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(Winnipeg Centre)  
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## **COURT OF KING'S BENCH OF MANITOBA**

### **B E T W E E N:**

HIS MAJESTY THE KING	)	Michael M. Desautels
	)	<u>Caitlin P. J. MacDonald</u>
- and -	)	for the Crown
	)	
	)	
KEVIN CHARLES QUEAU,	)	Saheel Zaman
	)	<u>Jeremy Kostiuk</u>
	)	for the accused
accused.	)	
	)	
	)	Judgment Delivered:
	)	May 6, 2025

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### **RULING ON VOIR DIRE** **APPLICATION TO EXCLUDE EVIDENCE – CHARTER s. 8**

#### **BOND J.**

[1] Kevin Queau (the accused) is charged with second degree murder in the death of Crystal Saunders in 2007 (the "homicide"). On March 20, 2025, I dismissed the accused's application to exclude certain evidence in this case, pursuant to the ***Charter***, with reasons to follow. These are my reasons.

## **BACKGROUND**

[2] Ms. Saunders' body was found in a rural area of Manitoba in 2007, and her death was investigated as a homicide. The accused was identified as a suspect in 2015. Subsequently, the Royal Canadian Mounted Police (the "RCMP") undertook an undercover operation that involved undercover police officers posing as members of an organized criminal group ("undercover operators"). Over a period of months in 2023 and 2024, undercover operators engaged the accused in social activities and activities held out to be criminal in nature through a series of orchestrated scenarios. The operation culminated in an interaction between one of the undercover operators and the accused wherein the accused was asked about his involvement in the homicide. (This type of undercover operation is sometimes referred to as a "Mr. Big" operation.)

[3] Between January 2023 and January 2024, police sought and obtained six authorizations to intercept private communications with one party's consent pursuant to s. 184.2 of the ***Criminal Code***. Each one authorized interception and recording of communications between the accused and any one or more of the undercover operators, who were the consenting parties, for a period of 60 days. The authorizations were issued on January 27, 2023; June 16, 2023; August 9, 2023; September 29, 2023; November 22, 2023; January 16, 2024. Pursuant to the authorizations, police made audio recordings, and in the final scenario a video recording, of interactions between the undercover operators and the accused.

[4] As I explain below, the affidavit used to obtain the first authorization set out the basis for identifying the accused as a suspect in the homicide and described in general

terms the proposed undercover operation. The affidavit used to obtain the second authorization repeated much of what is in the first, but also described failed attempts by an undercover operator to engage the accused, and explained the proposed continuation of the undercover operation with a different approach. The affidavits used to obtain the subsequent four authorizations again repeated much of the same information as found in the first two, but also included references to interactions between undercover operators and the accused as they engaged in social activities and later activities held out to be criminal in nature.

### **THE ACCUSED'S APPLICATION FOR EXCLUSION OF EVIDENCE**

[5] The accused argued that the judicial authorizations obtained by the police pursuant to s. 184.2 of the *Criminal Code* were unlawfully granted. Section 184.2(3) sets out three requirements for the issuance of what is often referred to as a "one party consent" authorization to intercept private communications: (a) that there are reasonable grounds to believe an offence under the *Criminal Code* or other federal Act has been or will be committed; (b) that either the originator or the recipient of the communication has consented to the interception; and (c) "that there are reasonable grounds to believe that information concerning the offence referred to in paragraph (a) will be obtained through the interception sought".

[6] The accused conceded that the first two requirements of s. 184.2(3) were met but argued that the third requirement was not. He argued that the affidavits relied upon for the issuance of the first authorization (January 27, 2023) and second authorization

(June 16, 2023) disclosed no reasonable basis to believe that the proposed undercover operation would obtain any information about the homicide.

[7] The accused argued that once the first two authorizations were found to be unlawfully granted, not only the audio and video recordings made pursuant to the authorizations, but also the testimony of the undercover operators regarding their interactions with the accused should be found to have been obtained in a manner that violated s. 8 of the **Charter**. On that basis, he argued that references made in the affidavits used to obtain the subsequent four authorizations to the undercover operators' interactions with the accused must be excised upon review. He argued that once this information was excised, the subsequent affidavits contained insufficient information to permit issuance of the subsequent authorizations.

[8] Finally, the accused sought the exclusion of the audio and video recordings, as well as the testimony of the undercover operators from the **Hart voir dire (R. v. Hart, 2014 SCC 52)** and from the trial of this matter pursuant to s. 24(2) of the **Charter**.

### **THE TEST ON REVIEW**

[9] This is a challenge to the validity of the authorizations on the face of the affidavits used to obtain them, rather than a sub-facial challenge. See **R. v. Garofoli, 1990 CanLII 52 (SCC), [1990] 2 S.C.R. 1421**.

[10] The test I am to apply on review of the issuance of a judicial authorization to intercept communications is well established. To paraphrase **Garofoli**: It is not for me to substitute my own view about whether the authorization ought to have issued. The correct approach is to consider whether on a review of the material before the issuing

justice there was a basis upon which they could be satisfied that the pre-conditions for the granting of the authorization existed. If I conclude that the authorizing judge could have granted the authorization, then I must not interfere (*Garofoli*, at para. 68). See also *R. v. Pilbeam*, 2018 MBCA 128, at paras. 6-8.

[11] The authorization is presumed valid and the review I am to conduct is deferential in nature. The accused bears the burden of showing that the affidavits were insufficient to establish the statutory requirements for the issuance of the authorizations (*Pilbeam*, at para. 6).

[12] The concept of “reasonable grounds to believe is something more than mere suspicion but something less than ... a prima facie case” (*Pilbeam*, at para. 11). It is found where “credibly-based probability replaces suspicion” but the threshold is not susceptible to precise measurement (*Pilbeam*, at para. 12).

[13] In assessing whether an authorization could have issued on the basis of the affidavit used to obtain it, I am mindful that the issuing justice is entitled to draw reasonable inferences from the information contained therein (*R. v. Vu*, 2013 SCC 60, at para. 16). My approach must be deferential, contextual, practical and non-technical, applying common sense (*Pilbeam*, at paras. 6-8).

[14] I will turn now to the first two affidavits.

### **THE FIRST AFFIDAVIT AND AUTHORIZATION**

[15] The first affidavit was sworn on January 25, 2023 by Corporal Brock Carson (“Cpl. Carson”). In it, Cpl. Carson described the police investigation of the homicide and the manner in which the accused was identified as a suspect. He also outlined the RCMP’s

plan to continue the investigation by way of an undercover operation. He stated that the undercover operation would be employed to create an environment where the accused would feel comfortable explaining, in detail, what knowledge or involvement, if any, he had in the homicide.

[16] Cpl. Carson explained that the undercover operators would introduce themselves to the accused through the use of scripted scenarios with the objective of developing a strong relationship with him. He provided a list of themes these scenarios would seek to establish and the sequence of events that the operation was intended to take. He said that the undercover operators would begin with social interactions to establish a relationship and a bond of trust. They would then offer the accused a job and introduce the concept of honesty. Next, more intricate social interactions would be introduced, and the accused would be offered the opportunity to undertake activities with the undercover operators that they held out to be illegal. The themes of trust, honesty, safety and non-violence would be reinforced. Next, the undercover operators would "display an advanced level of work-related sophistication and introduce a hierarchical criminal group of which they were part". They would introduce a leader and create an environment where all topics and activities were accepted aside from dishonesty. The importance of honesty would be made clear and it would be demonstrated that any problem the accused may have could be solved by the undercover operators and their group. Finally, the undercover operators would generate conversation with the accused and "conduct a covert non-custodial interview". All of this would be achieved through the orchestrated introduction of undercover operators to the accused.

[17] The accused argued that the affidavit must disclose some reasonable basis to conclude that the proposed undercover operation would be successful. He argued that this affidavit did not do so because there was no evidence that the accused would engage with the undercover operators.

[18] In his affidavit, Cpl. Carson relied on a journal entry and an e-mail purportedly sent by the accused to his mother in support of an assertion that the accused had demonstrated a willingness to discuss his criminal history. I agree with the accused's submission that this evidence offers weak support for the proposition that the accused could be expected to talk with the undercover operators about his involvement in the homicide. Both the journal entry and the e-mail are dated, having been composed some ten years prior, and both are context specific. A journal is generally recognized as a private, confidential writing, and the e-mail was a communication apparently intended for his mother. Also, as counsel for the accused pointed out, neither communication provides specific detail regarding any particular criminal conduct by the accused.

[19] However, there is no requirement that the accused has previously made incriminating comments. See *R. v. McDonald*, 2013 BCSC 2072, at para. 93. Moreover, in my view, it is not necessary that the affidavit establish any particular likelihood that the accused will speak about his knowledge or involvement in the homicide to the undercover operators during the Mr. Big operation. Contrary to the argument of the accused, the absence of specific information regarding the accused's employment, financial, or social circumstances does not undermine the inference available to the issuing justice that the undercover operators' efforts to engage the accused would be

successful. As outlined in the affidavit, the undercover operators would use a series of scripted scenarios to develop a relationship with the accused characterized by trust and acceptance, with an emphasis on the importance of honesty, such that when asked, he would provide information concerning the offence under investigation. In my view, this is evidence upon which the authorizing justice could find reasonable grounds that the accused, once questioned in accordance with the undercover operation's plan, would provide information about his involvement, if any, in the homicide.

[20] I find the case law upon which the accused relies to be distinguishable. In *R. v. Bashir and Muddej*, 2019 ONSC 4937 (affirmed in *R. v. Muddej*, 2021 ONCA 200), the police were granted authorization in 2016 to intercept communications between targets of the investigation who it was believed had been involved in a homicide that had occurred in 2009, some seven years before. The reviewing judge found that the affidavit did not establish a credibly-based probability that the targets continued to communicate with one another during the years since the homicide and that the communications, if intercepted, would afford evidence of the homicide (at paras. 36-37). The evidence in the affidavit indicated that communications between the targets about the homicide had been very limited and quite dated. The reviewing judge found it was not reasonable to infer that the targets would communicate with one another nor that they would communicate about the homicide (at para. 65).

[21] The *Bashir and Muddej* case involves a "full blown" wiretap pursuant to s. 186 of the *Criminal Code* which requires reasonable grounds to believe that the interception

will afford *evidence* of the offence, arguably a higher threshold than will provide *information* as required by s. 184.2. However, I do not find this distinction to be determinative here. Rather, the important distinguishing feature is the involvement of undercover operators in this case. In the affidavit, Cpl. Carson describes how the undercover operators will actively take steps to establish a relationship with the accused with the intention of creating an environment in which he would be prepared to speak about his involvement in the homicide. The police would not be relying on a relationship between targets who had had limited communication for a number of years, as in ***Bashir and Muddei***. The police would be actively engaging with the accused, through undercover operators participating in scripted scenarios that would be aimed at establishing trust and openness with the intention of eliciting information from him.

[22] Similarly, I find ***R. v. Bullen***, 2016 ONSC 7684, distinguishable. In ***Bullen***, police were engaged in a drug trafficking investigation and intended to direct a civilian agent to contact the accused to purchase cocaine. The accused and agent had been associates in the past but had been estranged after a disagreement, without any communication for 18 months. The reviewing judge was not satisfied that the issuing justice could have concluded that there were reasonable grounds to believe that the interception of the agent's communication with the target would provide evidence. He stated at para. 31:

[31] According to the [affidavit] the plan was for [the agent] to telephone the defendant on his home telephone "in an attempt to purchase a half a kilo of cocaine". The success of this cold call was premised on the past relationship between Edwards and the defendant. Missing from the [affidavit] was a rational presentation of information that would explain why the affiant had confidence that the plan for [the agent] and the defendant to reconnect would be successful. ...

[23] The reviewing judge in *Bullen* also interpreted some of the language of the affidavit as indicating that both the police and the civilian agent had doubts about his ability to reconnect with the target (at paras. 32-33). Ultimately, the reviewing judge found that the authorizing judge could not have concluded that evidence would be obtained through the interception sought. Again, the distinguishing feature in this case is the evidence in the affidavit about the planned undercover operation involving a series of scenarios orchestrated and carried out by undercover operators and designed to establish trust between the accused and the undercover operators leading to elicitation of information from him regarding the homicide.

[24] (I would note, with respect, that I also question some of the analysis conducted by the reviewing judge in *Bullen*, but it is unnecessary to discuss this further.)

[25] In the case before me, I find that there was evidence in the first affidavit upon which the issuing justice could find a credibly-based probability that through the planned undercover operation the accused would come to speak about the homicide. I am satisfied that there is sufficient evidence in the first affidavit based upon which the first authorization could have issued.

### **THE SECOND AFFIDAVIT AND AUTHORIZATION**

[26] The accused argued that even if the first affidavit were found to meet the test necessary for the issuance of the authorization, the second surely must not.

[27] The second affidavit, also prepared and sworn by now Sergeant Brock Carson ("Sgt. Carson") on June 15, 2023 contained much of the same information as was included in the first affidavit, with some additional evidence. Sgt. Carson described

attempts made by an undercover operator to engage the accused in January and February 2023 by way of an ostensibly chance meeting outside his workplace. The undercover operator posed as someone attempting to repossess two Sea-Doos, and through three scenarios sought the accused's assistance with that task, offering him money in payment. As outlined in the affidavit, these attempts were unsuccessful, with the accused showing little interest in the money offered. As explained in the affidavit, this particular theme was abandoned by the investigators, and a new theme was developed with new undercover operators.

[28] In the second affidavit, Sgt. Carson again outlined the proposed undercover operation and provided more detail than in the first affidavit. He stated that because of the accused's level of sophistication, it was expected that the undercover operation would take several months, and possibly over a year, to achieve its objectives. He then described five phases of the proposed operation, that would focus not on providing the accused with employment or money-making opportunities, but instead on developing a strong social bond. These five phases more or less coincide with the investigative plan set out in the first affidavit, but with a different approach.

[29] The accused argued that the failure of the first attempts to engage the accused undermined the grounds to believe that through the undercover operation the accused would be induced to provide information regarding the homicide. He argued that even if the first affidavit met the test for the issuance of the first authorization, there should be no question that the second authorization was unlawfully granted. I disagree.

[30] In the second affidavit, Sgt. Carson acknowledged the failure of the first attempt and identified a change in approach to be pursued in the undercover operation. He acknowledged that the first attempt had failed and so the plan would be amended accordingly. In my view, that the accused had not been receptive to the first approach does not undermine the potential for success with a different approach as outlined in the affidavit. My comments regarding the proposed undercover operation as set out in the first affidavit apply equally to the second affidavit. I am satisfied that there is sufficient evidence in the second affidavit upon which the authorization could have issued.

### **THE SUBSEQUENT FOUR AFFIDAVITS AND AUTHORIZATIONS**

[31] The subsequent four affidavits used to obtain the subsequent four authorizations were prepared by Corporal Stanley John McCutchin ("Cpl. McCutchin"). Each included much of the same information as had been provided in the first two affidavits. However, each also included details of the accused's interactions with undercover operators during the weeks prior to the affirmation of each affidavit. The affidavit affirmed by Cpl. McCutchin on August 9, 2023 described the accused's interactions with undercover officers during six scenarios between June 21, 2023 and July 28, 2023, following the issuance of the second authorization. These interactions show engagement on the part of the accused with the undercover operators in social scenarios. The subsequent three affidavits of Cpl. McCutchin affirmed on September 28, 2023, November 21, 2023 and January 15, 2024 respectively similarly described the interactions between the accused and the undercover operators as they engaged in social activities as well as activities held out to be criminal in nature. In each affidavit, Cpl. McCutchin stated that the source of

this information was the operators' notes regarding their interactions with the accused. He did not rely on the recordings made pursuant to the prior authorizations.

[32] The accused argued that the evidence of his interactions with the undercover operators should be excised from each of the four subsequent affidavits. He takes the position that not only were the recordings obtained in violation of s. 8 of the **Charter**, but also the undercover operators' descriptions of their interactions with the accused relied upon by Cpl. McCutchin, were also obtained in a manner that breached s. 8 of the **Charter**.

[33] Having found that the first two authorizations were lawfully issued, and therefore no evidence was obtained in a manner that violated s. 8 of the **Charter**, it is not necessary for me to address this argument. No evidence is subject to excision. Clearly the affidavits prepared by Cpl. McCutchin by which the subsequent four authorizations were obtained provide sufficient evidence upon which the issuing justice could be satisfied that the interception sought would provide information about the homicide. The accused did not argue otherwise.

### **CONCLUSION**

[34] In the result, I find the following:

- a) The January 2023 authorization was lawfully granted.
- b) The June 2023 authorization was lawfully granted.
- c) There is no basis to excise the evidence regarding interactions between the accused and the undercover operators from any of the affidavits submitted to obtain the subsequent authorizations.

- d) All of the subsequent authorizations were lawfully granted.
- e) There is no basis to exclude pursuant to s. 24(2) of the **Charter** any of the evidence obtained through the interception of communications made pursuant to any of the authorizations from the **Hart voir dire** or from the trial.

\_\_\_\_\_J.