

Citation: HMTQ v. Loring  
2001 BCSC 200

Date: 20010205  
Docket: 15043  
Registry: Smithers

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

**HER MAJESTY THE QUEEN**

**AGAINST**

**JAMES HAROLD LORING**

**RULING**

**OF THE**

**HONOURABLE MR. JUSTICE R. D. WILSON**

Counsel for the Crown:

N. A. Lauder

Counsel for the Accused:

R. E. Williamson

Date and Place of Hearing/Trial:

8 - 12 January 2001  
Smithers, BC

2001 BCSC 200 (CanLII)

## I.

[1] Mr. Loring is charged with two counts of making child pornography. There are separate complainants on each count.

[2] Child pornography is defined in s. 163.1(1) of the **Criminal Code**, to mean:

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

[3] On his arraignment, Mr. Loring entered pleas of not guilty to these accusations.

[4] From 8 through 12 January 2001, a *voir dire* was conducted for determination, among others, of the admissibility of certain segments of video recordings, characterized by Mr. Lauder as "similar fact evidence". This is a ruling on that determination.

## II.

[5] The evidence on the *voir dire* included two video recordings made by Mr. Loring. Constable Reynolds identified both complainants in those video recordings. Both complainants, on the video recording, are engaged in explicit sexual activity, and, the dominant characteristic of the complainants' appearances in both recordings is the depiction, for a sexual purpose, of the sexual organs of the complainants.

[6] Mr. Lauder said that evidence would be called at the trial to prove that both of the complainants were under the age of eighteen years, at the time the recordings were made.

[7] In addition to the complainants, other unidentified female persons appear in other segments of the recordings. These persons are not depicted as engaged in explicit sexual activity. The dominant characteristic of those segments is not the depiction for a sexual purpose of a sexual organ or anal region of the persons shown. The segments do not advocate or counsel sexual activity with a person under the age of eighteen years that would be an offence under the ***Criminal Code***.

[8] There is footage of a nude female in a shower. There is footage of children on a beach, dressed appropriately.

[9] Mr. Lauder appeared to concede that this proposed evidence is evidence of disposition. Nevertheless, said Mr. Lauder, it is admissible to rebut a defence of innocent association; or to illustrate the defendant's method of creating pornographic material.

[10] However Mr. Lauder describes it, it seems to me that the fact in issue, to which the prosecution directs this evidence, is Mr. Loring's knowledge, or lack of knowledge, of the ages of the complainants.

### III.

[11] The similarities to the segments depicting the complainants, and the segments depicting the unknown persons, is not compelling. They are similar in that all segments were made by Mr. Loring. And, in part, there is a common feature of nudity. All of the persons being filmed are female persons, and they are "young".

[12] Under contemporary mores, it is not immoral or illegal to take still, or moving, pictures of the naked female form. It becomes illegal only if it offends s. 163.1 of the **Criminal Code**.

[13] It may be immoral and therefore discreditable, if the naked form is that of a person under the age of eighteen.

[14] In the absence of any evidence of the ages of the other persons depicted in these video recordings, Mr. Lauder submits that it is open to me to make a finding of "apparent age" by looking at the video recording.

[15] I have no expertise in assessing the age of young persons. I have no confidence that I would be able to give a reliable opinion on "apparent age" or otherwise, which would permit a distinction between one aged seventeen years and nine months, and one aged eighteen years one month. My confidence is in no way enhanced if I am asked to distinguish between an eighteen year old and a fifteen, sixteen or seventeen year old. These matters ought not to be determined on a guess. I decline Mr. Lauder's invitation to speculate on the apparent age of the unidentified persons depicted in the video recording.

**IV.**

[16] The framework for the analysis of the question of admissibility of similar act or similar fact evidence begins

with a finding of relevancy and probative value.<sup>1</sup> Something is relevant to some other thing if it is connected to it. Something is probative of some other thing if it has some tendency, as a matter of logic and human experience, to make the other thing more likely than would appear in the absence of that something.

[17] I am not persuaded that the filming of a naked female in a shower or the filming of clothed persons on a beach are facts connected to the fact of knowledge of the age of a participant in the creation of a film of explicit sexual activity.

[18] If I am wrong on that finding, then it is my view that the fact of filming a naked female in a shower and filming persons on a beach are not facts which would make it more likely, as a matter of logic and human experience, that the person making the film would have knowledge of the age of the person participating in a film which does depict a person engaged in explicit sexual activity.

[19] I find that the proffered evidence does not pass the threshold for the admissibility of similar act or similar fact evidence. However, if I am wrong in that finding, then it is

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<sup>1</sup> *R. v. B.(C.R.)*, [1990] 1 S.C.R. 717 and *R. v. Craig* (1982), 1 C.C.C. (3rd) 416 (B.C.C.A.).

my opinion that the prejudicial effect of this propensity evidence far exceeds whatever probative value it may have.

[20] In result, the segments of the video recordings containing depictions of unidentified persons are not admissible in evidence on Mr. Loring's trial.

[21] I believe that counsel were agreed that the evidence on the *voir dire* could become evidence on the trial. It seems to me, therefore, that it will be unnecessary to replay these video recordings at the trial. Accordingly, it seems to me that it is not necessary for the Crown to go to the trouble of editing these video tapes for the purposes of cutting out the inadmissible portions.

"R.D. Wilson, J."  
The Honourable Mr. Justice R.D. Wilson