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 APPELLANT

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Part I – Overview and Statement of Facts

1. Overview: Citizen's arrest laws are essential to public safety

1. Citizen's arrest laws provide ordinary people with the tools necessary to respond to crimes. When police officers are not present or are unable to respond, it is essential that Flavellians have the ability to carry out an arrest and, in some cases, a search incident to that arrest.

2. Crimes against children can be prevented and prosecuted as a result of citizen arrests. Due to the clandestine nature of these crimes, they are often difficult to detect. When a citizen finds a crime of this nature occurring in front of them, it is essential that they have the legal tools to react in a reasonable manner.

3. In this case, Richard Fox ("Fox") used the authority provided to him by section 494(1) of the Flavellian *Criminal Code* ("the *Criminal Code*") to make a lawful arrest of a child predator involved in the production and sale of child pornography. He used this power as a private citizen, not as an agent of the state.

4. Fox's actions led to the arrest of David Hodgkinson ("the Respondent"), a habitual and skilled child predator who had sexually assaulted many children and produced thousands of hours of child pornography in a studio he had constructed in his home.

5. Fox's use of his power to arrest and search did not violate the *Charter of Rights and Freedoms* ("*Charter*"). In the alternative, if the Respondent's *Charter* right(s) were breached, the evidence obtained by Fox's actions should not be excluded due to society's interest in this case being tried on its merits.

2. Background Facts: The Respondent's Attempted Sexual Encounter with a Minor

6. On August 15, 2011, Fox read an advertisement for a community education seminar conducted by the Mayoville Police Department ("MPD") on protecting children from online predators.

Problem at para 2.

7. Fox, as a concerned member of his community, attended the seminar, where Detective Olivia Stabler ("Detective Stabler") of the MPD explained that under section 172.1 of the *Criminal Code*, adults who communicate online with a minor in order to facilitate a sexual act with that minor are committing a crime. She further advised that anyone who had knowledge of such online conversations should alert the police. Detective Stabler advised the attendees that film footage of predators engaging in sexual acts with minors constitutes child pornography.

Problem, *supra* para 6 at paras 3-4.

8. Fox, an aspiring actor and television producer, had an idea for a new television show. He would pose as a minor in an online chat room, looking for adults willing to engage in sexual conversations. Once he found an interested adult, Fox would arrange a meeting between the adult and the fictitious minor. The child predator would arrive, expecting to have a sexual encounter with a minor, but would instead find Fox, with evidence of the predator's illegal intentions.

Problem, *supra* para 6 at para 6.

9. Fox described his idea to Detective Stabler and asked for her advice on how best to collect evidence if he were to carry out his plan. Detective Stabler repeated her earlier

description of section 172.1 of the *Criminal Code* by telling Fox that in order to constitute an offence, the fictitious child should be under the age of consent, and that the adult should be over the age of majority.

Problem, *supra* para 6 at paras 6-7.

10. Fox received other general information from Detective Stabler. She told Fox that when confronting the child predators, he should show them the chat transcripts and try and obtain a confession on camera. She also suggested that Fox be mindful that the predator might bring with them items that would serve as evidence of their intention to engage in sexual activity with a child.

Problem, *supra* para 6 at para 9.

11. Fox hired an actress, Chelsea Stoddard ("Stoddard"), to pose as a minor. Fox then set up a chat room account under the name lonelygirl13.

Problem, *supra* para 6 at para 8.

12. On September 3, 2011, lonelygirl13 sent a message to the Respondent, who identified himself online as "older_man_31." After chatting for several weeks, lonelygirl13 invited the Respondent to meet her and have sex. The Respondent agreed that he would. He said he was "very excited" and described in detail the sexual acts he would perform on her. The Respondent said he would be bringing a video camera with him.

Problem, *supra* para 6 at paras 10-12.

13. On September 29, 2011, the Respondent arrived at what he thought was lonelygirl13's home. Stoddard greeted him and then left him in the den, where Fox surprised the Respondent and asked him about his intentions.

Problem, *supra* para 6 at paras 13-15.

14. Fox asked to look in the Respondent's bag, and he handed it to Fox. Fox expected to find the video camera that the Respondent had said he would bring with him. Instead, the bag contained condoms, lubricant and a DVD.

Problem, *supra* para 6 at para 16.

15. The Respondent left the house and did not take his backpack or its contents with him.

Problem, *supra* para 6 at para 17.

16. Fox decided to give the chat logs, a copy of his TV pilot, and the Respondent's backpack to Detective Stabler. Detective Stabler then obtained a warrant to search the Respondent's backpack solely on the basis of Fox's account of the contents of the backpack.

Problem, *supra* para 6 at paras 19-20.

17. Detective Stabler watched the DVD found in the Respondent's backpack and discovered that it contained several videos of adults performing sexual acts on minors. Detective Stabler immediately obtained a warrant to search the Respondent's home, where the police found thousands of hours of child pornography and a studio in which the Respondent had filmed himself performing sexual acts on children. The police also found accounting records indicating that the Respondent had been actively involved in selling and purchasing child pornography for more than five years.

Problem, *supra* para 6 at para 22.

18. The Respondent was 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 *Criminal Code.*

Problem, *supra* para 6 at para 23.

3. Judicial History

A. Trial Judgment

19. Justice Ho found that Fox had acted as a state agent when he detained and searched the Respondent. Applying the "but for" test from *R v Buhay,* Justice Ho found that Fox would not have created the television show, nor would he have carried it out in the same manner, had it not been for Detective Stabler's information. Justice Ho made a finding of fact that Fox incorporated Detective Stabler's advice into his production.

Problem, *supra* para 6 at paras 29-30.

20. Justice Ho then considered whether Fox's arrest of the Respondent constituted an arbitrary detention contrary to section 9 of the *Charter*. Justice Ho held that according to the standard in *R v Grant*, the Respondent had been detained. However, Justice Ho found that the detention was not arbitrary because Fox had reasonable grounds to believe that the Respondent would be in possession of child pornography at the time of the arrest.

Problem, *supra* para 6 at para 31.

21. Justice Ho held that the Respondent had a reasonable expectation of privacy in his backpack, and therefore Fox had performed a search of the Respondent's backpack. However, she found that there was no violation of the Respondent's section 8 *Charter*

rights because the search passed all three branches of the test set out in *R v Collins* for warrantless searches.

Problem, *supra* para 6 at paras 30-36.

22. However, Justice Ho did find a violation of section 10(b), as Fox did not advise the Respondent of his right to counsel. Justice Ho found that Fox had enough evidence without the interrogation to search the Respondent's backpack, and therefore the section 10(b) violation had no impact on the evidence. Ho J. did not need to consider whether or not to exclude the evidence under section 24(2) of the *Charter*.

Problem, *supra* para 6 at para 36.

B. Falconer Court of Appeal Judgment

23. Justice Sanderson agreed with Justice Ho's finding that Fox was a state agent. However he found that Fox's search and arrest of the Respondent violated sections 8 and 9 of the *Charter,* respectively.

Problem, *supra* para 6 at paras 39-41.

24. Justice Sanderson found that Fox's search failed the *Collins* test. Even if the search passed the first stage because it was authorized by section 494(1), Justice Sanderson found that section 494(1) was unreasonable because it was overly broad.

Problem, *supra* para 6 at para 42.

25. Regarding section 9, Justice Sanderson found that the detention was arbitrary. Justice Sanderson agreed with Justice Ho that this violation automatically triggered a section 10(b) infringement, but that the section 10(b) violation was not relevant to determining

the admissibility of the evidence.

Problem, *supra* para 6 at paras 44-45.

26. Justice Sanderson found that under section 24(2) of the *Charter,* the evidence obtained through the police search should be excluded under the *Grant* test. Although society had a strong interest in this case being adjudicated on the merits, this could not outweigh the seriousness of the *Charter*-infringing state conduct.

Problem, *supra* para 6 at paras 46-47.

27. Justice Guest, writing in dissent, found that the evidence should be admitted under section 24(2). As a producer of child pornography, the Respondent sexually abused children in his home. Society therefore has a strong interest in seeing this case adjudicated on the merits. Justice Guest found that this factor, combined with the high degree of credibility of the evidence, "far outweighed" the impact on the Respondent's rights.

Problem, *supra* para 6 at paras 49-50.

Part II – Statement of Issues

Issue 1: Does the *Charter* apply to Fox's interaction with the Respondent?

Issue 2: If the *Charter* does apply to his actions, did Mr. Fox's detention of the Respondent contravene section 9 of the *Charter*?

Issue 3: If the *Charter* does apply to his actions, did Mr. Fox's search of the Respondent's backpack contravene section 8 of the *Charter?*

Issue 4: If the *Charter* breach(es) are established, should the evidence obtained in the police search be excluded pursuant to section 24(2) of the *Charter*?

Part III – Statement of Argument

Issue 1: The *Charter* does not apply to Fox's interaction with the Respondent

28. The *Charter* applies to Parliament and the government of Flavelle. There are two possible exceptions to this general rule that would make Fox subject to *Charter* scrutiny: first, if he is found to have been acting as an agent of the state or second, if the use of the citizen's arrest power in section 494(1) is a "government function" and therefore automatically subject to *Charter* scrutiny.

> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11 [*Charter*].
>
> *R v Dell*, 2005 ABCA 246, 256 DLR (4th) 271 at paras 7-8 [*Dell*].

A. Fox was not a state agent

29. Fox was not a state agent and the *Charter* does not apply to his interaction with the Respondent. Although Fox received general legal advice from the police about his television show, the advice he received was vague and unspecific. Finding Fox to be a state agent would require an overly broad interpretation of the state agent doctrine, which would undermine cooperation between police and citizens.

30. The test to determine whether an individual was acting as a state agent is: "would the exchange between the accused and the [alleged state agent] have taken place, in the form and manner in which it did take place, but for the intervention of the state or its agents?"

> *R v Broyles*, [1991] 3 SCR 595 at para 25, 84 Alta. L.R. (2d) 1 [*Broyles*].

31. This test was narrowed in *R v Buhay*, where the Supreme Court of Canada ("SCC") stated that "the intervention of the police must be specific to the case being investigated." The SCC added this requirement because it believed that "volunteer participation in the

detection of crime" and "general encouragements by the police authorities to citizens to participate in the detection of crime" should not attract *Charter* scrutiny.

R v Buhay, 2003 SCC 30 at para 30, 225 DLR (4th) 624 [*Buhay*].

32. In this case, Fox received only banal legal advice and general encouragements from Detective Stabler. In response to Fox's questions, Detective Stabler merely explained the definition of "luring a child" under s 172.1 of the *Flavellian Criminal Code* when she told Fox to pretend to be a 12-or-13-year-old and engage in conversation with an adult. This was simply a reiteration of Detective Stabler's presentation to the public.

Problem, *supra* para 6 at para 7.

33. The other advice provided by Detective Stabler was general and not specific to the case being investigated. Detective Stabler told Fox that he ought to confront his targets with chat transcripts in order to obtain a confession. Confronting subjects with evidence of their crimes is a common technique that has been used by TV journalists for decades. Likewise, it is trivially obvious that a confession would be strong evidence.

Problem, *supra* para 6 at para 9.

34. Detective Stabler also told Fox that a child predator might carry evidence of their intentions with them. It would be obvious to any reasonable person that an individual who has come to a house to have sex might bring with them evidence of their intentions, such as condoms. This is especially true in this case because the Respondent told Fox that he would be bringing a video camera.

Problem, *supra* para 6 at para 9.

35. These facts sit in stark contrast to the cases in which Canadian courts have found an individual to be an agent of the state. Typically these cases involve intervention that is specific to a particular case and to a particular accused.

36. In *Broyles* the SCC found an informant to be an agent of the state. The informant's conversation with the accused had been entirely arranged and facilitated by the police. The informant was specifically instructed to speak to a particular individual and directed to ask questions about the death of a particular person.

Broyles, *supra* para 30 at para 35.

37. Canadian courts that have applied the *Buhay* test to find that an individual was not a state agent have also stressed the necessity that any state intervention be particular to one investigation. In *R v Castor* the accused was arrested by a security guard for shoplifting. The court found that the security guard was not a state agent in part because he had not received any direction from the police that was *specific to the accused*.

R v Castor, 2006 ABPC 64 at para 40, 395 AR 270.

38. The SCC held that an individual was not a state agent when conducting a search despite a police officer being physically present during the entire interaction. In *R v M (MR)* a school principal searched two students with an RCMP officer present. When the principal found a hidden bag on a student, the RCMP officer identified its contents as marijuana. Despite this close interaction between the principal and the officer, the SCC found that there was no state agency relationship.

R v M (MR), [1998] 3 SCR 393 at paras 26-30, 171 NSR (2d) 125.

39. The interaction between Detective Stabler and Fox does not meet the requirement for state agency. Detective Stabler never told Fox to carry out his plan. She never told Fox to contact the Respondent or any other person specifically. She did not organize or facilitate the interaction between Fox and the Respondent. The plot to confront the Respondent was conceived, organized, and carried out by Fox.

40. Applying the *Broyles* test without incorporating *Buhay's* requirement that the intervention be "specific to the case being investigated" would make the state agent doctrine unreasonably broad. Courts must be wary of extending the *Charter* too far into private citizens' actions, as this could "strangle the operation of society." Flavellian society enjoys healthy cooperation between police officers and civil society. In this case, that cooperation helped identify and convict a child predator.

McKinney v University of Guelph, [1990] 3 SCR 229 at para 3, 76 DLR (4th) 545.

41. The police frequently advise schools, security guards, neighbourhood watch associations, journalists, and other individuals and institutions on criminal law issues by providing the kind of general advice that Fox received. The purpose of giving this advice is to prepare individuals and institutions to respond to criminal acts taking place right before them.

42. Providing general advice unspecific to any investigation cannot be sufficient reason to transform individuals into agents of the state. This interpretation would mean that any person who responds to a crime, and who has received advice or training by police officers, would be transformed into a state agent. This would categorize a much broader range of activity as "state agency" than has been recognized by the Supreme Court in

Broyles.

Broyles, *supra* para 30 at para 35.

B. The use of the citizen's arrest power under section 494 of the *Criminal Code* does not attract *Charter* scrutiny because it is not a "governmental function"

43. Requiring full *Charter* protections for arrests carried out by private individuals under section 494(1) would make this provision functionally useless. Ordinary citizens are rarely prepared to provide the full suite of *Charter* protections to individuals facing arrest or detention.

44. Anyone who is arrested or detained must be informed of his or her right to counsel under section 10(b) of the *Charter*. This "informational" right includes a requirement that the detainee be told how to make use of duty counsel and legal aid. Ordinary citizens are likely to be unaware of this requirement and unprepared to meet it, making any use of section 494(1) almost certain to violate the *Charter*.

R v Bartle, [1994] 3 SCR 173 at para 21, 33 CR (4th) 1.

45. This would vitiate the citizen's arrest power. By passing section 494(1) into law, Parliament intended to provide an arrest power to ordinary citizens. Finding that section 494(1) is always subject to *Charter* scrutiny would dismantle this right.

46. Canadian courts have confirmed that the citizen's arrest power under section 494 does not constitute a "governmental function" and is therefore not automatically subject to *Charter* scrutiny. Three appellate courts have held that the use of the citizen's arrest

power does not automatically render the arrest subject to *Charter* scrutiny.

R v NS, [2004] OJ No 290 (CA), 2004 CarswellOnt 8093.

R v J (AM), 1999 BCCA 366, 137 CCC (3d) 213.

R v Skeir, 2005 NSCA 86, 233 NSR (2d) 298.

47. In *Buhay* the Supreme Court stated that citizen's arrests carried out by security guards are private activity beyond the scope of the *Charter*.

Buhay, *supra* para 31 at para 31.

Issue 2: Hodgkinson's section 9 rights were not violated

48. The Appellant submits that Fox's interactions with the Respondent are not subject to *Charter* scrutiny. However, if Mr. Fox is found to be a state agent, or if his actions are subject to the *Charter* by virtue of his performing a government function, then in the alternative, the Appellant submits that Fox's arrest of the Respondent was not in violation of section 9 of the *Charter.*

49. Section 9 protects against arbitrary detention or imprisonment. Fox's arrest of the Respondent did not violate section 9 because it was authorized by law and because the authorizing law is reasonable.

Charter, supra para 28 at s 9.

R v Grant, [2009] 2 SCR 353, 2009 SCC 32 at para 54 [*Grant*].

A. Fox's arrest of the Respondent was authorized by section 494(1)(a) of the Flavellian *Criminal Code*

50. Section 494 of the *Flavellian Criminal Code* provides that:

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.

51. Section 494(1)(a) authorized Mr. Fox's arrest of the Respondent. This section requires that the arrestee be committing an indictable offence at the time of arrest. When Fox detained the Respondent, he was committing the offence of possession of child pornography contrary to section 163.1(4) of the *Criminal Code*. The Respondent was convicted of this offence at trial.

Gentles v Toronto (City) Non-Profit Housing Corp, 2010 ONCA 797 at para 131, 2010 CarswellOnt 4929.

Problem, *supra* para 6 at para 37.

52. It was apparent to Mr. Fox that the Respondent was committing an offence. Because it is "impossible to say that an offence is committed until the party arrested has been found guilty by the courts," section 494(1)(a) must be understood to mean that a person has the authority to arrest an individual who is *apparently* committing an offence. Other Canadian courts have subsequently interpreted 494(1) to require that the offence be "apparent."

R v Biron, [1976] 2 SCR 56 at 75, 1975 CarswellQue 34.

R v Abel, 2008 BCCA 54 at para 51, 291 DLR (4th) 110 [*Abel*].

53. In this case, the Respondent was convicted of possession of child pornography. It is undisputed that the Respondent was in possession of child pornography throughout his

interview with Fox, and was therefore committing an offence contrary to section 163.1(4).

Problem, *supra* para 6 at para 37.

54. The Respondent's possession of child pornography was apparent to a reasonable person at the time of his interview with Fox. Fox knew that the Respondent had a sexual interest in minors. He knew that the Respondent was technologically savvy and able to convince children in online chat rooms to engage in sexual conversations. The Respondent told him that he would be bringing a video camera. Modern video cameras use digital storage devices that can retain video data long after it has been erased. It was reasonable of Fox to believe that the Respondent would be in possession of child pornography stored on his video camera.

Problem, *supra* para 6 at paras 4, 10-12.

55. The authority to arrest under section 494(1)(a) does not require unequivocal personal knowledge that an offence is being committed. Rather, there must be "reasonable grounds to believe that the person to be arrested is apparently in the process of committing an indictable offence."

Abel, *supra* para 52 at para 52.

56. Fox's knowledge of the Respondent's interests and intention to bring a video camera combined to give Fox reasonable grounds to believe an offence was being committed. In *R v Jones* the court considered the standard for when an offence is "apparent." In that case, an off-duty police officer observed a person driving erratically and detained him on that basis. The court found that it was reasonable for the off duty police officer to believe,

on the basis of the observed driving, that the driver was committing the offence of impaired driving.

R v Jones, [2005] NBQB 14 at paras 7-12, 13 MVR (5th) 210 [*Jones*].

57. In its reasons, the court in *Jones* quoted the Quebec Court of Appeal which remarked:

> It is not necessary for a citizen making an arrest under s. 494(1)(a) to have personal knowledge of all the factors that lead him to conclude that the person is "committing" an offence. The citizen may deduce from a series of circumstances that a person is apparently in the process of committing an offence, and that offence must be apparent to a reasonable person in the same circumstances.
>
> *R v Sirois,* [1999] QJ No 1079 at para 13, 44 WCB (2d) 213, translated and quoted in *Jones*, *supra* para 56 at para 11.

58. Child pornography and offences related to the sexual violation of minors are a unique threat to our society. They are frequently difficult to detect. The adults who traffic in child pornography “do not advertise their intentions” and “may use any means to obtain their ends.” Fox reasonably deduced that the Respondent, who had travelled to a home with a camera with the explicit intention of having sex with a child, would be in possession of child pornography. Fox’s arrest of the Respondent was therefore authorized by 494(1)(a) of the *Criminal Code*.

R v Gurr, 2007 BCSC 979 at para 24, [2008] BCWLD 1960.

59. Fox did not deliver the Respondent to a police officer as required by section 494(3) of the *Criminal Code*. However, an arrest can be lawful even where the person carrying out the arrest fails to comply with section 494(3).

Chopra v T. Eaton Co., 1999 ABQB 201 at paras 155-158, 240 AR 201 [*Chopra*].

B. Section 494(1) itself is reasonable and not arbitrary

60. The second requirement for finding that a detention will not violate section 9 is that the authorizing law not be arbitrary.

R v Clayton, 2007 SCC 32 at para 21, [2007] 2 SCR 725.

61. Section 494(1) is not arbitrary. It contains clear and express criteria that govern its application. Section 494(1) authorizes an arrest only when a person is committing an indictable offence. As discussed in paragraphs 42-45 above, Canadian courts have interpreted this provision to require that a reasonable person would find it apparent that a crime was being committed.

R v Hufsky, [1988] 1 SCR 621 at para 13, 63 CR (3d) 14 [*Hufsky*].

62. In *R v Hufsky* the Supreme Court found that a law authorizing random vehicle spot-checks was arbitrary because it included no criteria that governed its application. The law gave police officers absolute discretion. In this case, section 494(1) requires that an offence be reasonably apparent at the time of arrest and therefore does not give citizens absolute discretion.

Hufsky, *supra* para 61 at para 13.

<u>Issue 3</u>: Hodgkinson's section 8 rights were not violated

63. If Fox's actions are subject to *Charter* scrutiny, the Appellant submits that Fox's search of the Respondent was not in violation of section 8 of the *Charter.* While a search did occur, the search did not violate section 8 of the *Charter*.

64. The circumstances of Fox's search of the Respondent satisfy the criteria set out in *R v Collins* for determining whether a warrantless search violates section 8. In this case:

1. The search was authorized by law;
2. The authorizing law, section 494 of the *Criminal Code*, is reasonable; and
3. The manner of the search was reasonable.

R v Collins, [1987] 1 SCR 265 at para 23, 56 CR (3d) 193 [*Collins*].

A. The search was authorized by law

65. Fox's arrest was authorized under section 494(1)(a) of the *Criminal Code*. Fox then exercised his power at common law to conduct a search incidental to arrest.

66. When an arrest has occurred, the common law authorizes an incidental search when three conditions are met:

1. The arrest must be lawful;
2. The search must have been conducted as an incident to the lawful arrest;
3. The manner in which the search is carried out must have been reasonable.

R v Stillman, [1997] 1 SCR 607, 5 CR (5th) 1 at para 27.

1. The arrest was lawful

67. As argued above in paragraphs 50-59, the arrest was lawful under section 494(1)(a). It was reasonably apparent to Fox at the time of the arrest that the Respondent was in possession of child pornography, satisfying the requirements of section 494(1).

2. The search was conducted incident to the lawful arrest

68. Fox's search of the Respondent's bag was incident to the arrest because it was carried out to preserve evidence of his offence. The Supreme Court in *Cloutier v Langlois* reviewed the Canadian case law on incidental searches and found that:

> It seems beyond question that the common law as recognized and developed in Canada hold that the police have a power to search a lawfully arrested person and to seize anything in his or her possession or immediate surroundings to guarantee the safety of the police and the accused, prevent the prisoner's escape or provide evidence against him.
>
> *Cloutier v Langlois*, [1990] 1 SCR 158 at para 40, 74 CR (3d) 316 [*Cloutier*].

69. The Court in *Cloutier* further held that:

> The process of arrest must ensure that evidence found on the accused and his immediate surroundings is preserved. The effectiveness of the system depends in part on the ability of peace officers to collect evidence that can be used in establishing the guilt of a suspect beyond a reasonable doubt.
>
> *Cloutier, supra* para 68 at para 53.

Fox's objective was to gather evidence of the Respondent's crime. It would have been easy for the Respondent to destroy or dispose of the DVD had Fox released him without performing the search. Therefore Fox was acting towards a "valid objective in pursuit of the ends of criminal justice."

> *Cloutier, supra* para 68 at para 61.

70. Fox carried out his search in order to procure evidence that was directly connected to the crime that the Respondent was apparently committing. It was reasonably apparent to Fox that the Respondent would be in possession of child pornography. The Respondent had told Fox that he would be bringing a video camera. It was reasonable in the circumstances to believe that a camera or related evidence would be found in the Respondent's backpack. Fox was pursuing the legitimate objective of obtaining evidence to establish the Respondent's guilt when he searched the Respondent's backpack, and therefore this search was properly conducted as an incident to arrest.

3. The manner in which the search was carried out was reasonable

71. Mr. Fox's search was conducted in a reasonable manner. Justice Ho found at trial that Mr. Fox did not use excessive force or coercion to seize the backpack, and that at all times he treated the Respondent with dignity and respect.

Problem, *supra* para 6 at para 34.

B. The law itself is reasonable

72. Fox was authorized at law to search the Respondent's bag through the statutory power provided by section 494(1)(a) and by the common law power to search incident to an arrest. Combining these two powers and allowing the common law power to search incidental to a citizen's arrest is necessary to preserve essential evidence.

73. Whether an arrest is carried out by a police officer or by any other person, one of the purposes of an arrest is to gather information about offences that may have been committed by the arrested person and to prevent flight or destruction of the evidence. As the Court explained in *Cloutier*:

> The legitimacy of the justice system would be but a mere illusion if the person arrested were allowed to destroy evidence in his possession at the time of the arrest.

Cloutier, supra para 68 at para 53.

74. The Alberta Court of Appeal case of *R v Lerke* considered whether a citizen also had the right to search the individual they had arrested. The Court in *Lerke* found that the principles which authorized a citizen to search upon arrest were the same as those that authorized a police officer to search. Both were legally enforcing "the King's Peace." Despite the fact that citizens perform arrests much less frequently than police officers,

> There is no rational ground to suppose that the private citizen needs less protection than does the peace officer nor is the need to obtain or preserve evidence less when the private citizen makes the arrest.
>
> *R v Lerke*, 1986 ABCA 15 at paras 35, 67 AR 390 [*Lerke*].

75. The Court in *Lerke* further stated that there is no "litmus test" for determining when a search and seizure during the course of a citizen's arrest is reasonable. Each case will need to be considered on its circumstances. What is clear from *Lerke* is that the search cannot be a "fishing expedition" but that there must be a nexus between the search and the offence for which the person is being arrested.

> *Lerke, supra* para 74 at paras 8-9.

76. In the totality of the circumstances, it was reasonably apparent that the Respondent could be in possession of child pornography. Fox's search of the Respondent's backpack was not a fishing expedition. The search was conducted incidental to a lawful arrest, with the objective of obtaining evidence connected to the very offence that for which the Respondent was arrested. Fox searched only the Respondent's backpack, the place where a video camera was most likely to be found. Fox limited his search to only the location that was most closely connected to the crime of possession of child pornography under these circumstances.

77. Moreover, Section 494 itself is not overly broad. In order to arrest an individual under this provision, an indictable offense must be in process (subsection (1) states "anyone may arrest without a warrant (a) a person whom he find committing an indictable offence"), or the arresting citizen must have a reasonable belief that the individual is being actively sought by police for an indictable offense. This considerably narrows the

instances in which a citizen's arrest can be used, and even further the instances in which its use will be unwarranted. This *Criminal Code* provision is a codification of a citizen's arrest power that has existed for centuries in the common law. Section 494 is narrower than the power found at the common law, as it does not convey the power to arrest to prevent a breach of the peace. Parliament narrowed the scope of this power, and as a result minimized the potential for *Charter* breaches.

Chopra, *supra* para 59 at para 121.

C. The manner of the search was reasonable

78. As submitted above at paragraph 71, the manner of the search was reasonable.

79. Citizens' arrest laws play an important role in the detection and prevention of crime in Canada. These laws enable citizens to make arrests when police officers are not present. These arrests serve the public interest in reducing the number of potential criminals that escape justice. The codification of a citizen's arrest provision in the *Criminal Code* evolved from a common law power, which had "a broad public purpose of maintaining the peace." In order for citizens' arrests to fulfill their broad public purpose within the justice system, they must be supported by the common law power to conduct a search incidental to that arrest either for protection or to preserve evidence.

Dell, supra para 28 at para 24.

Issue 4: Excluding evidence obtained from the search would bring the administration of justice into disrepute

A. Two of the *Grant* factors weigh in favour of admitting the evidence

80. If this Court finds that the Respondent's *Charter* rights were breached by any of Detective Stabler's or Fox's actions, the evidence should not be excluded under section 24(2) of the *Charter*. Section 24(2) states:

> 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.

81. An application of the Grant test weighs in favour of admitting the evidence. *R v Grant* details a three-factor test for determining whether evidence obtained through a breach of *Charter* rights should be excluded under s 24(2). McLachlin C.J. and Charron J. held in *Grant* that:

> The court must assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to:
>
> (1) The seriousness of the Charter-infringing state conduct (admission may send the message the justice system condones serious state misconduct),
>
> (2) The impact of the breach on the Charter-protected interests of the accused (admission may send the message that individual rights count for little), and
>
> (3) Society's interest in the adjudication of the case on its merits.
>
> *Grant*, *supra* para 49 at para 71.

82. The purpose of the *Grant* test is to determine:

> [w]hether a reasonable person, informed of all relevant circumstances and the values underlying the Charter, would conclude that the admission of the evidence would bring the administration of justice into disrepute?

This inquiry is an objective, forward-looking concern about the long-term reputation of the justice system.

Grant, supra para 49 paras 68, 70.

83. Two of the above factors weigh in favour of admitting the evidence obtained through Fox's detention and search of the Respondent. First, the *Charter*-infringing state conduct was not serious. Second, society has a high interest in seeing this case adjudicated on its merits.

1. The Charter-infringing state conduct was not serious

84. Fox did not act in bad faith. Though he was ignorant of the Respondent's *Charter* rights, he did not display the intention required to make a finding of bad faith. On the contrary, Fox wanted to gather evidence that would help ensure a conviction.

Problem, *supra* para 6 at para 6.

85. The police, even if they were acting on a retroactively invalidated warrant, acted in good faith at all times, which reduces the need for the Court to distance itself from their actions. *Grant* states that "the more severe or deliberate the state conduct that led to the *Charter* violation, the greater the need for the courts to disassociate themselves from that conduct." This recognizes a spectrum of *Charter* violations, from "inadvertent or minor violations" to "wilful or reckless disregard of Charter rights."

Grant, supra para 49 at paras 72-74.

Fox did not act in bad faith

86. Fox did not act in bad faith. In *R v Smith*, Ryan J. describes the distinction between good and bad faith as follows:

> ... good faith connotes an honest and reasonably held belief. If the belief is honest but not reasonably held, it cannot be said to constitute good faith. But it does not follow that is therefore bad faith. To constitute bad faith the actions must be knowingly or intentionally wrong.
>
> *R v Smith,* 2005 BCCA 334 at para 61, 30 CR (6th) 20.

87. Fox was ignorant of the Respondent's *Charter* rights, and it is not reasonable to expect that he would know, given the circumstances, that he had acted to violate section 9 or section 8. Ignorance of the law cannot support a finding of good faith, but neither does it lead to a finding of bad faith. Fox was not acting out of malice or even wilful blindness. As such, his lack of knowledge cannot be equated with bad faith.

88. Further, given that Fox had expressed his desire to obtain evidence in such a way as to ensure a conviction, he would not have breached the Respondent's rights if he had known that he was doing so. Had Fox been aware that he was jeopardizing a future trial on the evidence he was collecting, he would have acted differently. Under the circumstances, Fox made an honest mistake. Fox simply asked the Respondent to let him look in his bag, and the Respondent handed it to him. This is not egregious conduct by any definition.

Problem, *supra* para 6 paras 6, 16

89. Given that Fox did not act in bad faith, and that his conduct was not egregious, this factor weighs in favour of admitting the evidence.

The Police acted in good faith

90. If Fox's breach of the Respondent's *Charter* rights is found to taint the subsequent warrant that Detective Stabler obtained, the police nonetheless acted in good faith when obtaining and executing the warrant.

91. Detective Stabler gave deliberate consideration to the Respondent's rights when determining what evidence was appropriate to use in obtaining a warrant. The detective read through the chat logs and determined that the tactics used by Stoddard were too "aggressive" to obtain a conviction for luring a minor. Further, Detective Stabler, after watching Fox's show, was concerned that Fox's manner of questioning the Respondent may not stand up to *Charter* scrutiny. When the police deliberately violate *Charter* rights, it tends to support exclusion of the evidence; however, Detective Stabler considered the Respondent's rights when determining what evidence she could use.

Problem, *supra* para 6 at paras 20-21.

92. Nor was the police conduct part of a pattern of police abuse of *Charter* rights. There is no evidence that the MPD habitually violates *Charter* rights in their investigations, or uses citizens to investigate crimes as a way to avoid *Charter* scrutiny. In this case, as in others, the police sought a warrant and executed it lawfully.

Grant, supra para 49 at para 75.

93. In this instance, the *Charter* breach by Detective Stabler was completely inadvertent. She had given extensive consideration to the *Charter* rights of the Respondent, and had a reasonable and honest belief that her warrant was valid.

Problem, *supra* para 6 at paras 20-21.

94. In the Supreme Court case of *R v Morelli*, the Court found that a search and seizure of a computer by police officers when looking for child pornography in the accused's home was:

> [U]nwarranted but not warrantless: they were conducted pursuant to a search warrant by officers who believed they were acting under lawful authority. The executing

> officers did not wilfully nor even negligently breach the Charter. These considerations favour admission of the evidence. To that extent, the search and seizure cannot be characterized as particularly egregious.
>
> *R v Morelli,* [2010] 1 SCR 253 at para 107, 72 CR (6th) 208.

95. Justice Sanderson of the Falconer Court of Appeal erred when he held in his judgment that Detective Stabler "knew" that the production of the episode would involve a breach of *Charter*-protected rights. The detective had no way of knowing how Fox would question the Respondent, that he would lock the door, or that the Respondent would believe that Fox was a police officer. Detective Stabler did not advise Fox to violate the Respondent's rights. There is nothing to support a finding of bad faith on the part of Detective Stabler, and similar to *Morelli*, her conduct cannot be characterized as "egregious."

Problem, *supra* para 6 at para 46.

Morelli, supra para 94 at para 99.

96. It is reasonable that Detective Stabler could not have known that Fox's detention of the Respondent and search of his backpack violated his *Charter* rights. The jurisprudence is ambiguous regarding whether an individual acting under section 494 is subject to *Charter* scrutiny. When police officers are operating in "circumstances of considerable legal uncertainty," it weighs in favour of admitting the evidence obtained.

Grant, *supra* para 49 at para 140.

97. Fox did not act in bad faith. Where bad faith is not present, the courts have a lower need to disassociate themselves from the state conduct. The conduct of the authorities in this case – Detective Stabler and Fox – does not weigh in favour of excluding the evidence.

2. The Charter breaches were not at the most severe end of the spectrum

98. The *Charter* breaches in this case were not overly intrusive and did not have a large impact on the Respondent's *Charter* interests. In this case, the breaches, when placed on a spectrum, were not "profoundly intrusive" and are not so serious as to be determinative of the outcome of the Grant analysis.

Grant, *supra* para 49 at para 76.

99. In *Grant*, the police violated a suspect's section 9 rights. The Supreme Court of Canada found that the police conduct in that case was not severe as it did not involve physical coercion and was not abusive. As in *Grant*, Fox did not physically coerce the Respondent or abuse him. At no point did Fox physically intimidate the Respondent, touch the Respondent, or actively interfere with the Respondent's ability to leave. Therefore, even if the breach was "more than minimal," it was not severe.

Grant, *supra* para 49 at para 135.

100. Fox's search of the Respondent's backpack did not intrude on an area in which the Respondent had a high degree of privacy, and did not interfere with his human dignity. When the Court is assessing the seriousness of a breach of section 8, "an 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 is not."

Grant, *supra* para 49 at paras 76, 78.

101. A recent Ontario Court of Appeal case, *R v Kelsy*, found that despite the intrusion into a suspect's privacy interest in her backpack, the evidence was still admissible without bringing the administration of justice into disrepute.

R v Kelsy, 2011 ONCA 605 at para 69-70, 283 OAC 201.

102. The warrantless search of a backpack, while serious, is not the most intrusive on a spectrum of severity regarding section 8 violations. The two strongest privacy interests are found in our bodies and our homes. In *R v Tessling,* the Supreme Court found that "privacy of the person has perhaps the strongest claim to constitutional shelter because it protects bodily integrity," and in *R v Silveira* that "there is no place on earth where persons can have a greater expectation of privacy than within their 'dwelling house."

R v Tessling, 2004 SCC 67, 3 SCR 432 at para 21.

R v Silveira, [1995] 2 SCR 297 at para 140, 38 CR (4th) 330.

103. In *R v Washington,* a case where a package was searched in violation of section 8, the British Columbia Court of Appeal held that "the expectation of privacy in the contents of the package is not as high as that related to bodily integrity or one's home or office. The seriousness of the violation should be judged in this light." The search of a backpack, or a package, falls well short of a search of an individual's person or home.

R v Washington, 52 CR (6th) 132 at para 69, 227 CCC (3d) 214 (BC CA) [*Washington*].

104. *Washington* holds that an assessment of privacy interests involves a comparison between the violated interest and other interests. The section 8 violation in this case, when put on this spectrum, is significant but not severe. It is certainly not so serious as to be

determinative in the way that a violation of bodily integrity might be to balancing the *Grant* factors.

Washington, supra para 103 at para 69.

105. One of the key differences between a search that is so intrusive as to weigh heavily in favour of exclusion, and Fox's search of the Respondent's backpack, is that the Respondent's human dignity was not negatively impacted by the search itself. Given that the search was not at the most serious end of the spectrum of privacy rights, and did not violate the Respondent's human dignity, this factor does not weigh heavily in favour of exclusion of the evidence.

R v Golden, [2001] 3 SCR 679 at para 87, 47 CR (5th) 1.

3. Society has a high interest in this case's adjudication on its merits

106. The third *Grant* factor weighs in favour of inclusion of the evidence, as it asks the Court to consider the impact of failing to admit the evidence in a criminal trial. This is a reflection of "society's collective interest in ensuring that those who transgress the law are brought to trial and dealt with according to the law."

Grant, supra para 49 at para 79.

107. The evidence is highly credible and unambiguously indicates that the Respondent possessed, produced, accessed and distributed child pornography. This evidence is the cornerstone of the Crown's case against the Respondent. Without it, the Respondent, who actively exploited children in his home studio, would go unpunished and unsanctioned by the justice system. In *Morelli,* a case regarding the possession of child pornography, the exclusion of the evidence would have left the Crown with no ability to prosecute the

accused. As in this case, excluding the evidence would have "seriously undermine[d] the truth-seeking function of the trial, a factor that weighs against exclusion."

R v Morelli, supra para 94 at para 107.

108. Society has a clear interest in protecting its most vulnerable members. Child exploitation offenses are some of the most reprehensible crimes imaginable to our collective consciousness. These offenses have lifelong psychological consequences for their victims. Moreover, the fact that the Respondent produced child pornography and distributed it means that his victims will never know who has access to it, or where it might resurface. As the Supreme Court stated in *R v Sharpe*:

> The link between the production of child pornography and harm to children is very strong. The abuse is broad in extent and devastating in impact. The child may be traumatized by being used as a sexual object in the course of making the pornography. The child may be sexually abused and degraded. The trauma and violation of dignity may stay with the child as long as he or she lives.

R v Sharpe, [2001] 1 SCR 45 at para 92, 39 CR (5th) 72.

R v M (L), [2008] 2 SCR 163 at paras 25-28, 56 CR (6th) 278.

109. The Respondent engaged in the activity that attracts the highest level of culpability – he produced child pornography for distribution and a view to profit. This scale of culpability "recognizes the stronger link with the abuse of children and the escalating pressing societal need to denounce and deter such activity." Over five years, with thousands of hours of footage, the Respondent degraded, abused, and traumatized numerous children whose lives are irrevocably altered as a result. The incalculable impact of the Respondent's numerous crimes on his vulnerable victims means that society has an extremely high interest in seeing this case adjudicated on its merits.

R v Hunt, 2002 ABCA 135 at para 30, 303 AR 240.

110. The Alberta Court of Appeal in *R v Shelton* stated that "simple possession for personal viewing has been described as less culpable than distribution, and distribution for a commercial purpose has been said to have an even higher degree of culpability."

R v Shelton, 2006 ABCA 190 at para 16, 391 AR 177.

111. Though "it is the long-term view of the [repute of the justice system] that counts, not society's unconsidered reaction to a particular case," the fact that society has such a high stake in seeing this case adjudicated weighs in favour of admitting the evidence. Indeed, society's interest in this case cannot weigh in favour of excluding the evidence.

Problem, *supra* para 6 at para 50.

R v Jones, 2011 ONCA 632 at para 101, 107 OR (3d) 241.

B. The *Grant* test weighs in favour of including the evidence

112. Two of the *Grant* factors weigh heavily in favour of inclusion of the evidence. Society has a strong collective interest in seeing this case adjudicated on its merits and a child predator brought to justice. Fox did not act in bad faith, and the Court has little need to disassociate itself from his conduct. The impacts on the Respondent's rights were not at the most severe end of the spectrum, and his human dignity was not affected. Excluding this evidence would do more damage to the repute of the justice system than including it in the long-term.

R v Jones, supra para 111 at para 102.

Part IV – Order Requested

113. The Appellant respectfully requests that the appeal be allowed and the convictions restored.

Part V – Table of Authorities

Cases	**Paragraphs**
Chopra v T Eaton Co., 1999 ABQB 201, 240 AR 201.	59, 77
Cloutier v Langlois, [1990] 1 SCR 158, 74 CR (3d) 316.	68, 69, 73
Gentles v Toronto (City) Non-Profit Housing Corp, 2010 ONCA 797, 2010 CarswellOnt 4929.	51
McKinney v University of Guelph, [1990] 3 SCR 229, 76 DLR (4th) 545.	40
R v Abel, 2008 BCCA 54, 291 DLR (4th) 110.	52, 55
R v Bartle, [1994] 3 SCR 173, 33 CR (4th) 1.	44
R v Biron, [1976] 2 SCR 56 at p. 75, 1975 CarswellQue 34.	52
R v Broyles, [1991] 3 SCR 595, 84 Alta. L.R. (2d) 1.	30, 36, 42
R v Buhay, 2003 SCC 30, 225 DLR (4th) 624.	31, 47
R v Castor, 2006 ABPC 64, 395 AR 270.	37
R v Clayton, 2007 SCC 32, [2007] 2 SCR 725.	60
R v Collins, [1987] 1 SCR 265, 56 CR (3d) 193.	64
R v Dell, 2005 ABCA 246, 256 DLR (4th) 271.	28, 79
R v Golden, [2001] 3 SCR 679, 47 CR (5th) 1.	105

R v Grant, [2009] 2 SCR 353, 2009 SCC 32.	49, 81, 82, 85, 92, 96, 98, 99, 100, 106, 112
R v Gurr, 2007 BCSC 979, [2008] BCWLD 1960.	58
R v Hufsky, [1988] 1 SCR 621, 63 CR (3d) 14.	61, 62
R v Hunt, 2002 ABCA 135, 303 AR 240.	109
R v J (AM), 1999 BCCA 366, 137 CCC (3d) 213.	46
R v Jones, [2005] NBQB 14, 13 MVR (5th) 210.	56, 57
R v Jones, 2011 ONCA 632, 107 OR (3d) 241.	111, 112
R v Kelsy, 2011 ONCA 605, 283 OAC 201.	101
R v Lerke, 1986 ABCA 15, 67 AR 390.	74, 75
R v M (L), [2008] 2 SCR 163, 56 CR (6th) 278.	108
R v M (MR), [1998] 3 SCR 393, 171 NSR (2d) 125.	38
R v Morelli, [2010] 1 SCR 253, 72 CR (6th) 208.	94, 95, 107
R v NS, [2004] OJ No 290 (CA), 2004 CarswellOnt 8093.	46
R v Sharpe, [2001] 1 SCR 45, 39 CR (5th) 72.	108
R v Shelton, 2006 ABCA 190, 391 AR 177.	110
R v Silveira, [1995] 2 SCR 297, 38 CR (4th) 330.	102

R v Sirois, [1999] QJ No 1079, 44 WCB (2d) 213. 57

R v Skeir, 2005 NSCA 86, 233 NSR (2d) 298. 46

R v Smith, 2005 BCCA 334, 30 CR (6th) 20. 86

R v Stillman, [1997] 1 SCR 607, 5 CR (5th) 1. 66

R v Tessling, 2004 SCC 67, 3 SCR 432. 102

R v Washington, 52 CR (6th) 132, 227 CCC (3d) 214. 103, 104

Legislation

***Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.**

Relevant provisions:

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.

***Criminal Code,* RSC 1985, C-46.**

Relevant provisions:

Definition of "child pornography"
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.

Accessing child pornography
(4.1) Every person who accesses 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.

Interpretation
(4.2) For the purposes of subsection (4.1), a person accesses child pornography who knowingly causes child pornography to be viewed by, or transmitted to, himself or herself.

Aggravating factor
(4.3) If a person is convicted of an offence under this section, the court that imposes the sentence shall consider as an aggravating factor the fact that the person committed the offence with intent to make a profit.

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.

Defence
(6) No person shall be convicted of an offence under this section if the act that is alleged to constitute the offence

(*a*) has a legitimate purpose related to the administration of justice or to science, medicine, education or art; and

(*b*) does not pose an undue risk of harm to persons under the age of eighteen years.

Question of law
(7) For greater certainty, for the purposes of this section, it is a question of law whether any written material, visual representation or audio recording advocates or counsels sexual activity with a person under the age of eighteen years that would be an offence under this Act.

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.