File No: 128601
Registry: Vancouver

In the Provincial Court of British Columbia

IN THE MATTER OF A SEARCH WARRANT ISSUED MARCH 12, 2002, TO SEARCH THE PREMISES OF SWEET ENTERTAINMENT GROUP, 2ND FLOOR, 1624 FRANKLIN STREET, VANCOUVER, BRITISH COLUMBIA AND APPLICATIONS PURSUANT TO S. 490 OF THE CRIMINAL CODE RSC 1985 C-46

AND

SWEET PRODUCTIONS INC.
d.b.a. SWEET ENTERTAINMENT GROUP

Applicant

AND

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA

Respondent

RULING
OF
THE HONOURABLE JUDGE BRUCE

COPY

Crown Counsel:	**M. Mahoney**
Defence Counsel:	**P. Kent-Snowsell**
Place of Hearing:	**Vancouver, B.C.**
Date of Judgment:	**June 6, 2003**

[1] THE COURT: I have reviewed the affidavit material that was filed by both the applicant and the respondent, the Crown in this case; as well as the authorities that were cited in respect of your position, and I have come to the following conclusions.

[2] Firstly, if the Crown's letter of April 16th, 2003 to Mr. Kent-Snowsell can be regarded as an application to extend the detention order with regard to the items seized from his client on the 13th of March 2002, it is out of time. The detention order of Judge Warren expired on the 13th of March 2003. An application to extend the detention of the items seized must be filed prior to the expiry of the order, and that proposition is confirmed by the decision in ***R. v. Hickey*** [2003] decision of the New Brunswick Queens Bench Court.

[3] Further, because the items seized have now been detained for over one year, only a superior court judge has jurisdiction to entertain an application for further detention; that is, even if the application were in time I do not have jurisdiction. That proposition is supported by my interpretation of s. 490(3)(a) of the *Criminal Code*.

[4] Now, if I am wrong in these conclusions, it is my view that the Crown has failed to satisfy the onus resting upon it to justify a further detention of the items seized. There is

no real complexity to the case such as would require further time beyond a year for review. It is merely a question of allocating the resources to the imaging of the hard drives.

[5] There is an onus on the police to proceed with due diligence in its examination of material seized under a warrant. They have failed to do so in this case. No order is, therefore, justified. I also relied upon ***R. v. Bromley***, and the comments therein by Judge Warren, and that decision is reported at 2002 BCJ Number 159, a decision of our Supreme Court.

[6] These findings or conclusions do not, however, apply to the items that are the subject of charges as proceedings have been instituted in regard to this material within the meaning of s. 490(3)(b) of the *Criminal Code*. The Crown is entitled to detain without any application any item or material that may be required to prove the charges against an accused. However, it is not just any material that may be so detained. Only material that is potentially relevant to a charge laid against an accused may be retained by the Crown in its original form. The Crown is not entitled to detain automatically any item or material that is not the subject of charges.

[7] The original material on the hard drive seized present a

different problem. Essentially it is not an application for further detention that the Crown makes in regard to this material. It is a question of whether the court may return this material to the person from whom it was seized because their possession of this material was lawful. Section 490(9)(c) provides -- and I am summarizing, "where a justice is satisfied the periods of detention have expired and proceedings have not been instituted in which the items may be required, [both of which have been satisfied in this case] she shall order the items returned to the person from whom they were seized, if their possession is lawful."

[8] Thus, under this section I am not dealing with an application by the Crown for further detention, but addressing a dispute over whether possession in the hands of the applicant is lawful.

[9] The police say the original production material and the hard drive is obscene, but no charges will be forthcoming because of the sheer volume of this material. The fact that the police say the material is obscene does not make it so. The onus rests with the Crown to establish on the balance of probabilities, under this section, that the material is obscene and thus possession of it would be unlawful in the hands of Sweet Productions. To facilitate a proper

determination of this matter I will retain jurisdiction to decide if the material is obscene.

[10] I am going to set the following parameters for the hearing of this issue to ensure it can be done expeditiously and fairly to the parties. I order that the Crown and the applicant divide the video productions into categories or general types, having the same or similar characteristics or subject matter. For each category the parties are to agree upon one production representative of the category to be viewed by the court, in whole or in part, in accordance with the discretion of the court. For each video a summary of its contents is to be prepared and submitted as evidence by consent. Based on this material and submissions of counsel, a determination will be made by the court as to whether all or any of it is obscene by category of video production. Those determined not to be obscene shall forthwith be returned to the applicant along with its hard drive. I will adjourn you to the Trial Coordinator to set a date for the hearing.

[11] Now, in respect of the orders I made on Friday, the 30th of May 2003, these stand with the following additions and amendments. One, the original paper records detained shall be returned forthwith to the applicant unless they may be required for proceedings instituted. For these records so

required, the police are ordered to make a photocopy of each and return these to the applicant before the close of business on June 13th, 2003.

[12] The original videos, DVD's, CD's and other formats containing photographic or video material shall be returned to the applicant forthwith, unless it may be required for proceedings instituted. For these originals so required the police shall make a copy of each and return them to the applicant before the close of business on June 27th, 2003.

[13] All equipment except hard drives containing material deemed to be obscene by the police shall be returned to the applicant forthwith. Hard drives with material against which proceedings have been instituted and which may be required for those proceedings may be retained, but copies of the material itself must be made and returned to the applicant before the close of business on June 27th, 2003, unless they are deemed to be obscene by the police and then, of course, they are going to be subject to the hearing process described above. For all hard drives containing material deemed to be obscene by the police, and which are not required for proceeding instituted, they will be subject to a hearing conducted before me as described above.

[14] In regard to personal information concerning a witness or

a potential witness in any proceedings instituted by the Crown, the applicant is entitled to the return of this information provided the individual has given written consent. Where the individual denies consent, their denial must be submitted to the applicant in writing before the close of business on June 27th, 2003. If the Crown fails to comply with this time limit and has not successfully applied for an extension, it shall return the said personal information to the applicant forthwith.

(RULING CONCLUDED)