* stage, the trial judge does not have to conduct [translation] “an isolated, hermetical analysis of the statements, as if only one existed. The judge is free to examine all the statements when considering reliability”. In addition, similarities between several statements may be an indicator of reliability.[[62]](#footnote-62)
17. The Court finds that the criterion of substantive reliability is also met.

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1. This situation is not unique.
2. Apart from *JNB* above,[[63]](#footnote-63) there are two examples from other Canadian appellate courts.
3. In *J.M.*,[[64]](#footnote-64) the Court of Appeal for Ontario confirmed the judge’s decision to admit in evidence statements by a 9-year-old child to her social worker and two recordings to the police, without cross-examination. The child, a victim of sexual offences, did not testify in Court because she was traumatized (necessity). The Court of Appeal stated the following about reliability:

[69] Z.S.[[65]](#footnote-65) had no motive to lie. This was not a case, as are many, where interfamilial discord may spawn unfounded, retaliatory allegations. The disclosure was not prompted by leading questions or other suggestive techniques. Z.S. appears to have an understanding of the difference between the truth and a lie, and the obligation to tell the truth, especially to her CAS worker, Jeff Laforet. In the police interview, Z.S. was fully aware that she was speaking to a police officer involved in an investigation. The police interviews were videotaped, which permitted the trial judge first-hand access to the declarant’s memory, narration and apparent sincerity.

1. In *Abdulkadir*,[[66]](#footnote-66) the Alberta Court of Appeal overturned the trial judge’s decision to dismiss a *Khelawon* application regarding the complainant’s statement to the police. The judge’s decision resulted in an acquittal. The adult complainant had been sexually assaulted by the accused, whom she did not know. The trial lasted several days, and the complainant attended on the sixth day. The prosecution asked the judge if she could testify behind a screen because she was afraid. The complainant answered that the screen did not make a difference. The prosecution began his examination then, after a break, the complainant did not return. The prosecution told the judge that he had received a message from the complainant that she was at the hospital and was sick. She did not attend the next day. In the circumstances, the Court of Appeal ordered a new trial.
2. With the necessary adjustments, the principles developed in these two cases apply here.

◊

1. The prosecution has discharged its burden and its *Khelawon* application is granted.

◊

#### CONCLUSION

**FOR THESE REASONS, THE COURT**:

1. **DECLARES** admissible in evidence to establish the truth of their contents:
2. X’s statements to her grandmother J. W. in October 2019;
3. X’s verbal statement to the police, videorecorded on December 7, 2020.
4. **SCHEDULES** the continuation of the trial on June 26, 2023.

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|  | | **\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**  **PIERRE LORTIE**  **Judge of the Court of Quebec** |
|  | | |
|  | | |
| Mtre Marie-Michelle Boulianne-Otis (July 12 and September 9, 2022) | | |
| Mtre Marie-Philippe Charron (February 13, 14 and 15, 2023) | | |
| Director of Criminal and Penal Prosecutions | | |
|  | | |
| MtreJean Girard | | |
| Counsel for the accused | | |
|  | | |
| Dates of hearing: | 2022: July 12, September 9  2023: February 13, 14 and 15 | |

**SCHEDULE 1**

**COUNTS**

1. Between January 1, 2016 and November 30, 2020, in Town A, in Town B and in Town C, district of Abitibi, for a sexual purpose, did touch a part of the body of [X] (2007…), a person under the age of sixteen (16) years, committing thereby the indictable offence provided by section 151a) of the Criminal code.
2. Between January 1, 2018 and December 31, 2018 in Town B, district of Abitibi, for a sexual purpose, did invite, counsel or incite [X] (2007…), a person under the age of sixteen (16) years, to touch him, committing thereby the indictable offence provided by section 152a) of the Criminal Code.
3. Between November 23, 2020 and December 1, 2020, in Town B, district of Abitibi, did for sexual purpose expose his genital organs to [Y] (2016…) and [X] (2007…), persons under the age of sixteen (16) years, committing thereby the indictable offence provided by section 173(2)a) of the Criminal Code.
4. Between August 1, 2020 and December 1, 2020, in Town C, district of Abitibi, did made available sexually explicit material to [X] (2007…), a person who was, or who the accused believed was under the age of sixteen years, for the purpose of facilitating the commission of an offence under section 151 or 152 or subsections 160(3) or 173(2) or section 271, 272, 273 or 280, committing thereby the indictable offence provided by section 171.1(1)b) (2)a) of the Criminal Code.
5. Between December 1, 2018 and June 1, 2019, in Town B district of Abitibi, for a sexual purpose, did touch a part of the body of [Z] (2007…), a person under the age of sixteen (16) years, committing thereby the indictable offence provided by section 151a) of the Criminal Code.
6. Between December 1, 2018 and June 1, 2019, in Town B, district of Abitibi, for a sexual purpose, did invite, counsel or incite [Z] (2007…), a person under the age of sixteen (16) years, to touch him , committing thereby the indictable offence provided by section 152) of the Criminal Code.

1. The complete counts are reproduced in schedule 1. [↑](#footnote-ref-1)
2. *R.* *v*. *Khelawon*, 2006 SCC 57, [2006] 2 S.C.R. 787 [*Khelawon*]. [↑](#footnote-ref-2)
3. Grandmother’s testimony on February 14, 2023. She is also Indigenous. [↑](#footnote-ref-3)
4. This issue was formally dealt with in a case management conference on September 9, 2022. [↑](#footnote-ref-4)
5. See in particular: *Dow* *c*. *R.*, 2009 QCCA 478; *Parsons* *c*. *R.*, 2014 QCCA 2206; *Dhingra* *c*. *R*., 2021 QCCA 1681. [↑](#footnote-ref-5)
6. The prosecution did not initially plan to use the recording. [↑](#footnote-ref-6)
7. See admission 3, exhibit P-1. [↑](#footnote-ref-7)
8. National Institute of Child Health and Human Development. The Guide’s title page is filed as VD-P2. [↑](#footnote-ref-8)
9. Transcript at 7. [↑](#footnote-ref-9)
10. Transcript at 8. [↑](#footnote-ref-10)
11. Transcript at 4. [↑](#footnote-ref-11)
12. Transcript at 17. [↑](#footnote-ref-12)
13. Transcript at 53. [↑](#footnote-ref-13)
14. Transcript at 17. [↑](#footnote-ref-14)
15. Transcript at 26. [↑](#footnote-ref-15)
16. Transcript at 30. [↑](#footnote-ref-16)
17. Transcript at 33. [↑](#footnote-ref-17)
18. Transcript at 39. [↑](#footnote-ref-18)
19. Transcript at 41. [↑](#footnote-ref-19)
20. Transcript at 42. [↑](#footnote-ref-20)
21. Transcript at 59. [↑](#footnote-ref-21)
22. Transcript at 64. [↑](#footnote-ref-22)
23. Transcript at 80. [↑](#footnote-ref-23)
24. Transcript at 49. [↑](#footnote-ref-24)
25. See admission 10, exhibit P-1. [↑](#footnote-ref-25)
26. VD-P1. [↑](#footnote-ref-26)
27. Lines 13 and following of the statement. [↑](#footnote-ref-27)
28. *Khelawon*, *supra* note 2 at para. 1. [↑](#footnote-ref-28)
29. *Ibid.* at para. 47. [↑](#footnote-ref-29)
30. *Ibid.* at para. 49. [↑](#footnote-ref-30)
31. *Ibid*. at para. 78. [↑](#footnote-ref-31)
32. *R.* *v*. *F. (W.J.)*, [1999] 3 S.C.R. 569. Emphasis added. [↑](#footnote-ref-32)
33. *Ibid*. at para. 37 et seq. [↑](#footnote-ref-33)
34. *R.* *v*. *Rockey*, [1996] 3 S.C.R. 829 at para. 28. [↑](#footnote-ref-34)
35. *R.* *v*. *Gladue*, [1999] 1 S.C.R. 688 [*Gladue*]. [↑](#footnote-ref-35)
36. *Bridging the cultural divide: a report on Aboriginal people and criminal justice in Canada* at 30. [↑](#footnote-ref-36)
37. Emphasis added. [↑](#footnote-ref-37)
38. *Gladue, supra* note 35. [↑](#footnote-ref-38)
39. *Ibid.* at para. 73. [↑](#footnote-ref-39)
40. *Ibid.* at para. 84. [↑](#footnote-ref-40)
41. *Ibid.* at para. 93, point 8. [↑](#footnote-ref-41)
42. *Ibid.* at para. 65. [↑](#footnote-ref-42)
43. *R.* *v*. *Barton*, 2019 SCC 33, [2019] 2 S.C.R. 579 [*Barton*]. [↑](#footnote-ref-43)
44. Benjamin A. Ralston, *The Gladue principles: a guide to the jurisprudence*, (Indigenous Law Centre, University of Saskatchewan, 2021) at 147. [↑](#footnote-ref-44)
45. *Barton*, *supra* note 43 at para. 196 et seq. [↑](#footnote-ref-45)
46. *R.* *v.* *JNB*, 2022 ABPC 169 at para. 78 et seq. [*JNB*]. [↑](#footnote-ref-46)
47. National Inquiry into Missing and Murdered Indigenous Women and Girls. *Reclaiming Power and Place: Final Report*, vol. 1a (Ottawa, 2019) at 692. [↑](#footnote-ref-47)
48. Commission’s Final Report at 298. [↑](#footnote-ref-48)
49. Concerning judicial notice of particular circumstances in their jurisdiction: *R.* *v*. *Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089 at para. 95. [↑](#footnote-ref-49)
50. Martin Vauclair & Tristan Desjardins, *Béliveau-Vauclair : Traité général de preuve et de procédure pénales*, 29th ed., (Montreal: Yvon Blais, 2022) at 1083, No. 44.24. [↑](#footnote-ref-50)
51. *Khelawon*, *supra* note 2 at para. 49. [↑](#footnote-ref-51)
52. M. Vauclair & T. Desjardins, *supra* note 50 at 1084, No. 44.26. [↑](#footnote-ref-52)
53. *R.* *v*. *Bradshaw*, 2017 SCC 35, [2017] 1 S.C.R. 865 at para. 27 [*Bradshaw*]. [↑](#footnote-ref-53)
54. Emphasis added. [↑](#footnote-ref-54)
55. *R.* *c.* *Guzoraky*, 2021 QCCA 1788 at para. 26. [↑](#footnote-ref-55)
56. *Bradshaw*, *supra* note 53 at para. 32. [↑](#footnote-ref-56)
57. *Ibid*. at para. 28. [↑](#footnote-ref-57)
58. *Ibid*. at para. 30. [↑](#footnote-ref-58)
59. *Ibid*. at para. 31. [↑](#footnote-ref-59)
60. Transcript at 17. [↑](#footnote-ref-60)
61. *J.D.* *c.* *R.*, 1997 CanLII 9935 (QC CA) at 18. The Court of Appeal relied primarily on the Supreme Court’s judgment in *R.* *v*. *U. (F.J.)*,1995 CanLII 74 (SCC), [1995] 3 S.C.R. 764. [↑](#footnote-ref-61)
62. *Ibid.* at 23. See also: *Khelawon*, *supra* note 2 at para. 108; *Bradshaw*, *supra* note 53 at para. 53. [↑](#footnote-ref-62)
63. *JNB*, *supra* note 46. [↑](#footnote-ref-63)
64. *R.* *v.* *J.M.*, 2020 ONCA 117. [↑](#footnote-ref-64)
65. The complainant. [↑](#footnote-ref-65)
66. *R.* *v*. *Abdulkadir*, 2020 ABCA 214. [↑](#footnote-ref-66)