
CANADA / JUDGMENT

R. v. Brade

2013 BCSC 2095

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Supreme Court of British Columbia

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2013 BCSC 2095 R. v. Brade

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Brade,

2013 BCSC 2095

Date: 20131118

Docket: 33834

Registry: Prince George

Regina

v.

Brett Kirby Brade

Before: The Honourable Mr. Justice Meiklem

Voir Dire Ruling on the Sufficiency of

Information to Obtain a Search Warrant

Counsel for Director of Public Prosecutions:

M.L. Ahrens

Counsel for the Accused:

R.J. Climie

Place and Date of Trial:

Prince George, B.C.

November 4 & 5, 2013

Place and Date of Judgment:

Prince George, B.C.

November 18, 2013

- [1] The accused has applied pursuant to Charter s. 24 [2] for exclusion from evidence of all items and information seized from his residence on July 4, 2008, during the execution of a search warrant issued on that date by a provincial court judge. The search warrant is challenged on the basis that the Information to Obtain ("ITO") did not provide a sufficient basis for reasonable grounds to believe that specified offences were committed in May 2008, or that a search of the accused's residence would offer evidence of those offences. The accused asserts that the search was strictly a fishing expedition without grounds.
- [2] I pronounced a brief oral ruling to the effect that on review I found that the facts set out in the ITO were not sufficient to justify the issuance of the search warrant. I have not yet heard the arguments for and against exclusion because I acceded to counsel's request that these be deferred until the court had provided counsel with its detailed reasons for the ruling. These are those reasons.
- [3] The correct legal approach to reviewing the sufficiency of a search warrant was reiterated in *R. v. Campbell*, 2011 SCC 32, at para. 14:
- [14] The relevant legal principles are not at issue in this appeal. *Juriansz J.A.* correctly followed the approach to reviewing the sufficiency of a warrant application recently reviewed by this Court in *R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253. In order to comply with s. 8 of the Charter, prior to conducting a search the police must provide "reasonable and probable grounds, established upon oath, to believe that an offence has been committed and that there is evidence to be found at the place of the search" (*Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p.168). The question for a reviewing court is "not whether the reviewing court would itself have issued the warrant, but whether there was sufficient credible and reliable evidence" to permit an issuing justice to authorize the warrant (*Morelli*, at para. 40). In conducting this analysis, the reviewing court must exclude erroneous information from the ITO and may have reference to material properly received as "amplification" evidence (*R. v. Araujo*, 2000 SCC 65, [2000] 2 S.C.R. 992, at para. 58; *Morelli*, at para. 41). The accused bears the burden of demonstrating that the ITO is insufficient (*Quebec (Attorney General) v. Laroche*, 2002 SCC 72, [2002] 3 S.C.R. 708, at para. 68; *Morelli*, at para. 131).
- [4] The review focuses on the totality of information and not on examining facts in isolation from the overall context: *R. v. Saunders*, 181 C.C.C. (3d) 268 (NLCA), aff'd 2004 SCC 70.
- [5] In this case, there was no amplification evidence and the informant was not cross-examined.

- [6] I will begin with an examination of the form and content of the ITO sworn on July 4, 2008. The front page of the ITO is a partially pre-printed form that sets out the jurat on that page. The first page makes reference to an attached Appendix "A" describing the things to be recovered that "will afford evidence with respect to the commission of the above offences" and has a heading for Grounds of Belief under which is typed "see attached Appendix B". A box at the top of the form is checked to signify that the information is pursuant to s. 487 of the Criminal Code (the "Code").
- [7] There are pre-printed headings on one line of the form which invite the drafter to provide details of the offence, under: Offence Date, Place, Description, Section, and Act. Below the line containing those headings the following appears:

Distribution of Child pornography, contrary to Section 163.1(1) of the Criminal Code of Canada

Procuring, contrary to Section 212(1)(a) of the Criminal Code of Canada

Corrupting Morals, contrary to Section 163(1)(a) of the Criminal Code of Canada

- [8] Obvious omissions are the dates and places of the alleged offences, although Appendix B provides facts from which an offence date of May 1, 2008 might be inferred. There is an error in specifying the charging section of the Code for distribution of child pornography, which is properly s. 163.1(3). Section 163.1(1) is a definition subsection.
- [9] I note that in paragraph 6 of Appendix B, Corporal Garcia incorrectly cites a nonexistent s. 163.1(b) as the charging section, although by accurately citing and quoting s. 163.1(1)(b) as the relevant definition section in paragraph 3 of Appendix B, she appears to be aware of the distinction between offence sections and definition sections.
- [10] Defence counsel did not make much of these errors which can be considered minor in themselves, but these simple errors do reflect to some extent upon the thoroughness and diligence of the informant in preparing the ITO and to some extent the issuing judge in considering the ITO.
- [11] Before I continue with my summary of the ITO, it should be mentioned that the accused has not been charged with any of the May 2008 offences specified in the ITO and search warrant. He currently is standing trial on a four-count indictment sworn on May 30, 2011. Two counts on that indictment relate to a firearm seized at his residence on July 4, 2008; one count charges possession of child pornography on July 4, 2008, and one count charges him with accessing child pornography between June 1, 2008 and July 2, 2008. Appendix A to the ITO sets out the things that the informant, Corporal Garcia, swore would afford evidence with respect to the commission of the offences listed in the ITO. It is comprehensive and in boilerplate form, but includes computers and any information or data stored on computer media or on media capable of being read by a computer.

[12] Appendix B to the ITO sets out Corporal Garcia's Grounds of Belief. Paragraph 3 of that Appendix quotes the definition of child pornography set out in s. 163.1(1)(b) of the Code as follows:

any written material, visual representation or audio recording that advocates or counsels sexual activity with a person under the age of eighteen years that would be an offence under this Act;

[13] Paragraph 8 of Appendix B sets out Corporal Garcia's overview of the relevant facts of the offence as follows:

8. On June 11, 2008 Cpl. GARCIA received an e-mail from Detective 1526 Russ MITCHELL a member of the Vancouver City Police Vice Squad regarding an investigation initiating in Vancouver involving an individual from the Prince George area. The Complainant had been on an Internet chat line, identified as squirt.org communicating with the accused. The complainant had told the police that the person who he was chatting with was offering to sell a 14 year old male for sexual services.

[14] Paragraph 9 of Appendix B is lengthy and I will not quote it all, but I will quote subparagraphs (a) to (e), which set out the details of the complaint and the initial investigation:

9. On June 17, 2008, I obtained a copy of the Vancouver City Police Departments working file from the PRIME computer system. I reviewed the Vancouver City Police Department file number 2008-78834. The following is a brief overview:

- (a) On May 1, 2008 at 0930 hours the original complainant, Kurt LUZNY, (LUZNY) reported to Vancouver City police that he had been on a gay man's chat site known as squirt.org. LUZNY began talking to a person with the handle "zapattack". "zapattack" told LUZNY that he had a 14 year old male for sale for sex. LUZNY told the police dispatcher that "zapattack" told him that he was staying at the Best Western located on Granville Street in Vancouver. No room number was provided.
- (b) LUZNY told the Vancouver City Police dispatcher that "zapattack" told him that he was getting men to pay for sex with the 14 year old.
- (c) "zapattack" described himself as being a white male, 33 years old 5'9" and average build.
- (d) On May 02, 2008 at 1025 hours LUZNY contacted Vancouver City Police Dispatcher a second time. LUZNY wanted to report that he had been in touch with the same suspect in the same chat room.
- (i) LUZNY asked "zapattack" if the boy was an escort. "zapattack" replied "no a family friend". "zapattack" stated that he's loving it down here and they were planning on staying until Sunday (May 04, 2009) .

- (ii) "zapattack" described the hotel as a Best Western located one block from Davie and Granville Streets near the bridge and the hotel had a White-Spot restaurant located in it. "zapattack" advised LUZNY that he was in room # 602.
 - (iii) "zapattack" provided a minimal description of the boy indicating that he had a skater build with long hair.
 - (iv) "zapattack" stated he watched the boy have sex with another male last night and was letting him sleep until noon.
 - (v) "zapattack" told LUZNY he was keeping the boy there for LUZNY to come and have sex with. LUZNY told police that he discontinued the conversation with the suspect as he had to attend to a business appointment.
 - (vi) LUZNY had no further conversation with the suspect and agreed to call police if there was anything further.
 - (vii) LUZNY stated that the chat line that he was on was to try and make new partnerships with other gay males. LUZNY did not want his present partner to know that he was visiting this site. LUZNY was reluctant to and has not yet provided a written statement to police.
 - (e) Vancouver City Police Constable Dhillon KAMALJIT VA 1941 (VA1941) attended to several hotels in the area, including the Best Western located on Granville and Drake Street in Vancouver. Room 602 was checked there was a male and female occupying the room. They did have a laptop computer with them but denied being in any chat rooms. The female was from Calgary, the male was from Vancouver. The couple had been there for one week and were to check out in the next half hour.
 - (i) Three other hotels in this area were checked. There was no one at any of the hotels checked that matched the description of the male and the 14 year old boy.
- [15] The remainder of paragraph 9 deals with Vancouver City Police Vice Squad investigation which confirmed, through counsel for the company operating the squirt.org website, that "zapattack" was associated with an e-mail address that further investigation revealed belonged to the accused. The squirt.org website only has access to information about a user's IP address during the time of the logon. The accused had registered the e-mail account in January 2007, and had access to it from four different IP addresses between January 2007 and May 2008. One of those IP addresses was identified by Shaw Communications as pertaining to the accused's address in Prince George and that IP address was used exclusively to access the Hotmail account from March 31, 2008 to May 22, 2008 and was so used on May 1, 2008.

- [16] Paragraph 10 of the Grounds of Belief set out in Appendix B recites how Corporal Garcia confirmed from the RCMP personnel records the accused's attendance at work as an auxiliary RCMP officer commencing at 19:00 hours on May 1, 2008 until the morning of May 2, 2008 and from 18:00 hours on May 2 to 05:00 hours on May 3, 2008. She confirmed his date of birth was March 10, 1965 and she confirmed his home address.
- [17] In paragraphs 11 and 12 of the Grounds of Belief, Corporal Garcia confirmed that CPIC records showed no criminal record or present charges. The corporal's PIRS check indicated ten files involving the accused, primarily as a complainant. Only one of those has any bearing on this application; the following description of that file is provided in subparagraph (iix) [sic]:

File 2005-18552 is an extortion file dated June 14, 2005. The file indicates that between the dates of June 14, 2004 and June 14, 2005, BRADE was in a relationship with a 19 year old male who had been harassing and threatening BRADE. BRADE confirmed that he had given the male money but was clear to say that it was not in exchange for sexual intercourse but was for food and spending money. Further review of this file indicates that the male later told BRADE that he was only 16 years old and wanted more money or he would share the fact that BRADE was a homosexual. The file was concluded by BRADE who stated that the harassment had ended and he no longer required police assistance.

- [18] Paragraph 13 continues from page 8 through to page 13 of the ITO Appendix B and recounts the results of Corporal Garcia's consultation with Dr. Matt Logan, described as the Operational Psychologist in the RCMP Behavioral Science Group, Major Crime Section. It is readily apparent that Corporal Garcia is not recounting her recollection of an oral consultation with Dr. Logan, but has incorporated prepared text authored by Dr. Logan at some point. Dr. Logan's references to other authors and studies appear throughout this section. The initial four pages of this section explain in generic terms deviant behavior and deviant sexual fantasy as the fuel for and the prime mover of sexual deviance.
- [19] Reference is made in this section to "Hebephiles/Ephebophiles (lovers of youth) - Individuals whose primary sexual attraction is to pubescent children." In paragraph 13(c), Dr. Logan, through Corporal Garcia, explained his definition of child pornography:

Child pornography can be behaviorally (not legally) defined as the sexually explicit reproduction of a child's image, voice, or handwriting--including sexually explicit photographs, negatives, slides, magazines, movies, videotapes, audiotapes, and handwritten notes. In essence, it is the permanent record of the sexual abuse of a child. The only way child pornography can be produced is through child victimization. Child pornography exists primarily for the consumption of predatory child molesters. If there were no child molesters, there would be little child pornography other than that involving adolescent children (Lanning, 2001).

- (i) Unlike child erotica, child pornography requires a child to be victimized. A child had to be sexually exploited to produce such material. Children used in pornography are desensitized and conditioned to respond as sexual objects. They are frequently ashamed of their portrayal in such material. They must deal with the permanency, longevity and circulation of such a record of their abuse.

[20] In subparagraph 13(g) on pages 12-13 of the ITO Appendix B, Corporal Garcia sets out Dr. Logan's opinion about the accused. That subparagraph reads, in its entirety:

- (g) THAT concerning Brett Kirby BRADE, Dr. Logan advises,

This is an individual who has an interest in adolescent boys (hebophile) and may be involved in sexual offending. It is certain that he at least has fantasy about sex with children (i.e. a 14-yr old boy). I would expect that fantasy is fed by either child pornography or actual sexual encounters (sexual assault) of adolescent and post-adolescent males. Although we have no evidence of that possession or of a sexual assault, it is my experience that the fantasy and thinking associated to this individual would involve child pornography acting as a "facilitator" to hands-on offending and that there is a high likelihood of possessing the material on a personal computer.

[21] The accused argues that Dr. Logan's opinion in respect of this accused should be excluded on review on a proper application of the comments of Fish J. for the majority of the court in *R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253, in paras. 79-86, which read as follows:

[79] To permit reliance on broad generalizations about loosely-defined classes of people is to invite dependence on stereotypes and prejudices in lieu of evidence. I am thus unable to agree with Justice Deschamps (at para. 162) that the ITO's claims in this regard could properly be relied on by the justice.

[80] Justice Deschamps supports her reliance on claims about the behaviour of "types of offenders" by citing child pornography cases in which courts, in her view, have accepted the tendency of certain kinds of child pornography offenders to collect many images and store them over long periods of time (para. 162). These decisions are rather in favour of the conclusion that an evidentiary basis is required to support a finding as to the characteristics or propensities of child pornography offenders.

[81] That some child pornography offenders do seek out and hoard illegal images is, of course, neither surprising nor helpful in determining whether reasonable and probable grounds exist in a particular case. Still, it is not the role of courts to establish by judicial fiat broad generalizations regarding the "proclivities" of certain "types" of people, including offenders. Matters of this sort are best left to be established by the Crown, according to the relevant standard -- in this case, reasonable and probable grounds for belief. As suggested earlier, moreover, courts must be particularly wary of endorsing such generalizations when, as in this case, the crime alleged is the subject of intense emotional responses and widespread condemnation, and the temptation to rely on stereotype rather than evidence is therefore especially dangerous and strong.

[82] An evidentiary basis is required as well for a finding of reasonable and probable grounds to believe that the alleged offender belongs to the class of child pornography offenders whose characteristics or propensities are mentioned in the ITO. This view of the law was adopted in *R. v. Fawthrop*, (2002), 161 O.A.C. 350, the only Canadian appellate decision cited by Justice Deschamps. My colleague finds in that decision support for her suggestion that general opinions on the propensity of child pornography offenders to collect and hoard child pornography material can give rise to reasonable and probable grounds for issuing search warrants. With respect, I read *Fawthrop* differently. As noted earlier, *Fawthrop* affirms the need for evidence both as to characteristics of an identified class of child pornography offenders, and as to the offender's membership in that class.

[83] As Borins J.A., speaking for the majority of the Ontario Court of Appeal, explained in *Fawthrop* (at para. 42):

In my view, the trial judge's finding, based on the testimony of Det. Const. Pulkki, that the police were engaged in a "fishing expedition" for items of child pornography leads to the conclusion that the breach of the appellant's s. 8 Charter rights was serious. It appears from the record that after she interviewed A.Y. and members of her family, Det. Const. Pulkki suspected that the appellant was a pedophile, which led her to further suspect that he might possess items of child pornography. To be fair to her, she realized that her suspicion was insufficient to enable her to obtain a warrant. She was aware that it was necessary that she have reasonable grounds to believe that child pornography would be located in the appellant's home. She sought the opinion of Dr. Collins in the hope that it would tip the scales from suspicion to reasonable grounds. As the trial judge recognized, the opinion of Dr. Collins failed to do so. He recognized the fatal flaw in the opinion. Although Dr. Collins opined that it was not uncommon for pedophiles to collect items of child pornography, he was unable to form an opinion as to whether the appellant was a pedophile. Without that link, Det. Const. Pulkki was in the same position as she had been before she contacted Dr. Collins. All she had was a suspicion that the appellant might be in possession of child pornography. ... This resulted in an unauthorized search for those items by means of what the trial judge correctly labelled a "fishing expedition". This is what the search warrant process is meant to prevent.

In the result, the evidence seized under the warrant was excluded pursuant to s. 24(2) of the Charter.

[84] In short, in most of the cases cited by my colleague, the original warrant application included relatively detailed descriptions of the habits of a specific class of child pornography offender. They thus provided evidence sufficient to establish a credible profile of a class of child pornography collectors and their typical behaviours, and a proper factual foundation for concluding that the alleged offender belonged to that class. This is not our case.

[85] Here, even if the impugned generalizations are accepted, the ITO as amplified does not reasonably permit the inference that the accused was the "type of offender" who sought out illegal pornography and stored it. This requirement was well explained in *United States v.*

Weber, 923 F.2d 1338 (9th Cir. 1990)), at p. 1345: "[I]f the government presents expert opinion about the behavior of a particular class of persons, for the opinion to have any relevance, the affidavit must lay a foundation which shows that the person subject to the search is a member of the class".

- [86] Two suspiciously-labelled links in the "Favourites" menu do not suffice to characterize a person as an habitual child pornography offender of the type that seeks out and hoards illegal images. Indeed, the fact that the bulk of the pornographic material that Mr. Hounjet observed at the accused's house was perfectly legal adult pornography suggests that the accused did not have a "pronounced" interest in child pornography at all, contrary to my colleague's assertion (paras. 177 and 179).
- [22] The crown distinguishes this case from Morelli on the basis that Dr. Logan did, unlike Dr. Collins, conclude that the accused was a member of a class of offender, namely a hebophile. I agree that there is that factual distinction and, of course, it is not for a reviewing court to re-weigh an expert opinion if it is one that could have been relied upon by the authorizing judge.
- [23] The accused argued that Dr. Logan's expressed certainty about the accused having fantasy about sex with children is built entirely upon the assumption that the content of Mr. Luzny's complaint to the Vancouver police is entirely true. Dr. Logan did not state the factual basis or reasoning for his conclusion, but it obviously also depends entirely upon interpreting the alleged conversation as manifesting fantasy because the police failed to find a person fitting the description of "zapattack" or a 14-year-old at a location that appeared to fit the description given, combined with the fact that evidence places Mr. Brade in Prince George as of the evening of May 1, 2008.
- [24] The accused argues that Mr. Luzny's complaint is analogous to a Crime Stoppers tip and, absent any corroboration, does not meet the threshold of reasonable and probable grounds to believe. This reliability issue applies both to the consideration of belief in the offences being committed and the foundation of Dr. Logan's opinion that the facts make it a certainty that the accused "at least has fantasy about sex with children (i.e. a 14 year old boy)".
- [25] The Crown argues that Mr. Luzny is not analogous to a Crime Stoppers tipster because he identified himself and had a plausible explanation for not wanting to be involved. The Crown submits further that Mr. Luzny's information is corroborated to some extent by the confirmation that there was a real person using the handle "zapattack" on the squirt.org website.
- [26] On this point, I agree with defence counsel that Mr. Luzny is closely analogous to an anonymous tipster. Although he identified himself, he declined to provide a written statement or become further involved. Plausible excuse or not, this is tantamount to remaining anonymous. The fact that there was at some time a correspondent at squirt.org named "zapattack" does nothing to corroborate the substance of his complaint. There is no other evidence indicating that "zapattack" visited Squirt.org on May 1 or May 2, 2008 or any

other specific date. All that the existence of "zapattack" as a squirt.org user confirms is that Mr. Luzny has visited squirt.org at some time and identified another visitor by that chat room handle.

- [27] The weight to be attached to an informer's tip was discussed by Wilson J. in the comparable context of justifying a warrantless search in *R. v. Debot* (1989), 52 C.C.C. (3d) 193 at p. 215:

In my view, there are at least three concerns to be addressed in weighing evidence relied on by the police to justify a warrantless search. First, was the information predicting the commission of a criminal offence compelling? Secondly, where that information was based on a "tip" originating from a source outside the police, was that source credible? Finally, was the information corroborated by police investigation prior to making the decision to conduct the search? I do not suggest that each of these factors forms a separate test. Rather, I concur with Martin J.A.'s view that the "totality of the circumstances" must meet the standard of reasonableness. Weaknesses in one area may, to some extent, be compensated by strengths in the other two.

- [28] In *R. v. Jacobsen* (2006), 207 C.C.C. (3d) 270, cited by defence counsel, the principal issue was the weight to be given to a Crime Stoppers tip on the issuance of a warrant. The court found that the tip could not form part of the grounds for obtaining a warrant because it was not compelling, the anonymous informer was not known to be credible, and the police were able only to confirm some of the details. The facts are not fully analogous to our case in that the tipster in *Jacobsen* only suspected the criminal activity, but it is instructive that the Ontario Court of Appeal found the tip provided no additional grounds for obtaining the warrant over and above the police investigation which it initiated.

- [29] In the case of Mr. Luzny's information, he was in effect reporting first-hand the elements of an apparent procuring offence as the complainant. His information was presumably compelling enough by its nature to stimulate a police search with some urgency, but it is not compelling in the sense that it contains details making it sound possible or furthering the Crown's surviving theory that Mr. Luzny was unwittingly subjected to a conversation that was fuel for a fantasy.

- [30] When the police were unable to locate the described offender or a 14 year old boy, their focus shifted to investigating the identity of "zapattack". For some reason unexplained in the ITO or in this voir dire, the police do not appear to have questioned the credibility of Mr. Luzny. If in fact the police believed that a record of the chat room conversations would reside on the computers of the chat line participants, an obvious and easy means of verifying his credibility and corroborating his information would have been to ask the complainant to provide a copy of his own computer records. This could have been arranged without offending his purported desire for confidentiality vis a vis his partner, and without requiring a written statement from him. There is no evidence that such a request was made. I find it remarkable that the question of what evidence of the commission of the offences could be afforded by Mr. Luzny's computer is not mentioned in the ITO. One wonders how the evidence is expected to be on Mr. Brade's computer if it is not on Mr. Luzny's.

- [31] There is, of course, no statutory requirement of proving investigative necessity in respect of search warrants, as there is in the case of wiretap authorizations. However, if it is proposed to seek a search warrant on the strength of informer's tips, the case law requires the police to attempt to assess the credibility of informers and to make reasonable attempts to corroborate the information that they provide.
- [32] In this case, the various police departments did a focused and very thorough job of investigating the identity of "zapattack". The apparent lack of focus on Mr. Luzny's credibility or the corroboration of his complaint means that he remains an informant of unknown reliability whose information was uncorroborated in any meaningful way.
- [33] When directed to the apparent contradiction of on the one hand believing that the accused's chat room offer supported a charge of procuring, and on the other hand tendering Dr. Logan's implied conclusion that the offer was false and simply manifested a fantasy, Crown counsel conceded that the ITO as a whole did not support a reasonable belief that the alleged procuring offence had occurred. The issuing judge obviously did not have the benefit of such a concession, and the contradiction that compels it may not have been obvious, in part because the ITO does not expressly reveal the process by which Dr. Logan reached his conclusion that Mr. Brade is a hebophile.
- [34] Turning to the remaining charges, it is Crown counsel's position that the alleged distribution of child pornography consisted of the accused simply talking to Mr. Luzny on the chat site and advocating or counseling illegal sexual activity with a young person.
- [35] That position raises several obvious questions in respect of which the ITO presents no evidence. There is no evidence as to whether the talk on the chat site was by text message or voice conversation. The ITO uses words such as "talking", "told", "asked", "stated", "conversation", which normally refer to oral communications, but may be referring to text messaging. The distinction is significant because, although there may be a viable argument that a text message could fit the description of being written material, a live oral conversation could not be argued to fit the definition in s. 163.1(1)(b) of the Code. The distinction also bears on the likelihood of there being any evidence of the chat itself on the computers used by Mr. Luzny or "zapattack", assuming the chat occurred.
- [36] I asked Crown counsel to identify any information in the ITO that could support a reasonable belief that the accused's computer would retain a record of the content of the alleged chat. The Crown's position is that the grounds for that belief consist of Dr. Logan's opinions on the certainty of the accused having the fantasy described and the likelihood that he would collect child pornography on his computer, combined with the proposition that the alleged chat content fits the definition of child pornography.
- [37] I have previously alluded to the issue of the reasonableness of deriving certainty of the described fantasy from the alleged communications on a hookup chat site for gay men, considering that Mr. Luzny, as the only other participant in the conversation, obviously understood it to be an offer to procure rather than a manifestation of a fantasy. He and the

Vancouver Police Department acted accordingly. One might think that to be a bizarre context and manner in which to express a fantasy which was so easily mistaken as real, particularly by an auxiliary RCMP member.

- [38] Quite apart from that issue, Dr. Logan's opinion uses a behavioral definition of child pornography which clearly does not encompass the targeted communication in this case. To reiterate, his definition is:

Child pornography can be behaviorally (not legally) defined as the sexually explicit reproduction of a child's image, voice, or handwriting--including sexually explicit photographs, negatives, slides, magazines, movies, videotapes, audiotapes, and handwritten notes. In essence, it is the permanent record of the sexual abuse of a child. The only way child pornography can be produced is through child victimization. Child pornography exists primarily for the consumption of predatory child molesters. If there were no child molesters, there would be little child pornography other than that involving adolescent children (Lanning, 2001).

- (i) Unlike child erotica, child pornography requires a child to be victimized. A child had to be sexually exploited to produce such material. Children used in pornography are desensitized and conditioned to respond as sexual objects. They are frequently ashamed of their portrayal in such material. They must deal with the permanency, longevity and circulation of such a record of their abuse.

- [39] Although the Crown may have had an argument that the alleged communication fell within the s. 163.1(1)(b) definition, it is clear that Dr. Logan's definition does not include that component. Dr. Logan's opinion expressed in subparagraph 13(g) as to the likelihood of child pornography being on the accused's computer quite simply does not address the specific facts of this case, and it would be improper for the authorizing judge to extrapolate or generalize Dr. Logan's opinion to cover the facts of the case, particularly in light of the paucity of unambiguous evidence cited in support of his diagnosis of the accused as a hebophile.

- [40] If the targeted evidence in this case was simply child pornography as defined by Dr. Logan, that was being sought in support of a charge of possessing or accessing pornography, Dr. Logan's opinions could have been a sufficient basis for a reasonable belief that such pornography would be found on the accused's computer, notwithstanding my own view of the reliability of his diagnosis of Mr. Brade. Such was not the case, however.

- [41] The distribution offences were very specific to the May 1, 2008, and possibly May 2, 2008, chat room conversations. Given that Dr. Logan's opinions do not touch on either these offences or the likelihood of chat room conversations being hoarded, and given that no evidence is provided as to the technical aspects of storing or recording chat room conversations on a computer, or of the habits of pornography consumers in respect of chat room conversations, there is no basis set out in the ITO for a reasonable belief that a search of Mr. Brade's computer would afford evidence of the alleged offences. All that remains is suspicion, speculation and conjecture.

- [42] For these reasons, I conclude that the ITO did not provide sufficient credible and reliable evidence to support a reasonable belief that the named offences were committed or that there was evidence of same at the accused's home. The accused has met the burden of establishing the insufficiency of the ITO on a balance of probabilities. The search warrant is ruled invalid.
- [43] The search was in effect a warrantless search and unreasonable in the circumstances. The accused has established a breach of his s.8 Charter rights on a balance of probabilities.
- [44] We will proceed to hear the arguments for and against exclusion of the evidence seized on the execution of the invalid warrant as a remedy under the Charter, s. 24(2).

"I.C. Meiklem J."

MEIKLEM J.

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