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Docket: CR 20-01-38182
(Winnipeg Centre)
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COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:

HER MAJESTY THE QUEEN,	)	Appearances:
	)	Carolyn Reimer,
	)	for the Crown
- and -	)	
	)	Daniel V. Gunn,
BRYAN JAMYE POHL,	)	for the accused
accused.	)	
	)	Kevin D. Toyne,
	)	for the Canadian Centre for
	)	Child Protection
	)	
	)	JUDGMENT DELIVERED:
	)	April 7, 2021

McCARTHY J.

[1] This is my decision on a motion by the accused, who is charged with one count of possess child pornography, for an order for disclosure of a mirrored image of a hard drive seized as evidence in this matter.

[2] The hard drive in question contains the primary evidence against the accused in this case. The computer was traced, through an IP address identified by the Winnipeg Police Service ("WPS") as containing child pornography, to an address where the accused is alleged to reside.

[3] It is agreed that the Crown in this matter has provided full disclosure of the contents of the seized hard drive. What the applicant has sought on this motion is access to a mirrored copy of the hard drive itself for forensic investigation by his proposed expert.

[4] At a preliminary motion relating to this matter, I granted the Canadian Centre for Child Protection ("the Centre") intervenor status to make submissions, not on the merits of the disclosure application, but rather on any conditions that they proposed were necessary and appropriate to protect the interests of the victims of child sexual abuse material in the event that disclosure was ordered.

[5] With respect to jurisdiction of the court for a further order of disclosure in this matter, in my view, it fits squarely within the framework set out in ***R. v. Stinchcombe***, [1991] 3 S.C.R. 326 ("***Stinchcombe***").

[6] In ***Stinchcombe***, the Supreme Court established that the right to disclosure is a constitutional right which is central to the accused's right to make full answer and defence to criminal charges. The court clearly established that the Crown has an obligation in every case to provide disclosure of evidence that is relevant to the defence. There are, however, some other interests which the Crown is also obligated to protect when determining what form that disclosure will take. That includes imposing appropriate trust conditions.

[7] In ***R. v. Smith*** (1994), 146 Sask. R. 202 (Q.B.), 1994 CarswellSask 500 ("***Smith***"), the court considered the balancing of interests required in a disclosure application (at paras. 6 and 7):

> *R. v. Stinchcombe*, 1991 CanLII 45 (SCC), [1991] 3 S.C.R. 326 (S.C.C.) establishes that the right to disclosure is a constitutional right not subject to qualification. Disclosure is a right vested in an accused not defence counsel. Disclosure is a constitutional right because of its crucial role in making full answer and defence.
>
> Aside from the *Charter,* a fair trial requires that accused persons know the case they have to meet. Information regarding the victims' allegations is essential to this and must be disclosed. However, this does not absolve the Crown of responsibility to do all it can properly do to ensure that the privacy interests of complainants are protected. The Crown has an obligation to protect the privacy of alleged victims of sexual assault cases…. In addition to the privacy interests of the complainant, the public interest is also served by providing complainants with assurances that the statements and videotapes will not be reproduced and distributed. ….

[8] The court, in ***Smith***, found that trust conditions imposed on counsel for the accused were required and appropriate to protect the interests of victims and the public in safeguarding disclosure. This is equally, if not even more, applicable in a child pornography case.

[9] In this case, the Crown was prepared, after request by counsel for the accused to provide access to a mirrored hard drive, but only at a police station under strict supervision. The Centre, in its submission, agreed that if the court was inclined to order disclosure of the hard drive, very strict conditions should be imposed to protect the victims of the child sexual abuse material from any possibility of further access or dissemination. As they point out, every viewing of this material amounts to the re-victimization of the subjects depicted in the material and those that live in fear that their images are being further disseminated and viewed.

[10] The Centre made a number of very helpful submissions and suggestions with respect to this matter. Key to the protections sought was an assurance that the hard drive will, at no point be connected to the internet, or in any way accessible from external sources, for the purpose of further uploading or downloading of the content. Most of the suggestions made by the Centre were accepted by the applicant and incorporated into a draft Order prepared by counsel for the applicant, for my consideration at the hearing.

[11] In this case, counsel for the applicant is prepared to accept trust conditions. They propose that they be required to obtain and provide to the Crown a written undertaking of the proposed expert prior to release of the forensic image hard drive directly to the expert from the WPS. They are prepared to abide by any other conditions that the court may impose on the provision of the evidence.

[12] Counsel for the accused argues that, because the entire case against the accused is the forensic analysis of this hard drive conducted by the WPS, being afforded an opportunity to have an independent expert perform analysis of the hard drive is essential to his ability to make full answer and defence. The hard drive may reveal timelines, user information or analysis errors, which support the accused's available defences.

[13] The applicant filed several cases where similar disclosure of hard drives had been ordered by the court. Notably, in ***R. v. Cassidy*** (2004), 180 O.A.C. 355, 2004 CarswellOnt 36, the Ontario Court of Appeal upheld the order of the lower

court that disclosure of hard drives at the core of the prosecution's case was required.

[14] There was disagreement on this application as to who has the onus in respect of this matter. It is clear from ***Stinchcombe*** that the Crown bears the onus in every prosecution of making disclosure of all relevant evidence to allow the accused to make full answer and defence. As stated by the court in ***R. v. Blencowe*** (1997), 35 O.R. (3d) 536 (O.C.J.), 1997 CarswellOnt 3549 ("***Blencowe***") (at para. 53):

> It is *not* suggested that the applicant, his counsel and any expert(s) retained by the defence are *not* entitled to view the video recordings whose contents are said to constitute the offences charged. *Prima facie,* the applicant is entitled to copies of the disclosure materials.

And further at paragraph 56:

> The privacy and public interests which I have identified only warrant disclosure by private viewing if they cannot be satisfied by an appropriate undertaking by defence counsel. The undertaking is not for the purpose of prohibiting or impeding the viewing of the tapes by the applicant, his counsel or any expert retained by the defence.

[15] The case of ***Blencowe*** dealt with copies of cassettes containing images of child sexual abuse material. However, in my view, the principle remains the same. Where the Crown is satisfied that the disclosure is relevant to the accused's right to make full answer and defence, the evidence should be provided subject to appropriate undertakings by counsel and any expert they retain. In a case like this one, where it is agreed that further disclosure is warranted, every effort should be made to agree upon appropriate disclosure conditions, which provide

appropriate safeguards. However, where conditions or undertakings cannot be agreed upon, where the relevance of the evidence is disputed, or where the security or privacy interests of the victims and public are thought to outweigh the constitutional interests of the accused, the court will be charged with determining relevance and balancing the competing interests. Disclosure of a hard drive, as in this case, does carry with it increased risk of easy or accidental dissemination of child sex abuse material, and protecting the victims and the public interest must be carefully weighed.

[16] Disclosure in any given case is a matter that is specific to the facts of that case.

[17] The Crown has conceded the relevance of the hard drive to the right of this accused to make full answer and defence. However, she is of the view that in order to protect the children depicted on the hard drive, and the public interest in a broader sense from the perpetuation of child sexual abuse material, the hard drive must remain under the care and control of WPS at all times. The Crown initially offered access by the expert only at a police station in Manitoba, and at the hearing offered that access could potentially be made available in Ontario, where the defence expert resides and works. However, no concrete arrangements were proposed in that regard.

[18] The most significant issue from my perspective is that, based upon the evidence filed by the applicant, forensic analysis will be undertaken using two different kinds of software and running continuously for a period of up to 24 hours

each. He proposes this analysis would be done in his office, using his computer equipment and software. With respect to the expert attending to Winnipeg for the purpose of such analysis at the WPS, I find that to be unwieldy, and overly costly and onerous on the accused and his expert in this case.

[19] As an additional factor, this case is being prosecuted in the midst of a global pandemic which has resulted in inter-provincial travel restrictions that remain in place at the time of making this order. The proposed expert is in a high-risk age category and the self-isolation requirement, both on entering and leaving the province, make his attendance here very difficult.

[20] In the circumstances of this case, I find that I can impose appropriate and extensive conditions which will serve to balance the constitutional rights of the accused, the privacy and security rights of the victims of the child sexual abuse material, and the interests of the public. I am therefore, prepared to order release of a mirrored hard drive to the expert for the Defence, on conditions as set out below.

[21] A second issue raised by the Crown was whether the hard drive should be released to the particular expert proposed by the applicant. The Crown and the Centre argued that the proposed expert should be found to be disqualified from providing evidence in this matter based upon the principles set forth in ***R. v. Mohan***, [1994] 2 S.C.R. 9 and ***White Burgess Langille Inman v. Abbott and Haliburton Co.***, 2015 SCC 23, [2015] 2 S.C.R. 182. Based upon those decisions,

they argue that the court should find that the proposed expert is not impartial and ought to be disqualified from giving evidence in this matter.

[22] The basis for that position are the findings of other courts with respect to evidence offered by this expert, and the refusal of the court to accept his evidence. While I understand the concern of the Crown and the Centre with respect to providing evidence to a proposed expert, who could end up disqualified by the court, particularly given the kind of evidence at issue in this case, the difficulty is that such a determination cannot properly be made without a *voir dire* on the proposed expert's expertise and impartiality.

[23] Further, I am of the view that the issues raised by the Crown as to the basis for such a finding would not likely be a permissible area of examination on a *voir dire*. I agree with the Alberta Court of Appeal in ***R. v. Karaibrahimovic***, 2002 ABCA 102, 2 Alta. L.R. (4th) 213 that (at para. 10):

> … Expert opinions may be rejected for several reasons, a number of which could legitimately affect a subsequent assessment of the worth of that expert's opinion, and a number of which clearly do not. ….

and (at para. 11):

> Similarly, investigating facts and issues that are collateral to a trial is precisely what the collateral evidence rule seeks to avoid: *The Law of Evidence in Canada*, *supra*, at 963. The rationale for the collateral evidence rule, that is to avoid mini-trials within trials on collateral issues, applies with equal force to cross-examining experts about the treatment of their testimony in prior cases.

[24] Even if the questioning was permitted on the *voir dire*, I would want to hear the proposed witness's explanations and answers before ruling on the admissibility

of his opinion. If the Defence wants to use this expert, being aware of the issues raised by the Crown, he is entitled to do so. There may well be issues of weight or admissibility of that evidence at trial, but I am still prepared to order provision of the copy of the hard drive to the proposed expert for the purpose of preparation for the trial of this matter.

CONCLUSION

[25] In all of the circumstances, I am prepared to order provision of the mirrored hard drive to Martin Musters, on the following conditions:

1. Counsel for the accused shall obtain and enforce a binding undertaking or agreement from Mr. Musters, who will have access to these materials or the data contained therein, that he will not use, transfer, copy, download or permit access to this data for any purpose other than as permitted by this order, and that he shall be bound by the provisions of this order. This undertaking shall be signed and sent directly to Crown attorney Carolyn Reimer, at Manitoba Prosecution Services, located at 510 – 405 Broadway Avenue, Winnipeg, Manitoba;
2. Mr. Musters shall provide Vulnerable Sector and Criminal Record Checks completed in the last six months, directly to Crown attorney Carolyn Reimer, at Manitoba Prosecution Services, located at 510 – 405 Broadway Avenue, Winnipeg, Manitoba;

3. Upon receipt of the binding undertaking, the Crown will direct WPS to contact Mr. Musters, and make immediate arrangements to provide a copy of the forensic image ("the hard drive"). The WPS shall note the serial number of the hard drive and verify the serial number upon return of the hard drive. The WPS will additionally ensure that the hard drive is couriered in a secure, locked case that is protected against tampering;

4. The hard drive shall be encrypted and accessible only with a strong password. The password shall be provided directly to Mr. Musters by Detective Kelly Runyan, or his designate, through a secure channel separate from the provision of the hardware. The password shall not be disclosed or provided to anyone except Mr. Musters;

5. The binding undertaking obtained and enforced by counsel for Mr. Musters shall also include a condition that the expert shall not disclose or provide the password to anyone or store a copy of it anywhere near the device;

6. The hard drive will be couriered directly to Mr. Musters' office located at the following address: Computer Forensics Inc., 1200 Speers Road, Unit 29, Oakville, Ontario, L6L 2X4. Mr. Musters shall retain the hard drive in his possession or control for the purposes of examination, and will directly courier it back to the WPS on the terms set out in condition number 7;

7. Forty-eight hours after the completion of the proceedings with respect to this matter, the hard drive containing images and/or movies of child pornography seized from the accused and retained by the WPS, shall be couriered in the same locked case it was received in, directly to Detective Kelly Runyan of the Winnipeg Police Service, located at 245 Smith Street, Winnipeg, Manitoba, R3C 1K1;

8. The hard drive shall be used only for the purpose of making full answer and defence to charges before the court, and for no other purpose or proceeding;

9. The forensic image contained on the hard drive shall not be copied or downloaded, nor shall any of the data contained therein be copied, downloaded, distributed or transmitted by anyone in any way for any purpose;

10. Any examination of the hard drive shall be conducted from an air-gapped work station, which is not connected to the internet. The hard drive shall never be left in an unlocked state, except when Mr. Musters is physically present in the same room. Mr. Musters shall not have a device capable of image or video capture in his possession while conducting his examination of the hard drive. Mr. Musters, upon receipt of the hard drive, shall keep it in a secure, locked place within his office when the hard drive is not being viewed, which is only accessible to Mr. Musters. The hard drive shall

only be viewed in a private place, secure from access by other individuals. Mr. Musters shall ensure that the forensic examination takes place in a room which is not visible or accessible to other individuals, or the public, by means of an open or uncovered window, or unlocked door;

11. No one, including the accused, shall have possession or control of the hard drive, except Mr. Musters;

12. No one shall be permitted to view the material, except the expert retained by counsel, Mr. Musters;

13. The hard drive shall be couriered directly to Detective Kelly Runyan or his designate, at the Winnipeg Police Service, 245 Smith Street, Winnipeg, Manitoba, R3C 1K1, in the event of any change of counsel or termination of the relationship between the accused and Mr. Musters;

14. If, for any reason, Mr. Musters is unable to comply with the conditions in this order, he shall immediately return the hard drive and seek the consent of the Crown, through counsel for the accused, and the court to deviate from the ordered conditions. Mr. Musters shall additionally alert Detective Kelly Runyan of the Winnipeg Police Service, to any loss, theft, or other unforeseen issue which could result in the transmission of the contents of the hard drive;

15. The hard drive shall be returned to the Winnipeg Police Service in the same condition in which it was received. Any damage to the hard drive caused while in the possession or control of Mr. Musters will be paid by counsel for the accused.

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McCarthy J.