



THE CHARTER CHALLENGE

Ontario Justice Education Network

CASE SCENARIO Spring 2015

R. v. GRAHAM

*This OJEN Charter Challenge Case Scenario has been adapted from the Official Problem used at the University Of Toronto Faculty Of Law's **2012 Grand Moot**. OJEN gives full credit for original authorship with our deepest thanks to McCarthy Tetrault LLP and the University of Toronto Faculty of Law and Moot Court Committee.*

*L'éducation et le dialogue pour une société civile
A civil society through education and dialogue*



Ontario Superior Court of Justice**Date: 20150903
Court File No: 23157-06****B E T W E E N:****HER MAJESTY THE QUEEN****and****WALTER GRAHAM****REASONS FOR DECISION****I.M. WRIGHT, J:****Introduction**

1. Walter Graham is charged with four offences:
 - making child pornography [s. 163.1(2)]
 - distribution of child pornography [s. 163.1(3)]
 - possession of child pornography [s. 163.1(4)], and
 - accessing child pornography [s. 163.1(5)].
2. For the following reasons, Graham will be convicted.
3. In 2013, the Ballyfield, Ontario Police Department (BPD) developed a

community education program to respond to increasing incidents of online child luring. Specifically, a number of local residents had discovered their pre-teen and teenaged children having sexually explicit conversations online with strangers. Detective Marina Chu, head of the BPD sex crimes division, organized the seminar with the goal of educating concerned parents about the law governing this conduct.

4. Raymond Wood, a local resident and aspiring actor and television producer, saw a flyer advertising the seminar which was entitled “protecting your children from online predators.” He decided to attend.

5. At the seminar, Detective Chu explained that, under section 172.1 of the *Criminal Code*, it is a crime for an adult to communicate online with a minor in order to facilitate the commission of a sexual offence against that minor. She emphasized that whether the facilitated contact would amount to a sexual offence would depend on whether the minor could legally consent to sexual activity with the stranger, which would turn on their relative ages and the existence of any relationship of trust or authority. Detective Chu advised the attendees to bring any such conversations that they observed to the attention of police. She noted that any video recordings of sexual activity involving the attendees’ minor children would constitute child pornography, and her general discussion included mention of the kinds of evidence that could show intent to have sex with a minor.

6. The seminar was very well attended, which Wood took to mean that there was considerable public interest in the subject matter. There was particularly strong interest in Detective Chu’s discussion of child pornography laws. By the time Detective Chu had concluded her presentation, Wood had developed an idea for a television pilot that he hoped would be his ticket to stardom.

7. Wood stayed after the seminar to chat about his concept with Detective Chu. He described his plan of posing as a minor in an online chat room, initiating sexually-explicit conversations with adults and, if the adults seemed interested,

suggesting that the predators meet with him in person. Wood planned to videotape his confrontations with unsuspecting predators, which he hoped would create great television drama. Wood asked Detective Chu for her advice on how best to collect evidence to ensure a conviction.

8. Detective Chu told Wood that she really admired his desire to protect children. She noted that, in order to ensure that the facilitated contact would constitute a sexual offence, he should pose as a 12- or 13-year-old and seek out online predators who were over the age of majority. Detective Chu then gave Wood her e-mail address and offered to answer any further legal questions he might have.

9. Wood went home and immediately set up a chat-room account with the screen name lonelygirl13. He hired Simone Grande, a youthful-looking 19-year-old actress, to pose as the minor. On lonelygirl13's chat profile, Grande listed that she was a 13-year-old girl interested in making new friends and meeting someone special.

10. Chu and Wood stayed in contact after their initial meeting. Detective Chu advised Wood that to generate the most persuasive evidence, he should confront the predators with the chat logs during the interview and have them confess on camera that they intended to have sex with a minor. She suggested that the predators might bring items with them which would be solid evidence of their intention to have sex. Wood promised to hand over any evidence that he obtained to the BPD.

11. On September 3, 2013, Grande sent a private message to 51-year-old Walter Graham, who went by the screen name older_man_31. Grande told him that she was attracted to older men, but was embarrassed by her lack of experience. He replied that he was 31, and said that he would be happy to be her boyfriend.

12. After chatting by instant message for several weeks and exchanging photographs, Grande invited Graham to meet with her privately, telling him that she

wanted him to be her first time. Graham was reluctant, asking her whether she was sure about it, but agreed after Grande told him that she would find another boyfriend if he declined, arguing that he would not refuse to have sex if he truly loved her.

13. She told him that her parents were currently out of town, and gave Graham the address of a house that Wood had rented for the purpose of filming the show. Graham indicated that he was very excited and described in graphic detail all of the sexual acts that he intended to perform on Grande. He promised to come over the next afternoon and mentioned that he would be bringing a video camera.

14. At approximately 2 pm on September 29, 2013, Graham arrived at the rented house and was invited inside by Grande. She offered him a drink, brought him to the den, then left the room in order, she told him, “to slip into something more comfortable.” She continued talking as she left, indicating that she had a “surprise” for him.

15. At that point, Wood, dressed in a dark suit, emerged from the next room, announcing, “I’m probably not the surprise you were expecting.” Wood had spent over a decade working as a personal trainer and nightclub bouncer to supplement his acting income, which had given him both a broad build and a strong air of authority.

16. Graham immediately asked, “Am I going to jail?” Wood closed the door to the den, locked it, and replied, “Let’s have a little talk first.” Wood confronted Graham with the chat logs and asked him whether he had come to the house intending to have sex with a 13-year-old girl. When Graham refused to acknowledge any such intention, Wood read back to him the many instances when he had expressed to Grande his intention to perform sexual acts on her. He then asked whether Graham had brought condoms and a video camera with him that day. Graham refused to answer, saying, “I don’t have to talk to you.”

17. Wood then asked Graham whether he was aware that it was a crime for an adult to have sex with a 13-year-old, or to talk with one on the internet for that purpose. Instead of answering the question, Graham asked, “Are you going to book me now?” Wood replied, “Let’s have a look inside your bag first,” and held out his hand. Graham,

believing that Wood was a police officer, handed over his backpack. Inside, Wood found condoms, lubricant, and a DVD.

18. Wood went through all of the items, describing them for the cameras and laying them out on a table. He then asked Graham one more time whether he had come to the house intending to have sex with a 13-year-old. Graham begged to be let off with a warning and Wood replied that he was free to go. Graham ran out of the house, leaving his backpack and its contents behind. Thrilled with the success of his plan, Wood edited together all of the footage from the hidden cameras and created a pilot episode for his show. Unfortunately, all of the major networks rejected it, citing the disturbing nature of the content and the poor videography.

19. While Wood was disappointed by the failure of his television show, he decided to hand everything he had over to Detective Chu at BPD headquarters on October 25, 2013, bringing along the chat logs, a copy of the pilot, and Graham's abandoned backpack (complete with all of its contents). He explained that the show had not worked out, but expressed his hope that some good could still come of the project.

20. Detective Chu first watched the pilot for Wood's show, and became concerned that Wood's method of interrogating Graham would be subject to scrutiny under the *Charter of Rights and Freedoms*. She decided that she could not submit the video as evidence.

21. Detective Chu then read the chat logs between Graham and Grande. It became obvious that Grande had not only initiated the sexual discussion, but that she had pressured Graham into agreeing to it. Detective Chu concluded that the Crown would never succeed in obtaining a conviction for luring, as Grande's aggressive seduction tactics constituted entrapment.

22. Concluding that Graham had abandoned the knapsack and no longer had any privacy interest in it (*R. v. Patrick*, [2009] 1 SCR 579), Detective Chu then opened Graham's backpack and watched the DVD, which she discovered contained several videos of young children engaged in sexual acts with adults. On the basis of the

DVD, Detective Chu obtained a warrant to search Graham's home, where she found DVDs containing thousands of hours of footage of child pornography, a studio in which Graham had produced some of the material himself, and accounting records indicating that Graham had been actively involved in selling and purchasing child pornography for over five years.

23. Detective Chu charged Graham with making child pornography, distribution of child pornography, possession of child pornography and accessing child pornography, contrary to sections 163.1(2), (3), (4), and (5) of the *Criminal Code*.

Analysis

24. In the end, notwithstanding the evidence of Graham's chat logs with Grande and his subsequent discussions with Wood during the "sting," the police only laid charges based on (and the Crown only presented evidence of) the DVD in his backpack and the evidence found by search warrant in his home, namely, more child pornography DVD's, a studio for making child pornography, and accounting records indicating that he had been dealing in child pornography for over five years. Hence, the only charges laid were making, distributing, possessing and accessing child pornography: four distinct charges. No "child luring" charges arising from the television sting were laid.

25. Graham argued that the warrantless search of his knapsack and subsequent search of his home violated his section 8, 9, and 10(b) *Charter* rights. Graham argued that Wood was an agent of the state and that his search of his backpack was unreasonable and contrary to section 8. In addition, Mr. Wood's interrogation, which gave him the opportunity to search the backpack, constituted an arbitrary detention contrary to section 9. Graham also argued that Wood had violated his section 10(b) *Charter* right by not informing him of his right to counsel. As the police search warrant was obtained on the basis of the seized DVD, the warrant was therefore invalid. Graham further argued that in light of this breach, the evidence obtained in the police search should be excluded under section 24(2) of the *Charter*.

26. The Crown argued that the *Charter* should not apply to Mr. Wood's actions

because Mr. Wood was not performing a government function or acting as a state agent. Mr. Wood produced the episode entirely on his own and did not coordinate any of his activities with police. His primary goal was to create a pilot episode for a television show, not to obtain evidence that would lead to a conviction. His decision to turn over the knapsack and its contents (including the DVD) to police was made entirely of his own volition.

27. The Crown further argued that, even if Mr. Wood were found to be a state agent, he did not breach any of Mr. Graham's *Charter* rights. His search was authorized by the citizen's arrest provisions in the *Criminal Code* and was based on reasonable grounds.

28. In the alternative, the Crown submitted that even if Mr. Wood is found to have violated Mr. Graham's *Charter* rights, the evidence collected by the police in its search should not be excluded under section 24(2) of the *Charter*.

29. It was common ground between the parties that if the Court found Wood to be a state agent for the purposes of section 8, he would similarly be a state agent for the purposes of section 9. The Crown conceded that if Wood's actions constituted an arrest authorized by s 494(1) of the *Criminal Code*, they would constitute a detention under section 9. If the Crown could not establish that Wood had reasonable grounds to arrest Graham under section 494(1) of the *Criminal Code*, it would have failed to prove that Graham's detention was not arbitrary.

30. Having heard submissions of counsel, I find that Raymond Wood was a state agent in his detention and search of Mr. Graham. In coming to this conclusion, I apply the "but for" test from *R v Buhay*, which asks: would the search have taken place, in the form and manner in which it did take place, but for the intervention of the state or its agents?

31. I find that Mr. Wood would not have created the pilot had he not attended Detective Chu's presentation. Furthermore, Mr. Wood would not have carried out his operation in the form and manner in which he had unless he had spoken to Detective

Chu in advance. I find that Detective Chu's conduct in dealing with Wood amounted to silent approval.

32. I also find that, while Mr. Wood's interrogation did meet the test for detention as set out in *R v Grant*, it was not arbitrary and therefore did not violate Mr. Graham's section 9 *Charter* rights. Mr. Wood only detained him after he had acquired reasonable grounds to believe that Mr. Graham was in possession of child pornography.

33. Having found that there was a detention, I find that there was a violation of Mr. Graham's section 10(b) right "to retain and instruct counsel without delay and to be informed of that right." However, because the seizure of the DVD was reasonable, the violation of Mr. Graham's 10(b) right to counsel had no impact on the evidence against him.

34. I further find that Mr. Graham had a reasonable expectation of privacy in his backpack and that as a result, Mr. Wood's seizure of the DVD constituted a search under section 8 of the *Charter*. Accordingly, I now turn to the criteria authorizing a warrantless search laid out in *R v Collins*.

35. I find that the search met all three criteria laid out in *Collins* and thus did not violate Mr. Graham's section 8 *Charter* rights.

- First, the search was justified by law, pursuant to section 494(1) of the *Criminal Code* (Arrest without warrant by any person). Mr. Graham's suggestion that he videotape his encounter with Ms. Grande gave made it apparent that he would be in possession of child pornography.
- Second, the law itself was reasonable. The citizen's arrest powers are important safeguards for situations in which a crime is clearly in progress and no police are present.
- Third, the search was carried out in a reasonable manner. Mr. Wood did not use excessive force or coercion in order to seize the backpack. At

all times Mr. Wood treated Mr. Graham with dignity and respect.

36. Because there was no meaningful breach of Mr. Graham's *Charter* rights, I need not consider whether the evidence should be excluded under section 24(2).

37. Accordingly, the DVD evidence from Mr. Graham's backpack is admissible. The search warrant for Mr. Graham's house is also therefore valid and the evidence obtained in the police search is also admissible.

38. Having admitted the evidence of child pornography in Mr. Graham's backpack and the further child pornography in his home along with the filming studio and sales records, I find Mr. Graham guilty on all counts.

I.M. WRIGHT J.