Citation: *R. v. Garbett*, 2008 ONCJ 97

ONTARIO COURT OF JUSTICE
(Peel Region - Brampton)

BETWEEN:

HER MAJESTY THE QUEEN

and

JOHN GARBETT

Craig Penney for John Garbett
Victoria Reid for the Crown

Reasons for Judgment

MacDonnell J.:

[1] On June 18, 2007, John Garbett appeared before this court and was arraigned on an information alleging that:

> 1) …during a six year period… ending on or about the 14th day of June, 2006, at the City of Mississauga… [he] did have in his possession child pornography to wit: graphic computer images, contrary to section 163.1(4) of the *Criminal Code of Canada*;
>
> 2) …during a four year period… ending on or about the 14th day of June, 2006, at the City of Mississauga… [he] did access child pornography to wit: graphic computer images, contrary to section 163.1(4.1) of the *Criminal Code of Canada.*

[2] The Crown elected to proceed by way of summary conviction. Mr. Garbett pleaded not guilty to both charges.

[3] At the outset of the trial, Mr. Garbett applied pursuant to s. 24(2) of the *Canadian Charter of Rights and Freedoms* for an order excluding from evidence statements he had made to the police on the day of his arrest and the results of the forensic analysis of his computers. He submitted that all of this evidence was obtained in a manner that infringed his rights under s. 8 of the *Charter*. The voluntariness of his statements was also in issue. The parties agreed to hold a single evidentiary hearing to resolve those issues. After three days of evidence, the matter was adjourned to September 24, 2007 for submissions. On October 16, 2007, I dismissed the application to exclude evidence. I also ruled that the Crown had proved that Mr. Garbett's statements were voluntary.

[4] The parties agreed that the bulk of the evidence adduced on the evidentiary hearing would be applied to the trial proper. After hearing the submissions of counsel, a verdict on the two counts before the court was reserved until today.

I. Overview

[5] Police Constables Leanne Rivers and Paul Ceolaro were attached to the Internet Child Exploitation Unit of the Peel Regional Police. In June, 2006 they were investigating information that in 1999 individuals in Peel Region had purchased child pornography online from an American web site. These persons had been identified through their credit card records. Mr. Garbett's name was one of those that came to the attention of the Peel Regional Police in this way.

[6] Around noon on June 14, 2006, Rivers and Ceolaro went to the residence Mr. Garbett shared with his parents. Their purpose was to obtain Mr. Garbett's consent for a forensic examination of his computers to determine whether they contained child pornography. Mr. Garbett was not home when the officers arrived, but at the request of Constable Rivers he returned home. Constable Rivers advised Mr. Garbett of the nature of the investigation and asked if his computers had child pornography on them. He answered "no". Rivers told him that the officers wanted to examine the computers, and she produced the standard consent form employed by the Peel Regional Police. Mr. Garbett reviewed this document for five or six minutes before signing it. He then escorted the officers into the house where they seized two computers. One computer, an MDG, was taken from Mr. Garbett's bedroom. The other, an LG clone, was taken from a spare bedroom. The officers left Mr. Garbett's residence at 1:10 p.m. and returned to their office at 180 Derry Road.

[7] Thirty-five minutes later, at 1:45 p.m., Rivers was notified that Mr. Garbett had left a message for her to call him. When she returned the call, Mr. Garbett told her that he wanted to speak to her in person. Rivers gave him directions to the office. At 2:20 p.m. Mr. Garbett arrived at 180 Derry Road. He told Rivers that he had not been completely honest in their earlier conversation, and that forensic examination would reveal the presence of child pornography on his computers.

[8] Constable Rivers placed Mr. Garbett under arrest for possessing and accessing child pornography and took him to 22 Division where he was interviewed on videotape. In the course of the interview, Mr. Garbett acknowledged an interest in teenage pornography, conceded that he had viewed videos containing such material, and admitted that he had downloaded and saved some of those videos.

[9] Mr. Garbett's computers were held in the custody of the Technological Crimes Unit of the Peel Regional Police. Constable Gary Lancaster is an investigator with that Unit. His duties include "the detection, preservation, collection, analysis and presentation of electronic evidence found on computers and similar devices capable of storing data." The parties agreed that Constable Lancaster was, by reason of his training and experience, qualified to give opinion evidence in relation to "forensic computer analysis".

[10] On June 16, 2006, Constable Lancaster began the process of analyzing the data on Mr. Garbett's computers. Using a forensic utility called ENCASE, he made exact copies of the hard drives of the computers and lodged them on the servers of the Technological Crimes Unit. On June 21, Constable Lancaster used another programme, Categorizer for Pictures (C4P), to extract from the hard drives all of the picture files together with whatever technical information was available with respect to those files. This information included matters such as the name of the file, its location on the hard drive, when it was created and when it was last accessed. Constable Lancaster copied the picture files and any accompanying information into a folder. On July 6, 2006, he copied the folder onto a disc and forwarded it to Constable Rivers for examination. He did not view any of the pictures himself.

[11] Subsequently, Constable Lancaster examined the data provided by the C4P programme, looking for the file extensions of movie files (videos). Video files are not automatically extracted by the C4P programme and Constable Lancaster had to manually copy them into a folder. On August 9, the video files were copied onto a number of discs and provided to Constable Rivers.

[12] The disc provided to Constable Rivers on July 6 contained 110,901 pictures. Rivers began her examination of the pictures on July 17 and finished on September 5. She testified that "a lot" of the pictures were of motorcycles, but she did not indicate how many "a lot" was. Nor did she shed any light on the nature of the remaining images beyond expressing the view that the 48 that are the subject matter of this prosecution constitute child pornography.

[13] At some point, Constable Rivers examined the videos that Constable Lancaster had extracted from Mr. Garbett's computers. There is no evidence as to the number of videos there were. There is also no evidence of the nature of the material in the videos apart from Rivers' opinion that none of it fell within the definition of child pornography.

[14] The Crown alleges that all of the 48 pictures that Constable Rivers selected from the 110,901 found on Mr. Garbett's hard drives fall within one or the other of the definitions of child pornography set forth in s. 163.1(1)(a)(i) and (ii) of the *Criminal Code*. In support of this allegation, the Crown relies on the pictures themselves, viewed through the lens of the court's own knowledge and experience. The Crown further alleges that Mr. Garbett had a sufficient degree of knowledge and control of the pictures to constitute possession in law, and that he 'accessed' them within the meaning of s. 163.1(4.2). In this respect, the Crown relies on two bodies of evidence: Mr. Garbett's statements to Constable Rivers, and the data in relation to the relevant images that was obtained during Constable Lancaster's forensic analysis.

[15] Mr. Garbett did not testify and no evidence was called on his behalf. The position of the defence is that the Crown has failed to prove that any of the images constitute child pornography, and that in any event the Crown has failed to prove that Mr. Garbett ever viewed any of them, that he knew that they were on the hard drives of the computers, or that he had any degree of control over them.

II. Has 'Possession' or 'Access' Been Proved Beyond a Reasonable Doubt?

[16] I will first consider whether the Crown has proved beyond a reasonable doubt that Mr. Garbett 'possessed' or 'accessed' any of the impugned pictures. If the Crown has failed to meet that burden, Mr. Garbett is entitled to an acquittal without the need to consider whether the pictures constitute child pornography.

A. The Evidence

I. The Electronic Data

(a) Introduction

[17] The pictures that are alleged to constitute child pornography were reproduced on paper and filed in these proceedings as Exhibits 4 and 5. Each picture was accompanied by a text box setting out the information that the forensic analysis was able to retrieve in relation to, *inter alia*, the file path for the image, when it was written to the hard drive, and the last time it was "accessed".

[18] Exhibits 4 and 5 contain 48 text boxes and file paths but only 44 pictures. That is, there are text boxes for pictures 3, 4, 15, and 44, but the pictures themselves were not reproduced, apparently because they were "duplicates". In the end, nothing turns on the fact that those four pictures are missing. In the discussion that follows I will deal with what the forensic analysis revealed in relation to all 48 pictures.

[19] Of the 48 pictures, 47 were found on the hard drive of the MDG computer, which was taken from Mr. Garbett's bedroom. The remaining picture, #42, was found in the LG clone taken from the spare bedroom.

(b) Does the presence of pictures on a hard drive prove possession or access?

[20] If pictures are found on the hard drive of a computer that has been used exclusively by one person, is it reasonable to infer that the person must have known of the existence of the pictures, must have viewed them, and must have exercised some degree of control over them?

[21] Initially, Constable Lancaster testified that a picture file could not be created or accessed without someone viewing the image. He subsequently abandoned that assertion, however, as the questions and answers reproduced below illustrate:

> Q. For instance, … for [image #9] to be created on Mr. Garbett's hard drive and show as accessed on [the] hard drive would someone…have had to open the image on the … hard drive itself?
> A. This file would have had to be viewed in some fashion
> ***
> Q. … If you're copying it from a floppy disc to a hard drive, you can do it through the file folders without actually having to open a file, is that fair.
> A. That's correct.
> Q. But you've accessed the file by just copying it?
> A. That's correct.
> Q. And – so that's one way that the images can be put on the hard drive without actually having to open the images, to look at the image?
> A. That's correct.
> Q. Is there any other way that it can be done without having to open or view the image?
> A. *Innumerable ways*. … There's downloading from websites, there's opening up documents that contain images and saving those images. There's a myriad of ways
> Q. Is there any inadvertent way that it [could be copied onto a hard drive]?
> A. Internet browsing … without proper security on a computer could allow creation of files.
> [emphasis added]

[22] Constable Lancaster's evidence that internet browsing can result in the inadvertent copying of images onto a hard drive is important. Anyone who has used the internet, perhaps to read the online version of a newspaper, will understand that the "page" that opens when one enters a website may be considerably larger than what is immediately visible to the user. That is, a web page may contain substantially more information, in the form of images and text, than what can be seen on the computer screen. To see everything, the user may have to 'scroll' a considerable distance to the bottom of the page.

[23] Constable Lancaster testified that in order to make the internet browsing experience faster, the browser may write the entire contents of a web page to the computer's hard drive. The browser does this so that the page can be "repopulated" more quickly should the web site be revisited. The important point, for present purposes, is that what the browser writes to the hard drive is not only the images that the user is able to see on the computer screen but all of the images on the web page, even though the user may have never seen them or been aware of their existence. These images are written to the hard drive as "temporary internet files". Apart from opening the web page containing the picture, the user would not have to do anything to cause this to occur and, indeed, in the absence of computer expertise the user would probably not be aware that the process was occurring. Unless the cache of temporary internet files is cleared, the images can remain on the hard drive indefinitely.

[24] Accordingly, the mere fact that an image was found on a computer's hard drive does not lead inexorably to an inference that the user knew of its existence, or that the user had ever viewed it, intended to view it, intended to save it, or did anything to cause it to be saved. Constable Lancaster's evidence makes clear that to support any of those inferences, there must be something more.

(c) Location of the pictures on the hard drive

(i) Unallocated Clusters (30 pictures)

[25] Thirty of the 48 pictures were found in unallocated space on the hard drives, in "unallocated clusters".[1] With respect to "allocated" and "unallocated" space, Constable Lancaster testified:

> Allocated space on a hard drive is space that's being used by files, directories, folders, any of data … that may be on the drive that is, at that time, referenced by the operating system and accessible through the normal user interface to someone using a Windows machine…. Unallocated space…is an area of the hard drive that at the time is not referenced by the operating system. There is data in that area and it would be data that at one point in time was referenced by the operating system, deleted files. There's also, because of the nature of the computer and the memory that the computer is using, which is limited, parts of programs, parts of data that are in this memory, may be written to unallocated space which is temporarily referenced by the computer and once that reference is no longer needed, the computer in essence forgets about it.

[26] Constable Lancaster made it clear that the inferences that can be drawn with respect to any of the thirty pictures found in unallocated clusters are limited:

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[1] #7,10,12,14,16,17,18,19,20,21,22,24,25,26,27,28,30,31,32,34,35,36,38,39,40, 42,45,46,47 and 48

Q. … Can you explain what unallocated clusters means?
A. The file is in an area of the hard drive that the operating system is not referencing and ENCASE is not able to parse the information from the file allocation table to be able to say that this file was in a folder or in a directory structure. And that can – can be simply attributed to the file having been deleted and through further use of the computer, that information has just been overwritten by other data.
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Q. Let's – let's put the images into categories, 'cause there's one category of image – images that are unallocated clusters… Look at the image [#16] and the information in the box below… Would you agree with me that based on the information you had in that box, that you're not able to determine, as a forensic expert, whether that image was ever viewed by a user on the computer. You don't have sufficient information to say that?
A. Correct.
Q. And would you also agree that you certainly cannot determine whether this image was accessed, created, modified, downloaded, before or after January 1st 2006, correct?
A. You can't find dates from files that are located in unallocated space
Q. Okay, so if you could just stay within the question, please?
A. I apologize. That's correct
Q. … You're not able to say when that file was created, accessed, downloaded, correct?
A. Correct
Q. And I gather that's true of every image where it says "file unallocated clusters" in the report you have before you.
A. That's correct.

(ii) Lost Files (16 pictures)

[27] Of the remaining 18 pictures, 16 were categorized by the C4P programme as "Lost Files".[2] Constable Lancaster provided the following explanation of what this category contains:

> "Lost files" is a mechanism that ENCASE uses to… [When] we first open a case…the first thing we run is what's called "Recover Lost Folders". ENCASE is able to find data that is referenced to a directory or a folder… when the folder name is unable to be resolved because part of the file allocation table itself has been deleted, but there is enough information for ENCASE to see that a file does exist and it can rebuild the file or finds the information in…unallocated space. ENCASE will use the lost files name because it cannot

[2] #1,3,4,5,6,8,9,11,13,15,23,29,33,37, 43 and 44

> resolve the actual name of the folder or directory structure that the file came from. So it will rebuild in effect, to the best of its abilities that this file existed, it was in a folder but I can't give you that folder. And that folder itself was on the C drive of that particular computer

[28] The time when an image was written to the hard drive, *e.g.,* to the temporary internet files, will be stored on the hard drive. So too will the last time that the image was "accessed", which will ordinarily be the last time that the operating system touched the file in some way. Constable Lancaster testified that the process of writing an image to a hard drive constitutes an "accessing" of the image.

[29] With respect to 14 of the 16 "Lost Files", Constable Lancaster was able to obtain "creation" and "access" times.[3] In each case, those times were identical. In light of the evidence that writing a file to a hard drive constitutes an "accessing" of the file, and bearing in mind the probability that the access time obtained by Lancaster was the last time the operating system touched the file, it seems reasonable to infer that subsequent to the time when these files were written to the hard drive they were never viewed, moved, saved or touched in any way. In my view, this is consistent with the possibility that those files were inadvertently downloaded. In the course of the cross-examination of Constable Lancaster in relation to the Lost Files, the following exchange occurred:

> Q. And I'm simply going to suggest, sir, that based upon the information that you have before you right here in this report, that you can't draw a conclusive inference that this image was viewed by any user on the computer where this image was found?
> A. I don't know
> Q. That's my question, that you cannot conclusively say that this image was viewed by any user on that computer at any time?
> A. I – I can't say, yeah… correct
> Q. You could say it was certainly on the computer, correct?
> A. Yes.
> Q. And …you can certainly say it was created and accessed on that – on that date, correct?
> A. Correct
> Q. But there's a number of ways an image can be created and accessed?
> A. Correct
> Q. Right? One way is … it can be put into the temporary internet files, correct?
> A. Correct.

[3] #1,3,5,6,8,9,11,13,15,23,29,33,37, and 44; no creation or access times were available for #4 or 43.

> Q. And then subsequently erased afterwards. And for all the files that fall into the lost files category… you'd give me the same answer, that you cannot say conclusively whether a viewer… on the computer that was at issue here, whether a user saw that image – any one of those images on that computer?
> A. …. So no, all I could say about that file is that the created and the accessed date is what we see before us

[30] The technical data retrieved for all 16 Lost Files described each of them as "File, Deleted, Archive". What that means is unclear. Constable Lancaster testified:

> Q. And the next line is "description". Can you please explain what that means – what that references?
> A. The – this file, ENCASE has found that is has been deleted and it's listed as an archive file.
> Q. What do you mean an archive file?
> A. That I – It's a Windows mechanism and honestly I couldn't define it for you.
> Q. Fair enough, but the description indicates that the file had been deleted, correct?
> A. That's correct.

[31] There is no evidence with respect to how any of the Lost Files came to be deleted. That is, there is no evidence with respect to whether it occurred by autonomous activity of the computer's operating system or whether it required user intervention, or, if the latter, whether the intervention was advertent or inadvertent.

(iii) Temporary Internet Files (one picture)

[32] Two pictures – #2 and #41 – were not found in unallocated clusters or categorized as Lost Files. Based on the file path for picture #2, Constable Lancaster determined that it was a temporary internet file. As discussed earlier in these reasons, temporary internet files are created automatically by the Internet Explorer browser to expedite the browsing process. They are stored on the hard drive so that the web page from which they came can be repopulated more quickly should the web page be revisited. What is written to the hard drive as a temporary internet file may include far more than what was visible on the computer screen when the web page was opened. Accordingly, the fact that a picture is in a temporary internet file does not establish that the person using the computer at the relevant time ever saw the picture, knew that it existed, had any intention of saving it, or knew that it had been saved. The following exchange in the cross-examination of Constable Lancaster partially illustrates the point:

> Q. … When we see this image number 2 here and we see these dates, created and accessed, assuming those dates to be correct…

> without knowing more about where on the webpage that image was, you're not able to say, from the information you have before you, whether the viewer at the time would even have seen that image, correct?
> A. I don't know…
> Q. You would have to have more information, correct?
> A. Correct

[33] Constable Lancaster's evidence was that as of the day the computers were seized the 30 pictures in unallocated clusters and the 16 in Lost Files were not accessible to a "non-forensic" user. They were not "live" files. He testified that while image #2 was a live file and was accessible, it would not be easily accessible to a non-expert. Based on his description of what would be required to access image #2, I have no difficulty accepting that opinion. He testified:

> The easiest way is through Windows Explorer, utilize the search function and knowing that the folder content .ie5 is a Windows standard, searching for that folder and upon finding it, navigating to the folders below and you can see that one of them almost appears to be a random string of letters and numbers, the 8HOVCBCZ, is the actual cache folder. There are, on normal computers that do internet browsing there will be quite a number of these. Browsing through that folder you will find the…temporary internet files. Again, they – they can become quite numerous, but you could then navigate to this 14(1).jpeg file itself.

(iv) The Desktop (one picture)

[34] Picture #41 was found in a folder within two other folders on the 'desktop' of Mr. Garbett's computer. Constable Lancaster testified that it was easily accessible:

> Q. …This is an image that is simply on the desktop and if you know where the image is, even a relatively inexpert user of the computer can go in and find it, correct?
> A. Correct.
> Q. Unlike image number 2 which you said was not easily accessible. Correct?
> A. Correct

[35] The forensic examination of the hard drive on which Image #41 was found revealed that it was created (*i.e.*, written to the hard drive) on April 29, 2006, and that it was last "accessed" on May 14, 2006. Initially, Constable Lancaster testified that this indicated that the image was viewed by a user of the computer on May 14, but under further cross-examination he conceded that the file could have been "accessed" in ways that did not require that it be viewed. He conceded, for example, that if it were simply moved into the folder in which it was

found from elsewhere on the computer, without being opened, the computer would record it as having been accessed. He also testified:

> Q. Or, it could be one of 5000 files that were copied over at one time, correct?
> A. Could be.
> Q. Or it could be one of five , correct?
> A. Yeah…
> Q. Okay. But based on the information you have before you, you don't know.
> A. No. What I know is it was created on that particular date, accessed on that particular date, and it's resident in a folder that is on the desktop of the computer.
> Q. Right. But you don't' know if it was viewed at any time on that computer? Correct?
> A. I – I don't know.

II. Mr. Garbett's Statements

[36] On the day of his arrest, Mr. Garbett had conversations with Constable Rivers about child pornography on three occasions in three different locations.

[37] The first conversation took place in Mr. Garbett's driveway around noon. After advising Mr. Garbett of the nature of the investigation, Constable Rivers asked if his computers had child pornography on them and he answered "no". Rivers told him that the officers wanted to examine his computers, and produced the standard consent form employed by the Peel Regional Police. The form set out accurately and in detail what the police proposed to do with Mr. Garbett's computers, and it contained a warning that the forensic analyst was "capable of recovering computer files including active files, deleted files, password protected files and encrypted files". Mr. Garbett reviewed the form for five or six minutes and then signed it. He escorted the officers into the house where they seized two computers. The officers left Mr. Garbett's residence, with the computers, at 1:10 p.m.

[38] Thirty-five minutes later, Rivers was notified that Mr. Garbett had left a message for her, and when she returned the call, he told her that he wanted to speak to her in person. At 2:20 p.m. Mr. Garbett met with Rivers and told her that he had not been completely honest with her. He indicated that he had looked at child pornography over the preceding years, the last time being about six months earlier, and that while he had deleted the material, he thought that the forensic examination would discover it.

[39] Constable Rivers placed Mr. Garbett under arrest for possessing and accessing child pornography and took him to 22 Division where a videotaped interview was conducted. In the course of the interview, Mr. Garbett told Rivers

that there was currently no child pornography on his computers. However, he acknowledged an interest in teenage pornography and he indicated that he had viewed and downloaded videos containing such material.

[40] The Crown relies on all of utterances that Mr. Garbett made to Constable Rivers on the day of the arrest, but places particular weight on what was said in the course of the videotaped interview. I accept that Mr. Garbett's statements are relevant in relation to the issues of possession and access, but, as I will expand upon later,[4] in the particular circumstances of this case their probative value is limited.

[41] When the police conducted the forensic search of Mr. Garbett's computer, they found two types of visual representations: "pictures" and "videos". There were 110,901 representations that fell into the former category and an indeterminate number that fell into the latter. Early in the videotaped interview, when asked why he had come to speak to Constable Rivers, Mr. Garbett drew a distinction between the two (at page 6 of the transcript of the interview):

> … [L]ike today there's nothing illegal on the computer… But I thought I remembered one of the questions that you asked. If after that purchase, the online purchase of that website, if I had ever seen or viewed anything. So I wanted to make it clear that I had after that time had come across more illegal <u>pictures</u> or <u>videos</u>. [emphasis added]

[42] At that point, the forensic examination of the computers had not occurred and Constable Rivers had no way of knowing whether any pornography that might be on Mr. Garbett's computers would be in the form of pictures, videos or both. For whatever reason, however, she focussed on videos, and throughout the remainder of the interview all the questions that she asked were in relation to videos. Mr. Garbett was never asked, and he never talked about, viewing, downloading or saving pictures. Indeed, the word "picture" was never mentioned again, by either Rivers or Garbett. The following excerpts illustrate the point:

> (at page 7)
> Q. So you came to tell me basically or to be honest with me about viewing those **<u>videos</u>**.
> A. Yes
>
> ***
>
> (at page 8)
> Q. These girls in the **<u>videos</u>** are they like I described at the house. No pubic hair, breast development or hip development?
> A. That's not what I was looking for… I was looking for teens that were going through puberty.

[4] See paragraphs 57-60, *infra*

Q. Okay. I guess some of the **videos** that you downloaded did have girls younger than your interest.
A. Correct
Q. Okay. And I guess – are those the ones that are causing you concern, and those are the ones that you are concerned that I would find?
A. Yes.

***

(at page 9, in the context of downloading files from a peer-to-peer programme)
Q. [On each occasion]… how many **videos** would you view?
A. Each time maybe 10.
Q. Okay. Cause they take sometimes along time to download don't they depending on how big they are.
A. Yeah

***

(at page 10)
Q. Did you ever come across a **video** that you liked to much that you kept it for maybe even a couple of days…
A. Maybe a few days. Then I would delete it.

***

(at page 12)
Q. Okay. And the **videos** that you got were… from what I understand you tend to get pretty close to what you ask for. Would you agree?
A. Yeah

***

(at page 18)
Q. … Do you remember … you told me at Derry Road that you thought the last time you viewed a child porn **video** was about six months ago… Do you still think that's an accurate amount of time?
A. About. I would say so.
Q. Okay.
A. Four to six months

***

(at page 19-21)
Q. Okay. Four to six months ago when you last downloaded kiddie porn. Tell me about the **videos** that you think would concern me. Can you describe any of them?
(he describes the contents)
Q. Did you masturbate to that **video**?
(shakes head no)

Q. How long was it?
A. In length?
Q. Yeah.
A. Maybe 30 seconds. Less.
Q. Anybody in the **video** with her?
(Shakes head no)
Q. And what did you do with that **video**?
A. I deleted it.
Q. Any others?
Q. Like I say when I was downloading various files and opening them. There were some that were below the age that I was interested in.
(Describes contents of one)
Q. Just herself and the man in the **video**?
A. (nods head yes)
Q. What did you do with that **video**?
A. I deleted it.

***

Q. Okay, any others?
(He describes another video)
Q. And how long was that **video**?
A. These always were just short.

***

Q. Is that the **video** that you masturbated to?

[43] I will return to the significance of the foregoing later in these reasons.

B. The Law

[44] The information before the court alleges offences of possessing and accessing child pornography, contrary to ss. 163.1(4) and 163.1(4.1) of the *Criminal Code*.

(i) Possession

[45] The principles applicable to the assessment of whether a person has been shown to be in possession of images found on the hard drive of a personal computer were helpfully summarized by Doherty J.A. in *R. v. Chalk*, 2007 ONCA 815, at paragraphs 17-20:

> Section 4(3) of the *Criminal Code* contains a definition of possession. Section 4(3)(a)(ii) contains the relevant part of that definition for present purposes:
>
> > a person has anything in possession when he … knowingly
> > (ii) has it in any place … for the use or benefit of himself or another person;
>
> Possession requires knowledge of the criminal character of the item in issue. In this case, the Crown had to prove that the appellant had knowledge of the contents of the videos in issue. It was, of course, irrelevant whether the

> appellant knew the contents constituted child pornography: see *Beaver v. The Queen* (1957), 118 C.C.C. 129 at 140 (S.C.C.); *Rex v. Hess (No. 1)* (1948), 94 C.C.C. 48 at 51-52 (B.C.C.A.)… Knowledge alone will not establish possession. The Crown must also prove that an accused with the requisite knowledge had a measure of control over the item in issue. Control refers to power or authority over the item whether exercised or not: *R. v. Mohamad* (2004), 182 C.C.C. (3d) 97 at paras. 60-61 (Ont. C.A.). In *R. v. Daniels* (2004), 191 C.C.C. (3d) 393 at para. 12 (Nfld. C.A.), a case which also involved a charge of possession of child pornography in the form of material located on a computer hard drive, Welch J.A. explained the concept of control in these terms:
>
> > To be in possession of child pornography, it is not necessary for the individual to have viewed the material. For example, a person may obtain pornographic material in an envelope, but without viewing it, either place it in a drawer or dispose of it in the garbage. It is the element of control, including deciding what will be done with the material, that is essential to possession.
>
> [Emphasis added by Doherty J.A.]

[46] As of June 14, 2006, Mr. Garbett did not have the ability to access or control 46 of the 48 pictures of which the Crown alleges he had possession. The only "live" files among the impugned images were #2 and #41, and #2 would not have been easily accessible to someone who was not a computer expert. This does not mean, however, that the 46 inaccessible pictures can be removed from consideration. Both the possession and accessing counts are charged as offences that continued over a period of years leading up to June 14, 2006. Because the Crown elected to proceed by way of summary conviction, the Crown must prove that part of each offence occurred within six months of June 14, but if it is able to do so any other instances of possession or accessing within the time frame of the charges might be considered to be part of those continuing offences.

[47] If Mr. Garbett viewed any of the 48 images on his computer screen, he would be fixed with the requisite knowledge for the purposes of the possession analysis. Knowledge alone is not enough to establish possession. The Crown must also prove an element of control. As the user of the computer at the time an image was viewed, Mr. Garbett would have had the ability to control the image. For example, if the image came from the internet, Mr. Garbett would have had the option of exiting out of the web site that had transmitted it to his computer. At that point, knowledge and control would have come together, and possession would have been established. However, it would not necessarily have been criminal possession. If a person exploring the internet were to come across child pornography, recognize its criminal character and then either delete it or exit out of the web site displaying it, the combination of the person's power over the image, the exercise of that power to delete it, and the knowledge of the character of the image would not necessarily constitute a possession giving rise to criminal liability. Justice Doherty considered this issue in *Chalk*, *supra*, at paragraphs 23-25:

There is a line of authority supporting the proposition that exercising control over contraband with the requisite knowledge, but solely with the intent of destroying the contraband or otherwise permanently removing it from one's control does not constitute criminal possession: see *R. v. Glushek* (1978), 41 C.C.C. (2d) 380 (Alta. S.C. App. Div.); *R. v. Christie* (1978), 41 C.C.C. (2d) 282 (N.B. S.C. App. Div.); *R. v. York* (2005), 193 C.C.C. (3d) 331 (B.C.C.A.). In *Christie*, *supra*, Chief Justice Hughes, in referring to what I would call "innocent possession", said at p. 287:

> In my opinion, there can be circumstances which do not constitute possession even where there is a right of control with knowledge of the presence and character of the thing alleged to be possessed, where guilt should not be inferred, as where it appears there is no intent to exercise control over it. An example of this situation is where a person finds a package on his doorstep and upon opening it discovers it contains narcotics. Assuming he does nothing further to indicate an intention to exercise control over it, he had not, in my opinion, the possession contemplated by the *Criminal Code*. Nor do I think that a person who manually handles it for the sole purpose of destroying or reporting it to the police has committed the offence of possession. …

The "innocent possession" line of authorities was helpfully examined by Green J. in *R. v. Loukas*, [2006] O.J. No. 2405 (Ont. C.J.). Green J. points out that some of the "innocent possession" cases recognize a public duty defence as for example where an accused takes possession of contraband to deliver it to the authorities. In other cases, "innocent possession" is said to arise from the absence of an intention to exercise control beyond that needed to destroy the contraband or otherwise put it permanently beyond one's control. Green J. observes that in all of these cases there is, despite the existence of possession in the strict sense, an absence of a blameworthy state of mind or blameworthy conduct. Convictions for criminal possession by a technical application of the concepts of knowledge and control in these circumstances would overreach the purpose underlying the criminal prohibition against possession. I agree with the analysis described above.

(ii) Accessing

[48] Constable Lancaster was able to determine 'creation' and 'access' times for 16 of the 48 pictures. It is important to be clear that the definition of access for Constable Lancaster's purposes is significantly different from the definition of access set forth in s. 163.1(4.2) of the *Criminal Code*. For Constable Lancaster, the 'access' time was the last time that the operating system 'touched' the file in some way. This would not necessarily require that the file be viewed: Lancaster testified that writing a picture file to the hard drive constitutes an accessing of the file, and that there are "innumerable ways" that this could happen without opening or viewing the picture.

[49] However, for the purposes of a criminal prosecution, ss. 163.1(4.2) provides that "a person accesses child pornography who knowingly causes child pornography to be viewed by, or transmitted to, himself or herself." This definition excludes from its reach inadvertent viewing of child pornography. The requirement that a person "knowingly causes" the viewing or transmission of child pornography to himself or herself imports a requirement of intent to view or receive child pornography. That is not to say that a person cannot be liable for viewing inadvertently accessed child pornography. Once fixed with the requisite knowledge of the character of the image, a person with control of the computer who continued to view it might be knowingly causing the pornography to be viewed by or transmitted to himself or herself. It would be a question of fact to be determined in light of all of the circumstances whether accessing had been established.

C. Analysis

[50] The Crown's submission that Mr. Garbett had the requisite degree of knowledge and control of the pictures to constitute possession in law, and that he accessed them within the meaning of s. 163.1(4.2), rests on two bodies of evidence: the data in relation to the relevant images that was obtained during Constable Lancaster's forensic analysis, and Mr. Garbett's statements to Constable Rivers.

(i) The forensic evidence

[51] As was discussed earlier,[5] the fact that any particular picture was on the hard drive of one of Mr. Garbett's computers does not, by itself, support a conclusion that Mr. Garbett knew it was there, exercised any measure of control over it, or viewed it. On the basis of Constable Lancaster's testimony, it is not only possible but probable that a person who regularly accesses internet web sites will have on his or her computer's hard drive, in the temporary internet files, pictures that the person has never seen and has no knowledge of. There is nothing speculative about this conclusion. It is based on Constable Lancaster's description of the way the Internet Explorer browser works.

[52] Mr. Garbett admitted to an interest in pornography. His preference, he told Constable Rivers, is for teenage pornography but he also indicated that he masturbates to adult pornography. He admitted that he would look for pornography on the internet and it is a reasonable inference from his statement that he has visited many pornographic web sites over the years. Each time Mr. Garbett opened one of those web sites, every image on the web page may have been written to Mr. Garbett's hard drive. This could have occurred whether or not the images were visible, and even if Mr. Garbett had immediately exited out of the web page.

[5] See paragraphs 20 to 24, and paragraph 32, *supra*

[53] On the basis of the data before the court, Constable Lancaster could not say whether any user of the computers had ever viewed any of the pictures alleged to constitute child pornography. Further, as I understood his evidence, he was not able to exclude the possibility that every one of the pictures, save for picture #41, was written to the hard drive in the course of the internet browsing process without the user being aware that this was occurring.

[54] No creation or access times were available for the 30 pictures found in unallocated clusters. Those times were available for 16 of the 18 remaining pictures, including picture #41. For the moment, I will set #41 aside, and deal with the other 15 pictures. Their creation and access times were identical. It is a reasonable inference that after those 15 pictures were written to the hard drive, the operating system of the computer never touched them again.[6] That is, after that point, they were never opened, viewed, moved or touched in any way. This does not establish that they were inadvertently downloaded from the internet but it is consistent with that possibility. What it is not consistent with is an intention to retain those pictures on the computer in locations from which they could be retrieved.

[55] The reasonableness of the possibility of inadvertent downloading has to be assessed in context, of course, and part of that context is the fact that there were not just one or two images of alleged child pornography, but forty-eight. How realistic is it, one might ask, to think that all 48 got onto Mr. Garbett's hard drive without his knowledge? There is logic to that argument, but the significance of the number of pictures cannot be determined in the abstract. It would require more information about the population from which that number was extracted. If there were ten thousand pornographic pictures on Mr. Garbett's computers and nine thousand of them were child pornography, it might be unreasonable to entertain the possibility that all nine thousand migrated onto Mr. Garbett's hard drives without his knowledge. However, if there were ten thousand pornographic images and only 48 of them amounted to child pornography, the possibility that the 48 might have been written to the hard drive in the manner described by Constable Lancaster, without Mr. Garbett's knowledge, cannot be so readily dismissed.

[56] There is no evidence as to how many "legal" pornographic pictures were on the hard drives of Mr. Garbett's computers. It is clear that Mr. Garbett regularly accessed pornography. Indeed, almost the entirety of the videotaped interview on June 14 was devoted to a discussion of the pornographic videos that Mr. Garbett had downloaded. There is no evidence as to how many videos there were, but they filled several discs. With respect to the 110,901 pictures that were found on Mr. Garbett's computers, 48 are alleged to constitute child pornography. The only evidence with respect to the nature of the remaining 110,853 is that there were "a lot" of pictures of motorcycles. In the absence of evidence with respect to the proportion of the 110,901 pictures that were pornographic, there is

[6] See paragraph 29, *supra.*

an insufficient factual context for a determination of whether the inference that the Crown would draw from the numbers is reasonable or unreasonable. In other words, on the basis of the evidence, I cannot determine whether the fact that there were 48 impugned pictures is any more significant than if there were one or two.

(ii) Mr. Garbett's admissions

[57] The admissions that Mr. Garbett made to Constable Rivers support a number of findings, including: (a) Mr. Garbett "accessed" what he believed to be child pornography; (b) he downloaded and therefore possessed what he believed to be child pornography; and (c) he did those things within the six months preceding his arrest. The extent to which those findings assist the Crown in this case, however, has to be assessed in light of a number of additional considerations.

[58] What Mr. Garbett admitted in the videotaped interview was downloading videos, not pictures. The only reference to pictures was near the beginning of the interview when Mr. Garbett indicated that he had "come across more illegal pictures or videos". While Mr. Garbett recognized that both pictures and videos might qualify as child pornography, Constable Rivers, for reasons that are not apparent, focussed the remainder of the interview on videos, and the word "pictures" was never mentioned again. The case at bar is concerned exclusively with pictures.

[59] It should be said that even with respect to videos, Mr. Garbett's admissions would only have value to the Crown if Mr. Garbett had an accurate understanding of what constitutes child pornography. It appears that a substantial number of videos were on Mr. Garbett's hard drive. They were all viewed by Constable Rivers, who determined that they did not contain child pornography. At least two possible inferences might be drawn from that: (a) all of the videos that Mr. Garbett thought contained child pornography had been successfully erased from the hard drives of his computers; or (b) Mr. Garbett's understanding of what material would qualify as child pornography was in error.

[60] In the absence of evidence that deleting a video file would make it unrecoverable in a forensic examination, I am not prepared to draw the first inference, particularly in the face of the evidence that deleting a picture file will not make it unrecoverable. The second inference strikes me as the more likely of the two. That is, while Mr. Garbett may have thought his videos contained child pornography, he was probably wrong. To the extent that this is so, his admissions of downloading child pornography must be approached with caution, and in the end, I am uncertain as to the weight that can be attached to them.

(iii) Conclusions re all the pictures save for #41

[61] It is trite to say that the forensic evidence and the admissions made by Mr. Garbett have to be considered cumulatively in deciding whether the Crown has

proven possession and/or access beyond a reasonable doubt. However, bearing in mind the limitations on the inferences that might be drawn from the forensic evidence and the uncertain value of Mr. Garbett's admissions, I am of the view that with respect to all of the pictures, apart from #41, the Crown has not established beyond a reasonable doubt that Mr. Garbett knew that the pictures existed, that he exercised any measure of control over them, or that he knowingly caused any of them to be viewed by him or transmitted to him. In other words, the Crown has not established beyond a reasonable doubt that Mr. Garbett was at any time in possession of any of those 47 pictures or that he accessed them.

(iv) Picture #41

[62] Picture #41 is in a different position from all the other images. The evidence of Constable Lancaster is that it was written to the hard drive on April 29, 2006 and last accessed on May 14, 2006. It was the only one of the 48 pictures that was in an easily accessible location. It was found on the desktop in a folder within a folder within a folder. This location – four layers deep – suggests an intention to conceal. The folder in which it was found was titled "folder", as was the folder within which that folder was located. That has significance because Mr Garbett told Constable Rivers that he would put pornographic videos into a "hidden folder" on his computer, titled "folder". It is common ground, as I understand it, that picture #41 could not have been placed where it was found without user intervention.

[63] On Mr. Garbett's behalf, Mr. Penney submitted that the Crown had not excluded the possibility that one of Mr. Garbett's parents might have been responsible for the presence of this picture on the computer. I reject that possibility. I acknowledge that Mr. Garbett's parents regularly used the computers. However, the computer on which picture #41 was found was in Mr. Garbett's bedroom. When the police asked for consent to take the computers, Mr. Garbett gave that consent on his own, without consulting either parent. Mr. Garbett told Constable Rivers that he kept pornography in a "hidden' folder, titled "folder", and the location in which picture #41 was found meets both of those descriptors. Further, this picture is generally of the kind of pornography that Mr. Garbett admitted he had an interest in. In light of the combined weight of those circumstances, the only reasonable inference is that the person who put #41 into the subfolder in which it was found was Mr. Garbett.

[64] There is no direct evidence that Mr. Garbett viewed picture #41. Constable Lancaster agreed with the suggestion that the fact that it was accessed on May 14 did not mean that it was viewed then or on any occasion. He agreed that it might have been transferred from another folder without being opened, or that it might have been among 5000 files that were transferred into the subfolder at the same time. Against that, however, is the competing and much more logical inference that Mr. Garbett would not have gone to the trouble of saving and hiding the image if he did not know what it contained, and that he would not have known what it contained if he had not viewed it.

[65] In my opinion, the Crown has proved beyond a reasonable doubt that Mr. Garbett both possessed and accessed picture #41 between April 29 and May 14, 2006. The question that remains is whether the Crown has proved beyond a reasonable doubt that picture #41 constitutes child pornography.

II. Is the Image Child Pornography?

A. The Law

[66] Section 163.1(1) of the *Criminal Code* defines child pornography, in part, as:

> (a) a photographic… or other visual representation…
>
> (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.

[67] While both subparagraphs of this definition are concerned with visual representations of a sexual nature, they focus on different kinds of images. Subsection (a)(i) applies where the representation shows "explicit sexual activity". Subsection (a)(ii) applies where there is no explicit sexual activity but the *dominant characteristic* of the image is the depiction *for a sexual purpose* of a sexual organ or the anal region.

[68] Both subparagraphs are restricted to visual representations of persons "under the age of eighteen years", but they state the age requirement differently. That difference became an issue in these proceedings.

(a) s. 163.1(1)(a)(i)

[69] Under ss. (a)(i), a representation of explicit sexual activity will constitute child pornography if the person shown "is" or "is depicted as being" under the age of eighteen years. Insofar as a picture of a pre-pubescent child is concerned, it will ordinarily not be difficult to conclude that the person "is" less than eighteen years of age. However, being satisfied beyond a reasonable doubt of that fact raises obvious problems after the onset of puberty. A reasonable doubt with respect to whether the person is under eighteen will not end the analysis. The court must go further and consider whether the person is "depicted as being" under eighteen. The meaning of "depicted" in this context was explained by Chief Justice McLachlin, speaking for the majority of the Supreme Court of Canada, in *R. v. Sharpe*, [2001] 1 S.C.R. 45, 150 C.C.C. (3d) 321:

> Does "depicted" mean: (a) intended by the maker to depict; (b) perceived by the possessor as depicting; or (c) seen as being depicted by a reasonable observer? … [The] statute makes it an offence for anyone to possess such material, not just those who see it as depicting children. The only workable

> approach is to read "depicted" in the sense of what would be conveyed to a reasonable observer. The test must be objective, based on the depiction rather than what was in the mind of the author or possessor. *The question is this: would a reasonable observer perceive the person in the representation as being under 18 and engaged in explicit sexual activity?*[7]
> [emphasis added]

[70] The questions that the trier of fact must ask, therefore, are whether the person in the representation "is" under the age of eighteen years, and if not, whether a reasonable person looking at the representation would perceive the person as being under eighteen. The latter question focuses squarely on how old a reasonable person would think that the person depicted actually is. Regardless of which question is asked, the requirement of proof beyond a reasonable doubt applies. The difference lies in what the trier of fact must be satisfied of beyond a reasonable doubt. In relation to the first question, it is the actual age of the person in the representation. In relation to the second, it is whether a reasonable observer would *perceive* the actual age of the person as being under eighteen. A reasonable doubt with respect to the first question does not lead inexorably to a reasonable doubt with respect to the second. Further, with respect to the second question, the trier of fact does not have to be satisfied that a reasonable observer would have no reasonable doubt about the age of the person.

[71] Counsel for the Crown and counsel for Mr. Garbett both take issue with this interpretation of the meaning of "depicted". They submit that it is too narrow because it would exclude much of what has been termed "dress down" pornography. In their helpful written submissions, both have posed the hypothetical example of a photograph of explicit sexual activity involving a person who is clearly an adult but is dressed in a child-like fashion – perhaps wearing a primary school uniform. Both counsel submit that even though no one would perceive the person as actually under the age of eighteen years, the photograph would constitute child pornography because the person is *depicted* as being under that age.

[72] There is support in the case law for this interpretation of "depicted". In *Re Langer* (1995) 97 C.C.C. (3d) 290 (Ont. Ct. Gen. Div.), at paragraph 120, Justice McCombs stated:

> By extending the reach of the legislation to material in which persons are "depicted as" being under the age of 18 years in the legislation, Parliament has targeted depictions of persons over 18 who pose as children engaging in explicit sexual activity. This type of material, known as "dress down" pornography, often employs models who are childlike in appearance, posing, for example in children's nightclothes, clutching a teddy bear or similar prop, and engaging in explicit sexual activity. Such material is clearly aimed at paedophiles, so that they may fantasize about sex with children. In my view, it

[7] At paragraphs 42-43

> poses the same risk that the paedophile will act on his fantasies as if the person depicted was actually under 18 years of age.
> [emphasis added]

[73] In *R. v. Sharpe*, (2000), 136 C.C.C. (3d) 97, Justice Rowles of the British Columbia Court of Appeal appeared to accept that dress down pornography was caught by ss. (a)(i). At paragraph 186 of her concurring reasons, she stated:

> Respondent's counsel pointed out another way in which the definition of child pornography captures materials that may be produced without the involvement of any actual children or youth. The definition in s. 163.1(1) includes adults who are "depicted as being under the age of eighteen years". While the concept of "dress down" pornography may not be assailable as such, it is not at all clear why the age chosen for the cutoff point for depictions of sexual activity is the same as that for actual participation in sexual activity, namely 18 years of age. The appellant has not shown that any harm could flow from the depiction, by adult actors, of an activity which in itself is perfectly legal, namely sexual activity involving persons between 14 and 18 years of age that does not fall within the relationships prohibited under the Criminal Code (s. 153(1), sexual exploitation; s. 212(4), payment for sexual services; or s. 271, sexual assault).

[74] Neither Justice McCombs nor Justice Rowles had the benefit of Chief Justice McLachlin's reasons in *Sharpe*. In my opinion, their interpretation of "depicted" cannot be reconciled with the definition enunciated by the Chief Justice. The Chief Justice stated, unequivocally, that the question is "would a reasonable observer perceive the person in the representation as being under 18…?" The interpretation of Justices McCombs and Rowles would effectively amend that question by adding to it "…or as being an adult masquerading as a person under eighteen". There is nothing in the Chief Justice's reasons to justify the significant expansion of the reach of the child pornography provisions that this would entail. In my opinion, if the trier of fact concludes that a reasonable observer would perceive the person in a picture as, for example, a 50-year-old dressed in a diaper and a baby bonnet, the clear test articulated by the Chief Justice has not been satisfied, subparagraph (a)(i) does not apply, and the image does not constitute child pornography.

[75] That is not to say that the manner in which the person is dressed or the location in which he or she is shown are irrelevant. Based on those circumstances, a trier of fact may well conclude that a reasonable observer would perceive the person to be under eighteen years of age.

(b) s. 163.1(1)(a)(ii)

[76] Subparagraph (a)(ii) extends the definition of child pornography beyond representations of explicit sexual activity to representations 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. Unlike subparagraph (i), this branch of the definition does not specifically apply to a

person "who is *or is depicted as being*" under the age of eighteen. The question that arises is whether the difference in wording manifests an intention, when this subparagraph applies, to require proof that the person actually is under eighteen.

[77] It is difficult to understand why different approaches would be taken to the question of age depending on whether the material shows explicit sexual activity or is a static depiction of a sexual organ or the anal region. However, there is an undeniable logic to the argument that if Parliament had intended to have ss. (a)(ii) apply to anyone other than persons who actually are under 18, it would have done what it did in ss. (a)(i) and specifically said so. There is judicial support for that position. In *R. v. Gurr*, [2007] B.C.J. No. 1481, 2007 BCSC 982, Justice Powers stated:

> So, there is a difference in those two subsections. If the photographic image is engaged in an explicit sexual activity, then the Crown must prove that either that person is under the age of 18 years or is depicted to be under the age of 18 years. If the photographic image is that of a sexual organ or the anal region of a person, then the Crown must prove that that person is under the age of 18 years and that the dominant characteristic is a depiction of those organs or regions for a sexual purpose.[8]

[78] However, there is also authority for the proposition that the test is the same under both subparagraphs. In *R. v. Nedelac*, [2001] B.C.J. No. 2243, (BCSC), in the context of subparagraph (a)(ii), Justice Wedge stated:

> Following the objective approach as directed by the court in *Sharpe, supra*, and bearing in mind the purpose of the legislature in enacting s. 163.1, I conclude that the test is whether a reasonable viewer, looking at the depiction objectively and in context, would conclude that the person depicted is under 18 years of age. If there is reasonable doubt as to the age of the person depicted, the accused must be acquitted. In the present case a substantial majority of the materials upon which the Crown's case rests are caught by s. 163.1(1)(a)(ii).[9]

[79] While subparagraph (ii) is worded differently from subparagraph (i), there is nothing about the wording that necessarily excludes representations of persons who are depicted as being under eighteen. That is, there is nothing grammatically unsound in reading "depiction" in ss. (a)(ii) as referring both to the phrase "of a sexual organ or anal region" and to the phrase "of a person under eighteen".

[80] In *Sharpe*, Chief Justice McLachlin did not address this particular issue. However, her comments with respect to the meaning of 'person' are instructive. She stated:

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[8] At paragraph 21
[9] At paragraphs 43-44

> Notwithstanding the fact that 'person' in the charging section and in s. 163.1(1)(b) refers to a flesh-and-blood person, I conclude that 'person' in s. 163.1(1)(a) includes both actual and imaginary human beings.[10] [emphasis added]

[81] In holding that, for the purposes of s. 163.1(1)(a), "person" includes both actual and imaginary human beings (*e.g.*, cartoon characters), the Chief Justice did not distinguish between ss. (a)(i) and (a)(ii). However, if ss. (a)(ii) only applies to persons who actually are under the age of 18, the Chief Justice's definition cannot apply to ss. (a)(ii), because imaginary human beings have no actual age.

[82] I am inclined to the view that the approach to age is the same under both ss. (a)(i) and (a)(ii), and that the "perception of a reasonable observer" test applies to both branches of the definition. That view was potentially of great significance in the case at bar, in that 33 of the 48 pictures do not contain representations of explicit sexual activity. Whether those 33 pictures constitute child pornography depends, therefore, on whether they come within ss. (a)(ii).

[83] In the end, however, I do not have to come to a firm position in relation to the scope of ss. (a)(ii), because the only picture that I am satisfied Mr. Garbett possessed and accessed is #41. That picture depicts two female persons engaged in an act of cunnilingus, which is clearly 'explicit sexual activity' within the meaning of that term set forth by Chief Justice McLachlin in *Sharpe*. Whether picture #41 amounts to child pornography, therefore, falls to be decided under subparagraph (a)(i).

B. Application to This Case

[84] The question that remains is whether the Crown has proved beyond a reasonable doubt that either of the persons in image #41 is or would be perceived by a reasonable observer as being under the age of eighteen years. I have been left to make that determination on the basis of my own experience and knowledge[11]. That is a daunting task, and I am not the first judge to recognize the problems inherent in it. In *R. v. Loring,* [2001] B.C.J. No. 2895 (B.C.S.C.), Justice Wilson observed:

> In the absence of any evidence of the ages of the other persons depicted in these video recordings, Mr. Lauder submits that it is open to me to make a finding of "apparent age" by looking at the video recording. I have no expertise in assessing the age of young persons. I have no confidence that I would be able to give a reliable opinion on "apparent age" or otherwise, which would permit a distinction between one aged seventeen years and nine months, and one aged eighteen years one month. My confidence is in no way enhanced if I am asked to distinguish between an eighteen year old and a fifteen, sixteen or seventeen year old. These matters ought not to be

[10] At paragraph 38

[11] The Crown sought to qualify the investigating officer, Constable Rivers, as an expert in the determination of age. I ruled that she was not qualified to give opinion evidence on that subject.

> determined on a guess. I decline Mr. Lauder's invitation to speculate on the apparent age of the unidentified persons depicted in the video recording.[12]

[85] Picture #41 shows two naked females on a bed. The photograph is taken from the head of the bed. One female is lying on her back. Her legs are spread apart. The second female is at the foot of the bed, on her knees, leaning forward so that her head is between the first female's thighs, with her mouth either in contact with or closely adjacent to the first female's vagina.

[86] The front of the first female's torso is exposed almost completely to the camera. She appears to have minimal breast development. Her torso, arms and legs are relatively thin. No pubic hair is visible, but it must also be said that no part of her vulva can be seen. Her face offers no clue as to whether she is over or under the age of eighteen years.

[87] Neither the genital area nor the breasts of the second female are visible in the photograph. Only part of her face is visible. Her legs and arms could be those of an adult, or they could be those of a young teenager. Her torso appears to be thin, but because of the angle at which the picture was taken it is very difficult to be certain.

[88] There are no props in the photograph, such as a child's toy, a doll or a teddy bear. However, the second female is wearing a pink ring that could be a child's, pink and blue bracelets that look plastic, and a pink slipper. The sheet on the bed is adorned with pink stars.

[89] In the bottom right corner of the picture is a small inset photograph of a female. The logo underneath the inset photograph reads "CHLOE18.COM".The person in the inset photograph bears a resemblance to the female shown lying on her back in the larger photograph. I could not say that the person in the inset photograph is under the age of 18 years, nor do I believe that there is any basis for a reasonable observer to perceive her as being under that age.

[90] With respect to the first part of the test under ss. (a)(i), I cannot say that I am satisfied beyond a reasonable doubt that either of the female persons in picture #41 is in fact under the age of eighteen years. The easier decision has been with respect to the second female. As I have noted, neither her genital area nor her chest is visible, and there is nothing about the parts of her body that can be seen that mark her as over or under eighteen years. There is more visual information in relation to the first female, but not enough to satisfy me beyond a reasonable doubt that she is not at least 18 years of age. To put the matter plainly, some adult women are thin, lack musculature, and have minimal breast development. Further, the amount of natural body hair, pubic or otherwise, that adults have varies from individual to individual. I believe I can take judicial notice of the fact that some adults take steps to minimize or remove the body hair that

[12] At paragraphs 14-15

they do have. The first female may well be under the age of 18, but I cannot say that I am confident that she is.

[91] The second part of the test under ss. (a)(i) requires a consideration of whether I am satisfied beyond a reasonable doubt that a reasonable observer, looking at this photograph, would perceive either of these females as being under 18. In this respect, the nature of the bedding, which appears to be of a kind favoured by an adolescent or a child, and the child-like ring on the second female's finger together with the matching bracelet are relevant circumstances. They are part of the context to consider in relation to the perception that a reasonable observer would form of the age of the females. So too, however, is the logo in the bottom corner, which suggests that the image comes from the web site of someone who is 18, and the inset photograph. As I have said, I do not believe that a reasonable observer would perceive the person in the inset photograph, who resembles the first female in picture #41, as being under 18 years of age.

[92] Taking all of these circumstances into account, and applying the test set forth by Chief Justice McLachlin in *Sharpe*, I am not satisfied that "a reasonable observer [would] perceive [either] person in the representation as being under 18". It seems to me to be just as likely that a reasonable observer would be unable to form an opinion one way or the other.

[93] I am left with a reasonable doubt with respect to whether either person in picture #41 "is or is depicted as being under the age of eighteen years". Accordingly, the Crown has not proved that picture #41 constitutes child pornography.

III. Disposition

[94] Mr. Garbett is found not guilty of both charges before the court.

March 4, 2008