

R. v Way, 2015 ONSC 3080 (CanLII)

Date: 2015-05-12

Docket: CR-15-50000129-0000

Citation: R. v Way, 2015 ONSC 3080 (CanLII), <<http://canlii.ca/t/ghtcq>>, retrieved on 2017-11-22

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COURT FILE NO.: CR-15-50000129-0000
DATE: 20150512

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)	
HER MAJESTY THE QUEEN)	J. Cameron and J. Strasberg, for the Crown
)	n
– and –)	
)	
BRIAN WAY)	N. Dwyer for Brian Way
)	
Defendant)	

HEARD: January 19 to April 1, 2015

THORBURN J.

REASONS FOR JUDGMENT

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1. OVERVIEW OF THE CASE

[1] This case involves 176 films that the Crown alleges are child pornography. Mr. Way claims they are nudist films of young boys at play and are not child pornography. Unlike many child pornography cases, there are no sexual acts depicted in these films.

[2] On May 1, 2011, police executed a search warrant at Mr. Way's home and business.

[3] At Mr. Way's home, police found approximately 187,001 unique images and 8,747 unique videos. Many of the images in this collection are graphic and disturbing depictions of young children involved in sex acts. Mr. Way does not dispute that he was in possession of this material found on his home computer. Some images were found on a shared drive.

[4] Mr. Way pleads guilty to possession of child pornography at his home and making some of those pornographic images on his home computer available to others.

[5] At Mr. Way's workplace, police found over 800 films and photo images relating to those films. The films include commercially available films, "coming of age" films, adult pornography films, and approximately 300 films that Mr. Way characterized as nudist films.

[6] Mr. Way concedes he is legally responsible for the content of the films found at his workplace.

[7] The Crown claims that 176 of the 300 nudist films are child pornography.

[8] Mr. Way is charged with numerous offences relating to the 176 films and related pictures namely:

- (i) making and possessing pornography for the purpose of publication (Counts 1 through 8),
- (ii) possessing for the purpose of publishing and advertising for the purpose of distributing pornography (Counts 9 and 10),
- (iii) selling and distributing pornography (Count 11),
- (iv) possessing for the purpose of exporting, importing and exporting child pornography (Counts 14 and 15),
- (v) being in possession of money made from selling child pornography (proceeds of crime) (Counts 12 and 13), and
- (vi) instructing others to import, produce, distribute and export child pornography for the benefit of a criminal organization (Count 16).

[9] The Crown claims the dominant characteristic of these 176 nudist films is to portray the genitals and buttocks of prepubescent and adolescent boys for a sexual purpose. The Crown claims therefore that these films and the photographs taken from them are child pornography within the meaning of [section 163](#) of the *Criminal Code*. The Crown says Mr. Way knew his films were illegal and hid his activity from the police.

[10] The Crown also asserts that Mr. Way instructed his film editor, Mr. Donnelly, one of his cameramen Mr. Roth, and his mother Sandra Waslov, to produce, import, distribute and export child pornography for the benefit of this criminal organization.

[11] Mr. Way claims none of the nudist films and related pictures are child pornography.

[12] In the alternative, he claims the charges should be stayed because in 2006, he was told by a police officer with the child exploitation unit that his nudist films were lawful. The films were returned to him knowing he was in the business of selling them. He says he relied on that advice in continuing to sell his nudist films.

[13] Mr. Way submits that even if some or all of the films are determined to be child pornography, there is no evidence Mr. Way's actions were for the benefit of a criminal organization.

2. THE ISSUES

[14] The issues in this case are:

- i. Are all, some or none of the 176 “nudist” films child pornography within the meaning of the *Criminal Code*?^[1] (In other words, is the dominant characteristic of these films and related pictures, the depiction of sexual organs and/or anal regions of children under 18, for a sexual purpose?)
- ii. If some or all of the 176 films and images are child pornography, should some or all of the charges be stayed on the grounds that police reviewed many of Mr. Way’s films in 2006, he was told they were lawful, and the films were returned to him knowing he might continue to sell them?
- iii. Did Mr. Way knowingly direct his film editor and one of his cameramen to import, produce, distribute and export child pornography for the benefit of a criminal organization operating under the names, 4P5P Inc and Azov films?

3. THE EVIDENCE

The Business Operated by Way

[15] Mr. Way owned and operated companies that made and sold films under the names Azov films, 4p5p.com, Tiny Sumo Entertainment Inc., BaikalFilms.com, BoyJoy and MovieBizz.com. Brian Way corresponded with others using the web names Steve White, Webmaster@azov.com, CS@azov.com, legal@4p5p.com and Legal@azov.com.

[16] The business office was located at 523 The Queensway, Toronto. The office contained a number of computers with access to servers on which the raw footage was stored and special editing software was available to create the films.

[17] From 2005 until mid-2006, Mr. Way sold films made by others. In July 2006, Mr. Way started to pay others a fee to create original material. The three main producers were Andrei Ivanov, Igor Rusanov and Markus Roth. The films were shot in the Ukraine, Romania and elsewhere. Several boys appeared repeatedly in different films.

[18] Mr. Way hired Mr. Donnelly to edit the raw footage, add title pages, a trailer, a brief synopsis of nudism, copyright notices and sometimes music and subtitles. The films were then offered for sale on the website. Photographic images were sometimes sold separately or offered to members. Trailers were placed on the company website to entice potential customers into purchasing these films.

[19] Each film was categorized. Some of the films were commercially available, and others were “coming of age” films, nudist films or adult pornography films.

[20] Mr. Way put notices on his website to say that all of his films were legal.

[21] Approximately 300 films were categorized by Mr. Way as “naturist” or “nudist” films. There is a one page scroll at the beginning of each film that purports to inform the viewer about nudism. The scroll reads as follows:

Naturism has been around since the dawn of time. The freedom of being “one with nature” is a healthy pastime in many European cultures and since the fall of Communism, nudist resorts have experienced unprecedented growth and popularity. Now practiced by millions of people all over the world, naturists enjoy a certain freedom that can only truly be appreciated by experiencing...

... nude sunbathing and nude recreation is adored by people of all ages, shapes and sizes.

[22] Purchasers could order a film online to be shipped or downloaded from the company's website, or both. Further, there was a special section on the website that could be accessed by purchasers who registered as "members". This special section contained pictures and biographical information on the boys who were featured in the films.

[23] Canadian and U.K. orders were shipped directly from 523 The Queensway to their destination. International orders were transported to America by a third party shipper and then shipped from Buffalo, New York to the final destination.

[24] Mr. Way's mother Sandra Waslov signed the pay cheques and dealt with civil legal issues that arose. She was listed as Treasurer of Azov Films.

[25] Until the time of his arrest in May of 2011, these films were produced for commercial gain and offered for sale in ninety-two different countries. Gross revenues increased over time and in 2011 exceeded one million dollars.

Characteristics of the Films Alleged by the Crown to be Child Pornography

[26] It is agreed that almost of the people that appear in the films are boys between 10 to 18 years of age. They are clothed and then naked. They are engaged in a variety of activities that include swimming, wrestling, showering, exercising, fixing a moped, and general play.

[27] The same general formula is present in all of the 176 films:

- i. Before the films begin, there is text that scrolls down the screen explaining nudism and asserting that the film in question is a nudist film. This is accompanied by soft music and background scenery.
- ii. Thereafter, the boys arrive on camera. They are clothed. Sometimes they perform an activity or go on an outing.
- iii. They then disrobe and do an activity or activities while all of them are nude. Sometimes the activities involve outdoor activities like swimming, running through the woods, chopping wood or exploring on the beach. At other times the activities are indoors in saunas, showers, swimming pools or blow up pools or in a small sparsely furnished apartment used for many activities such as getting dressed in costumes, eating, play fighting and sitting on a couch. A significant portion of each film includes the boys naked.
- iv. Toward the end of the movies the boys put their clothes back on. Sometimes there is an interview with the boys at the end of the movie. In some cases, members have access to accompanying pictures.

[28] The films purport to be nudist films.

[29] In almost all of the films, there are no adults or girls present. The boys are often but not always naked. There are no sexual acts. Occasionally the boys look into the camera as though for direction.

[30] There is little or no artistic merit in the films. There is no obvious storyline, the camera work in most cases is poor and there is little dialogue. The dialogue is not in English. In some

cases there are subtitles.

Police Review of Some of the Films in 2006

[31] In 2006, the United Postal Service (UPS) was shipping parcels from Azov films to its customers. UPS seized several of those shipments and forwarded them to the Toronto Police because of concerns that the films might be child pornography.

[32] Police seized two or three garbage bags full of these films on November 27, 2006.

[33] Officer Purchas testified that he and another officer in the child exploitation unit spent two or three weeks viewing the films.

[34] The police kept no record of the films they seized and viewed or of what was said at the meeting. Officer Purchas did not have a clear recollection of what he said.

[35] Trial Exhibit 49 is a list of the DVDs sent to UPS to be shipped to Mr. Way's customers between November 8 and 26, 2006. Mr. Way testified that he received complaints from some customers who did not receive their shipments during that period.^[2]

[36] It is agreed that this list is the best available evidence as to what was contained in the two or three garbage bags of films seized and reviewed by police.

[37] It is also agreed that on December 19th, 2006, Mr. Way was asked to come to the police station to meet with Officer Purchas from the child exploitation unit. Mr. Way came to the meeting with his lawyer.

[38] Officer Purchas testified that he advised Mr. Way and his counsel that he was a police officer and that he and a fellow officer with the child exploitation unit had reviewed the films.

[39] Mr. Way was told he would not be charged with a criminal offence.

[40] At trial Officer Purchas was asked,

Q. What you said to Mr. Way was that, "I have no right to keep these movies because they're lawful movies", correct?

He replied,

That's correct. That's why he wasn't charged, yes.

[41] Officer Purchas testified that the films were returned to Way knowing he might continue to sell the movies.^[3] Officer Purchas did not tell Mr. Way that there would be any ongoing investigation into his films.

[42] Mr. Way testified that Officer Purchas told him the films were "fine" and that he would not be pressing charges. He testified that Officer Purchas said, "It's just a bunch of naked boys running around on a beach or in a sauna."

[43] Mr. Way says Officer Purchas showed him a film he was selling called, *Emperor Tomato Ketchup* and focused on two parts of the film. Mr. Way testified that one part showed a naked boy slapping and massaging a woman's breasts. The other part showed two naked adult women massaging the boy's back and running a feather over his naked body including penis.

[44] Mr. Way testified that *Emperor Tomato Ketchup* was the line not to be crossed. Mr. Way says he understood that as long as he fell under this threshold, he would be not be breaking the law and he relied on this advice.

[45] The film *Emperor Tomato Ketchup* is no longer available.

Police Review of the Nudist Films in 2011

[46] After Mr. Way's arrest in May of 2011, a team of six police officers spent approximately six months watching films seized from Mr. Way's business to decide whether they were child pornography. All of the officers were part of child exploitation units.

[47] None of the officers was given a list of factors to be considered, to determine whether some or all of the films were child pornography. Each officer made his or her decision independent of the other officers.

[48] The following is the list of films reviewed in 2006 that were again reviewed by police in 2011 and classified by police in 2011 as child pornography:

- i. Crimean Vacation 1
- ii. Bikes and Backstrokes
- iii. Vladik's Fun
- iv. Crimean Vacation Part 3
- v. Vladik's Mountain Retreat
- vi. After School Break
- vii. Beach Bums
- viii. Holiday Fun 1
- ix. Capital Fellows
- x. Merry Boys
- xi. Rose of Youth
- xii. Rascals in Action
- xiii. Kombat Kids
- xiv. Freedom of Summer
- xv. Oscar and His Moped

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4. ANALYSIS OF THE LAW AS APPLIED TO THE EVIDENCE

A. The First Issue: Are Some or all of the Films and/or Pictures Child Pornography?

The Law

The Purpose in Enacting Child Pornography Legislation

[49] The purpose in enacting the child pornography law was to prevent harm to children by sending a message, "that children need to be protected from the harmful effects of child sexual abuse and exploitation". (House of Commons Debates, 3rd Sess, 34th Parl., vol. XVI, June 3, 1993, at p. 20328.)

[50] Parliament intended to catch all material that, "poses a reasoned risk of harm to children ... where the countervailing right to free expression or the public good does not outweigh the risk of harm." (*R. v. Sharpe* 2001 SCC 2 (CanLII), [2001] 1 SCR 45, para 122)

Defining Child Pornography

[51] Child pornography is defined in [section 163.1 \(1\) \(b\)](#) of the *Criminal Code*, as a film, video or picture that has as its dominant characteristic, the depiction of a sexual organ or anal region of a person under eighteen for a sexual purpose.

[52] Most of the boys in this case are under the age of eighteen ^[4].

[53] The Crown must establish three things beyond a reasonable doubt:

- i. first, that the dominant characteristic of the image is the depiction of their sexual organs or anal regions,
- ii. second, that the depiction is for a sexual purpose, and
- iii. third, that the image or images were in Mr. Way's possession.

[54] The trier of fact must look at the image (s) and answer the following questions:

- (a) Would a reasonable person, viewing the image objectively, and in context, see its dominant characteristic as the depiction of the child's sexual organ or anal region? And
- (b) Would the image be reasonably perceived as being intended to cause sexual stimulation to some viewers? (*R. v. Sharpe*, (supra) at para. 50 and *R. v. Grant*, 2009 BCCA 72 (CanLII), [2009] B.C.J. No. 311 aff'd (unreported) 2009 72 (BCCA).)

[55] There is no list of factors in the legislation or existing authorities to assist in determining whether the dominant characteristic of the image is the depiction of their sexual organs or anal regions, or that the depiction is for a sexual purpose.

[56] I have articulated below the factors I used to decide these first two issues.

[57] These factors are not exhaustive, no one factor is determinative, and an understanding of the overall context is essential. Where there are no sexual acts, no fondling and no sexual touching, this determination can be difficult.

STEP 1: Factors to be Considered in Deciding whether the Dominant Characteristic is the Depiction of the Child's Sexual Organ or Anal Region

[58] In determining whether the dominant characteristic is the depiction of the genital or anal area, I considered the following three factors:

- i. **first**, the number of images of the genitals and or anal region;
- ii. **second**, the characteristics of the images. This includes:
 - a. the clarity of the image;
 - b. the proximity of the genital area or anal region to the camera;
 - c. the duration of the depiction of the genital and anal region;
 - d. the camera angle ^[5];
 - e. whether the camera zooms in on the genital or anal region ^[6];

- f. whether the focus on the genital area or anal region seems to be a deliberate intention to emphasize the genitals or anal region; and
- g. whether there are captions or other methods used to highlight the genital and anal regions.

iii. **third**, the context in which the images are taken. This includes:

- a) the significance of the images to the film as a whole including the plot, visual representations or music;
- b) the apparent purpose of the depiction of the genitals and /or anal region; and
- c) if they are part of a larger collection, the context of the collection as a whole^[7].

[59] The determination of whether the dominant characteristic is the depiction of the genital or anal area is based on the *image* not on what was in the mind of the person in possession or the maker of the image. (*R. v. Sharpe* (supra) and *R. v. Chaisson* at p. 31 (unreported) MacDougall J. (S.C.J.))

STEP 2: Whether the Depiction is for a Sexual Purpose

[60] If the Crown establishes beyond a reasonable doubt that the dominant characteristic of the image or images is the depiction of the genitals or anal region, the Court must then consider whether, taken as a whole, the image or images are likely to stimulate a sexual interest in the viewer. (*R. v. J.E.I.*, 2005 BCCA 584 (CanLII), [2005] B.C.J. No. 2592 (C.A.) at para. 17-19.)

[61] In order to determine whether an image would be reasonably perceived as intended to cause sexual stimulation to some viewers, I considered the following factors:

- i. whether and to what extent the children are nude^[8];
- ii. whether there is sexual contact or the poses are sexual^[9];
- iii. whether there are indicia of sexual stimulation of the person depicted or sexual interest by that person in another person;
- iv. whether the activities engaged in are associated with sexual activities^[10];
- v. whether the images include the use of items commonly used for sexual pleasure^[11];
- vi. whether there are captions or extraneous indicia of sexuality;
- vii. whether the images appear to have been obtained surreptitiously or under protest;
- viii. whether the images are part of a collection of sexual material^[12]; and
- ix. the content of the collection as a whole.

[62] The determination of whether images would be reasonably perceived as intended to cause sexual stimulation to some viewers is also based on the *image* not on what was in the mind of the

person in possession or the maker of the image. (*R. v. Sharpe* (supra) and *R. v. Chaisson* at p. 31 (unreported) MacDougall J. (S.C.J.))

The Defences of Artistic Merit or Educational Purpose

[63] In deciding whether an image is child pornography, the court must consider whether the films or images have artistic merit or an educational purpose.

STEP 3: Possession of and/or Making Child Pornography

[64] If the Crown establishes beyond a reasonable doubt that the image is child pornography, the Court must be satisfied that the image or images were in the possession of the accused.

[65] Possession as defined in s. 4(3) of *Criminal Code* requires knowledge and control. Knowledge means that an accused must know that the images are there, what they are, and that they are under his control. It is not necessary that he know they are child pornography.^[13]

[66] In order to find an accused guilty of making child pornography available, contrary to s. 163.1(3) of the *Criminal Code*, the Crown must prove that the accused,

... inten[ded] to make computer files containing child pornography available to others ... or have actual knowledge that the file sharing program makes files available to others [or] ...wilful blindness (*R. v. Spencer, supra*, at para. 87.)

Application of the Law to the Evidence

Whether the dominant characteristic of the image is the depiction of a sexual organ or anal region

[67] Generally, the earlier films are shorter, contain less nudity and have fewer close-up images of the nude boys. The activities are almost never sexualized.

[68] By contrast, the films made in 2007 and thereafter, are different in kind from those made earlier. They are longer with lengthy nude scenes that highlight the genitals and buttocks. There is more interaction between the boys that includes scenes such as them pulling off one another's underwear, fighting together, and putting creams on one another. These later films sometime include more graphic and close up photo shots of the naked boys. The camera is more often placed below the boys' waistlines and at other odd angles to best depict the images of genitals. The focus is sometimes prolonged for several seconds.

[69] The following characteristics are present in the films I found to be child pornography:

- i. there are lengthy nude scenes;
- ii. the nude images are clear;
- iii. there are several instances where the nude child's genitals and or buttocks are very close to the camera;
- iv. on occasion the camera zooms in on the genitals or anal region and emphasizes them;

- v. the camera is sometimes placed underneath the level of the boys' waist so as to best capture the genitals;
- vi. there is no reason in the story line for nudity nor is there any artistic or educational purpose to the film;
- vii. some of the films are accompanied by close up nude photographs of the boys. The accompanying photographs are often images taken at close range in poses that emphasize their genitals. They provide a sexual context to the nude films; and
- viii. in some of the films, objects such as whipped cream, toothpaste or tin foil are used to focus on the genitals and render the images more sexual.

[70] Instances where the boys are engaged in sexualized and provocative poses include for example:

- i. in *Cutting Room Floor*, a boy slowly and seductively savours a greasy chicken while moaning, sucking his fingers and licking his lips. This is followed immediately thereafter with him placing whipped cream on a basketball and placing his bare buttocks on the ball. There are close up images of the genitals and buttocks and the camera is very close to the boy's body positioned below his waist to catch clear images of his genitals. The nude scene lasts 48 minutes. This exercise forms the dominant theme of the film;
- ii. in *Matter of History Spas on Khortytsya*, a group of boys play Twister with their nude bodies contorted and their genitals in plain view at close range while their bodies are contorted. The focus of many of the images is the genitals;
- iii. in *BVF 2.0 FKK on Tour 70245*, boys put toothpaste on one another's nude bodies, including their nipples. The three boys are later lined up on the ground with their backs arched and penis' in the air;
- iv. in *Slippery Vlavu Commando Wiggles, 70121*, two young boys are naked in an apartment. They are playing in a blow up pool on the floor. They put on white underwear that becomes see through when wet. They proceed to wrestle and to attempt to rip off the other boy's underwear. The camera zooms in on their genital areas. They then put baby oil, ketchup and whipped cream on one another;
- v. in *Vladic 70132*, nude boys wrap tin foil around their genitals and engage in activities with nothing on except for the tin foil around their genitals; and
- vi. in 2010 for a short period, Mr. Way sold photographs of a young boy named Paul sitting on a chair with his legs up nude. There is a clear focus on the boy's genitals.

[71] It is conceded that the films are "not sophisticated, are not particularly well made, and show mostly mundane, pointless activity." [14] They therefore have little or no artistic merit. Moreover, in the context of the film as a whole, the one page scroll extolling the virtues of nudism set out at paragraph 20 above, does not constitute an educational purpose. There is therefore no artistic or educational reason for the nude images.

[72] For these reasons, I find the dominant characteristic in the films attached at Exhibit A, is the depiction of the genitals and buttocks of the boys.

Whether the image would be reasonably perceived as being intended to cause sexual stimulation to some viewers

[73] Revenues for the Azov business increased every year. In 2011, revenues reached approximately \$1.6 million. Azov films had a sizeable group of viewers in 92 different countries.

[74] The client base expanded as did the amount of nudity in the films and photographs sold by Azov films. As owner of Azov films Mr. Way communicated this fact to others.

[75] On March 28, 2008 he said,

As for the new water fight. Well, let's just say we want you to make another one. This new one is selling exceptionally well...but I was hoping/thought there was a little more nudity. It's no problem, I think we can grow to that point as the boys get more comfortable (but the nudity, the more I pay and the more valuable it becomes for the customers.) (emphasis added)

[76] On April 5, 2008 the following email was received:

...what sells the water videos so well is because the white underwear is see through. I prefer that they wear white underwear or most of them. For another project I suggest to take photos of the models posing. (emphasis added)

[77] On April 22, 2008, Mr. Way sent the following email to his cameraman:

I just noticed while they were wrestling you focused a lot below the waste (sic). Just be conscious of that. I know the viewers want to see that but if we make it too obvious, then it will be seen as lewd and of no legitimate educational or entertainment value. (emphasis added)

[78] On June 14, 2008 Mr. Way sent an email that includes the following:

The photos though I will have to leave some out because they may be considered as "lewd". I will ask my lawyer about those. I may just leave the pictures for long time customers. (emphasis added)

[79] Mr. Way sent an email to Roth where he said, (Vol 4, Tab B p. 4)

What sells the water videos so well is because the white underwear is see through.

[80] The increasingly large revenues, the desire of the many customers for more nudity, a focus below the waist, as well as,

- i. the sexual poses,
- ii. the type of activities engaged in,
- iii. the website on which the films are sold (the common element of which is the sale of films that depict young nude boys and men),
- iv. the fact that graphic photographs accompany some of the films, and

- v. the communications by Way regarding the desires of his ever increasing client base,

taken together, lead me to conclude that the reasonable viewer would conclude that the depictions were for a sexual purpose.

[81] For these reasons, the Crown has satisfied me beyond a reasonable doubt that the dominant characteristic of the films listed in Exhibit A is the depiction of the genitals and anal regions of the boys for a sexual purpose and those films are therefore child pornography.

STEP THREE: Whether Way was in Possession of and Made Images of Child Pornography

[82] As the owner of the company that made and sold the films, and the person who rented the premises upon which the items were found, Mr. Way had knowledge of the existence of the films and photographs and the control necessary to find him in possession of the child pornography.

[83] The films were marketed on his website.

[84] He advertised the films on his website and they were sold in many countries.

[85] As such I find that Mr. Way made, was in possession of, advertised on his website to distribute, sold and distributed, imported and exported child pornography.

[86] Finally, it is clear from the financial records and Mr. Way agrees that he was paid from money earned as a result of selling films including those listed in Exhibit A. He was thereby in receipt of proceeds of crime.

The Second Issue: If some or all of the films and images are child pornography, was there an officially induced error such that some or all of the charges should be stayed?

The Law

[87] The Defence of officially induced error is an exception to the rule that ignorance of the law does not excuse.

[88] The rationale for the rule of officially induced error is that most people would consider it unjust for the same government to prosecute an individual for an offence that it had already assured him was not an offence, through one of its bureaus. In *R. v. Jorgensen*, 1995 CanLII 85 (SCC), [1995] 4 S.C.R. 55, Lamer J. held that: “It is difficult to justify convicting an individual who has considered that her behaviour may be illegal, consulted an appropriate authority regarding the legality of her actions, and relied on the advice she obtained in a way that appears objectively reasonable.”

[89] Reasonable reliance on wrong legal advice will not negative culpability, but the State has done something which disentitles it to a conviction (*R. v. Mack*, 1988 CanLII 24 (SCC), [1988] 2 S.C.R. 903, at p. 975).

[90] Officially induced error of law functions as a bar to conviction rather than a full defence. It can only be raised after the Crown has proven all elements of the offence. (*Jorgensen*, *supra*).

[91] In order to establish that there was an officially induced error the defence must prove on a balance of probabilities that:

- i. there is an error of law or mixed fact and law;

- ii. the accused considered the legal consequences of his actions. It is insufficient for an accused who wishes to benefit from this excuse to simply have assumed that the conduct was permissible;
 - iii. the advice was obtained from one whom a reasonable individual in the position of the accused would normally consider responsible for advice about the particular law. In general, government officials who are involved in the administration of the law in question will be considered appropriate officials;
 - iv. the advice was reasonable in the circumstances. As an individual relying on advice has less knowledge of the law than an appropriate official, the advice obtained will be presumed to be reasonable unless it appears on its face to be utterly unreasonable;
 - v. the advice was wrong; and
 - vi. the accused relied on the official advice and his reliance was reasonable.
- (*R. v. Jorgensen*,^[15] (supra) at paras. 28-36 and *R. v. Cancoil Thermal Corp.* (1986) 1986 CanLII 154 (ON CA), 27 CCC (3d) 295 (O.C.A).)

[92] All of these conditions must be met.

[93] Passive ignorance however, is not a valid defence. (*Lévis (City) v. Tétreault*, 2006 SCC 12 (CanLII), [2006] 1 S.C.R. 420, at paras. 30-33.^[16])

[94] Various factors will be taken into consideration, including efforts made by the accused to obtain information, the clarity or obscurity of the law, the position and role of the official who gave the information or opinion, and the clarity, definitiveness and reasonableness of the information or opinion. (*R. v. Cancoil Thermal Corp.* (1986), 1986 CanLII 154 (ON CA), 27 C.C.C. (3d) 295 at p. 303).

[95] This aspect of the question must be considered from the perspective of a reasonable person in a situation similar to that of the accused.

Application of the Law to the Evidence

A. Error of Law

[96] Mr. Way was clearly aware of the existence of section 163.1 of the *Criminal Code* as he referred to the section on his website. He knew it was against the law to possess or sell child pornography. He engaged legal counsel to advise him. He knew he was involved in a business which risked infringing the *Criminal Code* as the films he was selling had lengthy scenes with young nude boys.

[97] The issue as to whether the films and photographs fit within the definition of child pornography set out in the *Criminal Code* is clearly a matter of law and fact.

B. Consideration of the Legal Consequences

[98] Mr. Way considered whether his conduct in making and selling the films might be illegal and sought advice from counsel. He also attended a meeting with a police officer from the child exploitation unit.

[99] In so doing, he considered the legal consequences of his actions.

C. *The Individual who gave Advice Must be Someone Normally Considered an Authority about the Particular Law*

[100] The advice obtained came from an appropriate official. Officer Purchas was an officer with the child exploitation unit who had taken the time to review the films. Officer Purchas was someone whom a reasonable individual in the position of the accused would consider responsible for advice about the particular law in question.

D. *The Advice was Reasonable*

[101] Officer Purchas kept no notes of his conversation with Mr. Way on December 19, 2006. Officer Purchas said there was no reason to take notes as the films were not child pornography. [17]

[102] Officer Purchas told Mr. Way the police had reviewed his films. He returned the films to Mr. Way, knowing Mr. Way was in the business of selling them to others and knowing that he might continue to sell the films. [18] Officer Purchas told Mr. Way not to sell *Emperor Tomato Ketchup* and he agreed not to. Officer Purchas did not indicate that he required any further information.

[103] At trial Officer Purchas was asked,

Q. What you said to Mr. Way was that, “I have no right to keep these movies because they're lawful movies”, correct?

He replied,

A. That's correct. That's why he wasn't charged, yes.

[104] Later in his testimony he said that,

A. There were no videos that I had found that met the definition of child pornography. I did note, however, that there was one that was, borderline.

[105] He was told that *Emperor Tomato Ketchup* (which Mr. Way says contains sexual touching of a boy's penis with a feather) was borderline child pornography.

[106] I accept that Officer Purchas told Mr. Way the films were not child pornography.

[107] The information he received from Officer Purchas was reasonable as Officer Purchas was trained in the area of child exploitation and took the time to review the films before the meeting. Mr. Way did not have the knowledge or experience dealing with these legal issues that Officer Purchas did and it was therefore reasonable for him to rely on Officer Purchas' findings.

E. *The Advice was Wrong*

[108] The advice was wrong in respect of the five films reviewed by Officer Purchas and his colleague that I found to be child pornography.

F. *The Accused Reasonably Relied on the Information he Obtained*

[109] Mr. Way continued to sell the films seized by police in December 2006 except for the film *Emperor Tomato Ketchup*. This decision was reasonable because he was told the films were

not child pornography and he did not sell the film Officer Purchas said was borderline child pornography.

[110] It would be unjust to permit the State to prosecute an individual for an offence that one of its agents had assured him was not an offence, through one of its bureaus. Mr. Way's reasonable reliance on wrong legal advice does not negate his culpability but the State agent has done something which disentitles the State to a conviction.

[111] I do not agree with the Crown submission that Mr. Way should not be entitled to advance the defence of officially induced error because he did not solicit the advice from the police. Mr. Way agreed to attend a meeting at the request of Officer Purchas and was told by a State agent in a position to give that information that the films were "lawful movies".

[112] Fifteen films that were determined by Officer Purchas not to be child pornography were determined by police to be child pornography in 2011. Of those fifteen films, I found that five were child pornography. There will be a stay of proceedings in respect of those five films as Mr. Way reasonably relied on Officer Purchas' statement that the films were legal. Those films are:

- i. Kombat Kids
- ii. Crimean Vacation Part 3
- iii. Rose of Youth
- iv. Rascals in Action
- v. Oscar and His Moped 4

[113] However, the defence of officially induced error is not available in respect of films I determined were child pornography that were not reviewed by the police in December 2006.

[114] During the 4 1/2 year period after the December 19, 2006 meeting, Mr. Way never contacted any official to review the content of new films. He failed to make any inquiry with any State official as to the legality of the films he was selling although the nature of Azov films had changed since the time he met with Officer Purchas.

[115] An accused cannot assume his actions are reasonable. Mr. Way knew there was a risk that some of the films he was producing after December 2006 were not legal. For example, on April 22, 2008 Mr. Way sent the following message:

We are trying something new so I do not know how law enforcement will react if they come across the video.

[116] Moreover, the film *Cutting Room Floor* referred to above was initially not sold as Mr. Way stated in an email that it will "almost certainly end up on internet or newsgroup that would get both of us in trouble". In February 2011, that film was released and sold.

[117] Finally, all of the films I found to be child pornography as set out in Exhibit B, were in my view, worse than the films I saw that were seized in 2006.^[19]

[118] For these reasons, the stay of proceedings applies only in respect of the films specifically reviewed by the police in December of 2006 that were considered by me to constitute child pornography. After subtracting the five films reviewed by the officer in December 2006 that were determined by me to be child pornography (but to which the defence of officially induced error applies), the remaining list of films considered by me to be child pornography is set out in Exhibit B.

The Third Issue: Was Mr. Way a Member of a Criminal Organization?

The Law

[119] Mr. Way is charged with instructing others to import, produce, distribute and export child pornography for the benefit of a criminal organization. [Section 467.1\(1\)](#) of the *Criminal Code*, defines “criminal organization” as a group, however organized, that

- i. is composed of three or more persons in or outside Canada; and
- ii. has as one of its main purposes or main activities the facilitation or commission of one or more serious offences that, if committed, would likely result in the direct or indirect receipt of a material benefit, including a financial benefit, by the group or by any of the persons who constitute the group.

[120] Under s. 467.12(1), it is an indictable offence for a person to commit an indictable offence for the benefit of, at the direction of, or in association with a criminal organization. (*R. v. Ciarniello* [2006 BCSC 1671 \(CanLII\)](#), *R. v. Kirton* [2007 MBCA 38 \(CanLII\)](#), and *R. v. Riley*, [2009 CanLII 15450 \(ON SC\)](#), 2009, CanLII 15450 (On. S.C.).)

[121] The factors to be considered to determine whether a group is a criminal organization include a determination as to whether there are:

- i. rules amongst those in the organization,
- ii. defined roles within a structure,
- iii. communication among the participants,
- iv. actual or pending material benefit to the parties, and
- v. an organizational structure that promotes the commission of offences. (*R. v. Giles*, [2008 BCSC 367 \(CanLII\)](#) and *R. v. Lindsay*, [2005 CanLII 24240 \(ON SC\)](#)).

[122] There must be a hierarchy of at least three permanent positions, meaning they are not dependent on a particular person holding them at any given time. (*R. v. Lindsay*, [2005 CanLII 24240 \(ON SC\)](#), [2005] OJ No. 2870 (S.C.J.)).

[123] In *Lindsay*, the court held that while certain characteristics such as:

- i. the primary motive to make money for themselves;
- ii. group hierarchy with at least three permanent positions and rules;
- iii. limited or exclusive memberships;
- iv. an organization that perpetuates itself;
- v. use of illegal means; and
- vi. domination of a territory or industry;

are important, “it is preferable to focus on the goal of the legislation, which is to identify and undermine groups of three or more persons that pose an elevated threat to society due to the ongoing and organized association of their members”.

Application of the Law to the Evidence

[124] In this case, the Crown suggests that the criminal organization consisted of Mr. Way, his film editor Mr. Donnelly, one of his cameraman, Mr. Roth and his mother, Ms. Waslov.

[125] Little evidence was lead as to Mr. Donnelly's role. Mr. Way testified that Mr. Donnelly had a contract and received a salary to edit the film footage for the nudist and other films he sold. Mr. Donnelly was not the directing mind of the business nor did he gain financially from the sale of these films, other than payment of his salary.

[126] Mr. Roth provided footage that was edited and then included in some of the films sold by Mr. Way. He received a fee for the footage. He received some direction from Mr. Way as to the type of footage Mr. Way wanted and according to one email he received a higher fee if there was more nudity. There is no suggestion that he shared in the profits. He had no permanent position or decision-making role within the organization.

[127] Mr. Way's mother Sandra Waslov signed the pay cheques and dealt with civil legal issues that arose. She is listed as Treasurer of Azov Films. She received a salary of \$60,000 per annum.

[128] The Crown produced no evidence of,

- i. the rules of the organization,
- ii. the interrelationship among the parties to the alleged criminal organization,
- iii. the knowledge of Donnelly, Roth or Waslov about what other members of the organization were doing for the criminal organization,
- iv. any dealings at all among Mr. Donnelly, Mr. Roth or Ms. Waslov, or
- v. an organization that took on a life beyond the immediate roles of the persons employed by the company.

[129] For these reasons, I find the Crown has not established that Mr. Way instructed others to import, produce, distribute and export child pornography for the benefit of a criminal organization.

5. CONCLUSION

[130] For the above reasons, I find Brian Way,

- (a) guilty of making and possessing pornography for the purpose of publication (Counts 1 through 8),
- (b) guilty of possessing for the purpose of publishing, and advertising for the purpose of distributing pornography (Counts 9 and 10),
- (c) guilty of selling and distributing pornography (Count 11),
- (d) guilty of possessing for the purpose of exporting, importing and exporting child pornography (Counts 14 and 15),
- (e) guilty of possessing money made from selling child pornography (proceeds of crime) (Counts 12 and 13), and

- (f) not guilty of instructing others to import, produce, distribute and export child pornography for the benefit of a criminal organization (Count 16).

The list of films and accompanying images that are the subject of these convictions are attached as Exhibit B.

Thorburn J.

Released: May 12, 2015

EXHIBIT "A"

Vladik's Fun (2006) DVD
Crimean Vacation Part 3: Summer's End (2006) DVD
Vladik Anthology 11:13 (2007) DVD
Vladik's Spring Break (2007) DVD
Vladik's Excursion: Day 2 (2007) DVD
Sticky Water Wiggles: Boy Fights IX (2008) DVD
Parkour Boys (2008) DVD
Even More Water Wiggles: Boy Fights X (2008) DVD
Water Wiggles Going Commando: Boy Fights XI (2008) DVD
Water Wiggles Continues: Boy Fights XII (2008) DVD
Extremely Sticky Water Wiggles Going Commando: Boy Fights XIII (2008) DVD
Water Wiggles Portfolio (2008) Photo DVD
Vlaviu Wiggles: Boy Fights XIV (2008) DVD
Water Wiggles FKK Workout: Boy Fights XV (2008) DVD
Vlaviu Wiggles Going Commando: Boy Fights XVI (2008) DVD
Slippery Vlaviu Commando Wiggles: Boy Fights XVII (2008) DVD
Boy Fights XVIII: Commando Squared (2008) DVD
Boy Fights XIX: Triple Threat (2009) DVD
Vladik Remembered Vol. 2 [2-disc] (2008) DVD
Wrestling Teens (2009) DVD
Boy Fights XXI: Commando Christmas (2009) DVD
Boy Fights XXII: Commando Knights (2009) DVD
Winter Play Inside (2010) DVD
Sticky Quadwiggles: Boy Fights XXIII (2009) DVD
Loredan Wiggles: Boy Fights XXIV (2009) DVD
Boy Fights XXV: Bowlarama (2009) DVD
Paul in Pictures
Boy Fights XXVI: Buddy Brawl (2009) DVD
It's a Boy Thing (2009) DVD
Beyond Boy Fights (2009) DVD
FKK Ranch: Party Games (2009) DVD
Scenes from Crimea: Vol. 1 (2009) DVD
Black Sea Boys Portfolio (2009) Photo DVD
Scenes from Crimea: Vol. 2 (2009) DVD
Azov Beach, The (2009) DVD
FKK Wilderness (2010) DVD
FKK Black Sea (2009) DVD
Scenes from Crimea: Vol. 4 (2009) DVD

Scenes from Crimea: Vol. 5 (2009) DVD
 FKK Moldavian Forest (2010) DVD
 Rose of Youth, The (2003) DVD
 Scenes from Crimea: Vol. 6 (2009) DVD
 FKK Wiggly Wonders (2010) DVD
 Cutting Room Floor [4-disc] (2010) DVD
 Winter Play Inside (2010) DVD
 Un-Scenes from Crimea [3-disc] (2010) DVD
 Skate Brats (2010) DVD
 4 Igor (2010) DVD
 Snowballers (2010) DVD
 BF v2.0: FKK Paul (2010) DVD
 BF v2.0: FKK Paul + Calin (2010) DVD
 BF v2.0: Salt Mine (2010) DVD
 Paul and Calins & Alex ATV Adventure
 BF v2.0: FKK On Tour (2010) DVD
 BF v2.0 : FKK Waterlogged (2010) DVD
 BF v2.0 : Black Sea 2.0 [3-disc] (2010) DVD
 BF v2.0: Paul & Calin's Home Video [3-disc] (2011) DVD
 Cutting Room Floor: Vlaviu [2-disc] (2011) DVD
 Raw Rewind Vol.2 [2-disc] (2011) DVD
 Raw Rewind Vol.3 [2-disc] (2011) DVD

EXHIBIT "B"

1. Vladik Anthology 11:13 (2007) DVD
2. Vladik's Spring Break (2007) DVD
3. Vladik's Excursion: Day 2 (2007) DVD
4. Sticky Water Wiggles: Boy Fights IX (2008) DVD
5. Parkour Boys (2008) DVD
6. Even More Water Wiggles: Boy Fights X (2008) DVD
7. Water Wiggles Going Commando: Boy Fights XI (2008) DVD
8. Water Wiggles Continues: Boy Fights XII (2008) DVD
9. Extremely Sticky Water Wiggles Going Commando: Boy Fights XIII (2008) DVD
10. Water Wiggles Portfolio (2008) Photo DVD
11. Vlaviu Wiggles: Boy Fights XIV (2008) DVD
12. Water Wiggles FKK Workout: Boy Fights XV (2008) DVD
13. Vlaviu Wiggles Going Commando: Boy Fights XVI (2008) DVD
14. Slippery Vlaviu Commando Wiggles: Boy Fights XVII (2008) DVD
15. Boy Fights XVIII: Commando Squared (2008) DVD
16. Boy Fights XIX: Triple Threat (2009) DVD
17. Vladik Remembered Vol. 2 [2-disc] (2008) DVD
18. Wrestling Teens (2009) DVD
19. Boy Fights XXI: Commando Christmas (2009) DVD
20. Boy Fights XXII: Commando Knights (2009) DVD
21. Winter Play Inside (2010) DVD
22. Sticky Quadwiggles: Boy Fights XXIII (2009) DVD
23. Loredan Wiggles: Boy Fights XXIV (2009) DVD
24. Boy Fights XXV: Bowlarama (2009) DVD
25. Paul in Pictures
26. Boy Fights XXVI: Buddy Brawl (2009) DVD
27. It's a Boy Thing (2009) DVD
28. Beyond Boy Fights (2009) DVD
29. FKK Ranch: Party Games (2009) DVD
30. Scenes from Crimea: Vol. 1 (2009) DVD

31. Black Sea Boys Portfolio (2009) Photo DVD
32. Scenes from Crimea: Vol. 2 (2009) DVD
33. Azov Beach, The (2009) DVD
34. FKK Wilderness (2010) DVD
35. FKK Black Sea (2009) DVD
36. Scenes from Crimea: Vol. 4 (2009) DVD
37. Scenes from Crimea: Vol. 5 (2009) DVD
38. FKK Moldavian Forest (2010) DVD
39. Scenes from Crimea: Vol. 6 (2009) DVD
40. FKK Wiggly Wonders (2010) DVD
41. Cutting Room Floor [4-disc] (2010) DVD
42. Winter Play Inside (2010) DVD
43. Un-Scenes from Crimea [3-disc] (2010) DVD
44. Skate Brats (2010) DVD
45. 4 Igor (2010) DVD
46. Snowballers (2010) DVD
47. BF v2.0: FKK Paul (2010) DVD
48. BF v2.0: FKK Paul + Calin (2010) DVD
49. BF v2.0: Salt Mine (2010) DVD
50. Paul and Calins & Alex ATV Adventure
51. BF v2.0: FKK On Tour (2010) DVD
52. BF v2.0 : FKK Waterlogged (2010) DVD
53. BF v2.0 : Black Sea 2.0 [3-disc] (2010) DVD
54. BF v2.0: Paul & Calin's Home Video [3-disc] (2011) DVD
55. Cutting Room Floor: Vlaviu [2-disc] (2011) DVD
56. Raw Rewind Vol.2 [2-disc] (2011) DVD
57. Raw Rewind Vol.3 [2-disc] (2011) DVD

CITATION: R. v. Way, 2015 ONSC 3080
COURT FILE NO.: CR-15-50000129-

0000

DATE: 20150512

ONTARIO

SUPERIOR COURT OF JUSTICE

HER MAJESTY THE QUEEN

– and –

BRIAN WAY

Defendant

REASONS FOR JUDGMENT

Thorburn J.

Released: May 12, 2015

[1] It is agreed that if so, Mr. Way is guilty of making, possessing for the purpose of publication, advertising, selling, distributing, importing, exporting child pornography, and being in possession of over \$5,000.00 knowing the money was obtained directly or indirectly from the commission of an indictable offence.

[2] Transcript of Trial Proceedings, March 11, 2015 at pages 85 to 88.

[3] Q. You returned them to him ... You knew that what, that this guy was selling the movies because that was the context in which they were seized....You gave them back to him and you expected that one of the possibilities was that he was going to continue to sell these movies, correct?

A. I would imagine so. (Transcript of Trial Proceedings, March 6, 2015 at page 41.)

[4] Paragraph 23 of Defence Closing Submissions

[5] In *R. v. R.R.K.*, [2010] O.J. No. 245 (S.C.) at para. 34, Dambrot J. held that the dominant characteristic was the depiction of the Complainant's breasts where,

The camera that was used to record the video was obviously positioned ... in a manner likely to capture her frontally when she undressed for bed. While the duration sometimes varies, the constant theme throughout the clips is the undressing of the complainant, commonly capturing her exposed breasts.

[6] In *R. v. Hurtubise*, [1997] B.C.J. No. 40 (S.C.) at para. 17 the Court found that the dominant characteristic was the depiction of the genitals of a young girl where:

... the adult male's gaze is focused on the girl's pubic region, thus drawing the viewer's eyes to that area and making it the dominant feature of the picture. As well, his mouth is open and her hand is placed on the back of his head, implying an imminent act of cunnilingus.

[7] In *R. v. Rudiger*, 2011 BCSC 1397 (CanLII), [2011] B.C.J. No. 1947 (S.C.) at para. 120 (citing para. 34 of the trial decision); leave to appeal to BCCA denied July 2012 and *R.R.K.* [2010] O.J. No. 245) at paras. 139-40 the court held that:

A photograph which, on an objective basis has the dominant characteristic of depicting a "child's sexual organs or anal region for a sexual purpose" may well lose that dominant characteristic when transplanted into a more benign or innocent collection of photographs. That is different, however, from arguing that an overtly and unequivocally pornographic depiction, regardless of how explicit, loses its dominant characteristic simply because it is interspersed with a volume of other materials.

[8] Nudity is an important part of context but is not determinative. (*Sharpe* (supra) at para. 129).

[9] This may include sexual acts, fondling, sexual touching or positioning of the body in a sexual way.

[10] This includes things such as the depiction of a child's penis near the mouth of another child, or having one child taking off another's underwear.

[11] This would include items such as oils and creams.

[12] In *R. v. Nedelec* 2001 BCSC 1334 (CanLII) at para 49, the court held that a photograph of a little girl's genital region placed with a number of other sexualized photos of nude children, rendered the image likely to stimulate a sexual interest in the viewer.

[13] *Beaver v. The Queen*, 1957 CanLII 14 (SCC), [1957] S.C.R. 531, at pp. 541-42.

[14] Defence submissions paragraph 77.

[15] In *Jorgensen*, the appellants were aware that they were involved in a business which risked infringing the *Criminal Code*. The films they were selling were legally obscene. The accused's films were approved by the

Ontario Film Review Board (OFRB). While the OFRB is not legally responsible for deciding whether a film infringes the *Criminal Code*, Lamer J. held that there is no other body which would be the logical choice for someone to consult or seek advice about whether a film can be legally retained in Ontario. The opinion was deemed to be reasonable due to the fact that the content of only a few scenes in the movies were determined by the judge, upon viewing, to “be close to the line”(but over it). It was also significant that those seeking OFRB approval and classification must pay the OFRB for this service. Since the appellants sought, and paid for, the OFRB opinion of each film before putting them on their shelves, the question of reliance on the advice was proven.

[16] In *Levis*, Mr. Tétreault was aware of the date when the fees relating to the registration of its vehicle would be due and, accordingly, when the registration would cease to be valid. He could and should have been concerned when he failed to receive a notice. He proved no action or attempt to obtain information. He did nothing. Lebel J. for the court held that he had a duty to do more and as a result, the acquittals were overturned.

[17] I didn't take note of the titles. ... my approach was obviously if I, if I located a video that met the definition of child pornography, something that, that I would be charging on, I would've taken note of that. But in the absence of, of any material that met the definition of child pornography, they would've had to be returned to the owner at any rate, so there was no point in, in recording it. ... there was nothing that I deemed to be criminal.

[18] Q. You returned them to him ... You knew that what, that this guy was selling the movies because that was the context in which they were seized....You gave them back to him and you expected that one of the possibilities was that he was going to continue to sell these movies, correct?

A. I would imagine so.

[19] I note that Emperor Tomato Ketchup is no longer available and it is therefore impossible to review the whole film in context.