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Criminal

Quebec Appeal Court issues guidelines over access to sensitive evidence in child porn case

By **Luis Millán**

(July 19, 2023, 12:15 PM EDT) -- A defendant's right to make full answer and defence was not violated by strict conditions of access to evidence proposed by the Crown in a case dealing with child pornography, held the Quebec Court of Appeal in a decision replete with guidance for the lower courts, lawyers and experts.

The decision, viewed as reasonable and judicious by criminal lawyers, reiterates that the prosecution has the discretion to determine the timing and manner of disclosure of evidence; reaffirms that certain elements of evidence in child pornography cases must not be reproduced or provided to the defence; and outlines numerous factors the courts must take into consideration when limiting the conditions of access to evidence of child pornography and delineating the conditions of its disclosure to defence counsel.

The reasons provided by the Quebec Appeal Court in *Abel c. R.,* 2023 QCCA 824, issued on June 22, "seem irreproachable in law," remarked Julien Grégoire, a Quebec City criminal lawyer with Gagnon & Associés, avocats. "It is clear, particularly in matters of child pornography, that the disclosure of evidence must be rigorously circumscribed," said Grégoire.

Julien Grégoire, Gagnon & Associés

According to Michel LeBrun, the former president and founding member of the criminal defence lawyers' organization Association Québécoise des Avocats et Avocates de la Défense (A.Q.A.A.D.), just as an accused in a drug seizure case does not have "unfettered access" to evidence nor should an accused in a child pornography case. "As a defence lawyer, it's obviously important to be able to make full answer and defence but you have to accept that conditions have to be imposed" in such cases, said LeBrun of Lacoursière LeBrun LLP in Trois-Rivières.

The Appeal Court decision is important because it is the first time that an appellate court in Canada

has clearly "framed the terms and conditions of access to child pornography by an accused for defence purposes," said Jessy Heroux, a Montreal criminal lawyer with Battista Turcot Israel LLP, who successfully petitioned the Appeal Court to issue guidelines. Heroux represented the Canadian Centre for Child Protection, a national charity that was an intervener in the case.

Jean-Baptiste Abel, a former military computer technician, was found guilty by a jury in February 2020 on counts of possessing, distributing and accessing child pornography. Quebec Superior Court Justice Carl Thibault, who viewed some of the images and described them as "degrading, disgusting and beyond imagination," sentenced Abel in July 2020 to 30 months of imprisonment.

Abel appealed, arguing that the trial judge erred by unduly restricting access to the evidence held by the prosecution, by finding admissible an out-of-court statement made in the presence of the police, and by giving the jury erroneous instructions.

Jessy Heroux, Battista Turcot Israel LLP

In a decision that Heroux maintains "recognizes the importance of victims and their contribution to the issues" at stake, the Appeal Court dismissed his arguments. The Appeal Court held that Abel's right to make full answer and defence was not breached by the conditions of access to the evidence. Abel filed motions to obtain a complete copy of all the exhibits, including those containing child pornography in order to analyze the evidence and submit it to an expert "to fully understand the details relating to this information and the technical data associated with this information."

The motions were denied. Instead, the Crown proposed that Abel and his expert consult the evidence at the offices of the provincial police force, the Sûreté du Québec, to extract data that did not contain child pornography for analysis. Abel turned down the proposal.

"Sometimes, and I would even say generally, elements of child pornography should not be copied or otherwise handed over to the defence at this stage or even later," held Quebec Appeal Court Justice François Doyon in reasons that both Justices Simon Ruel and Peter Kalichman concurred with. The possession of this kind of evidence is prohibited, and its dissemination must "obviously" be completely restricted, added Justice Doyon. Even the most stringent undertaking signed by a lawyer may not be enough in some cases as the accused "may then wish to examine them himself and a computer error" leading to their release is "always" possible, noted Justice Doyon.

He also pointed out that the dissemination of child pornography, even inadvertently, fuels sexual violence because the child victim "lives with the knowledge that others may have access to the films or images, which may resurface at any time in his or her life," as was underlined by the Supreme Court of Canada in *R. v. Friesen*, 2020 SCC 9.

Abel should have at the very least tried the Crown's proposal, consult the evidence on the premises of the provincial police force, ensure that it was done in a setting where confidentiality between him and his lawyer were protected, and if necessary make further requests. "The appellant's unqualified and unconditional demand for a mirror copy of the evidence was limited to invoking his right to a full and complete defence without any concrete arguments and without taking into account the other

interests at stake, in particular those of the young victims and the justice system," said Justice Doyon.

Acceding to a request by the Canadian Centre for Child Protection, Justice Doyon delineated three general factors the courts must take into account when reviewing the conditions of access to child pornography evidence, and the terms of its disclosure to evidence.

The courts must first take into consideration the harm likely to be caused to the victims. It does not matter whether the victims are known or not, said Justice Doyon. "It is important to bear in mind the damage to their dignity in the event of dissemination and, sometimes, even in the event of simple access to the images," said Justice Doyon. Courts must also take into account the "real danger" of accidental dissemination that could end up in the hands of third parties.

"Although a judicial officer undertakes to keep everything confidential, the fact remains that accidental computer manipulation can occur," added Justice Doyon. Finally, the courts must precisely define the terms of access, weigh the consequences and ensure that the defence has "sufficient" access to the evidence to preserve its right to defend itself. Justice Doyon recommends the courts ask themselves the following questions: Who will have access to the evidence? Where? Can copies be made? Should undertakings be required? How should they be transported and transferred, if necessary? How should the duties and responsibilities of each party be described and defined?

On top of these factors, Justice Doyon held that the number of persons who may have access to the evidence should be limited as much as possible. Though "it goes without saying," the accused and his lawyer have this right, it remains that the terms and conditions must be determined, which in turn requires their collaboration and co-operation.

"The mere requirement of a signed undertaking by him or her to respect the terms and conditions will not always suffice," added Justice Doyon, without going into specifics.

The accused also has the burden of demonstrating the need for third parties to gain access to the evidence, said the Appeal Court. "Only a qualified expert should have access to the evidence to prevent an unqualified third party, not in a position to respond adequately to the defence's concerns, from gaining access to evidence, access to which, I repeat, constitutes an offence outside the judicial context," said Justice Doyon. Even then, an expert must sign an undertaking to comply with the strict conditions which may include the need to use a strong password, the prohibition of making additional copies and the obligation to conduct the analysis of a device without being connected to the Internet.

Michel LeBrun, Lacoursière LeBrun LLP

Evidence should be consulted in police premises, and the transport of exhibits outside these sites should be authorized only if the accused demonstrates its need, said the Appeal Court. Copies should not be made unless a review of factors justifies it. For instance, if it is established that an expert is unable to carry out his assessment within police quarters, then copies may be made, but they should be encrypted, stored securely and must ensure that no other person other those authorized have access to it. Once the examination is completed by the expert, the evidence must be returned to police within the time limit set out in the terms and conditions.

"The guidelines proposed by Justice Doyon illustrate the delicate nature of disclosure in this area,"

noted Grégoire. "In and of itself, the accused is not denied access to the evidence, but is given a concrete opportunity to have access to it, subject to restrictions that, in my view, seem entirely justified."

LeBrun is "comfortable" and "not surprised" by the parameters set out by the Appeal Court. The decision draws from other decisions, reiterates certain principles and fine-tunes guidance over access to evidence, said LeBrun. "E-discovery, by its very nature, is highly sensitive, and it raises legitimate security issues," said LeBrun.

These guidelines will likely promote a degree of uniformity and consistency, said Heroux. "They will enable those involved in the judicial system to better balance the right to a full and complete defence against the harm inherent in the possession of this type of material, with the emphasis on security, the risk of dissemination and the impact on victims," added Heroux.
