File Number: 36435

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

BETWEEN:

HER MAJESTY THE QUEEN

Appellant (on appeal)
(Respondent)

- and -

OSWALD OLIVER VILLAROMAN

Respondent
(Appellant)

FACTUM OF THE APPELLANT
ATTORNEY GENERAL OF ALBERTA

PURSUANT TO SECTION 40(1) OF THE *SUPREME COURT ACT* AND RULE 42 OF *RULES OF THE SUPREME COURT OF CANADA*

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PART I – OVERVIEW AND FACTS

Overview

1. Oswald Villaroman took his computer to a shop for repairs. A technician discovered child pornography files in the "music" folder. Using a file-sharing program called LimeWire, the files had been deliberately acquired over the preceding three months, mostly between midnight and 1:30 a.m. The computer had been used almost daily during that time. LimeWire had been specially configured to store completed downloads in the "music" folder. On the same day LimeWire was installed, the computer's only user account was set up and manually named "*oswaldvillaroman.*" There was no evidence that anyone other than Mr. Villaroman ever used or had access to his computer.

2. The trial judge convicted Mr. Villaroman of possession of child pornography. He declined the defence's invitation to speculate about ways that some unknown person or persons could have gotten at Mr. Villaroman's computer on all of the occasions necessary to download the child pornography.

3. The Alberta Court of Appeal did not. It invoked a flawed version of the Rule in *Hodge's Case* to overturn the conviction. In the court's words, there can be no finding of guilt where circumstantial evidence "leaves a reasonable (not remote) possibility that the event occurred in a way not involving the accused… It is not necessary that there be actual evidence of that innocent possibility; the onus is on the Crown to disprove it."[1] Since the Crown had not conclusively negatived all possibility of access by any other person or persons during the three-month download period, the guilty verdict was unreasonable.

4. Proof to such a standard of certainty is impossible. That is why Canadian law does not require it, even in a circumstantial case. The court below erred in imposing a burden on the Crown to eliminate all innocent possibilities with or without foundation in the evidence. It lost sight of the offence of possession and instead focused on evidence of downloading, which led it

[1] *R v Villaroman*, 2015 ABCA 104 [*"CA Reasons"*] at para 19 - AR Vol 1 at p 73

to two other errors in applying its version of the Rule in *Hodge's Case*. First, the Rule does not apply to pieces of evidence (such as downloading); it applies to the whole of the evidence (including ownership, viewing, software set-up, storage location and so on). Second, the Rule does not apply to knowledge or other forms of *mens rea*, which was the true issue.

5. The trial judge avoided the traps that still seem to accompany the Rule in *Hodge's Case*. Today, the Rule is best understood as an optional wording of the requirement for proof beyond a reasonable doubt. The trial judge correctly considered whether the evidence established guilt beyond a reasonable doubt. His conclusion deserved deference. The errors of the Court of Appeal should be reversed and the conviction restored.

Facts

Circumstances of the offence

1. On December 2, 2009, Mr. Villaroman took his laptop computer to a MyMacDealer shop for repairs to the power button and battery.[2] When he dropped it off, he provided his name, address, and telephone number.[3] Technician Alan Sopczak examined the computer (which was not password protected),[4] identified various problems, and telephoned Mr. Villaroman to authorize the work. Mr. Villaroman asked him to proceed.[5]

2. After completing some repair steps, Mr. Sopczak tested whether the computer's hardware and software were operating properly. He randomly checked some documents, music and picture files.[6] In his experience, "a lot of customers" find that the smooth operation of "music files, pictures, various other files of that sort" is "a big thing."[7] He emphasized that "people … with computers are quite concerned about music files."[8]

3. While checking the music files on Mr. Villaroman's computer, Mr. Sopczak discovered child pornography files in the "music" sub-folder of the "iTunes library" folder. He felt the

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[2] *R v Villaroman*, 2013 ABQB 279 at paras 5-6 ["*Trial Reasons*"] - AR Vol 1 at p 51; see also Copy of MyMacDealer Service Repair Order SRO S-289062- AR Vol 2 at p 162
[3] *Trial Reasons* at paras 7-8, 82(f) and (g) – AR Vol 1 at pp 51-52, 66-67; see also Copy of MyMacDealer Service Repair Order SRO S-289062 – AR Vol 2 at p 162
[4] *Trial Reasons* at para 16 – AR Vol 1 at p 53
[5] *Trial Reasons* at paras 6, 9 – AR Vol 1 at pp 51-52
[6] *Trial Reasons* at paras 11-12 – AR Vol 1 at p 52
[7] AR Vol 2 70/11-13
[8] AR Vol 2 70/36-37

number of files ruled out a random occurrence.[9] On December 11, 2009, he called the Calgary Police and secured the computer in his office. Constable Morcom responded to the call later that day. He took a statement from Mr. Sopczak and seized Mr. Villaroman's computer.[10]

4. Days later, Mr. Villaroman called MyMac about his computer. He attended the shop and paid for the repairs. Mr. Sopczak then told him that police had seized it.[11]

Forensic evidence

5. Constable Morcom obtained a general warrant authorizing a forensic examination of Mr. Villaroman's computer.[12] The objectives of the forensic examiner, Mr. LaFontaine, were to locate the child pornography, to discover how it got on the computer, and to determine whether the user knew that it was there.[13]

6. The computer's user took two relevant steps on July 1, 2007:

(a) He created the computer's only user account and named it "*oswaldvillaroman*" by manually typing that name into the computer.[14]

(b) He installed a program called LimeWire, which enables users to access and download one another's digital files over the Internet.[15]

The computer was used almost daily between July 1, 2007, and November 29, 2009.[16]

7. Mr. LaFontaine searched all the picture and video files, as well as compressed files. He found that the pornography files were associated with LimeWire, but not with internet browsing.

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[9] *Trial Reasons* at paras 14-15, 17, 20 – AR at Vol 1 pp 53
[10] *Trial Reasons* at paras 17-18 – AR Vol 1 at p 53; *R v Villaroman*, 2012 ABQB 630 at paras 3-5, 7, 70-72 ["*Voir Dire Reasons*"] - AR Vol 1 at pp 3-4, 16-17. Note that evidence and findings from the *voir dire* were applied in the trial: *Trial Reasons* at para 4 - AR Vol 1 at p 2; AR Vol 2 39/39-40/23, 50/21-51-12, 98/26-99/6
[11] *Trial Reasons* at para 19 – AR Vol 1 at p 53; AR Vol 2 77/2-23
[12] *Voir Dire Reasons* at paras 12, 160 - AR Vol 1 at pp 4, 37; AR Vol 1 104/11-24, 127/14-24
[13] AR Vol 1 150/15-17, 158/24-25, 160/32-35
[14] *Trial Reasons* at para 54 – AR Vol 1 at p 61; *Voir Dire Reasons* at para 24 – AR Vol 1 at p 6
[15] *Trial Reasons* at paras 56-60 - AR Vol 1 at p 62; AR Vol 1 158/23-160/10; Allen LaFontaine's Computer Forensic Examination Report ["*Forensic Report*"], Exhibit 6 at Trial - AR at Vol 2 at p 173
[16] *Trial Reasons* at paras 54, 82(d) - AR Vol 1 at pp 61, 66

He refrained from searching e-mails or "rebuild[ing] the Internet history" because there was no need to do so.[17]

8. LimeWire does not download files automatically without the user's consent or knowledge. To acquire a file using LimeWire, the user would first open the program and then enter search terms. To download a file, the user would have to select it from the results list and double click. The file starts downloading into a folder called "incomplete". Once the download is complete, the file is automatically moved to a different folder for storage. By LimeWire's default setting, that folder is labelled "shared." Here, the user had changed the default settings so that completed downloads were automatically moved to the computer's iTunes "music" folder. Files in the "music" folder were the only ones available for sharing to other LimeWire users.[18]

9. At the time of the forensic examination, the computer's hard drive contained 36 child pornography files: one picture and 35 videos depicting children of various ages, some younger than five years.[19] Two file names appear to be in an Asian language, but all the remaining files have English names that suggest or expressly describe pornographic content. For example:

- Pthc-Pedo 14Yr Illegal Suck Cum Inside Mouth Swallow.mpg
- T-177439724-Goicochea Vincent Pedofilia French Collection R@Ygold R@Ygold Hc-c4G – Fucking 5 – 8-13YoGirl And Older Man Vaginal And Anal Fuck (Pthc – 16m57S).mpg
- (Pthc) Threesome – 9yo Girl, 10yo & 15yo Boy..mpg
- (pthc) 7yo crystal pleasuring her pretty child cunt! masturbation, preteen pedo Lolita r@ygold.mpg
- Pthc-Alexa 14 yo and Uncle (BRUTAL).mpg.[20]

"Pthc" stands for "pre-teen hard core."[21]

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[17] AR Vol 1 179/7-180/11
[18] *Trial Reasons* at paras 57-59, 73 - AR Vol 1 at pp 62, 65; *Voir Dire Reasons* at para 29- AR Vol 1 at p 7; AR Vol 1 162/18-163/10, 165/35-38, 169/2-14, 170/28-29
[19] *Trial Reasons* at para 22 - AR Vol 1 at p 54; *Voir Dire Reasons* at para 25 - AR Vol 1 at p 7; AR Vol 1 150/17-20, 152/15-16, 153/3-8, 168/14-22; *Forensic Report* - AR Vol 2 at p 171-173
[20] List of accessed child porn movies and child porn images, Excerpt of Exhibit 7 at Trial - AR Vol 2 at pp 178-185
[21] AR Vol 1 156/12-17

10. These files were downloaded between September 16, 2009, and November 23, 2009, with downloads occurring on both dates.[22] All but two of the child pornography downloads occurred between the hours of midnight and 1:30 a.m.[23]

11. Eighteen of the videos were partial or incomplete downloads located in the "incomplete" folder.[24] Seventeen of the videos were complete downloads that were found, along with the one picture, in the computer's "music" folder.[25] The user had viewed some videos from each folder using two different media-playing programs. No automatic process would initiate the playing of the videos. The user had to take active steps to view them.[26]

12. The LimeWire program was last properly shut down just before 1:00 a.m. on November 23, 2009.[27] It was cued to download 67 files the next time it connected to the Internet.[28] Again, the file names were consistent with child pornography.[29]

Admissions at trial

13. At trial, Mr. Villaroman conceded that the 36 picture and video files constituted child pornography within the meaning of the *Criminal Code*.[30] He admitted through counsel that he owned the computer, that he resided at the same address as Benigno and Maxima Villaroman, and that neither of them had put the child pornography on the computer.[31] He did not testify or call any evidence in his defence. There was no evidence of multiple computer users, nor evidence that anyone other than the Respondent had ever used his computer.

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[22] *Trial Reasons* at para 55 – AR Vol 1 at p 61; *Voir Dire Reasons* at para 25 – AR at Vol 1 at p 7; AR Vol 1 158/17-20

[23] *Trial Reasons* at para 55 - AR Vol 1 at p 61. To be perfectly accurate, all but three of the downloads occurred between the hours of 11:45 p.m. and 1:30 a.m., Excerpt of Exhibit 7 at Trial - AR Vol 2 at pp 178-185

[24] *Trial Reasons* at para 57 – AR Vol 1 at p 62; AR Vol 1 169/2-14, 190/39-41

[25] *Trial Reasons* at paras 50, 57 - AR Vol 1 at p 60-62; AR Vol 1 154/13-14, 168/35-36, 169/2-14, 190/39-41

[26] *Trial Reasons* at paras 61-66, 69-70 - AR Vol 1 at pp 62-64

[27] The computer will not record the date and time of the shutdown if it experiences a sudden power loss or a forced shutdown: AR Vol 1 170/2-18

[28] AR Vol 1 169/13-14, 171/33-172/19

[29] Eg "Dad fucks both (8yo & 11yo) underage daughters incest preteen illegal pthc(1).MPG"; "PORNOFILM 12007, GROUP (pthc)11yo girl fucks man, 4yo boy with mom and sister, 12yo girl fucks dad and siste.mpgw"; "(Pthc)(Webacm) Blonde&Bf 14 Yr Old Jacking Off To Preteen Lolita Pussy Then Cumin On Stomach Sex Rape Russian Incest Underage Dick Boy Girl Cum Mpg.mpg". *Forensic Report* - AR Vol 2 at pp 174-177

[30] *Trial Reasons* at para 22 - AR Vol 1 at p 54; *Criminal Code*, RSC 1985, c C-46, s 163.1(1)

[31] *Trial Reasons* at paras 5, 80 - AR Vol 1 at pp 51, 66; AR Vol 1 98/4-8, AR Vol 2 58/32-38

Trial judge's reasons

14. Mr. Villaroman had admitted that he was the owner of the computer and conceded that the impugned image and videos were child pornography. The issue was whether he had knowledge and control of them. Of course, there was no eyewitness to the possession, so the Crown's case was circumstantial. Argument centred on the inferences to be drawn from the evidence of Mr. Sopczak and Mr. Lafontaine.[32]

15. The trial judge framed the essential question as "whether the totality of the evidence" permitted him to draw culpable inferences and to be satisfied beyond a reasonable doubt that Mr. Villaroman possessed child pornography. That burden never shifts; the accused is never obligated to call evidence. [33]

16. Inferences must be based in the evidence. "The question is whether the elements the Crown seeks to establish by circumstantial evidence may reasonably be inferred from the circumstantial evidence." [34]

17. Inferences cannot arise from speculation. There is no requirement to rule out every "hypothetical narrative that, however speculative, could possibly link the primary fact or facts to the inference or inferences sought to be drawn." [35] These principles "cut both ways":

> [47] … the Crown cannot ask this Court to rely on suppositions or conjecture to draw inferences that the accused committed the offences with which it has charged him. Similarly, the accused cannot ask this Court to rely on supposition or conjecture, that flows from a purely hypothetical narrative to conclude that the Crown has not proven he is guilty of the offences with which the Crown has charged him. As the Supreme Court of Canada stated in *R v Paul*:
>
> > I do not think that the burden resting upon the Crown to establish the guilt of the accused beyond a reasonable doubt includes the added burden of negativing every conjecture to which circumstantial evidence might give rise and which might be consistent with the innocence of the accused.
>
> …

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[32] *Trial Reasons* at paras 22 and 24 - AR Vol 1 at p 54
[33] *Trial Reasons* at paras 43-44 – AR Vol 1 at p 59
[34] *Trial Reasons* at paras 45, 48 – AR Vol 1 at pp 59-60, qtng *R v Mullings*, [2005] OJ No 2962 at para 33 [Not Reproduced]
[35] *Trial Reasons* at paras 45-46 – AR Vol 1 at pp 59-60, citing *inter alia R v Munoz*, (2006), 86 OR (3d) 134 (Ont SJC) at para 31 [Not Reproduced]

> [49] In other words, it is evidence that "bridges" the inferential gap; not conjecture or speculation. As McRuer CJHC said in *R v McIver*:
>
> > [T]he case is to be decided on the facts, that is, the facts proved in evidence, and the conclusions alternative to the guilt of the accused must be rational conclusions based on inferences drawn from proven facts. No conclusion can be a rational conclusion that is not founded on evidence. Such a conclusion would be a speculative, imaginative conclusion, not a rational one. [36]

18. Mr. Villaroman argued that since there was no evidence showing that he was using the computer at the times the pornographic files were downloaded or viewed, and since the computer was a portable laptop, "anyone could have accessed" it in Mr. Villaroman's absence. Or someone at MyMac could have downloaded the pornography in December, 2009. Further, though it was agreed that two other people lived with Mr. Villaroman and that they were not involved with the child pornography, the Crown had not proved that these were the *only* people who lived in the residence. The trial judge rejected these "hypothetical scenarios" as having no basis in the evidence. [37]

19. There was evidence of the following:

a) two people with whom the accused lives did not download child pornography to the computer;
b) the child pornography was in the iTunes "Music" folder, which was accessible to the computer's user;
c) the computer belonged to Mr. Villaroman;
d) the computer was used "almost daily" from July 1, 2007, to November 29, 2009;
e) the user name that was established on the same day that Limewire was installed was "oswaldvillaroman";
f) the computer was left at the MyMac on December 2, 2009, and Mr. Villaroman's name and home address were shown on the Service Repair Order;
g) the specific problems that the computer was suffering were listed under "Problem Description" on the Service Repair Order and specifically referred to the fact that the "client reports" the problems; and

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[36] *Trial Reasons* at paras 47, 49 (citations omitted) – AR Vol 1 at p 60
[37] *Trial Reasons* at paras 78-81 – AR Vol 1 at p 66

h) the majority of the downloads occurred in the small hours, and long before the computer was taken to the MyMac store.[38]

20. There was no evidence before the court of viewing files without having acquired the data files. Therefore, accessing was not proved. [39]

21. Possession was. Mr. Villaroman's computer contained the underlying data files for the pornography. They were not cached without the user's knowledge, nor downloaded inadvertently. Rather, the user of "oswaldvillaroman" took steps, as described by Mr. Lafontaine, to obtain and to retain them. [40] The trial judge was satisfied beyond a reasonable doubt that Mr. Villaroman was the computer's user when the pornography was downloaded. "Most importantly", he found that Mr. Villaroman was aware the pornography was on the computer. He "knew the nature of the material, had the intention to possess it, and had the necessary control over it." [41]

22. The trial judge was not satisfied that Mr. Villaroman had knowingly made child pornography available to others. LimeWire's default setting is to share files. Unlike the file storage setting, the sharing setting had not been changed. The trial judge was not satisfied that the user knew the files in the "music" folder could be accessed by other LimeWire users. "For all this Court knows, the Computer's user simply selected the iTunes 'Music' folder as an innocuous hiding place for the child pornography." [42]

23. Mr. Villaroman was acquitted of accessing and making available, and convicted of possessing child pornography. [43]

Reasons of the Alberta Court of Appeal

24. Mr. Villaroman appealed his conviction to the Alberta Court of Appeal, which identified two sets of issues. For present purposes, the relevant issue was "whether the Crown had proved that the accused put the pornography on the computer, or knew it was there."[44]

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[38] *Trial Reasons* at para 82-83 – AR Vol 1 at pp 66-67
[39] *Trial Reasons* at paras 69-70 – AR Vol 1 at p 64
[40] *Trial Reasons* at paras 50, 57-59, 67 – AR Vol 1 at pp 60-64
[41] *Trial Reasons* at paras 67-68, 85 – AR at Vol 1 at pp 63-64, 67
[42] *Trial Reasons* at paras 71-77 – AR Vol 1 at pp 64-66
[43] *Trial Reasons* at para 86 – AR Vol 1 at pp 67

25. Since the Crown's evidence was circumstantial,[45] the "big legal dispute" was: "Can the accused rely upon an inference or hypothesis leading to an innocent explanation for the evidence, if it is not based on any evidence, or not based upon proven facts?"[46] The court found conflict in the authorities on this subject.[47] It concluded that circumstantial evidence cannot lead to a finding of guilt "where it leaves a reasonable (not remote) possibility that the event occurred in a way not involving the accused… It is not necessary that there be actual evidence of that innocent possibility; the onus is on the Crown to disprove it."[48]

26. Whether there is a gap in the circumstantial evidence on an element of the offence is "a factual question." Here, the trial judge "misstated the current law."[49] The guilty verdict was an unreasonable one, since a trier of fact "could not reasonably and judicially find that [Mr. Villaroman] put the child pornography on the computer or knew it was there."[50]

27. Mr. Villaroman's laptop was portable and was not password-protected. "Therefore, anyone who could get temporary physical access to [it]… could access or transmit the child pornography on it…. And anyone with such recurring physical access could have put all the child pornography on the computer."[51] The court below identified a long list of items the Crown had neither proved nor disproved:

(a) where the computer was kept[52]
(b) where the computer was used[53]
(c) the number of people living in the Villaroman residence[54]
(d) the number of people frequenting the Villaroman residence[55]
(e) whether the computer "stayed regularly in one place or moved about"[56]
(f) if it stayed in the house,

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[44] *CA Reason* at paras 2, 4, 39 – AR Vol 1 at pp 71, 75
[45] *CA Reasons* at para 7 – AR Vol 1 at p 71
[46] *CA Reasons* at para 10 – AR at Vol 1 at p 72
[47] *CA Reasons* at paras 8, 15, 20 - AR Vol 1 at pp 72-73
[48] *CA Reasons* at para 19 - AR Vol 1 at p 73
[49] *CA Reasons* at paras 19, 20 - AR Vol 1 at p 73
[50] *CA Reasons* at para 38 - AR Vol 1 at p 75
[51] *CA Reasons* at paras 23, 25 - AR Vol 1 at pp 73-74
[52] *CA Reasons* at para 26 - AR Vol 1 at p 74
[53] *CA Reasons* at para 26 - AR Vol 1 at p 74
[54] *CA Reasons* at para 26 - AR Vol 1 at p 74
[55] *CA Reasons* at para 26 - AR Vol 1 at p 74
[56] *CA Reasons* at para 27 - AR Vol 1 at p 74

(i) whether anyone had access to it

(ii) whether any resident let friends use it

(iii) whether non-residents would "hang around the area where the laptop was"[57]

(g) if it did not stay in the house,

(i) whether it was in the custody of the accused or a family member

(ii) where it went[58]

(h) wherever it was,

(i) whether it was typically kept locked up or hidden

(ii) how many other people had access to it.[59]

Thus the Crown had not disproved the possibility of access by others.

28. The court below also felt that the relative infrequency of downloading child pornography did not "make actions by another user impossible, nor even highly unlikely." It said there was no evidence of the source of the pornography, no evidence about whether an ordinary computer user would be "bound to notice" the pornography, "nor argument about the legal position if he did notice."[60] Further, it would be "incautious" for a user to "put so much child pornography" on a computer bearing his own name, and "very careless" for that person to take it in for repairs. This added doubt to the question of whether Mr. Villaroman knew the pornography was on his computer.[61]

29. Thus there was no basis on which to put the case to a trier of fact.[62]

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[57] *CA Reasons* at para 28 – AR Vol 1 at p 74
[58] *CA Reasons* at para 28 – AR Vol 1 at p 74
[59] *CA Reasons* at para 28 – AR Vol 1 at p 74
[60] *CA Reasons* at paras 32, 35 – AR Vol 1 at pp 74-75
[61] *CA Reasons* at para 36 – AR Vol 1 at p 75
[62] *CA Reasons* at paras 31, 38 – AR Vol 1 at pp 74-75

PART II – ISSUES

30. **Issue 1:** Where the Crown's evidence is circumstantial, does the rule in *Hodge's Case* mandate an acquittal where there is an innocent possibility not based in any actual evidence? Put another way, must the Crown disprove all innocent possibilities, whether or not there is any evidence to support them?

31. **Response: No. The Crown is not required to disprove all innocent possibilities. Speculation is not permitted, and conclusions with no foundation in the evidence are not rational ones.**

32. **Issue 2:** Before a case of possession of child pornography can go to a trier of fact, must the Crown prove, beyond any hypothetical possibility, that the accused had exclusive access to the computer throughout the period over which the pornography was downloaded?

33. **Response: No. To prove that an accused possessed digital files, it is not necessary to prove that he downloaded them or that he had exclusive access to the computer where they were stored. These individual pieces of evidence may support inferences of knowledge and control, but the Rule in *Hodge's Case* does not apply to individual pieces of evidence; does not apply to *mens rea;* and does not require disproof of all hypothetical possibilities.**

PART III – ARGUMENT

34. The trial judge instructed himself not to act on speculative possibilities and to convict only if he were satisfied of guilt beyond a reasonable doubt. The former self-instruction was correct: verdicts must be based on evidence. The latter was sufficient: though some confusion remains, the considered view is that the Rule in *Hodge's Case* ["the Rule"] does not create a separate test for the trier of fact in circumstantial cases, but is merely another way to express "beyond a reasonable doubt".

35. The court below committed three salient errors, all sourced in misunderstandings of the Rule. It required the Crown to disprove all speculative possibilities; it misapplied the Rule to evidence of downloading, in isolation; and it misapplied it to what should have been a *mens rea* question. Any one of these errors is sufficient to dispose of this appeal.

The Crown is not required to disprove speculative possibilities

36. A surprising amount of confusion continues to surround the Rule in *Hodge's Case.* Despite all that, one aspect of the Rule's operation is perfectly clear: it does not impose on the Crown a requirement to disprove all innocent possibilities, even ones with no foundation in the evidence. Yet that is what the court below did, and in so doing, it erred.

It is neither obligatory nor possible to disprove all conjecture

37. In its original formulation, the Rule states that where the Crown's case consists entirely of circumstantial evidence, it must satisfy the trier of fact "not only that those circumstances were consistent with [the prisoner's] having committed the act, but […also…] that the facts were … inconsistent with any other rational conclusion but that the prisoner was the guilty person."[63]

38. The court below identified the subject of the appeal as "how to use circumstantial evidence" and defined "the big legal dispute" in terms that focus on innocent possibilities and the role of evidence, or lack thereof:

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[63] *Hodge's Case* (1838) 2 Lewin 227, 168 ER 1136 at p 1137 [Tab 1]

> Can the accused rely upon an inference or hypothesis leading to an innocent explanation for the evidence, if it is not based on any evidence, or not based upon proven facts? For conviction, we require that the circumstantial evidence be incompatible with any reasonable state of facts which would not involve the accused's commission of the crime. Must that innocent state of facts be based upon the evidence? Or can it be based upon lack of evidence? [64]

Acting on its understanding that the Crown must leave no gaps in the evidence,[65] the court below found the verdict unreasonable because there was no evidence on the long list of topics at paragraph 27 above.

39. To have disproved all the list items, the Crown would have needed to prove who had theoretical access to the computer for every minute of its existence from September 16 to November 23, 2009. That is, the police would have needed to know where the computer was, and how many people were nearby, in the three months before the police ever knew the computer existed. No one, likely not even Mr. Villaroman, would be able to recreate such a detailed timeline.

40. Nor did the police have the option of returning the computer, and the child pornography, to Mr. Villaroman in hope of gathering the evidence necessary to disprove the list prospectively. Such surveillance, if it were even possible, would have cost the police incalculable resources and would have intruded significantly on Mr. Villaroman's privacy.

41. When the court below overturned the conviction because the Crown had not disproved every possibility of access by others, it was not merely expressing a lurking doubt about the Crown's evidence.[66] It was imposing a positive requirement that the Crown disprove every innocent possibility, whether or not it could arise from the evidence. In its words, "[i]t is not necessary that there be actual evidence of that innocent possibility; the onus is on the Crown to disprove it."[67]

42. There is no such onus on the Crown, either as a general principle of criminal law or in circumstantial cases. The Crown is not required to prove anything to the impossibly high

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[64] *CA Reasons* at para 10 – AR Vol 1 at p 72
[65] *CA Reasons* at para 19 – At Vol 1 at p 73
[66] Though that, too, would have been an insufficient basis for appellate intervention: see *R v Biniaris,* 2000 SCC 15 at para 38 [Tab 8]
[67] *CA Reasons* at para 19 – AR Vol 1 at p 73

standard of absolute certainly.[68] Nor is it required to disprove all conceivable defence positions no matter how fanciful or speculative they may be.[69] The Crown does not bear the burden of "negativing every conjecture to which circumstantial evidence might give rise and which might be consistent with the innocence of the accused."[70]

43. Conjecture is not permitted even when inquiring whether the facts are "inconsistent with any other rational conclusion" but guilt. "No conclusion can be a rational conclusion that is not founded on evidence. Such a conclusion would be a speculative, imaginative conclusion, not a rational one."[71]

44. A reasonable doubt is "logically connected to the evidence or absence of evidence; … it is not proof beyond any doubt nor is it an imaginary or frivolous doubt."[72] Juries are instructed that a reasonable doubt is one based in the evidence and that they must not speculate.[73] "Inferences" arise from evidence; "speculation" or "conjecture" does not.[74] Failure to recognize the distinction between the two is legal error.[75]

45. The court below did not merely miss the distinction and entertain its own conjecture; it found the verdict unreasonable because the Crown had not disproved every conjecture that could be entertained. This was reversible error.

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[68] *R v Lifchus*, [1997] 3 SCR 320 at paras 31, 36, 39 [Tab 25]; *R v Ngo*, 2009 CarswellBC 1634, 2009 BCCA 301 at paras 55, 56 [Tab 30]
[69] *R v Gunning*, [2005] 1 SCR 627 at para 32 [Tab 18]; *R v Torrie*, [1967] 3 CCC 303 (ONCA) at para 10 [Tab 45]
[70] *R v Paul*, [1977] 1 SCR 181at para 12 [Tab 33] per Ritchie J; *R v Richer*, 82 CCC (3d) 385 (ABCA) at para 29 per Fraser CJ [Tab 36]
[71] *R v Wild*, [1971] SCR 101 at pp 110 and 114 per Martland J, and p 119 per Ritchie J [Tab 48]; *R v Munoz* (2006), 86 OR (3d) 134 (Ont SCJ) at para 31 [Not Reproduced]
[72] *R v Lifchus*, [1997] 3 SCR 320 at para 36 [Tab 25]
[73] David Watt, *Watt's Manual of Criminal Jury Instruction*, 2nd ed, (Toronto: Thomson Carswell, 2015) at pp 261-266 [Tab 61]; National Judicial Institute, *Model Jury Instructions*, Ottawa, Ont: Canadian Judicial Council, 2014, s 9.2 [Tab 57]; Gerry Ferguson et al, *Canadian Criminal Jury Instructions* (Vancouver: Continuing Legal Education of British Columbia, 2014) at ss 4.04.1 - 4.04.5 [Tab 53]
[74] *R v Wild*, [1971] SCR 101 at pp 114, 116-117 [Tab 48]; *R v B(G)*, [1990] 2 SCR 57 at pp 69-70 [Tab 5]; *R v Schuldt*, [1985] 2 SCR 592 at p 604 [Tab 40]; *R v Khela*, 2007 BCCA 50 at para 41[Tab 22], aff'd *R v Khela*, [2009] 1 SCR.104 at para 57 [Tab 23]; *R v Paskimin*, 2012 SKCA 35 at para 13 [Tab 32]; *R v Nguyen*, 2010 ABCA 145 at para 15 [Tab 31]
[75] *R v Wild*, [1971] SCR 101 at paras 114, 116-117 (per Martland J) and 50 (per Ritchie J) [Tab 48]; *R v Dubois*, [1979] 49 CCC (2d) 501 (ABCA) at para 15 [Tab 14]

Digression: Evidence, not "proven facts"

46. The court below commented that the jurisprudence on "the subject [of] how to use circumstantial evidence" is "not readily consistent."[76] Without identifying the inconsistency or citing examples, it concluded that "some case law may conflict, and seems to have changed in very recent years."[77] The only change that Appellant's counsel have been able to detect in "very recent years" is a correction of an erroneous formulation suggesting that inferences must arise from "proven facts." The court below may have over-interpreted the correction.

47. In a 1965 judgment, the Ontario Court of Appeal made an ill-considered attempt to restate the historical rule in *Hodge's Case*:

> the case is to be decided on the facts, that is, the facts proved in evidence, and the conclusions alternative to the guilt of the accused must be rational conclusions based on inferences drawn from **proven facts**. No conclusion can be a rational conclusion that is not founded on evidence. Such a conclusion would be a speculative, imaginative conclusion, not a rational one.[78] (emphasis added)

48. The "proven facts" formulation is wrong, in that it suggests a sequential approach to fact-finding where specific facts must be proved before inferences may be drawn or reasonable doubt assessed. As this Court ruled in *R v Khela*, the error is patent if its effect is to require "the defence to 'prove' certain facts in order for the jury to draw an inference of innocence from them."[79] However, this Court had applied the "proven facts" formulation through the 1970s and it has been quoted by some provincial appellate courts as recently as 2014.[80]

49. Other appellate courts have corrected the "proven facts" error. In the words of the British Columbia Court of Appeal, the law "does not require that inferences found to be inconsistent with guilt must arise from proven facts,"[81] and of the Ontario Court of Appeal, "the question of

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[76] *CA Reasons* at paras 7-8 – AR Vol 1 at pp 71-72
[77] *CA Reasons* at para 20 – AR Vol 1 at p 73
[78] *R v McIver*, [1965] 4 CCC 182 (ONCA) at para 7 [emphasis added] [Tab 27]
[79] *R v Khela*, [2009] 1 SCR 104 at para 58, [Tab 23]
[80] Eg *R v Bagshaw*, [1972] SCR 2 at pp 7-8 [Tab 6]; *R v Paul*, [1977] 1 SCR 181 at p 191 [Tab 33]; *R v Dubois*, [1979] 49 CCC (2d) 501(ABCA) at para 17 (per McGillivray CJA dissenting) [Tab 14], rev'd on appeal to the SCC for the reasons of McGillivray CJA, [1980] 2 SCR 21 [Tab 15]; *R v Polley*, 2014 NSCA 71 at para 19 [Tab 34]; *R v Brodeur*, 2014 NBCA 44 at para 16 [Not Reproduced]
[81] *R v Pryce*, 2014 BCCA 370 at para 10 [Tab 35]

whether there exists a reasonable doubt concerning guilt is to be assessed on the totality of the evidence, not simply on the proven facts."[82]

50. These corrections have discarded "proven facts", but have maintained the role of evidence in inference-drawing. As this Court wrote in 2009, "in order to convict, [the trier of fact] must be satisfied beyond a reasonable doubt that the only rational inference that can be drawn from the circumstantial evidence is that the accused is guilty." The verdict "must be logically *based upon the evidence or lack of evidence*" before the court.[83] This formulation – focusing on *evidence* and *reasonable doubt* but not *proven fact* – is consistent with fundamental rules of criminal justice.

51. The lower court's "disprove everything" formulation is not. It effectively *requires* the trier of fact to act without "actual evidence" – in other words, to speculate. It then requires the Crown to disprove all possible results of the speculation of the trier of fact, and of the court of appeal.

The Rule does not apply to evidence of downloading or to mens rea

52. The court below misdirected itself by focusing on downloading, which was not the issue. Knowledge was. Downloading was only one part of the evidence supporting an inference of knowledge. The Rule should not have been applied here for two reasons: it does not apply to individual pieces of evidence, and it does not apply to *mens rea* issues.

The Rule cannot apply to evidence of downloading, in isolation

53. Though the court below defined the relevant issue as "whether the Crown had proved that the accused put the pornography on the computer, or knew it was there,"[84] the majority of its reasons were directed to the serial acts of downloading. Its entire analysis of knowledge was the following:

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[82] *R v Bui*, 2014 ONCA 614 at para 28 [Tab 10]. See also *R v Robert*, 2000 CarswellOnt 608 (ONCA) at paras 17-25 [Tab 37]
[83] *R v Griffin*, 2009 SCC 28 at paras 33, 45 [Tab 17]; qtng *R v Lifchus*, [1997] 3 SCR 320 at para 36 [Tab 25], emphasis original to *R v Griffin*
[84] *CA Reasons* at paras 2, 4, 39 – AR Vol 1 at pp 71, 75

> 35 There was **(a)** no evidence at all about whether an ordinary user of this computer would be bound to notice this child pornography in the music folder, nor **(b)** argument about the legal position if he did notice.
>
> 36 Furthermore, **(c)** someone who put so much child pornography on his own computer in his own name would be incautious. Someone who did that, and then took it to a computer repair shop (giving his own name and address) for diagnosis and servicing, would be very careless. People sometimes do such rash things, and we do not mention that as a ground directly to upset the conviction. But it is one piece of positive evidence which helps one to doubt whether the owner of the computer (the appellant) really did know that there was child pornography on the computer. [85] (indexing added)

None of these objections can be sustained.

a) There was evidence from Mr. Sopczak that computer users are ordinarily "quite concerned about music files". [86]

b) If the user "noticed" child pornography in the music folder, then he knew it was there. It is not clear what legal argument is required. In any event, the Crown's argument did not depend on "noticing", but on the sum of the evidence.[87]

c) The assumption that the accused would not have taken his computer to the shop if he knew it contained child pornography is not based on "positive evidence", and is undermined by the fact that many other offenders have been convicted after doing exactly the same thing.[88] At any rate, as the court below recognized, this assumption about knowledge is not capable of upsetting the conviction.

54. The court below overturned the conviction on its analysis of downloading, not of knowledge. It applied the circumstantial evidence rule to the question of whether "the event occurred in a way not involving the accused." It found a "doubt as to the identity of the offender", because "anyone with … recurring physical access could have put all the child

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[85] *CA Reasons* at paras 35-36 – AR Vol 1 at p 75
[86] AR Vol 2 70/36-37 (evidence of Alan Sopczak). See also AR 70/11-13
[87] The evidence pointing to knowledge is summarized below at paras 83-87
[88] Eg *R v Batshaw*, [2003] MJ No 421 at para 3 [Not Reproduced], aff'd 2004 MBCA 117 [Not Reproduced]; *R v Butters*, 2014 ONCJ 228 at paras 2-3 [Not Reproduced]; *R v Graham*, 2011 ONSC 4002, at paras 2, 9 [Not Reproduced]; *R v Horvat*, [2006] OJ No 1673 at para 17 [Not Reproduced]; *R v Hildebrandt*, 2005 SKPC 35, at para 4 [Not Reproduced]; *R v Jiggins*, 2003 ABPC 75 at para 3 [Not Reproduced]; *R v Lane*, 2013 ONCJ 111 at para 3, [Not Reproduced]; *R v Turcotte*, 2001 ABQB 126 at para 1 [Not Reproduced]; *R v Weir*, 2001 ABCA 181 at para 3 [Not Reproduced]

pornography on the computer."[89] The court's checklist was designed to rule out the momentary access required to download.

55. Downloading is not an element of the offence of possession. In *R v Morelli,* this Court held that personal possession is established where "the accused [is] aware that he or she has physical custody of the thing in question, and [is] aware as well of what that thing is. Both elements must co-exist with an act of control."[90] Put another way, one "must [have] *knowingly acquire[d] the underlying data files and store[d] them in a place under one's control*." [91] Downloading is probably the most common means of acquisition, but it is not the only one. A person may possess cached files if they are "*knowingly* stored and retained."[92] Data files can be acquired by uploading from a storage medium, or by email or other electronic communication, and can be knowingly kept and controlled in cloud storage. A computer user can possess data files if he knows of their presence and their nature, and can control what happens to them -- even if they were downloaded, uploaded or stored by someone else.[93]

56. Acts such as downloading or viewing may give rise to the inference that the user had knowledge of the existence and content of the files, but these individual acts need not be proved beyond a reasonable doubt. Downloading is one piece of evidence that must be considered along with all the others before reaching a verdict. Reasonable doubt is not "to be tested piece-of-evidence by piece-of-evidence … especially where circumstantial evidence is involved."[94]

57. The court below erred when it focused on and applied the Rule to the isolated factual question of downloading.

The Rule does not apply to *mens rea*

58. Given that the only live issue in this case was knowledge, it was an error for the court below to apply the Rule at all.

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[89] *CA Reasons* at paras 19, 24-25, 32 – AR Vol 1 at pp 73-74
[90] *R v Morelli*, [2010] SCR 1 at para 16 [Tab 29]. Much of the discussion in this case (and subsequent cases) focused on the distinction between possession and accessing. References to downloading must be understood in that context.
[91] *R v Morelli*, [2010] SCR 1 at para 66 (emphasis in original) [Tab 29]
[92] *R v Morelli*, [2010] SCR 1 at para 36 [Tab 29]
[93] cf *R v Morelli*, [2010] SCR 1 at paras 17, 32 on constructive possession [Tab 29]
[94] *R v Currie*, 2008 ABCA 374 at para 20 [Tab 13]; also *R v Polley*, 2014 CarswellNS 482 (CA) at para 19 [Tab 34]; *R v Ngo*, 2009 BCCA 301at paras 53-54 [Tab 30]; qtng *R v Morin*, [1988] 2 SCR 345 [Not Reproduced]

59. This Court established decades ago that the Rule does not apply to *mens rea,* since evidence of a person's mental state "will seldom, if ever, be wholly consistent with only one conclusion … [yet may still] satisfy the jury, beyond a reasonable doubt, as to the guilty intent".[95] In *R v Mitchell*, the question was whether a murder was planned and deliberate:

> The pattern of evidence which [the jury] must now consider is not a series of facts, which, in order to establish guilt, must lead to a single conclusion. The jury is now concerned with the mental processes of a person who has committed a crime. In relation to that crime it has to consider his actions, his conduct, his statements, and his capacity and ability to plan and deliberate. It must consider the whole of the evidence in relation to the issue of planning and deliberation**. In nearly every case some of this evidence may indicate planning and deliberation and some may indicate the contrary. The jury must weigh all of this evidence and arrive at a conclusion.**[96] (emphasis added)

In *R v Cooper,* this Court reiterated that a trier of fact must be satisfied of guilty intent beyond a reasonable doubt, but that the terms of *Hodge's Case* do not apply.[97]

60. Unfortunately, this facet of the Rule seems to be forgotten more often than it is remembered. For example, the Rule is frequently relied on in possession cases, even on the issue of knowledge.[98] Such reliance is wrong in law, as some appellate courts have expressly recognized. Most recently, the British Columbia Court of Appeal rejected a request to overturn a conviction for drug possession because knowledge was not "the only reasonable inference":

> There are two significant difficulties with [the appellant's] argument. The first is that the rule in *Hodge's Case* applied only to the *actus reus* of the offence (i.e., the physical act of the crime) and not the *mens rea* (i.e., the mental element of the crime): *R. v. Mitchell*. Of particular note are *R. v. Boyer* and *R. v. Salekin*, both judgments of this Court holding that the rule does not apply to the issue of knowledge in a drug case. [99] (citations omitted)

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[95] *R v Mitchell*, [1964] SCR 471 at pp 479-480 [Tab 28]; see also *R v Cooper*, [1978] 1 SCR 860 at p 874 [Tab 12]
[96] *R v Mitchell*, [1964] SCR 471 at pp 479-480 [Tab 28]
[97] *R v Cooper*, [1978] 1 SCR 860 at p 877-878 [Tab 12]
[98] There are countless examples. To cite just two: *R v Twohey*, 2009 BCCA 428 at paras 13-18 [Tab 47] and *R v Eastgaard*, 2011 ABCA 152 at paras 10-11 [Tab 16]. See also *R v Sekhon*, 2014 SCC 15 at para 54 [Tab 41], where this Court wrote that "the circumstantial evidence bearing on [the offender's] knowledge can lead to only one rational conclusion". This comment was made to underscore the overwhelming strength of the Crown's case when applying the curative proviso, not as a true application of the Rule. In *R v Ngo*, 2009 BCCA 301 [Tab 30], the BCCA seems to have taken a hybrid approach, stating a diluted version of the Rule but only applying the "beyond a reasonable doubt" standard: see paras 54, 60.
[99] *R v Krieger*, 2015 BCCA 64 paras 186-187 [Tab 24], citing *R v Boyer*, [1969] 1 CCC 106 (BCCA) [Tab 9], leave to appeal ref'd [1969] SCR vii [Not Reproduced] and *R v Salekin*, [1978] 5 WWR 295 (BCCA) [Tab 38]

61. In *R v Boyer*, the accused, accompanied by two passengers, was driving a borrowed car across the border. Customs officers discovered packages of marijuana hidden among the springs in the back seat. On arrest, the accused made an inculpatory statement. At trial he said he did not know the drugs were in the car and tried to explain away his apparent confession.[100] A majority of the British Columbia Court of Appeal found that "it would not have been proper" to apply the Rule "to the evidence of guilty intention, which in this case consisted of evidence of knowledge … of the presence of marijuana in the car." [101]

62. In *R v Johnson*, the New Brunswick Court of Appeal found the sole issue to be "whether there was evidence upon which the judge could conclude beyond a reasonable doubt" that the offender knew there was illegal tobacco in two cars that he neither owned nor drove. The trial judge had erred by applying the Rule: "The question which the judge had to answer was not whether the evidence was 'entirely inconsistent with innocence' … but whether guilt was a reasonable inference to be drawn from the circumstances."[102]

63. As with any other version of *mens rea*, evidence of a person's state of knowledge "will seldom, if ever, be wholly consistent with only one conclusion … [yet may still] satisfy the jury, beyond a reasonable doubt."[103] Since knowledge was the only live issue in this case, the court below should not have applied the Rule at all.

Is the Rule still a rule?

64. It is possible to wonder whether the Rule is still recognized as a rule in its own right, or whether it is only an optional way of expressing the Crown's obligation to prove guilt beyond a reasonable doubt.

The *Griffin* chimera

65. In *R v Griffin*, this Court wrote:

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[100] *R v Boyer*, [1969] 1 CCC 106 (BCCA) at paras 67-73 [Tab 9]
[101] *R v Boyer*, [1969] 1 CCC 106 (BCCA) at para 40 [Tab 9]. The BCCA reiterated this point in *R v Salekin*, 1978 CarswellBC 463 [Tab 38] and added that even if the Rule could apply to knowledge, the trial judge erred by finding an innocent state of mind in speculation: *R v Salekin*, 1978 CarswellBC 463 at paras 4-6 [Tab 38]
[102] *R v Johnson*, 1994 CarswellNB 156 (CA) at paras 15-16 [Tab 21]. See also *R v Herrington*, 1994 CarswellNB 257 (CA) at para 16 [Tab 19]
[103] *R v Mitchell*, [1964] SCR 471 at pp 479-480 [Tab 28], *R v Cooper*, [1978] 1 SCR 860 at p 874 [Tab 12]

> We have long departed from any legal requirement for a "special instruction" on circumstantial evidence, even where the issue is one of identification. The essential component of an instruction on circumstantial evidence is to instill in the jury that in order to convict, they must be satisfied beyond a reasonable doubt that the only rational inference that can be drawn from the circumstantial evidence is that the accused is guilty.[104] (citations omitted)

It has proved difficult to fit these two sentences together. The first sentence appears to abrogate the Rule (or at least its "strict application").[105] However, the second sentence suggests that it remains necessary to communicate the content of the Rule.[106] Professor Dufraimont explains the disjunct:

> The Supreme Court's rejection of a legal requirement for a special instruction on circumstantial evidence **should finally put to rest any lingering notion that a heightened standard of proof applies in circumstantial cases**. This passage also clearly and sensibly eliminates any rigid requirement for trial judges to follow a particular form of words in charging the jury on the standard of proof as it applies to circumstantial evidence.
>
> However, by laying out what it calls an "essential component of an instruction on circumstantial evidence," the judgment in *Griffin* **strongly suggests that there must in fact be an instruction on circumstantial evidence**. It is not clear what it means that this instruction need not be "special," when the judgment implies that the instruction itself must exist. **Trial judges, who take pains to ensure that juries receive all necessary legal instructions, are likely to read *Griffin* as mandating an instruction on circumstantial evidence in every circumstantial case**. As long as such a requirement exists, our law remains mired in the legacy of *Hodge's Case*.
> …
> Ultimately, whether and in what form an instruction on circumstantial evidence would assist the jury can best be determined by the trial judge in the context of the particular case. One virtue of *R v Griffin* is that it ensures that trial judges have discretion over how to instruct juries on the issue. Regrettably, though, the Court's judgment seems to foreclose this discretionary, contextual approach to the question of whether to offer an instruction on circumstantial evidence at all.[107] (emphasis added)

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[104] *R v Griffin*, 2009 SCC 28 at para 33 [Tab 17]
[105] eg *R v Krieger*, 2015 BCCA 64 at para 188 [Tab 24]
[106] Don Stuart, "*Sunshine: The Need for further Clarity on Jury Directions in Circumstantial Evidence Cases*" (2013), 1 CR (7th) 346 at p 1 (WL) [Tab 60]
[107] Lisa Dufraimont, "*R. v. Griffin and the Legacy of Hodge's Case*" (2009), 67 CR (6th) 741 at p 2 [Tab 52]; Professor Berger argues that the Rule is alive and well: Benjamin L. Berger, "*Reasoning with Inferences: Themes from Prior Consistent Statements and Trace Evidence*" (2012), 92 CR (6th) 254 at pp 4-8 [Tab 50]; Benjamin L. Berger, "*The Rule in Hodge's Case: Rumours of its Death are Greatly Exaggerated*" (2005) 84:1 Can Bar Rev 47 at 73 [Tab 51]

66. It is not only trial judges who are at risk of believing that a *Hodge* instruction is a legal requirement in circumstantial cases. All three of the major jury instruction manuals present a stark version of a *Hodge* instruction as mandatory. For example, the National Judicial Institute's *Model Jury Instructions* cites *R v Griffin* as authority for the following:

> (Where the evidence for the prosecution is entirely or substantially circumstantial, it is necessary to give a further instruction:)
>
> However, you cannot reach a verdict of guilty based on circumstantial evidence unless you are satisfied beyond a reasonable doubt that (NOA)'s guilt is the only rational conclusion to be drawn from the whole of the evidence.[108]

According to *Watt's Manual*, "[s]ome judges consider it advisable to include this instruction in all cases irrespective of the prominence or insignificance of circumstantial evidence in the Crown's case."[109]

67. Some appellate courts are still overturning trial decisions when judges have not invoked the Rule in so many words. This Court was required to correct that appellate error in *R v Mayuran.* In doing so, it reiterated that it had "long departed from any legal requirement for a 'special instruction' on circumstantial evidence."[110]

68. The "long departure" likely began with *R v Mitchell*: "The direction in *Hodge's Case, supra*, did not add to or subtract from the requirement that proof of guilt in a criminal case must be beyond a reasonable doubt."[111] The equivalency between the two rules was echoed in *R v Cooper*, where a four-member majority seemed to frown on the tradition of courts "slavishly following" and "parroting the language" of *Hodge's Case.*[112]

69. Laskin CJC, writing for a three-member dissent, would have disposed of the Rule altogether. He observed that the House of Lords itself had rejected "the notion that there ever

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[108] National Judicial Institute, *Model Jury Instructions*, Ottawa, Ont: Canadian Judicial Council, 2014, s 10.2, online: https://www.nji-inm.ca/index.cfm/publications/model-jury-instructions/ [Tab 57]; See also Gerry Ferguson et al, *Canadian Criminal Jury Instructions* (Vancouver: Continuing Legal Education of British Columbia, 2014) at s 4.15 [Tab 53] *David Watt, Watt's Manual of Criminal Jury Instructions*, 2nd ed, (Toronto: Thomson Carswell, 2015) at 277 [Tab 61].

[109] *David Watt, Watt's Manual of Criminal Jury Instructions*, 2nd ed, (Toronto: Thomson Carswell, 2015) at 278 [Tab 61]

[110] *R v Mayuran*, [2012] 2 SCR 162 at para 38 [Tab 26], qtng *R v Griffin*, 2009 SCC 28 [Tab 17]

[111] *R v Mitchell*, [1964] SCR 471 at pp 479-480 [Tab 28]; also *R v Cooper*, [1978] 1 SCR 860 at pp 874, 878 [Tab 12]

[112] *R v Cooper*, [1978] 1 SCR 860 at pp 874, 876 [Tab 12]

was any rule arising from *Hodge's Case* which judges in England were required to follow where all or most of the evidence in a jury trial was circumstantial." Laskin CJC was dissatisfied with a law that seemed to impose one burden for *actus reus* elements of the offence and another for *mens rea.* "The traditional formula of required proof beyond a reasonable doubt is the safest as well as the simplest way" to instruct a jury on the Crown's burden.[113]

More problems than solutions

70. Like Laskin CJC, academics and other commentators have found little value in an archaic rule that seems to create more problems than it solves.

71. According to the House of Lords, *Hodge's Case* was never meant to establish a rule, but was reported only as a "helpful example of one way in which a jury could be directed" in circumstantial cases.[114] The Lords were directed to, and expressly rejected, the Canadian approach that had elevated the Rule to a mandatory mantra. [115] They saw "no advantage" in imposing a rule for determining the *actus reus* in wholly circumstantial cases (*mens rea* would necessarily be excluded since it "can rarely be proved by direct evidence"). They preferred to trust the common sense of juries and judges and to avoid "legalistic complications in a sphere where simplicity and clarity are of prime importance."[116]

72. The Rule brings with it a host of practical problems.

(a) By placing a focus on innocent explanations, the Rule invites two errors:

(i) speculation; or

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[113] *R v Cooper*, [1978] 1 SCR 860 pp 864-865 [Tab 12], citing *McGreevy v DPP*, [1973] 1 WLR 276 [Tab 2]
[114] *McGreevy v DPP*, [1973] 1 WLR 276 at p 9 [Tab 2]
[115] *McGreevy v DPP*, [1973] 1 WLR 276 at p 10 [Tab 2]
[116] *McGreevy v DPP*, [1973] 1 WLR 276 at p 13 [Tab 2]. The Rule has also been rejected in the United States: Benjamin L. Berger, "*The Rule in Hodge's Case: Rumours of its Death are Greatly Exaggerated*" (2005) 84:1 Can Bar Rev 47 at p 50 [Tab 51].

(ii) reversal of onus, by effectively requiring the accused to present an alternative explanation, or at least by causing the trier of fact to wonder why she has not done so.[117]

(b) The meaning of a "rational" conclusion is not clearly understood. Is it the same as a "reasonable" one? Depending on context, credibility and common sense, "[a] conclusion may be rational without being particularly reasonable."[118] If "rational" and "reasonable" have different meanings, then the Rule creates a standard different from "beyond a reasonable doubt."[119]

(c) If the Rule means anything other than "beyond a reasonable doubt", there are two separate standards for Crown to meet: one in wholly circumstantial cases and one if there is some direct evidence.[120]

(d) Direct evidence that was led in the Crown's case may be rejected by the jury. The trial judge would have no opportunity to instruct on the Rule in a case that has unknowingly become wholly circumstantial. [121]

(e) Any historical preference for direct evidence over circumstantial no longer makes categorical sense.[122] For instance, eyewitness identification, with all its potential perils, is direct, while DNA identification is circumstantial.[123]

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[117] Lisa Dufraimont, "*R. v. Griffin and the Legacy of Hodge's Case*" (2009), 67 CR (6th) 741 at p 2 [Tab 52]; *R v Robert*, 2000 CarswellOnt 608 (ONCA) at paras 17-25 [Tab 37]
[118] Eric Scott, "*Hodge's Case: A Reconsideration*" (1965-1966), 8 CLQ 17 at p 6 [Tab 58]
[119] Lisa Dufraimont, "*R. v. Griffin and the Legacy of Hodge's Case*" (2009), 67 CR (6th) 741 at p 1 [Tab 52]; Eric Scott, "*Hodge's Case: A Reconsideration*" (1965-1966), 8 CLQ 17 at p 6 [Tab 58]; Arthur Gans, "*Hodge's Case Revisited*" (1972-1973) ,15 CLQ 127 at p 4 [Tab 54]
[120] Eric Scott, "*Hodge's Case: A Reconsideration*" (1965-1966), 8 CLQ 17 at 6 [Tab 58], Arthur Gans, "Hodge's Case Revisited" (1972-1973),15 CLQ 127 at pp 1-2 [Tab 54], Berger "*The Rule in Hodge's Case: Rumours of its Death are Greatly Exaggerated*" at p 60 [Tab 51]
[121] *McGreevy v DPP*, [1973] 1 WLR 276 at p 13 [Tab 2]
[122] *Papaschase Indian Band No 136 v Canada (Attorney General)*, 2006 ABCA 392, [2006] AJ No 1603 (ABCA) at para 94 [Tab 3], supp reasons [2007] 10 WWR 79, rev'd on other grounds [2008] 1 SCR 372 [Not Reproduced], McWilliams CCE (online), "*Defining Circumstantial Evidence*, Part VI – The Evaluation of Evidence: Chapter 31 – Circumstantial Evidence: Drawing Reasonable Inferences" at 31:30 at p 2 [Tab 55]; *R v Sunshine*, 2013 BCCA 102, [2013] BCJ No 431, at para 15 (BCCA) [Not Reproduced], leave to appeal refused [2013] SCCA No 190 [Not Reproduced]
[123] *Reference re: Truscott*, [1967] SCR 309 at para 261 [Tab 46]; McWilliams CCE (online), "*Defining Circumstantial Evidence*, Part VI – The Evaluation of Evidence: Chapter 31 – Circumstantial Evidence: Drawing Reasonable Inferences" at 31:30 at p 2 [Tab 55]; Benjamin L. Berger "*Reasoning with Inferences: Themes from Prior Consistent Statements and Trace Evidence*" (2012), 92 CR (6th) 254 at pp 4-8 at pp 5-6 [Tab 50]

(f) If the two types of evidence are to be treated differently, there is a risk of bogging down in "abstract lectures" or "intellectual exercises" on the difference between them.[124]

(g) Post-*Cooper*, there are two separate standards for assessing *actus reus* and *mens rea;* this injects a complication that may be difficult to explain to a jury.[125]

(h) The Rule is confusing, even to lawyers, judges and scholars.[126]

73. These are the problems the Rule creates, but what problems does it solve?

74. Professor Berger argues that the Rule guards against the "additional possibility for error arising from inferential reasoning".

> [D]irect evidence requires only one determination – whether the evidence is to be believed. Circumstantial evidence, in contrast, adds a second question – even if believed, what conclusions can be drawn from the evidence?

This is a false dichotomy. Even cases based entirely on direct evidence require inference-drawing. For example, an impaired driving prosecution may be based entirely on directly observed evidence of driving pattern, slurred speech, uncoordinated movements, and identity of the driver. To convict, the trier of fact must draw the inference that the accused was impaired. And every criminal case requires proof of *mens rea*, which essentially always requires inference-drawing.

75. Professor Berger gives several examples of inferential error that he says could be solved by "*Hodge*-like reasoning", including: the inference that prior sexual activity makes a complainant less believable or more likely to have consented on a separate occasion; the use of a

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[124] Lisa Dufraimont, "*R. v. Griffin and the Legacy of Hodge's Case*" (2009), 67 CR (6th) 741 at pp 1-2 [Tab 52]; quoting *R v Tombran,* 2000 CarswellOnt 231 at para 29, [2000] O.J. No. 273 [Tab 43]; R v Ngo, 2009 BCCA 301 at para 55 [Tab 30]; quoting *R v To*, 16 BCAC 223 at para 41 [Not Reproduced]

[125] *McGreevy v DPP*, [1973] 1 WLR 276 at p 13 [Tab 2]; Laskin in *R v Cooper*, [1978] 1 SCR 860 [Tab 12], EE Smith, "*Hodge's Case and Criminal Intent*" 1974-1975 17 C.L.Q. 273 at p 1 [Tab 59]; Benjamin L. Berger "*The Rule in Hodge's Case: Rumours of its Death are Greatly Exaggerated*" (2005) 84:1 Can Bar Rev 47 at p 59 [Tab 51]; Arthur Gans, "Hodge's Case Revisited" (1972-1973),15 CLQ 127 at p 3 [Tab 54]

[126] Lisa Dufraimont, "*R. v. Griffin and the Legacy of Hodge's Case*" (2009), 67 CR (6th) 741 at pp 1-3 [Tab 52]; EE Smith, "*Hodge's Case and Criminal Intent*" 1974-1975 17 C.L.Q. 273 at p 1 [Tab 59]; Arthur Gans, "*Hodge's Case Revisited*" (1972-1973),15 CLQ 127 at pp 1-3 [Tab 54]; Don Stuart, "*Sunshine: The Need for further Clarity on Jury Directions in Circumstantial Evidence Cases*" (2013), 1 CR (7th) 346 at p 3 (WL) [Tab 60]. Except for the parts about "no speculation" and "no proof to a certainty." Those parts aren't confusing. See above at paras 36-45

criminal record or similar fact evidence in ways that are more prejudicial than probative; and in a DNA identification case, the "inferential leap" from "a finding that the respondent once came into contact with the mask to a finding that he actually donned the mask to commit the robbery".[127] These are indeed examples of flawed reasoning, the first three of which have been addressed with individualized rules.[128] All of these potential reasoning problems co-exist with the Rule in *Hodge's Case,* so evidently it is neither a preventative nor a cure.

76. Since *Hodge's Case* itself never intended to create a rule of law, it unsurprisingly offers no rationale for the Rule. Several commentators have observed that at the time *Hodge's Case* was decided, the accused was not entitled to counsel and was not permitted to testify. The penalty for all felonies was death, and "[t]he criminal standard had not yet settled on proof beyond a reasonable doubt."[129] These problems have now been solved by more robust means than the Rule in *Hodge's Case.*

Back to beyond a reasonable doubt

77. Although the Rule is still rotely applied as something separate from the "beyond a reasonable doubt" standard, the considered view is that the two are, or ought to be, one and the same.[130] As Professor Dufraimont concludes, "instead of retaining an emphasis on searching for other rational inferences, [courts would do] better to refocus attention on the standard of proof beyond a reasonable doubt."[131]

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[127] Benjamin L. Berger, "*The Rule in Hodge's Case: Rumours of its Death are Greatly Exaggerated*" (2005) 84:1 Can Bar Rev 47 at pp 50, 64-66 [Tab 51], Benjamin L. Berger "*Reasoning with Inferences: Themes from Prior Consistent Statements and Trace Evidence*" (2012), 92 CR (6th) 254 at pp 4-8 at p 6 [Tab 50]; citng *R v O'Brien*, [2011] 2 SCR 485 at para 22 [Not Reproduced]; Benjamin L. Berger, "*The Rule in Hodge's Case: Rumours of its Death are Greatly Exaggerated*" (2005) 84:1 Can Bar Rev 47 at pp 53, 60 [Tab 51]

[128] Benjamin L. Berger, "*The Rule in Hodge's Case: Rumours of its Death are Greatly Exaggerated*" (2005) 84:1 Can Bar Rev 47 at pp 64-66 [Tab 51]

[129] *R v Cooper*, [1978] 1 SCR 860 at paras 19-20, 24 [Tab 12], Arthur Gans, "*Hodge's Case Revisited*" (1972-1973),15 CLQ 127 at pp 2-3 [Tab 54], McWilliams CCE (online), "*The Influence of Hodge's Case*, Part VI – The Evaluation of Evidence: Chapter 31 – Circumstantial Evidence: Drawing Reasonable Inferences" at 31:40 at p 1 [Tab 56]

[130] Eg Eric Scott, "*Hodge's Case: A Reconsideration*" (1965-1966), 8 CLQ 17 at p 4 [Tab 58], Arthur Gans, "*Hodge's Case Revisited*" (1972-1973), 15 CLQ 127 at p 3 [Tab 54]. Even Judge Smith, while criticizing *Mitchell* and advocating an all-purpose return to the *Hodge* wording, noted that "if *Hodge* and reasonable doubt are one and the same thing, it should not be necessary to maintain both in separate and distinct form": EE Smith, "*Hodge's Case and Criminal Intent*" 1974-1975 17 C.L.Q. 273 at p 1 [Tab 59]

[131] Lisa Dufraimont, "*R. v. Griffin and the Legacy of Hodge's Case*" (2009), 67 CR (6th) 741 at p 3 [Tab 52]

78. A trial judge is under no obligation to instruct juries in the words of the Rule.[132] "What is important is that in cases that rely entirely on circumstantial evidence, the jury is made aware of how they can use that evidence to establish guilt beyond a reasonable doubt." This can be communicated in more than one way. For instance, if a trial judge explains "the nature of circumstantial evidence, the inferences that can properly be drawn from that evidence and the burden of proof beyond reasonable doubt", the *Griffin* test will be satisfied.[133] Or it will suffice to charge using "the traditional language of proof beyond a reasonable doubt", along with an explanation of the inferences the jury is being asked to draw and an instruction to acquit if any inference leaves open a reasonable doubt, or if not satisfied that guilt is "the only *reasonable* inference" (emphasis added).[134]

79. After noting that "nobody wants a return to *Hodge*", Professor Stuart offered this advice on what juries need to know:

> [T]he concepts of direct and circumstantial evidence do require not a lecture, but a brief explanation in all cases for the benefit of the Crown and the accused. Much can be achieved through relying on directions as to the meaning of proof beyond reasonable doubt. But there needs to be an instruction as to the ability of jurors to rely on both direct and circumstantial evidence. In my view, circumstantial evidence should require brief advice on the need for careful drawing of reasonable inferences which cannot be too speculative.[135]

80. One day, this Court may adopt the suggestion of Laskin CJC and abandon the Rule entirely. In the meantime, it is clear that a formulaic approach to circumstantial cases has been rejected. Judges are "to deal with all the evidence in terms of the general principles of reasonable doubt." As long as a trial judge has "convey[ed]… in a clear fashion the central point, namely, the necessity to find the guilt of the accused beyond a reasonable doubt,"[136] she should not be faulted merely for failing to invoke the Rule and its problematic quest for other rational explanations.

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[132] *R v Tombran*, 2000 CarswellOnt 231 at para 29 [Tab 43]
[133] *R v Mauyran*, [2012] 2 SCR 162 at para 38 [Tab 26]
[134] *R v Tombran*, 2000 CarswellOnt 231 at para 26 [Tab 43], modified to avoid the "proven facts" error.
[135] Don Stuart, "*Sunshine: The Need for further Clarity on Jury Directions in Circumstantial Evidence Cases*" (2013), 1 CR (7th) 346 at p 3 (WL) [Tab 60]
[136] *R v Tombran*, 2000 CarswellOnt 231 at para 29 [Tab 43]

The trial judge avoided the errors of the court below

81. Here, the trial judge's focus was in a safe place: whether the Crown had proved knowledge beyond a reasonable doubt. His analysis was legally correct. On a proper review, free of speculation or infinite gap-filling, the inference of knowledge was available to the trial judge. There is no legitimate basis for appellate intervention.

82. The trial judge considered "whether the totality of the evidence" permitted him to draw culpable inferences. [137] He instructed himself on two main points:

(a) It is evidence that bridges the inferential gap. Inferences cannot arise from speculation. There is no requirement to rule out every "hypothetical narrative that, however speculative, could possibly link the primary fact or facts to the inference or inferences sought to be drawn." [138]

(b) It is the Crown's burden to prove guilt beyond a reasonable doubt. Though he quoted two authorities that use the unfortunate "proven facts" wording, he expressly and emphatically instructed himself that the burden never shifts and that the accused is never obligated to call evidence.[139]

83. The trial judge was satisfied that Mr. Villaroman was the computer's user when the pornography was downloaded, but he did not limit his analysis to downloading. To reach the conclusion that Mr. Villaroman "knew the nature of the material, had the intention to possess it, and had the necessary control over it," [140] he considered all the evidence.

84. Mr. Villaroman admitted to being the owner of the computer where the child pornography files were stored. It had only one user account in the name of 'oswaldvillaroman'. That account was created on July 1st, 2007, the same day that LimeWire was installed.

85. LimeWire's default storage setting was changed so that completed downloads would be moved to the "music" folder. To acquire a file from LimeWire the user must type in a search

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[137] *Trial Reasons* at paras 43-44 – AR Vol 1 at p 59
[138] *Trial Reasons* at paras 45-49 – AR Vol 1 at pp 59-60, citing *inter alia R v Munoz* (2006), 86 OR (3d) 134 at para 31 [Not Reproduced]
[139] *Trial Reasons* at paras 43-44 – AR Vol 1 at p 59
[140] *Trial Reasons* at para 67-68, 85 – AR Vol 1 at pp 63-64, 67

term, peruse the search results, and click on a chosen title. The majority of the downloaded and partially downloaded files had names proclaiming their content. Some of the pornographic files had been viewed by taking directed steps.

86. The pornographic files were downloaded over a period of months, mostly in the early hours of the morning. The last complete download occurred on November 23, and future downloads were queued. The computer was last used on November 29. Until that point, it had been used almost daily. Mr. Villaroman took it to the shop on December 2.

87. There was no evidence of anyone else using or having access to the computer.

88. The Crown's position was (and is) that all the evidence, taken together, established knowledge and control. Defence counsel mischaracterized the Crown's position as "exclusive opportunity"[141] and then asked rhetorically "where this computer was stored? Who had it? Who had access to that place? … if it was in a house, what other items were in there?" and "that computer, does he have it all the time? Are friends over? Is it ever out of his sight?[142] He submitted the Crown had not proved that Mr. Villaroman had exclusive opportunity to control the computer on the dates of the downloads.[143]

89. As previously discussed, downloading does not determine possession. Nor does exclusivity. To prove possession, the Crown "[is] required to prove that the [accused] had knowingly acquired the pornographic material and stored it in a place under his control, although it [is] not required to establish that he had exclusive control."[144] Convictions for possession of child pornography have resulted in cases where the possibility of people other than the accused accessing the computer (or other storage media) could not be ruled out,[145] and in cases where it was clear that people other than the accused did in fact have access.[146]

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[141] AR Vol 2 155/12-14
[142] AR Vol 2 117/20-22, 124/29-30
[143] AR Vol 2 123/14-16
[144] *R v Cockell*, 2013 ABCA 112 at para 71 [Tab 11], citing *R v Chalk*, 2007 ONCA 815, 227 CCC (3d) 141 (Ont CA) [Not reproduced]; *R v Morelli*, [2010] SCR 1 at para 66 [Tab 29]
[145] *R v Ballendine*, 2009 BCSC 1938 at para 4, see also paras 7-8, 14, 29, 56-69 [Tab 7]; *R v Tootoosis*, 2010 ABQB 11 paras 3-8, 32, 52-54 [Tab 44]; cf *R v Houston*, 2008 CarswellSask 713 at paras 11-12 [Tab 20]
[146] *R v Cockell*, 2013 ABCA 112 at paras 69-72 [Tab 11], *R v Smith*, 2011 BCSC 1826 at paras 36-37, 86-88, 105-107, 187-188, 196-213 [Tab 42]; *R v Hopps*,2010 BCSC 2015 at paras 35, 53, 59, 68-75 [Tab 49]; *R v Tootoosis*, 2010 ABQB 11 at paras 3-8, 32, 52-54 [Tab 44]; *R v Sayre*, 2009 NBQB 209 at paras 29-35, 50-56, 75 [Tab 39]; *R*

90. And, of course, there is no such thing as exclusive opportunity for knowledge.

91. The defence's discussion of exclusive opportunity was either misdirection or a misapplication of the Rule. The Rule does not require the Crown to disprove every alternate possibility or to close off every speculative avenue; it does not apply to isolated parts of the evidence, such as downloading; and it does not apply to *mens rea*.[147]

92. The Rule does not apply in the manner suggested by the defence at trial and by the court below because if it did, convictions in cases of this kind would be all but impossible. No amount of investigation can reconstruct history in such detail or negative every alternate possibility. No offence, and no state of mind, can be proved to an utter certainty.

93. Unlike the court below, the trial judge avoided the traps of speculating, piece-mealing the evidence of downloading, and applying the Rule to *mens rea*.[148] He focused on the correct question: whether the elements of possession were proved beyond a reasonable doubt.

94. Presented with somewhat similar facts, some courts have acquitted while others have convicted. Those decisions are of little precedential value since each is based on its own subtle but unique features. Weighing those features is a matter for the trier of fact.[149] The bottom line is that the trial judge stated the law correctly and drew factual inferences that were available to him, without recourse to speculation. Deference was owed to his findings.

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v Houston, 2008 CarswellSask 713 at paras 17, 32, 34-40 [Tab 20]; *R v Allart* 2012 BCCA 100 at paras 2-13, 22-34 [Tab 4]

[147] As defence counsel suggested at AR Vol 2 114/31-33

[148] See, eg, his exchanges with defence counsel at AR Vol 2 124/15-17, 326/5-327/40, 133/34-41

[149] For example, the trier of fact weighed somewhat similar (not identical) evidence of possession in the following cases: *R v Allart*, 2012 BCCA 100 [conviction] [Tab 4];*R v Ballendine*, 2009 BCSC 1938 [conviction] [Tab 7]; *R v Cockell*, 2013 ABCA 112 at paras 69-72 [Tab 11]; *R v Houston*, 2008 CarswellSask 713 [conviction] [Tab 20]; *R v Sayre*, 2009 NBQB 209 [conviction] [Tab 39]; *R v Tootoosis*, 2010 ABQB 11 at paras 3-8, 32, 52-54 [conviction] [Tab 44]; *R v Smith*, 2011 BCSC 1826 [conviction] [Tab 42]; *R v Hopps*, 2010 BCSC 2015 [conviction] [Tab 49]; *R v Barwell*, [2013] OJ No 3743 (CJ) [conviction] [Not Reproduced]; *R v Benson*, 2012 SKCA 4 [conviction] [Not Reproduced]; *R v Bichsel*, 2014 BCCA 251 [conviction] [Not Reproduced]; *R v Butters*, 2014 ONCJ 228 [conviction] [Not Reproduced]; *R v Friers*, 2009 ONCJ 103 [conviction] [Not Reproduced]; *R v Garbett*, 2008 CarswellOnt 1147, 56 CR (6th) 91 [acquittal] [Not Reproduced]; *R v Graham*, 2011 ONSC 4002 (SCJ) [acquittal on possession/conviction on accessing] [Not Reproduced]; *R v Gurr*, 2007 BCSC 982 [conviction] [Not Reproduced]; *R v Jacques*, 2013 SKCA 99 [conviction] [Not Reproduced]; *R v Lamb*, 2010 BCSC 1911 [acquittal] [Not Reproduced]; *R v Midwinter*, 2015 ONCA 150 [conviction] [Not Reproduced]; *R v Missions*, 2005 NSCA 82 [conviction] [Not Reproduced]; *R v Panko*, 2010 ONCA 660 [acquittal] [Not Reproduced]; *R v Tresierra*, 2006 BCSC 1013 [acquittal] [Not Reproduced]

PART IV – COSTS

95. The Appellant makes no submissions regarding costs.

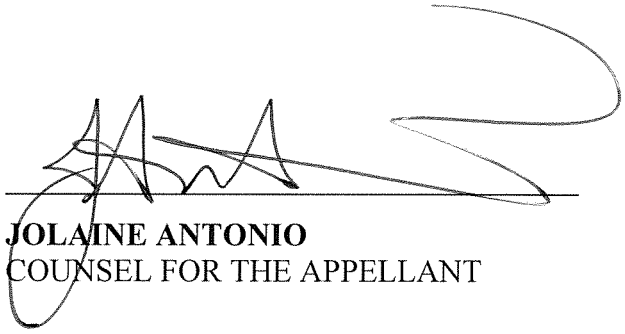
PART V – ORDER SOUGHT

96. The Appellant asks that the appeal be allowed and the conviction be restored.

97. *Per* s 46.1 of the *Supreme Court Act* and by agreement of the parties,[150] the case should then be remanded back to the Court of Appeal to determine the *Charter* issues that were raised in Mr. Villaroman's original factum.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Calgary, Alberta, this 20th day of November, 2015.



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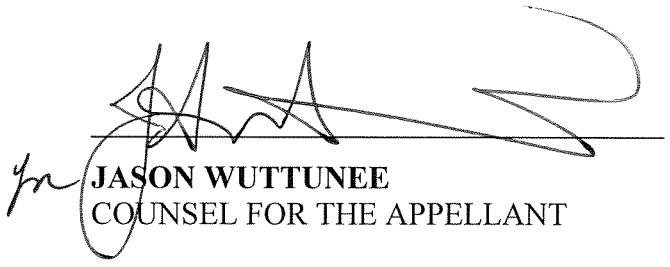

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[150] See letter from Appellant's counsel to the Supreme Court of Canada Registry dated September 16, 2015

PART VI - TABLE OF AUTHORITIES - SECONDARY SOURCES

TAB	APPELLANT AUTHORITIES	Cited at Paragraph No.
1.	*Hodge's Case* (1838) 2 Lewin 227, 168 ER 1136 at p 1137	37
2.	*McGreevy v DPP*, [1973] 1 WLR 276 at pp 9, 10, 13, [1973] 1 All ER 503	69, 71, 72
3.	*Papaschase Indian Band No 136 v Canada (Attorney General)*, 2006 ABCA 392, [2006] AJ No 1603 (ABCA) at para 94, supp reasons [2007] 10 WWR 79, 404 AR 349	72
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10.	*R v Bui*, 2014 ONCA 614 at para 28, 2014 CarswellOnt 11827	49
11.	*R v Cockell*, 2013 ABCA 112 at paras 69-72, 2013 CarswellAlta 603	89, 94
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13.	*R v Currie*, 2008 ABCA 374 at para 20, 2008 CarswellAlta 1724	56
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16.	*R v Eastgaard*, 2011 CarswellAlta 886 at paras 10-11, 2011 ABCA 152	60
17.	*R v Griffin*, [2009] 2 SCR 42 at paras 33, 45, 2009 SCC 28	50, 65-67
18.	*R v Gunning*, [2005] 1 SCR 627 at para 32, 2005 CarswellBC 1181	42

19.	*R v Herrington,* 1994 CarswellNB 257 (CA) at para 16, 145 NBR (2d) 34	62
20.	*R v Houston,* 2008 CarswellSask 713 at paras 11-12, 17, 32, 34-40	89, 94
21.	*R v Johnson,* 1994 CarswellNB 156 (CA) at paras 15-16, 149 NBR (2d) 292	62,
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28.	*R v Mitchell,* [1964] SCR 471 at pp 477-480, 1964 CarswellBC 67	59, 63, 68
29.	*R v Morelli,* [2010] 1 SCR 253 at paras 16, 17, 32, 36, 66, 2010 SCC 8	55, 89
30.	*R v Ngo,* 2009 BCCA 301 at paras 53-56, 60, 2009 CarswellBC 1634	42, 56, 60, 72
31.	*R v Nguyen,* 2010 ABCA 145 at para 15, 2010 CarswellAlta 827	44
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33.	*R v Paul,* [1977] 1 SCR 181 at p 191, 1975 CarswellQue 16 at para 12	42, 48
34.	*R v Polley,* 2014 CarswellNS 482 (CA) at para 19, 2014 NSCA 71	48, 56
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36.	*R v Richer,* 82 CCC (3d) 385 (ABCA) at para 29, 141 AR 116	42
37.	*R v Robert,* 2000 CarswellOnt 608 (ONCA) at paras 17-25, [2000] OJ No 688	49, 71, 72
38.	*R v Salekin,* [1978] 5 WWR 295(BCCA) at paras 4-6, 1978 CarswellBC 463	60, 61
39.	*R v Sayre,* 2009 NBQB 209 at paras 29-35, 50-56, 75, 2009 CarswellNB 338	89, 94

56.	McWilliams CCE (online), "*The Influence of Hodge's Case*, Part VI – The Evaluation of Evidence: Chapter 31 – Circumstantial Evidence: Drawing Reasonable Inferences" at 31:40 at p 1	76
57.	National Judicial Institute, *Model* Jury Instructions, Ottawa, Ont: Canadian Judicial Council, 2014, ss 9.2 and 10.2, online: <https://www.nji-inm.ca/index.cfm/publications/model-jury-instructions/>	44, 66
58.	Eric Scott, "*Hodge's Case: A Reconsideration*" (1965-1966), 8 CLQ 17 at pp 4, 6	72, 77
59.	EE Smith, "*Hodge's Case and Criminal Intent*" 1974-1975 17 C.L.Q. 273 at p 1	72, 77
60.	Don Stuart, "*Sunshine: The Need for further Clarity on Jury Directions in Circumstantial Evidence Cases*" (2013), 1 CR (7th) 346 at pp 1, 3 (WL)	65, 72, 79
61.	David Watt, *Watt's Manual of Criminal Jury Instruction*, 2nd ed, (Toronto: Thomson Carswell, 2015) at 261-266, 277, 278	44, 66
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PART VII – LEGISLATION AT ISSUE

Criminal Code, RSC 1985, c C-46, s 163.1(1)

163.1(1)Definition of "child pornography"
In this section, **"child pornography"** means

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

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

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

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

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

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

Code Criminel, LRC (1985), ch C-46, s 163.1(1)

163.1(1)Définition de « pornographie juvénile »
Au présent article, **« pornographie juvénile »** s'entend, selon le cas :

a) de toute représentation photographique, filmée, vidéo ou autre, réalisée ou non par des moyens mécaniques ou électroniques :

(i) soit où figure une personne âgée de moins de dix-huit ans ou présentée comme telle et se livrant ou présentée comme se livrant à une activité sexuelle explicite,

(ii) soit dont la caractéristique dominante est la représentation, dans un but sexuel, d'organes sexuels ou de la région anale d'une personne âgée de moins de dix-huit ans;

b) de tout écrit, de toute représentation ou de tout enregistrement sonore qui préconise ou conseille une activité sexuelle avec une personne âgée de moins de dix-huit ans qui

constituerait une infraction à la présente loi;

c) de tout écrit dont la caractéristique dominante est la description, dans un but sexuel, d'une activité sexuelle avec une personne âgée de moins de dix-huit ans qui constituerait une infraction à la présente loi;

d) de tout enregistrement sonore dont la caractéristique dominante est la description, la présentation ou la simulation, dans un but sexuel, d'une activité sexuelle avec une personne âgée de moins de dix-huit ans qui constituerait une infraction à la présente loi.