

IN THE SUPREME COURT OF FLAVELLE
(On Appeal from the Falconer Court of Appeal)

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

– and –

DAVID HODGKINSON

Respondent

FACTUM OF THE RESPONDENT

Counsel for the Respondent:

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Table of Contents

Part I – Facts and Overview 4

- 1. Overview 4**
- 2. Background Facts 5**
- 3. Judicial History 8**
 - A. Trial Judgment 8
 - B. Court of Appeal..... 10

Part II: Issues on Appeal..... 12

- Issue 1: Does the *Charter* apply to the detention and search of Mr. Hodgkinson by Mr. Fox? 12**
- Issue 2: Did Mr. Fox’s detention of Mr. Hodgkinson contravene section 9 of the *Charter*? 12**
- Issue 3: Did Mr. Fox’s search of Mr. Hodgkinson’s backpack contravene section 8 of the *Charter*?..... 12**
- Issue 4: If one or more of the above *Charter* breaches are established, should the evidence obtained during the police search be excluded pursuant to section 24(2) of the *Charter*?12**

Part III: Law and Argument 12

- Issue 1: The Charter applies to the search and detention of Mr. Hodgkinson by Mr. Fox 12**
 - A. The *Charter* applies to an arrest by a private citizen 12
 - B. Mr. Fox was a state agent 14
- Issue 2: Mr. Hodgkinson was arbitrarily detained in violation of section 9 of the *Flavellian Charter of Rights and Freedoms* 19**
 - A. The detention was not authorized by law 20
 - B. Section 494(1) is arbitrary 24
- Issue 3: Fox’s search of Hodgkinson’s backpack was an unreasonable search in violation of section 8 of the *Charter* 25**
 - 1. The search was not authorized by law 26**
 - 2. If the search was authorized by law, that law is unreasonable..... 29**
- Issue 4: The evidence obtained from the police searches should be excluded under section 24(2) of the Charter 31**
 - A. The *Charter*-infringing conduct was serious 31
 - B. The impact of the breach on Mr. Hodgkinson’s *Charter* rights was serious 34
 - C. Society’s interest in adjudication on its merits 36
 - D. The evidence should be excluded under section 24(2) 36

Part IV: Order Sought..... 37

Part V: Table of Authorities 38

Part I – Facts and Overview

1. Overview

1. After attending a seminar, run by the police, Mr. Richard Fox decided to produce a show in which he would catch and then confront a child predator.
2. After receiving advice and encouragement from a police detective, Mr. Fox hired an actress who impersonated a child and lured the Respondent, Mr. David Hodgkinson, to a house with the promise of a sexual encounter.
3. When Mr. Hodgkinson arrived, Mr. Fox confronted, detained and interrogated him. Mr. Fox allowed Mr. Hodgkinson to believe that Mr. Fox was a police officer and searched Mr. Hodgkinson's bag, finding a DVD containing child pornography, before allowing him to flee the house.
4. Mr. Fox subsequently gave Mr. Hodgkinson's bag to the police, who searched both the bag and Mr. Hodgkinson's home. The police used the evidence thereby acquired to charge him with possession and trafficking in child pornography.
5. The detention and search of Mr. Hodgkinson by Mr. Fox occurred while Mr. Fox was acting as a state agent and in violation of Mr. Hodgkinson's *Charter*-protected rights.
6. Mr. Fox arbitrarily detained Mr. Hodgkinson, contrary to section 9 of the *Charter*. Mr. Fox then unreasonably searched Mr. Hodgkinson's bag, contrary to section 8 of the *Charter*.

7. It was on the basis of evidence acquired through these *Charter* breaches that the police obtained the necessary warrants to search Mr. Hodgkinson's bag and home. Such evidence should therefore be excluded under section 24(2) of the *Charter* and the conviction of Mr. Hodgkinson, which rests upon that evidence, should be quashed.
8. *Charter* rights remain paramount, and their breach unacceptable, whether they are violated by a police officer or by an ordinary citizen. Mr. Hodgkinson was entitled to the protections he is afforded by the *Charter* and should not be convicted on the basis of improperly acquired evidence.

2. Background Facts

9. Richard Fox attended a seminar offered by the Mayoville Police Department on "protecting your children from online predators." Based on that presentation, Mr. Fox decided to produce a television show in which he would pose as a minor, initiate sexually explicit conversations with child predators, and then confront the predators on camera.

Problem at paras 2, 5-6.

10. Mr. Fox explained his concept to Detective Stabler, the officer who ran the seminar. She expressed admiration for his initiative and provided advice on how to produce the show both in person and, after giving Mr. Fox her email address, electronically.

11. Detective Stabler advised Mr. Fox that:

1. he should pose as a 12-or-13-year-old and seek out predators over the age of majority to ensure the contact constituted a sexual offence;

2. to generate the most persuasive evidence, he should confront the predators with the chat logs during the interview and have them confess on camera;
3. the predators might bring items with them which would be even more solid evidence of their intention to have sex.

Problem, supra para 9 at paras 7-9.

12. Mr. Fox promised to hand over any evidence obtained.

Problem, supra para 9 at para 9.

13. Mr. Fox hired Chelsea Stoddard, a 19-year-old actress, to pose as a minor. Ms. Stoddard subsequently contacted Mr. Hodgkinson. Ms. Stoddard invited Mr. Hodgkinson to meet privately to have sex and, when Mr. Hodgkinson proved reticent, pressured him by threatening to find another boyfriend if he demurred.

Problem, supra para 9 at paras 8, 10, 11.

14. After obtaining Mr. Hodgkinson's acquiescence, Ms. Stoddard invited Mr. Hodgkinson to a house to meet.

Problem, supra para 9 at para 12.

15. On September 29, 2011 Mr. Hodgkinson arrived at the house and was invited inside by Ms. Stoddard. After inviting Mr. Hodgkinson into the den, Ms. Stoddard left the room. At that point Mr. Fox emerged and confronted him. Mr. Fox wore a dark suit, and had a broad build and air of authority. The entire confrontation was filmed by Mr. Fox, using preplaced cameras.

Problem, supra para 9 at paras 13, 14.

16. Mr. Hodgkinson asked “Am I going to jail?” Rather than clarifying that he was not a police officer, Mr. Fox locked Mr. Hodgkinson in the room and replied “let’s have a little talk first.”

Problem, supra para 9 at para 15.

17. Mr. Fox then confronted Mr. Hodgkinson with the chat logs and interrogated him, asking whether Mr. Hodgkinson had come intending to have sex with a 13-year-old girl. Mr. Fox also informed Mr. Hodgkinson that it was an offence for an adult to have sex with a 13-year-old or to talk with one on the internet for that purpose.

Problem, supra para 9 at paras 15-16.

18. Mr. Hodgkinson replied by asking “are you going to book me now?” Once again, Mr. Fox did not clarify that he was not a police officer, but instead replied “Let’s have a look inside your bag first.” Mr. Hodgkinson, believing Mr. Fox was a police officer, handed over the backpack.

Problem, supra para 9 at para 16.

19. Mr. Hodgkinson asked to be let off with a warning. Mr. Fox said he was free to go and Mr. Hodgkinson ran out of the house, without his backpack.

Problem, supra para 9 at para 17.

20. Mr. Fox handed over both Mr. Hodgkinson’s bag and the tapes of the interrogation to the police. Detective Stabler concluded that because Ms. Stoddard had initiated the sexual discussion and pressured Mr. Hodgkinson into agreeing to sex, the tactics employed

constituted entrapment and therefore the Crown could not succeed in obtaining a conviction for luring.

Problem, supra para 9 at paras 19, 21.

21. On the basis of Mr. Fox's account, Detective Stabler obtained a warrant to search Mr. Hodgkinson's backpack and found a DVD containing child pornography. On that basis the police obtained a warrant and searched Mr. Hodgkinson's home, finding evidence of child pornography and its production.

Problem, supra para 9 at para 22.

22. Mr. Hodgkinson was therefore charged with making child pornography, distribution of child pornography, possession of child pornography and accessing child pornography contrary to sections 163.1(2), (3), (4), and (5) of the Flavellian *Criminal Code* ("Criminal Code").

Problem, supra para 9 at para 23.

Criminal Code, RSC 1985, c C-46, ss 163.1.

3. Judicial History

A. Trial Judgment

23. At trial, Justice Ho held a *voir dire* into the admissibility of the evidence obtained through the police searches of Mr. Hodgkinson's house and backpack. Those searches were authorized by warrants obtained on the basis of DVD evidence found in Mr. Hodgkinson's backpack and on the basis of Mr. Fox's account of the interrogation, respectively.

Problem, supra para 9 at para 24.

24. Justice Ho found that Mr. Fox was a state agent in his detention and search of Mr. Hodgkinson, since the search would not have taken place in the form and manner that it did, but for the involvement of the police. The Crown conceded that if Mr. Fox was a state agent for the purposes of section 8, he was also a state agent for the purposes of section 9, and that unless his detention of Mr. Hodgkinson could be authorized under section 494(1) of the *Criminal Code* it would be arbitrary.

Problem, supra para 9 at para 28.

25. Justice Ho concluded that, while Mr. Hodgkinson had been detained, the detention was not arbitrary since Mr. Fox had reasonable grounds to believe that Mr. Hodgkinson was in possession of child pornography. Therefore the detention did not violate section 9 of the *Charter*.

Problem, supra para 9 at para 31.

26. Justice Ho found that Mr. Hodgkinson had a reasonable expectation of privacy in his backpack, and therefore its seizure by Mr. Fox constituted a search.

Problem, supra para 9 at para 33.

27. However, Justice Ho found that the search met the criteria authorizing a warrantless search from *R v Collins*. Justice Ho held that the search was authorized by law, pursuant to section 494(1) of the *Criminal Code*, and that Mr. Fox had reasonable grounds to believe that Mr. Hodgkinson would be in possession of child pornography. Justice Ho found the law was a reasonable safeguard for situations where a crime was in progress and no police were present. Therefore, Justice Ho found there was no breach of Mr.

Hodgkinson's section 8 rights.

Problem, supra para 9 at paras 34-36.

R v Collins, [1987] 1 SCR 265, 38 DLR (4th) 508 [*Collins*].

28. Justice Ho found that Mr. Hodgkinson's section 10(b) right to counsel was violated but that the violation had no impact on the evidence against him.

Problem, supra para 9 at para 32.

29. Justice Ho therefore ruled that the DVD evidence was admissible, the search warrant was valid and the evidence obtained as a result of the police search was admissible at trial. Mr. Hodgkinson was convicted on all four counts.

Problem, supra para 9 at para 37.

B. Court of Appeal

30. The majority of the Court of Appeal allowed the appeal and found that the evidence obtained from the police search should not have been admitted at trial.

Problem, supra para 9 at para 38.

31. The entire court upheld the trial judge's finding that Mr. Fox was a state agent, and that his actions constituted a search and a detention for the purposes of sections 8 and 9 of the *Charter*.

Problem, supra para 9 at paras 40, 49.

32. The court held that Mr. Fox's search and detention of Mr. Hodgkinson were not authorized by section 494(1) of the *Criminal Code*. It was not apparent to Mr. Fox that Mr. Hodgkinson was in possession of child pornography and Mr. Fox was therefore not

authorized to search him. As such, the search and seizure of Mr. Hodgkinson's backpack violated section 8 of the *Charter*.

Problem, supra para 9 at para 41, 43.

33. The court would also have found that section 494(1) was unreasonable since it was overly broad and because citizens tend to lack the ability to detain criminals while respecting their *Charter* rights. These flaws also meant the law could not be upheld under section 1 of the *Charter*.

Problem, supra para 9 at para 44.

34. The court upheld the trial judge's finding that Mr. Hodgkinson's section 10(b) right to counsel was violated, but that the breach had no impact on what evidence was obtained.

Problem, supra para 9 at para 42.

35. The majority excluded the evidence under section 24(2) of the *Charter*. Applying the test from *R v Grant*, the majority found that the breach had a significant impact on Mr. Hodgkinson's section 8 and 9 rights, and the *Charter*-infringing state conduct was sufficiently severe that these factors outweighed society's interest in adjudicating the case on its merits.

Problem, supra para 9 at para 46.

R v Grant, 2009 SCC 32, [2009] 2 SCR 353 [*Grant*].

36. In dissent, Justice Guest agreed that the evidence was obtained in violation of sections 8 and 9 of the *Charter* but she would not have excluded the evidence under section 24(2).

She held that the reliability of the evidence and the seriousness of the offence outweighed the impact on Hodgkinson's *Charter* rights.

Problem, supra para 9 at para 50.

37. The majority of the Court of Appeal therefore overturned the trial judge's findings and excluded the unconstitutionally obtained evidence.

Part II: Issues on Appeal

38. There are four issues on appeal:

Issue 1: Does the *Charter* apply to the detention and search of Mr. Hodgkinson by Mr. Fox?

Issue 2: Did Mr. Fox's detention of Mr. Hodgkinson contravene section 9 of the *Charter*?

Issue 3: Did Mr. Fox's search of Mr. Hodgkinson's backpack contravene section 8 of the *Charter*?

Issue 4: If one or more of the above *Charter* breaches are established, should the evidence obtained during the police search be excluded pursuant to section 24(2) of the *Charter*?

Part III: Law and Argument

Issue 1: The Charter applies to the search and detention of Mr. Hodgkinson by Mr. Fox

A. The *Charter* applies to an arrest by a private citizen

39. The *Charter* applied to Mr. Fox's conduct when he arrested and searched Mr. Hodgkinson because the arrest was carried out pursuant to section 494 of the *Criminal Code*.

40. The *Charter* must apply to Mr. Fox's conduct. But for government legislation authorizing it, an arrest could constitute unlawful confinement or an illegal detention. When Mr. Fox

arrested Mr. Hodgkinson, according to the Crown, he did so pursuant to a criminal law power, and did so to enforce the criminal law.

41. In *R v Lerke*, the Alberta Court of Appeal held that when one citizen arrests another they are exercising a government function to which the *Charter* applies.

R v Lerke, 1986 ABCA 15, 67 AR 390 [*Lerke*].

42. Although courts have been inconsistent in their application of *Lerke*, in *R v Asante-Mensah*, the Supreme Court of Canada declined to rule on whether an arrest by a private citizen constituted a state action for the purposes of the *Charter*. *Asante-Mensah* indicates that, at the very least, *Lerke* has not been overturned.

R v Asante-Mensah, 2003 SCC 38, [2003] 2 SCR 3 at para 77 [*Asante-Mensah*].

43. In the recent decision *R v McCowan*, Fradshaw J. of the Alberta Provincial Court concluded, on the strength of *Asante-Mensah*, that the Supreme Court of Canada had not overturned *Lerke* in *R v Buhay*, and *Lerke* therefore remained good law. Fradshaw J. used *Lerke* to conclude that the *Charter* applied to the arrest and search of an accused shoplifter by a security guard.

R v McCowan, 2011 ABPC 79, [2011] AJ 239.

44. It would be anomalous and disturbing if treatment of an individual, which would have constituted a *Charter* violation if carried out by a police officer, became immune from scrutiny when carried out by a private citizen, particularly when those actions are the basis upon which the state both acquires evidence and ultimately seeks a conviction.

45. Were the *Charter* not to apply, a black hole would exist, whereby citizen's arrests would become immune from *Charter* scrutiny. Citizens' interests in their *Charter* rights are not diminished when they are unreasonably detained or searched by their fellow citizens rather than by a police officer. Indeed, the danger of *Charter* violations occurring, due to the lack of training of private citizens, is likely to be exacerbated in such circumstances.
46. It would be perverse if the state were to be given an incentive to leave some of the most dangerous and important aspects of its law enforcement function to private citizens who were unencumbered by a constitutional obligation to respect the rights of others. Such an approach would make *Charter*-infringing conduct more likely and put the safety of the detainee and arresting citizen at risk.
47. It cannot be that Mr. Hodgkinson was detained and searched, pursuant to a criminal law power, and yet those actions are totally immune from *Charter* scrutiny.

B. Mr. Fox was a state agent

48. In the alternative, Mr. Fox was a state agent when he detained Mr. Hodgkinson and searched his backpack and, as such, the *Charter* must apply to his conduct. Mr. Fox would not have searched Mr. Hodgkinson's backpack, conducted himself in the manner that he did, and may not have even attempted to produce his television show at all, but for the directions he received from Detective Stabler. Detective Stabler assisted Mr. Fox in orchestrating a specific strategy and, as such, Mr. Fox was a state agent and his conduct is subject to *Charter* scrutiny.

49. The test to determine whether a private individual should be considered a state agent with respect to a particular interaction, such as a search or an interrogation, depends upon the relationship between the state and that individual. The test was enumerated by the Supreme Court of Canada in *R v Broyles*, in the context of police informers, and subsequently endorsed in *R v Buhay*.

R v Broyles, [1991] 3 SCR 595 at 608, 84 Alta LR (2d) 1 [*Broyles*].

R v Buhay, 2003 SCC 30, [2003] 1 SCR 63 at para 25 [*Buhay*].

50. The test, as presented in *Broyles* is: “[w]ould the exchange between the accused and the informer have taken place, in the form and manner in which it did take place, but for the intervention of the state or its agents?”

Broyles, supra para 49 at p 608.

51. In *Buhay*, the Supreme Court of Canada further clarified that the intervention must go beyond a general encouragement to combat crime and must be specific to the case being investigated.

Buhay, supra para 49 at para 30.

52. In this case, Mr. Fox would not have conducted himself as he did, but for the intervention of Detective Stabler. Subsequent to the police seminar, Detective Stabler encouraged Mr. Fox to proceed with his specific plan and assisted him in refining his strategy.

Problem, supra para 9 at para 7.

53. Detective Stabler further provided Mr. Fox with advice on how to ensure that the conduct captured by his show would constitute a sexual offence, including the required ages of both the predator and the “minor”.

Problem, supra para 9 at para 7.

54. Detective Stabler did not merely provide general encouragement for citizens to participate in the detection of crime. Rather, she helped orchestrate the specific investigation and tactics employed by Mr. Fox. Detective Stabler did not merely provide information to Mr. Fox as part of a general seminar, but provided Mr. Fox with her contact information to facilitate ongoing communication and with specific legal and strategic advice as he continued to produce the show. In particular, she suggested tactics to elicit a confession, suggested that he film any confession and suggested that predators might bring items with them which would be solid evidence of their intention to have sex.

Buhay, supra para 49 at para 30.

Problem, supra para 9 at paras 7, 9.

55. Mr. Fox also coordinated with the state by committing to hand over any evidence acquired while producing the show.

Problem, supra para 9 at para 9.

56. Detective Stabler’s advice on both the elements of the relevant offence and the conduct of the interview were necessary for the interrogation to proceed in the way it did. Without this advice, Mr. Fox may not have thought to conduct the interview by presenting chat logs before attempting to elicit a confession. This interrogation strategy likely influenced Mr. Hodgkinson’s perception that he was being interrogated by a police officer, given the

professional tactics involved, and may have contributed to a feeling of panic and desperation, inducing cooperation.

57. Even more significantly, the decision to search Mr. Hodgkinson's backpack, which ultimately led to the evidence on the basis of which Mr. Hodgkinson was charged, was a direct result of Detective Stabler's advice. Detective Stabler specifically noted that predators may bring items with them which would make for solid evidence of their intention to have sex. Without this advice, it is unlikely that Mr. Fox would have attempted to search Mr. Hodgkinson's backpack.

Problem, supra para 9 at para 9.

58. Contrary to the position of the Crown, Detective Stabler's interaction with Mr. Fox went far beyond a general encouragement to participate in the detection of crime. She helped orchestrate and design a strategy to catch and interrogate a specific type of offender. Her advice was tailored to the specific investigation Mr. Fox conducted.

59. In arguing that what occurred in this case was only a "general encouragement" to combat crime, the Crown has misinterpreted *Buhay*. The Supreme Court of Canada's remarks that general encouragement to combat crime is insufficient, and that any interaction must be specific to the investigation, are explained by two factors.

60. First, this statement was a response to the possibility, discussed in the previous paragraph of the judgement, that a general policy by security personnel of cooperating with police, as evidenced by the use of police evidence forms, could be sufficient to make the security guards state agents. Because that interaction evidenced only a general policy of

cooperation it was insufficient to make the guards state agents for the purposes of the particular search at issue.

Buhay, *supra* para 49 at para 29.

61. Second, it is notable that, in *Buhay*, the police only interacted with the security guards *after* they had already searched the defendant's locker. As such, only general encouragements to combat crime could have influenced the search on the but-for test from *Broyles*, since there had been no involvement in the specific investigation before the search occurred. The Supreme Court of Canada clarified that such general interaction was insufficient to make the security guards into state agents.
62. This case stands in stark contrast; Detective Stabler helped design the strategy of a particular investigation and had an ongoing collaborative relationship with Mr. Fox leading up to his detention and search of Mr. Hodgkinson.
63. It is noteworthy that, while Detective Stabler participated in constructing a strategy to catch Mr. Hodgkinson, she at no point informed Mr. Fox of the *Charter* rights of the individuals he would attempt to catch through his show. Nor did she suggest that the police should be involved in the actual confrontation, to reduce the risk of any *Charter* breaches and to ensure that any arrest would be carried out properly.
64. The state cannot evade its obligations under the *Charter*, nor can a citizen's rights under the *Charter* be denied, by simply instructing private citizens of how to perform the role of police officers. In this case the police encouraged, advised and assisted Mr. Fox knowing

that he intended to perform one of their core duties. Having done so, the state cannot rely on his actions while simultaneously washing its hands of his subsequent wrongdoing.

Issue 2: Mr. Hodgkinson was arbitrarily detained in violation of section 9 of the *Flavellian Charter of Rights and Freedoms*

65. The detention of Mr. Hodgkinson was arbitrary. A detention is arbitrary where it is either i) not authorized by law or ii) the authorizing law is itself arbitrary. Contrary to the position of the Appellant, the detention of Mr. Hodgkinson was not authorized by section 494(1) of the *Criminal Code* and, even if it were so authorized, section 494(1) is itself arbitrary.

Grant, supra para 35 at para 56.

66. The Crown has rightly conceded that Mr. Hodgkinson was detained by Mr. Fox. Mr. Fox was detained, according to the standard established in *Grant*, because he reasonably felt legally obliged to comply with Mr. Fox's instructions.

Grant, supra para 35 at para 21.

67. In this case Mr. Fox confronted Mr. Hodgkinson and locked him in a room. This was a clear act of control, taken to establish Mr. Fox's dominance in the situation. Mr. Fox had a powerful and authoritative demeanour which, taken together with his knowledge of the law and access to detailed private chat records, reasonably gave Mr. Hodgkinson the impression that he was a police officer in the course of an investigation. Rather than correcting Mr. Hodgkinson's misapprehension, when Mr. Hodgkinson made it clear he thought Mr. Fox was a police officer, Mr. Fox allowed him to continue under this illusion

and used it to his advantage in securing compliance from Mr. Hodgkinson.

Problem, supra para 9 at paras 15-16.

68. Confronted by an authoritative man who acted like a police officer, did not clarify his identity, and locked him in the room, Mr. Hodgkinson reasonably believed he had no choice but to comply and could not simply walk away. But for that detention, the evidence upon which the Crown relies would not have been acquired.

A. The detention was not authorized by law

69. The Crown argues that Mr. Fox's detention of Mr. Hodgkinson was authorized by section 494(1)(a) of the *Criminal Code*. Section 494(1) of the *Criminal Code* authorizes an ordinary citizen to arrest:

(a) a person whom he finds committing an indictable offence; or

(b) a person who, on reasonable grounds, he believes

(i) has committed a criminal offence, and

(ii) is escaping from and freshly pursued by persons who have lawful authority to arrest that person

Criminal Code, RSC 1985, c C-46, s 494(1).

70. The Crown argues that the offence Mr. Hodgkinson was committing, so as to justify his arrest under section 494(1)(a), was possession of child pornography. However, the Crown cannot rely on Mr. Hodgkinson's possession for two reasons: first, it was not apparent to Mr. Fox that Mr. Hodgkinson was in possession of child pornography and, second, even if such an arrest could have been reasonable, Mr. Fox did not actually detain Mr. Hodgkinson on that basis.

71. As held by the British Columbia Court of Appeal in *R v Abel*, section 494(1) requires that it must be apparent to a reasonable person in the position of the arresting officer that an offence is in progress and there must be an element of immediacy. As noted by the trial judge in that case, upheld by the Court of Appeal, the section requires immediacy and an arrest based on personal observation.

R v Abel, 2008 BCCA 54, [2008] BCJ 197.

72. Mr. Fox had no evidence that Mr. Hodgkinson was in possession of child pornography, and no basis to think that he would have brought any with him. He had certainly made no personal observation to that effect. Mr. Hodgkinson had made no mention of child pornography to Mr. Fox or Ms. Stoddard and there were no visual indications that Mr. Hodgkinson was in possession of any such material.

73. Nor did Mr. Hodgkinson having been entrapped into committing a luring offence make it “apparent” that he was committing a possession offence at that time. Many offences are related. Drug possession may be associated with a laundry list of other crimes, such as trafficking or arms offences, but a reasonable basis to infer drug possession does not make it “apparent” that other offences are in progress.

74. Even if possessing child pornography and luring a minor share a common type of victim, the offences are themselves very different and may be committed by very different types of offenders. The degree of moral opprobrium, justification for the offences, and *actus reus* required are different, despite that one similarity. While hate speech against a religious minority and hate-driven assault against that minority share a common victim, the offences themselves are fundamentally different.

75. Nor can the Crown rely on a general propensity of those involved in sexual offences against children to possess child pornography. Whether an arrest is “apparent” would depend on the subjective knowledge and intent of the arresting individual, and the Crown has provided no evidence that Mr. Hodgkinson had such knowledge or made an arrest on that basis.
76. Were there not a subjective element, then utterly unreasonable and arbitrary detentions could be justified on the basis that a distinct but unconsidered justification may have existed for them. For example, if an individual were to be unreasonably arrested solely because of his ethnicity, the fact that he may, for example, have actually committed a crime or meet the description of someone who had done so, would be irrelevant. It is the basis upon which he was *actually* arrested that is relevant, not the existence of a reasonable justification unknown to, or unconsidered by, the arresting individual.
77. Moreover, even if it had been apparent that Mr. Hodgkinson was in possession of child pornography, he was not actually arrested on that basis. It is not clear that Mr. Fox intended to arrest Mr. Hodgkinson at all, and if he did intend to make an arrest it was not on the basis of that offence.
78. Mr. Fox clearly detained Mr. Hodgkinson on the basis of a breach of section 172.1 of the *Criminal Code*. The purpose of the show was to catch predators who engaged in such offences. No discussion of possession charges was ever held with the police. In the interrogation, Mr. Fox directly referred to the offence elements of section 172.1 but made no mention of possession offences. It defies credibility to claim that Mr. Fox detained Mr. Hodgkinson on the basis that it was apparent he was engaged in possession of child

pornography when the entirety of his conduct was directed towards an entirely different offence.

79. Mr. Fox actually detained Mr. Hodgkinson on the basis of a breach of section 172.1 of the *Criminal Code*. However, at the point Mr. Fox appeared, and before Mr. Fox made any attempt to detain him, Mr. Hodgkinson had clearly abandoned any attempt to commit any further offence against Ms. Stoddard. He also immediately adopted a frightened and deferential posture, asking “Am I going to jail?” While Mr. Hodgkinson may have previously been entrapped into committing the *actus reus* of the offence, there was no further risk in this particular encounter.

80. The citizen’s arrest powers exist because it is important that a citizen be able to stop an offence in progress. This was a situation of neither exigency nor danger; Mr. Hodgkinson had abandoned any sexual intent and, should there have been a basis for an arrest, it could easily have been conducted after calling the police. Mr. Fox knew in advance that Mr. Hodgkinson would be attending the rendezvous and could have arranged for police officers to be present. It was only his deliberate failure to inform the police, motivated by a desire to produce dramatic television, that created the situation. There was no need for a citizen’s arrest to be invoked.

81. Finally, it is not even clear that Mr. Fox arrested Mr. Hodgkinson at all. While a private citizen may not be aware of the technical requirements of an arrest, Mr. Fox did not inform Mr. Hodgkinson that he was under arrest, let alone on what grounds.

82. Section 494(3) requires that, after performing an arrest, anyone other than a peace officer must forthwith deliver the arrested person to a peace officer. Mr. Fox made no effort to comply with this provision. This further suggests that Mr. Fox had no intention of actually arresting Mr. Hodgkinson. Instead Mr. Fox simply detained him without authorization, making that detention unconstitutional, as well as potentially criminal and tortious.

Criminal Code, RSC 1985, c C-46, s 494(3).

B. Section 494(1) is arbitrary

83. If Fox's detention of Hodgkinson were authorized by section 494(1), that section itself would be arbitrary. A law authorizing detention is arbitrary where it does not specify criteria for detention. The lack of criteria makes enforcement of the law entirely an exercise in individual discretion, making it arbitrary.

R v Hufsky, [1988] 1 SCR 621, [1988] SCJ 30.

84. If the citizen's arrest power in section 494(1)(a) can be extended to this situation, then the requirement that an offence is ongoing would be so broad as to be meaningless, such that that there would effectively be no criteria under the law. Mr. Hodgkinson was not attempting to lure a child at the time and there was no need for Fox to detain him on that basis. Any unlawful activity that may have occurred was based on the chat logs that Fox already possessed.

85. The decision to detain and confront Hodgkinson was made entirely at Fox's discretion since he wanted a dramatic confrontation scene for his television pilot. If this situation could be brought under section 494(1), then the provision would justify an arrest in a very

wide range of circumstances where there were grounds to believe an individual had, in the past, committed an offence.

86. Similarly, if section 494(1) were to be extended to justify arrest for state-based offences, such as possession charges, in cases where there was no clear indication that the individual was actually in possession, it would be so broad in scope as to effectively impose no criteria. It will be rare that it is apparent a possession offence is in progress and as such, if the law were to justify the arrest of such non-apparent possession offences, then it would justify arrest in a very wide range of circumstances and run the risk of multitudinous wrongful arrests.

87. Finally, given Mr. Fox's failure to comply with section 494(3) of the *Criminal Code*, if his arrest of Mr. Hodgkinson is nevertheless deemed to be authorized by law, then section 494(3) clearly is not a criterion capable of restraining discretion. A rule that can be freely breached is of little use in preventing arbitrariness.

Issue 3: Fox's search of Hodgkinson's backpack was an unreasonable search in violation of section 8 of the Charter

88. Section 8 of the *Charter* provides that everyone has the right to be secure against unreasonable search and seizure. The search of Mr. Hodgkinson's backpack by Mr. Fox was just such an unreasonable search, and therefore a breach of Mr. Hodgkinson's *Charter* rights.

89. Mr. Fox searched Mr. Hodgkinson's backpack without a warrant. Mr. Fox knew in advance where and when Mr. Hodgkinson would attend the meeting and, on the advice of Detective Stabler, had every intention of searching his bag. Mr. Fox did not inform the

police, who could have applied for a warrant to search Mr. Hodgkinson. Instead he searched a bag, in which Mr. Hodgkinson had a significant privacy interest, without any attempt to acquire prior authorization.

90. Given that the search was warrantless, the Crown has the burden of showing that the search was, on a balance of probabilities, reasonable. The search in this case was not authorized by law and, even if it were, the authorizing law was unreasonable. As such, the search itself was unreasonable.

Collins, supra para 27.

R v Caron, 2011 BCCA 56, [2011] BCJ 200.

1. The search was not authorized by law

91. The Crown argues that the search of Mr. Hodgkinson was authorized by section 494(1) of the *Criminal Code*, which justifies the arrest of a person found in the process of committing an offence.

92. Section 494 provides no specific authorization for search or seizure. It is for the Crown to demonstrate that such a power exists, given its total absence from an otherwise complete statutory provision. Moreover, if such a power did exist, it would logically be constrained to situations where the arresting citizen needed to perform a search either to ensure their safety or prevent the destruction of evidence.

Lerke, supra para 41.

93. Given that section 494(3) requires that any individual arrested pursuant to section 494(1) be taken forthwith to a peace officer, it is likely that the legislature deliberately did not

provide a citizen's search power incident to arrest. Section 494(3) ensures that a peace officer could perform that function, barring exigent circumstances.

94. Even if a citizen's search power incident to arrest does exist, the search of Mr. Hodgkinson's backpack can only be authorized if the Crown demonstrates that the arrest of Mr. Hodgkinson was authorized by section 494 and that the search of his backpack was reasonable and truly incidental to that arrest.

R v Caslake, [1998] 1 SCR 51, 155 DLR (4th) 19 [*Caslake*].

95. For a search to be truly incidental to an arrest, there must be a reasonable prospect of securing evidence of the offence for which the accused is being arrested.

Caslake, *supra* para 94 at paras 22-27.

R v Belnavis (1996), 29 OR (3d) 321, 91 OAC 3 (CA).

96. In this case, as argued with respect to section 9 of the *Charter*, the search was not authorized by law because the initial arrest was not authorized by section 494 of the *Criminal Code*.

97. As argued above, Mr. Fox actually detained Mr. Hodgkinson for a breach of section 172.1. However, while he had committed offence elements in the past, by the time he was detained Mr. Hodgkinson had abandoned any further sexual intent against Ms. Stoddard.

98. Since there was no imminent danger of a further offence, given Mr. Hodgkinson's immediate retreat to a frightened and deferential posture, and the absence of a minor to lure, these circumstances fall neither within the letter nor the spirit of section 494.

Therefore, the initial arrest being unlawful, no search can be authorized incident to that arrest.

R v Stillman, [1997] 1 SCR 607, 144 DLR (4th) 193.

99. The Crown argues that Mr. Fox arrested and searched Mr. Hodgkinson because he believed Hodgkinson to be in possession of child pornography.

100. As argued above, such a claim is dubious, given that no mention of possession of child pornography was ever made by either Mr. Fox or Detective Stabler. The inspiration for his proposed show was the offence of luring, and it was to find evidence of that offence that Detective Stabler advised a search.

101. As such, even if it would have been objectively reasonable to arrest and search Mr. Hodgkinson for possession of child pornography, that was not the basis upon which the search and arrest occurred.

102. The standard for a search incident to an arrest is subjective. As the Supreme Court of Canada held in *Caslake*, “the police cannot rely on the fact that, objectively, a legitimate purpose for the search existed when that is not the purpose for which they searched.” Mr. Fox needed to believe that Mr. Hodgkinson had illicit material in his backpack, and to have searched him for that reason in order for the search to be justified. That was not the case.

Caslake, *supra* para 94 at para 27.

103. Moreover, such an arrest would not have been objectively reasonable, since it would rely on propensity-based reasoning sufficient to justify a search in an overly expansive array

of cases. While it may be true that those who commit sexual offences against children are more likely to possess child pornography, this justification could be used to arrest and search anyone accused of such an offence at almost any time. For example, such propensity-based reasoning would allow for arrest and search of anyone ever convicted of a drug offence on the basis that possession is more likely. Any conviction would be the death of one's privacy rights.

104. The extremely expansive search powers provided by the Crown's position demonstrate the dangers of applying the citizen's arrest powers to state-based offences, such as possession charges. This danger is exacerbated when twinned with the power to search incident to an arrest.

2. If the search was authorized by law, that law is unreasonable

105. If the arrest of Mr. Hodgkinson, and the search of him incident to that arrest, are found to be authorized by section 494 of the *Criminal Code*, then that section is unreasonable.

106. In *Hunter v Southam*, the Supreme Court of Canada held that a constitutionally reasonable search power must:

1. Require prior authorization, usually in the form of a warrant, where feasible;
2. if there is prior authorization, the authorizing party must be an impartial judicial officer; and
3. there must be reasonable and probable grounds that an offence has been committed and that evidence will be found at the place of the search.

Hunter v Southam, [1984] 2 SCR 145, 11 DLR (4th) 641.

107. Section 494 provides no basis for prior authorization but, according to the Crown, simply permits a citizen to arrest and, as an incident thereto, to search a person whom he, on reasonable grounds, believes has committed an offence or is fleeing those with authority to arrest him.
108. If the search of Mr. Hodgkinson was justified by section 494, which the Respondent specifically denies, it does not comply with the test from *Hunter v Southam*.
109. In general, it may not be feasible to obtain a warrant when an individual is in the process of committing an offence. In this case, however, the rationale breaks down. Mr. Fox knew that Mr. Hodgkinson had committed an offence, because he had arranged for him to be entrapped. Therefore Mr. Fox had ample opportunity to contact the police, who could have sought to obtain a warrant, but made no effort to do so.
110. Similarly, even if the Crown were correct that there were reasonable grounds to search Mr. Hodgkinson for child pornography, he similarly could have informed the police and they could have attempted to acquire a warrant.
111. In this case, prior authorization was feasible, and therefore should have been required by section 494. Therefore, if section 494 does authorize a search and an arrest in such circumstance, then section 494 must permit searches in cases where it would be feasible to obtain a warrant, but one has not been obtained. Section 494 would therefore be an unreasonable law and fail to meet the test set out in *Hunter v Southam*.

Issue 4: The evidence obtained from the police searches should be excluded under section 24(2) of the Charter

112. The evidence obtained through violations of Mr. Hodgkinson's *Charter* rights should be excluded because its admission would bring the administration of justice into disrepute. Three factors may be considered when establishing whether admitting the evidence will bring the administration of justice into disrepute:

1. The seriousness of the *Charter*-infringing conduct;
2. The impact of the breach on the *Charter*-protected interests of the accused; and
3. The societal interest in an adjudication on the merits

Grant, supra para 35 at para 85.

A. The *Charter*-infringing conduct was serious

113. The breaches of Mr. Hodgkinson's section 8 and section 9 rights were serious. These were no mere technical breaches, but flowed from the bad faith conduct of both Mr. Fox and the police. Even if the court were to find that their conduct did not constitute bad faith, both Mr. Fox and the police still demonstrated a lack of good faith. Either a lack of good faith, or bad faith, makes the breaches more serious, and favours the exclusion of the evidence.

Collins, supra para 27 at para 16.

R v Therens, [1985] 1 SCR 613, [1985] SCJ 30.

Grant, supra para 35 at para 74.

Buhay, supra para 49 at para 52.

114. For good faith to be shown, Mr. Fox and Detective Stabler must have honestly and reasonably believed that they were acting lawfully. Good faith cannot be claimed where the breach resulted from ignorance, negligence or unreasonable error. Both Detective Stabler and Mr. Fox either knew or ought to have known that their actions violated Mr. Hodgkinson's *Charter* rights.

Caron, supra para 90 at para 41.

Buhay, supra para 49 at para 59.

Grant, supra para at 75.

R v Kokesch, [1990] 3 SCR 3, 51 BCLR (2d) 157.

115. Detective Stabler wilfully disregarded Mr. Hodgkinson's *Charter*-protected rights. She instructed Mr. Fox on how to target and interrogate Mr. Hodgkinson but made no effort to ensure that Mr. Fox acted in accordance with the *Charter*. She specifically suggested that Mr. Hodgkinson may have items on his person worth searching for, but made no mention of Mr. Hodgkinson's privacy rights that would be threatened by a search. If Detective Stabler had searched Mr. Hodgkinson in the way she prepared Mr. Fox to do, her conduct would have constituted bad faith. Failing to properly prepare Mr. Fox, while encouraging him to conduct the search, was similarly an act of bad faith. Faith in the justice system is not restored when the state outsources its dirty work.

116. To prepare Mr. Fox to conduct an illegal search by neglecting to inform him of his constitutional obligations was, at the very least, negligent and lacking in good faith, even if it did not rise to the level of bad faith. This failure led directly to the violation of Mr. Hodgkinson's section 8, 9 and 10(b) rights.

117. Mr. Fox also acted in bad faith when he detained and searched Mr. Hodgkinson. Mr. Fox unnecessarily misled and humiliated Mr. Hodgkinson. Mr. Hodgkinson clearly thought Mr. Fox was a police officer, an illusion that Mr. Fox carefully allowed him to maintain so as to secure his acquiescence. He filmed Mr. Hodgkinson, without his knowledge, and exploited the situation to create drama for his television pilot.

118. Mr. Fox could have arranged for the police to be present when Mr. Hodgkinson arrived at the house, to ensure that Mr. Hodgkinson's rights were respected and that prior authorization was sought before his privacy interest was infringed. Mr. Fox could have informed Mr. Hodgkinson of his identity, and could have delayed any search to give Mr. Hodgkinson access to counsel. Rather than taking any such reasonable precautions, Mr. Fox engineered a situation in which he entrapped, misled and searched Mr. Hodgkinson for profit.

119. Even if Mr. Fox acted through ignorance rather than malice, such ignorance shows a lack of good faith. The Supreme Court of Canada has held that good faith cannot be claimed on the basis of "unreasonable error or ignorance".

Buhay, supra para 49 at para. 59, citing J. Sopinka, S. N. Lederman and A. W. Bryant, *The Law of Evidence in Canada*, 2d ed (1999) at 450.

120. Both the police's failure to prepare Mr. Fox to treat Mr. Hodgkinson in a constitutional manner and Mr. Fox's self-interested and reckless conduct in the pursuit of television ratings would bring the administration of justice into disrepute if evidence obtained on those bases were admitted. If the state, and those carrying out its functions, is seen to

employ such tactics and demonstrate such disregard for the rights of the accused, the integrity of the justice system will be undermined.

B. The impact of the breach on Mr. Hodgkinson's *Charter* rights was serious

1. The impact on Mr. Hodgkinson's right to be protected from unreasonable search and seizure

121. Mr. Hodgkinson had a very high expectation of privacy in items that he carried in his backpack. Searching an accused's backpack is a serious intrusion into an accused's privacy.

R v AM, 2008 SCC 19, [2008] SCR 569.

R v Indoe, [2004] OJ No 4422, [2004] OTC 946 (Sup Ct).

122. The Supreme Court of Canada in *Grant* held that “[a]n unreasonable search that intrudes on an area in which the individual reasonably enjoys a high expectation of privacy, or that demeans his or her dignity, is more serious than one that does not.”

Grant, *supra* para 35 at para 78.

123. Mr. Hodgkinson kept the bag sealed and on his person, and had a high expectation of privacy in it. The search of his bag despite this high expectation of privacy is a serious breach of his section 8 rights.

124. The fact that Mr. Hodgkinson was surreptitiously filmed during the entire encounter makes the breach of his reasonable expectation of privacy even more serious, because it was intended to unnecessarily exacerbate the scope of the privacy breach by widely distributing the footage. The creation of this film demonstrated an utter disregard for Mr. Hodgkinson's rights, sacrificing his privacy in the pursuit of television ratings.

125. The concurrent breach of Mr. Hodgkinson's section 10(b) right to counsel was a further aggravating factor militating towards the exclusion of the evidence.

126. When significant breaches of multiple *Charter*-protected interests occur, the public will rightly lose confidence in the repute of the justice system.

2. The impact on Mr. Hodgkinson's right not to be detained arbitrarily

127. The arbitrary detention of Mr. Hodgkinson was serious; it violated his autonomy and freedom of movement and removed his ability to respond to threatening or degrading situations by removing himself from them.

Grant, supra para 35 at paras 20-22.

128. The gravity of the breach was exacerbated by the fact that Mr. Fox was an ordinary citizen who led Mr. Hodgkinson to believe that he was a police officer with the power to arrest him. Mr. Hodgkinson was misled with respect to the nature of his detention and his interrogator, he was not informed of his right to counsel, and he was surreptitiously filmed. His detention did not assist in protecting the public, as he was neither committing a crime nor fleeing arrest when he was detained. In stark contrast, he was detained so that Mr. Fox could have a dramatic interview for his television pilot.

129. That he was arbitrarily detained by a private citizen who sought to exploit the situation for his own gain further exacerbates the degradation and violation of Mr. Hodgkinson. The arbitrary removal of Mr. Hodgkinson's freedom under misleading and exploitative circumstances is a severe violation of his section 9 rights.

C. Society's interest in adjudication on its merits

130. While on balance this factor may favour admissibility, the seriousness of the offence not only enhances the public interest in adjudication on the merits, but also the public interest in having a justice system that is beyond reproach. Therefore, as the Supreme Court of Canada noted in *Grant*, the seriousness of the alleged offence can cut both ways. In particular, the Court warned that:

while the public has a heightened interest in seeing a determination on the merits where the offence charged is serious, it also has a vital interest in having a justice system that is above reproach, particularly where the penal stakes for the accused are high.

Grant, supra para 35 at para 84.

131. Therefore, despite the importance of the unconstitutionally obtained evidence to the Crown, the seriousness of the offence does not itself tip the scales in favour of admission. The Supreme Court of Canada has noted that “the seriousness of the offence should seldom if ever serve as the sole basis for admitting evidence obtained through bad faith or a serious violation of the accused's constitutional rights”.

Stillman, supra para 98 at para 269.

D. The evidence should be excluded under section 24(2)

132. Balancing the *Grant* factors, the evidence should be excluded under section 24(2) of the *Charter*. The breaches of Mr. Hodgkinson's *Charter* rights were severe and flagrant. Even in the most serious cases, respect for the *Charter* rights of the accused should not be easily overridden. As the Supreme Court cautioned in *Grant*, “[t]he short term public clamour for a conviction in a particular case must not deafen the 24(2) judge to the

longer-term repute of the administration of justice”.

Grant, supra para 35 at para 84.

Part IV: Order Sought

133. The Respondent requests that the appeal be dismissed.

Part V: Table of Authorities

Jurisprudence

Case	Paragraphs
<i>R v Abel</i> , 2008 BCCA 54, [2008] BCJ 197.	71
<i>R v AM</i> , 2008 SCC 19, [2008] SCR 569.	121
<i>R v Asante-Mensah</i> , 2003 SCC 38, [2003] 2 SCR 3.	42
<i>R v Belnavis</i> (1996), 29 OR (3d) 321, 91 OAC 3 (CA).	95
<i>R v Broyles</i> , [1991] 3 SCR 595, 84 Alta LR (2d) 1.	49, 50
<i>R v Buhay</i> , 2003 SCC 30, [2003] 1 SCR 63.	49, 51, 54, 60, 113-114, 119
<i>R v Caron</i> , 2011 BCCA 56, [2011] BCJ 200.	90, 114
<i>R v Caslake</i> , [1998] 1 SCR 51, 155 DLR (4th) 19.	94-95, 102
<i>R v Collins</i> , [1987] 1 SCR 265, 38 DLR (4th) 508.	27, 90, 113
<i>R v Grant</i> , 2009 SCC 32, [2009] 2 SCR 353.	35, 65-66, 112-114, 122, 127, 130, 132
<i>R v Hufsky</i> , [1988] 1 SCR 621, [1988] SCJ 30.	83
<i>Hunter v Southam</i> , [1984] 2 SCR 145, 11 DLR (4th) 641.	106
<i>R v Indoe</i> , [2004] OJ 4422, [2004] OTC 946 (Sup Ct).	121
<i>R v Lerke</i> , 1986 ABCA 15, 67 AR 390.	41
<i>R v Kokesch</i> , [1990] 3 SCR 3, 51 BCLR (2d) 157.	114
<i>R v McCowan</i> , 2011 ABPC 79, [2011] AJ 239.	43
<i>R v Stillman</i> , [1997] 1 SCR 607, 144 DLR (4th) 193.	98, 131
<i>R v Therens</i> , [1985] 1 SCR 613, 18 DLR (4th) 655.	113

Statutory Provisions

Canadian Charter of Rights and Freedoms as found in the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982*, c11, ss 1, 8, 9, 10(b), 24(2).

Criminal Code, RSC 1985, c C-46, ss 163.1, 172.1, 494(1).

Relevant Provisions of:

***Canadian Charter of Rights and Freedoms* as found in the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982*, c11.**

Rights and Freedoms in Canada

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Search or Seizure

8. Everyone has the right to be secure against unreasonable search or seizure.

Detention or Imprisonment

9. Everyone has the right not to be arbitrarily detained or imprisoned

Arrest or detention

10. Everyone has the right on arrest or detention
 - a) To be informed promptly of the reasons therefor;
 - b) To retain and instruct counsel without delay and to be informed of that right; and
 - c) To have the validity of the detention determined by way of *habeus corpus* and to be released if the detention is not lawful

Enforcement of guaranteed rights and freedoms

24 (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Exclusion of evidence bringing administration of justice into disrepute

24 (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

Relevant provisions of:

***Criminal Code*, RSC 1985, c C-46, ss 163.1, 172.1, 494.1.**

163.1 (1) In this section, “*child pornography*” means

(a) a photographic, film, video or other visual representation, whether or not it was made by electronic or mechanical means,

(i) that shows a person who is or is depicted as being under the age of eighteen years and is engaged in or is depicted as engaged in explicit sexual activity, or

(ii) the dominant characteristic of which is the depiction, for a sexual purpose, of a sexual organ or the anal region of a person under the age of eighteen years;

(b) any written material, visual representation or audio recording that advocates or counsels sexual activity with a person under the age of eighteen years that would be an offence under this Act;

(c) any written material whose dominant characteristic is the description, for a sexual purpose, of sexual activity with a person under the age of eighteen years that would be an offence under this Act; or

(d) any audio recording that has as its dominant characteristic the description, presentation or representation, for a sexual purpose, of sexual activity with a person under the age of eighteen years that would be an offence under this Act.

Making child pornography

(2) Every person who makes, prints, publishes or possesses for the purpose of publication any child pornography is guilty of

(a) an indictable offence and liable to imprisonment for a term not exceeding ten years and to a minimum punishment of imprisonment for a term of one year; or

(b) an offence punishable on summary conviction and is liable to imprisonment for a term not exceeding two years less a day and to a minimum punishment of imprisonment for a term of six months.

Distribution, etc. of child pornography

(3) Every person who transmits, makes available, distributes, sells, advertises, imports, exports or possesses for the purpose of transmission, making available, distribution, sale, advertising or exportation any child pornography is guilty of

(a) an indictable offence and liable to imprisonment for a term not exceeding ten years and to a minimum punishment of imprisonment for a term of one year; or

(b) an offence punishable on summary conviction and is liable to imprisonment for a term not exceeding two years less a day and to a minimum punishment of imprisonment for a term of six months.

Possession of child pornography

(4) Every person who possesses any child pornography is guilty of

(a) an indictable offence and is liable to imprisonment for a term of not more than five years and to a minimum punishment of imprisonment for a term of six months; or

(b) an offence punishable on summary conviction and is liable to imprisonment for a term of not more than 18 months and to a minimum punishment of imprisonment for a term of 90 days.

Defence

(5) It is not a defence to a charge under subsection (2) in respect of a visual representation that the accused believed that a person shown in the representation that is alleged to constitute child pornography was or was depicted as being eighteen years of age or more unless the accused took all reasonable steps to ascertain the age of that person and took all reasonable steps to ensure that, where the person was eighteen years of age or more, the representation did not depict that person as being under the age of eighteen years.

Agreement or arrangement — sexual offence against child

172.2 (1) Every person commits an offence who, by a means of telecommunication, agrees with a person, or makes an arrangement with a person, to commit an offence

(a) under subsection 153(1), section 155, 163.1, 170 or 171 or subsection 212(1), (2), (2.1) or (4) with respect to another person who is, or who the accused believes is, under the age of 18 years;

(b) under section 151 or 152, subsection 160(3) or 173(2) or section 271, 272, 273 or 280 with respect to another person who is, or who the accused believes is, under the age of 16 years; or

(c) under section 281 with respect to another person who is, or who the accused believes is, under the age of 14 years.

Arrest without warrant by any person

494. (1) Any one may arrest without warrant

(a) a person whom he finds committing an indictable offence; or

(b) a person who, on reasonable grounds, he believes

(i) has committed a criminal offence, and

(ii) is escaping from and freshly pursued by persons who have lawful authority to arrest that person.

Arrest by owner, etc., of property

(2) Any one who is

(a) the owner or a person in lawful possession of property, or

(b) a person authorized by the owner or by a person in lawful possession of property,

may arrest without warrant a person whom he finds committing a criminal offence on or in relation to that property.

Delivery to peace officer

(3) Any one other than a peace officer who arrests a person without warrant shall forthwith deliver the person to a peace officer.