IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *R. v. C.G.,*
2016 BCSC 1062

Date: 20160425
Docket: X079458-1, X079458-2
Registry: New Westminster

Regina

v.

C.G.

Before: The Honourable Mr. Justice McEwan

Oral Reasons for Judgment

Counsel for the Crown:	N.M.D Reithmeier
Counsel for the Accused:	P.G. Kent-Snowsell
Place and Date of Trial/Hearing:	New Westminster, B.C. April 25, 2016
Place and Date of Judgment:	New Westminster, B.C. April 25, 2016

[1] **THE COURT:** The Crown is seeking an order for the further detention of three matters seized from C.G. The first is a Motorola cellular telephone, the second is a Canon PowerShot camera, and the third is an Asus laptop computer. The matters were seized in connection with the investigation of a murder of a child named C.J. on or about February 11, 2015 in Surrey, British Columbia. The items were seized from C.G. pursuant to s. 489(2)(c) of the *Criminal Code*. Of the three items, a search warrant has issued only for the telephone as of March 7, 2015. The seized items must be held under court authority. Detention orders were apparently lawfully granted and were set to expire on May 14, 2015. No further applications were made for detention of these items. So the matter comes before this court, now, on the basis that the authority to hold them has long since expired. The application of the Crown is met by an application on behalf of C.G. for return.

[2] The Crown's application proceeded on the basis of affidavit material and, to some extent, on the basis of the Crown's description, after some questioning by the court, of the nature of the investigation. The Crown placed before the court an envelope which was ordered to be sealed by Madam Justice Brown until this date, April 25, 2016. The Crown's intentions with respect to that material were to place it before the court on the basis that the court could review it in connection with this application, but that the defence could not. Concerned about the fairness of that kind of proceeding while recognizing the Crown's situation, I attempted to elicit from the Crown sufficient information to, in my view, address this case without going to that material. Had I had any doubt about the conclusion I have reached, I would, of course, have gone to that, if necessary, in order to give a full and ample hearing to the case. I have, however, concluded that, on the basis of the information I have, I am in a position to make a ruling.

[3] The situation is that the police have, through their own delict, allowed their authorization to hold this material lapse for some considerable period of time. I do not have before me any explanation for that except that, when the date came, the matter was overlooked and continued to be overlooked for many months.

[4] There was some controversy between counsel in the matter of the legal analysis to apply. The section under which such detentions of property are governed is s. 490. It has several sub-sections. The Crown brings the application primarily under s. 490(9.1) while the defence urges that the analysis must include consideration of s. 490(3). 490(3) deals specifically with situations where the excuse for requiring the further detention of material is that the investigation is complex.

[5] There are cases where the complexity of the investigation is used as a justification in part, at least, for the detention of the material. The Crown does not assert in a manner that I find compelling that this is a complex investigation. That does not mean it is not a difficult case or anything like that. It is simply to say that, as I understand and would ordinarily apply the term "complex," that would mean the type of case where there are many, many participants, multiple scenes or multiple documents, and there is no suggestion here that the case has that kind of dimension. What has happened is that the police have simply allowed their authorization to lapse and they are seeking now to detain the property until September of this year.

[6] The provision upon which the Crown relies is s. 490(9.1) which is titled, "Exception," and reads:

> Notwithstanding subsection (9), a judge or justice referred to in paragraph (9)(a) or (b) may, if the periods of detention provided for or ordered under subsections (1) to (3) in respect of a thing seized have expired but proceedings have not been instituted in which the thing may be required, order that the thing continue to be detained for such period as the judge or justice considers necessary if the judge or justice is satisfied
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> (a) that the continued detention of the thing might reasonably be required for a purpose mentioned in subsection (1) or (4); and
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> (b) that it is in the interests of justice to do so.

[7] Subsection (9) referred to in that paragraph is the subsection that essentially mandates the release of material that has been seized and for which there is not a further justification. Subsection (4), it is agreed, does not apply, but s-s. (1) does. It reads:

> Subject to this or any other Act of Parliament, where, pursuant to paragraph 489.1(1)(b) or subsection 489.1(2), anything that has been seized is brought before a justice or a report in respect of anything seized is made to a justice, the justice shall,
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> (a) where the lawful owner or person who is lawfully entitled to possession of the thing seized is known, order it to be returned to that owner or person, unless the prosecutor, or the peace officer or other person having custody of the thing seized, satisfies the justice that the detention of the thing seized is required for the purposes of any investigation or a preliminary inquiry, trial or other proceeding; or
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> (b) where the prosecutor, or the peace officer or other person having custody of the thing seized, satisfies the justice that the thing seized should be detained for a reason set out in paragraph (a), detain the thing seized or order that it be detained, taking reasonable care to ensure that it is preserved until the conclusion of any investigation or until it is required to be produced for the purposes of a preliminary inquiry, trial or other proceeding.

[8] The task, as I see it, is to consider whether the continued detention of these items is necessary on the basis that they might reasonably be required for a purpose relating to the investigation of the crime. The Crown has indicated that there is a nexus between the items and a suspicion relating to the commission of the offence. I emphasize that it is the most serious of offences, a murder of a small child, and that in weighing the interests of justice, I consider, as well, that the material has been unlawfully held for some time and that the police offer no satisfactory explanation for its continued possession except that they require it now for further investigation until September.

[9] I also take account, however, of the fact that there appears to be no compelling interest beyond the interests of the applicant, C.G., in the possession of his own property for the material to go back immediately. That is a strong and compelling interest in ordinary circumstances. It is an interest that should not likely be interfered with. It is an interest that the court should not countenance the police transgressing, except for very good cause. I do not underestimate the importance of C.G.'s rights to his own property, but I am satisfied on the basis of what I have been advised and without having to resort to the material seized, that the nature of the investigation and of the crime are such that there is an articulable reason why this

material should be retained and examined, and the court should be very careful about releasing it without it being so examined.

[10] I am satisfied on the basis of what I have been advised that in this case the continued detention of that material might reasonably be required for a purpose mentioned in s. 1, and I am also satisfied that weighing the interests of C.G. and his property and the interests of the police and society in the investigation and detection of serious crime, that in this particular case under that section, the order I ought to make is one that permits the Crown to further detain the material until September -- what date?

[11] MR. REITHMEIER: 1st, My Lord.

[12] THE COURT: September 1st --

[13] MR. REITHMEIER: Yes.

[14] THE COURT: -- 2016, and I so order it. Anything else?

[15] MR. REITHMEIER: Yes, My Lord, I do not have a written order form to that effect prepared. I would simply seek your leave to file it as a desk order with my friend advising whether he wishes to approve it as to form or not?

[16] THE COURT: You will approve it as to form if it is in proper form?

[17] MR. KENT-SNOWSELL: I shall, yes.

[18] MR. REITHMEIER: Okay.

[19] THE COURT: Then you can enter it as a desk order, and the last thing I guess I should say is I will make the order that is not opposed, that the material sealed by Madam Justice Brown -- I do not see the date she did so here, but that was sealed until today's date will continue to be sealed until further order of the court.

[20] MR. REITHMEIER: Yes, that was the 11th of --

[21] THE COURT: All right.

[22] MR. REITHMEIER: -- April it was made. The application, My Lord, was for an order to seal all material filed in support of and resulting from this application.

[23] THE COURT: As well?

[24] MR. REITHMEIER: Yes.

[25] THE COURT: In addition to that?

[26] MR. REITHMEIER: Yes.

[27] THE COURT: All right, any problem with that?

[28] MR. REITHMEIER: The exception I would --

[29] THE COURT: All right.

[30] MR. REITHMEIER: The exception I would seek, My Lord, is that for whatever reason there is not a volume of case law with respect to the section and I will ask for approval for these reasons to be prepared. You have obviously named C.G. on several occasions in the judgment.

[31] THE COURT: Yes.

[32] MR. REITHMEIER: So what I would suggest is that there be an exception to the sealing order with respect to the judgment, but that Your Lordship make a direction that C.G.'s name and that of --

[33] MR. KENT-SNOWSELL: C.J.

[34] MR. REITHMEIER: -- C.J. be either referred to by initials or just as person A.

[35] THE COURT: That is fine. That is fine. They can be substituted by initials.

[36] MR. REITHMEIER: Thank you, and then I would seek leave to distribute that as judicial precedent once prepared?

[37] THE COURT: This is a judicial precedent?

[38] MR. REITHMEIER: I believe so.

[39] THE COURT: Then the one thing I will say in addition to that is that I reserve the right -- I expect to receive a copy and I reserve the right to clean it up for grammar or dangling sentences and things of that nature.

[40] MR. REITHMEIER: Very well.

[41] THE COURT: All right.

[42] MR. REITHMEIER: Then, with that proviso, I have your leave, then, to seek -- to do what I seek with it?

[43] THE COURT: Yes, that is right.

[44] MR. REITHMEIER: Thank you, My Lord.

[45] THE COURT: I should include, I suppose, a disclaimer that it is done off the bench at 4:10.

[46] Thank you, both.

"McEwan J."