CANADA
PROVINCE OF NOVA SCOTIA

CASE NO. 2028419, 2028420, 2028421

IN THE PROVINCIAL COURT

Cite as: R. v. Seguin, 2014 NSPC 119

HER MAJESTY THE QUEEN

versus

GREGORY LEO SEGUIN

DECISION RE S. 601(4.1) and DIRECTED VERDICT MOTIONS

HEARD BEFORE: The Honourable Judge Frank P. Hoskins

PLACE HEARD: Provincial Court
Dartmouth, Nova Scotia

DATE OF DECISION: January 21, 2014

COUNSEL: Peter Dostal — Crown Attorney
Robert Stewart, QC — Defence Attorney

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HOSKINS, J.P.C. (Orally):

At the end of the Crown's case, the court was faced with two motions: a Crown motion to amend the date of *Information* pursuant to section 601(4.1) of the *Criminal Code*, and a defence motion for a directed verdict.

Given the nature and timing of these motions, I will consider their merits in the proper order. First, I will address the Crown motion to amend the dates specified in the *Information*, as that motion was made before the Crown closed its case. Following that I will then consider the defence motion for a directed verdict.

Before I address these issues, I wish to express my gratitude for the comprehensive and well written briefs submitted by counsel, as well as their clear and able oral submissions. I must say I appreciated that very much. It was very helpful. Thank you.

At the end of the Crown's case, Mr. Dostal, Crown counsel, made an application pursuant to section 601(4.1) of the *Criminal Code* to amend the *Information* by changing the specified date from March 2nd, 2009, to a range of dates between March 1st, 2009, and March 25th, 2009. Mr. Dostal provided written notice of this application to both the court and the defence before closing of the Crown's case, but after the trial commenced: after the Crown presented its evidence.

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There are two corollary issues which arise from the motion to amend the *Information*. They are as follows: First, whether or not the motion to amend the date of the alleged offences is required in this case, which turns on the question of whether time is an essential element of the offences. Second, if it is determined that the motion to amend the date of the alleged offences is required in this case, then the next issue is whether the proposed amendment would cause irreparable harm to the defence.

Having identified these issues, I will now address the relevant statutory provisions and the common law. Section 601 of the *Criminal Code* provides the court with authority to amend an *Information* to conform with the evidence. The criteria set out in this section and the governing interpretative case law must be considered. The relevant portions of section 601 read as follows:

> 601(2) Subject to this section a court may on the trial of an indictment amend the indictment or a count therein or a particular that is furnished under section 587 to make the indictment count or particular conform to the evidence where there is a variance between the evidence and:
>
> (a) a count in the indictment as preferred; or
>
> (b) a count in the indictment;
>
> (i) as amended; or
>
> (ii) as it would have been if it had been amended in conformity with any particular

> that has been furnished pursuant to section 587.

Subsection (4) also states, and I will omit the other sections:

> The court shall, in considering whether or not an amendment should be made to the indictment or a count therein considered:
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> (a) the matters disclosed by the evidence taken on the preliminary inquiry;
>
> (b) the evidence taken on the trial, if any;
>
> (c) the circumstances of the case;
>
> (d) whether the accused has been misled or prejudiced in his defence by any variance, error or omission mentioned in (2) or (3); and
>
> (e) whether, having regard to the merits of the case, the proposed amendment can be made without injustice being done.

Subsection (4.1) reads:

> A variance between the indictment or a count therein and the evidence taken is not material with respect to:
>
> (a) the time when the offence is alleged to have been committed if it is proved that the indictment was preferred within the proscribed period of limitation, if any.

In determining the central issue of whether or not to amend the *Information*, the court must determine:

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(1) whether there is a variance between the date specified in the *Information* and the evidence; and

(2) consider the factors enumerated in section 601(4), which includes whether the accused would be misled or prejudiced in his defence.

As explicitly stated in section 601(4.1) of the *Code*, a variance between the evidence and an indictment with respect to the time when an offence was committed is not material as long as the *Information* was laid within the prescribed period of limitation. The analytical framework for determining the central issue is informed by *R. v. B.(G.)*, [1990] 2 SCR 30. In that case, three appellants were acquitted after a trial judge refused a motion to amend an *Information* and then concluded that the date of a sexual assault having been committed upon a young child had not been proved beyond a reasonable doubt. After reviewing the law concerning situations where there is a variance between the indictment and the evidence in relation to the date of the offence, Wilson, J.A., endorsed Ewaschuk, J.'s, summary of the law as stated at paragraph 9:10050, in his text *Criminal Pleadings and Practice in Canada*, second edition, (Aurora: Canada Law Book, 1987), wherein he observed:

> From time immemorial, a date specified in an indictment has never been held to be a material matter. Thus, the Crown need not prove the alleged date unless time is an

> essential element of the offence or unless there is a specific prescription period. . . .

In light of the foregoing, it is clear that it is of no consequence, if the date specified in the *Information* differs from that arising from the evidence unless the time of the offence is critical and the accused may be misled by the variance and, therefore, prejudiced in his or her defence. It is also clear from the authorities cited in *B.(G.)*, *supra*, that the date of the offence need not be proven in order for a conviction to result unless time is an essential element of the offence; such as, in cases where an alibi is at issue, age of a complainant or accused, or where it impacts on the right to make full answer and defence.

After referencing several examples of cases where time was an essential element of the offence, Wilson, J.A., at paragraph 4 drew the following conclusions from the authorities:

> (1) While time must be specified in an information in order to provide an accused with reasonable information about the charges brought against him and ensure the possibility of a full defence and a fair trial, exact time need not be specified. The individual circumstances of a particular case may, however, be such that greater precision as to the time is required. For instance, if there is a paucity of other factual information available with which to identify a transaction.
>
> (2) If the time specified in the information is inconsistent with the evidence and time is not an essential element of

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> the offence or crucial to the defence, the variance is not material and the information need not be quashed.
>
> (3) If there is conflicting evidence regarding the time of the offence, or the date of the offence cannot be established with precision, the information need not be quashed and a conviction may result provided that time is not an essential element of the offence or crucial to the defence.
>
> (4) If the time of the offence cannot be determined and time is an essential element of the offence or crucial to the defence, a conviction cannot be sustained.

In the present case, the Crown contends that time is not an essential element of the offence, as it was not in *R. v. Jacques*, 2013 SKCA 90 a decision of the Saskatchewan Court of Appeal. In that case, which is similar to the case at bar, the appellant was charged with accessing child pornography. The court held at paragraph 65:

> In the present circumstances, the date when Mr. Jacques accessed child pornography was not an essential element of the offence and he does not suggest otherwise.

However, the appellant, Mr. Jacques, maintained that it would have been prejudicial to convict him with respect to any accessing of child pornography that took place outside the time period referred to in the indictment. In reaching the conclusion it would not, the court commented that it was not persuaded that the dates included in the indictment were in any way crucial to Mr. Jacques' defence as he did not defend the accessing charge by adducing evidence to establish that he

had not accessed child pornography only between the dates specified in the indictment. Rather, his evidence was that, but for once unknowingly downloading child pornography after searching the term "PTHC," he had never accessed child pornography at any time. The court further held at paragraph 70 that:

> In the end, this appeal is much like *R. v. B.(G.) supra*. There, in dealing with the importance to the defence of the date of the offence, Wilson, J., noted that at trial the accused had put forward only general denials. On that basis, she concluded that the date was not crucial to the defence. The same reasoning applies here, see also *R. v. S.D.*, [2011] SCC 14.

In the present case, the defence submits that time is an essential element, and to admit the amendment would cause irremediable prejudice to Mr. Seguin in making full answer and defence as it would broaden the scope of the offence. The defence asserts:

> Alleging that the accused committed the crimes of possession of and accessing child pornography on one date is a much more narrow scope of an offence than alleging that it occurred on any of several dates. This case has been ongoing for four years now and the trial itself began more than eight months ago. The accused has gotten significantly entrenched mounting his defence to the charges as stated. To amend the date at this point in the proceedings would result in an injustice.

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The defence further submits that the *Jacques, supra,* decision is distinguishable from the case at bar, because unlike in the *Jacques, supra,* case where Mr. Jacques had put forward only general denials, Mr. Seguin has:

> mounted a defence with regards specifically to the allegations of March 2nd, 2009. He did not tender any absolute general denial. Therefore, the timing of the offence is important to his ongoing defence and the result in *Jacques* should not be followed in this case.

In my view, the present case is similar to the *Jacques, supra,* case.

In any event, having considered s. 601 of the *Code* and the reasoning in *B.(G.), supra,* and in *Jacques, supra,* I am of the view that time is not an essential element of the offence in the case at bar. In reaching that conclusion, I am mindful that I have made this decision upon the closing of the Crown's case and not at the end of the trial.

Having reached that conclusion, the next issue to address is whether or not the directed verdict should be granted. However, before addressing that issue, I will deal with the defence submission that time is an essential element and to permit the amendment would cause irremediable prejudice to Mr. Seguin in making full answer and defence as it would broaden the scope of the offence.

In addressing this assertion, I am cognizant of the proposition of law that there is no vested right to any particular defence. Otherwise, any amendment that

removed a defence or legal argument would automatically be prejudicial. Prejudice relates to the accused's ability and opportunity to meet the charge (*R. v. P.(M.V.)*, [1994] 80 CCC (3d) 289, Supreme Court of Canada).

The present case is not one of those cases where the individual circumstances of the particular case would require greater precision as to time because of a paucity of other factual information identifying the transaction. According to the evidence, Mr. Seguin's statement, Exhibit 1, the computer was given to him by his father and it was the only computer in his home, which he shared with his partner. Mr. Seguin explained in his statement of March 24th, 2009, that he obtained the internet for the computer approximately six months earlier. He described generally the nature of the material he had accessed on the computer and what he deleted. He recalled specifically on accessing the computer on March 2nd, 2009, and looking at porn all night.

The computer was seized by the police on March 24th, 2009. The time and date stamps recorded on several hundreds of the files indicated access dates of March 4th, 2009, and March 7th, 2009. According to Mr. Seguin's statement, he used the computer and so did his partner. In light of his comments contained in Exhibit 1, which included references to accessing pornography of young persons, coupled with the number of pictures present on the computer, it is reasonable to

infer that Mr. Seguin intentionally accessed those files and then deleted them. The files would have been acquired through the websites in peer-to-peer software between the time of the reinstallation, February 17th, 2009, until March 24th, 2009, the date the search was conducted.

Thus, the stage of the proceedings can be crucial to the existence of prejudice and whether it can be remedied. A question arises, if the offence had originally been laid as amended, would the defence have done something that it has not done or would it have not done something that it has done? If so, would it have been likely to make any difference? If so, there is likely prejudice. Perhaps remedies, such as an adjournment for further preparation or recalling Crown witnesses can cure the prejudice.

The motion to amend in the present case occurred upon the Crown closing its case. The court will obviously provide the defence with an opportunity to adjourn and prepare accordingly and hear any further requests to recall witnesses.

With respect to the defence's concern that the matter has been before the court for four years, my only comment is that this case was adjourned on several occasions to permit Mr. Seguin the opportunity to retain legal counsel. Indeed, the court permitted two previous solicitors of record to withdraw as counsel for Mr. Seguin, Mr. Manning and more recently Ms. Endres. Once Mr. Stewart, trial

counsel, became involved in this case, however, it proceeded in the usual manner. Admittedly the case has taken longer than perhaps it should because of the legal issues addressed, coupled with the backlog of the court.

Be that as it may, I am of the view that, while time must be specified in an *Information* in order to provide an accused with reasonable information about the charges brought against him or her and ensure the possibility of a full defence and a fair trial, exact time need not be specified. It should be noted that, although the general rule is that the alleged date is not an essential element on a charge, dates become essential when they are critical to preparing a defence and regarding them as immaterial would prejudice the accused. As stated, where time is not an essential element of the offence, as in the present case, the *Information* should be amended to conform with the evidence if the offence is proved to have been committed at a time different from the alleged in the *Information*, as long as it does not cause irremediable harm *(B.(G.), supra)*.

It is my view that the time specified in the *Information*, March 2nd, 2009, is at a variance with the evidence. As will be explained later in these reasons, I am satisfied that there is an evidentiary basis upon which a conviction on either of the charge of possession of child pornography, 163.1(4) of the *Code*, or that of

accessing child pornography, 163.1(4.1), could be obtained based on the totality of the evidence presented.

Having carefully considered the totality of the evidence, which includes Mr. Seguin's statement to the police, I am satisfied that there is some evidence adduced on each and every essential element of the two alleged offences, accessing child pornography and possession of child pornography, upon which a reasonable jury, properly instructed, could return a verdict of guilty for the following reasons.

Now, before I specifically address the evidence, I will briefly touch on the law as it has been thoroughly discussed in the written and oral submissions. To put succinctly, the issue for consideration is whether or not there is evidence upon which a reasonable jury properly instructed could return a verdict of guilty. There must be some evidence of culpability for every essential element of the offences for which the Crown has the evidential burden. It does not matter whether the evidence is direct or circumstantial.

The Nova Scotia Court of Appeal in *R. v. Beals*, [2011] N.S.J. No. 231, addressed a motion for a directed verdict that had failed in the court below. In doing so, the court summarized the requirements of a directed verdict application at paragraphs 20 to 22:

> [20] It has long been understood that the test a trial judge is to apply on a motion for a directed verdict is the same

as that which an extradition judge or a judge at a preliminary inquiry must employ. In *United States of America v. Shephard*, [1977] 2 S.C.R. 1067, [1976] S.C.J. No. 106 (Q.L.), Richie, J., for the majority wrote at page 1080:

> I agree that the duty imposed upon a "justice" under 475(1) is the same that which governs a trial judge sitting with a jury and deciding whether the evidence is "sufficient" to justify him in withdrawing the case from the jury, and this is to be determined according to whether or not there is any evidence upon which a reasonable jury, properly instructed, could return a verdict of guilty. The "justice", in accordance with this principle, is, in my opinion, required to commit an accused person for trial in any case in which there is admissible evidence which could, if it were believed, result in a conviction.

[21] These directions were reaffirmed by Chief Justice McLachlin writing for a unanimous court in *R. v. Acuri*, 2001 SCC 54:

> 21 The question to be asked by a preliminary inquiry judge under section 548(1) of the *Criminal Code* is the same asked by a trial judge considering a defence motion for a directed verdict, namely, "whether or not there's evidence upon which a reasonable jury properly instructed could return a verdict of guilty": *Shephard, supra,* p. 1080. See also *Monteleone,* [1987] 2 S.C.R. 154, at p. 160. Under this test, a preliminary inquiry judge must commit the accused to trial "in any case in which there is admissible evidence which could, if it were believed, result in a conviction," *Shephard, supra,* at p. 1080.

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> 22 The test is the same whether the evidence is direct or circumstantial: see *Mezzo v. The Queen*, [1986] 1 S.C.R. 802, at pp. 842-43; *Monteleone, supra*, at p. 161. The nature of the judge's task, however, varies according to the type of evidence that the Crown has advanced . . .

> I would point out that in *R. v. Monteleone*, [1989] 2 S.C.R. 154 and *Mezzo v. The Queen*, [1986] 1 S.C.R. 802, were both directed verdict cases.

And at paragraph 22, of the *Beals, supra,* decision, the court observed:

> [22] Faced with such a motion, Judge MacDonald was obliged to consider the evidence offered by the Crown and decide whether it was sufficient to reasonably support a conviction. In concluding such analysis, he was required to weigh the evidence to a limited extent. That task was described by Chief Justice McLachlin in *Acuri*. While her comments were made in the context of a preliminary inquiry, we know that they are of similar binding authority when considering a motion for a directed verdict. The Chief Justice began her reasons:
>
> > 1 . . . for the following reasons I reaffirm the well-settled rule that a preliminary inquiry judge must determine whether sufficient evidence to permit a properly instructed jury, acting reasonably, to convict, and the corollary that the judge must weigh the evidence in a limited sense of assessing whether it is capable of supporting the inferences the Crown asked the jury to draw. As this court has consistently held, this task does not require the preliminary inquiry judge to draw inferences from the facts or assess credibility. Rather, the preliminary inquiry judge must, while giving full recognition to the right of the jury to draw justifiable inferences of fact and assess credibility,

> consider whether the evidence taken as a whole could reasonably support a verdict of guilty."

As noted in *Beals*, *supra*, on a motion of directed verdict, it does not matter whether the evidence is direct or circumstantial as the nature of the judge's job will vary according to the type of evidence the Crown has presented. After quoting McLaughlin, J.A.'s, observation in *Acuri*, *supra*, as to the approach to be taken by a judge when considering a motion for a directed verdict, the court quoted at paragraph 28, the following instructive comments:

> 22 The test is the same whether the evidence is direct or circumstantial. The nature of the judge's task, however, varies according to the type of evidence the Crown has advanced . . .
>
> 23 The judge's task is somewhat more complicated where the Crown has not presented direct evidence as to every element of the offence. The question then becomes whether the remaining elements of the offence, that is those elements as to which the Crown has not advanced direct evidence, may reasonably be inferred from the circumstantial evidence. Answering this question inevitably requires the judge to engage in a limited weighing of the evidence because, with circumstantial evidence, there is by definition an inferential gap between the evidence and the matter to be established, that is an inferential gap beyond the question of whether the evidence should be believed. See Watt's *Manual of Criminal Evidence, supra* 9.01 (circumstantial evidence, "in any item of evidence, testimonial or real, other than the testimony of an eyewitness to a material fact. It is any fact from existence of which the trier of fact may infer the existence of a fact in issue."); *McCormick on*

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> *Evidence, supra*, page 641-42 ("circumstantial evidence...may be testimonial, but even if the circumstances depicted are accepted as true, additional reasoning is required to reach the desired conclusion.") The judge must therefore weigh the evidence in the sense of assessing whether it is reasonably capable of supporting the inferences that the Crown asks the jury to draw. This weighing, however, is limited. The judge does not ask whether she herself would conclude that the accused is guilty, nor does the judge draw factual inferences or assess credibility. The judge asks only whether the evidence, if believed, could reasonably support an inference of guilt.

Later on at paragraph 36, the court in *Beals*, *supra*, noted that there is no scientific formula for assessing what constitutes limited weighing of the evidence:

> There is no ready instrument one can use to gauge the parameters of limited weighing by preliminary inquiry judges when dealing with a committal decision or by a trial judge on a motion for a directed verdict. No such assessment of the evidence can be plumbed with mathematical precision. Whether a motion will succeed or fail must depend upon the judge's evaluation of the evidence in that particular case.

In view of the foregoing, I must consider the evidence in its totality in applying the test of whether or not there is evidence upon which a reasonable jury, properly instructed, could return a verdict of guilty. This requires an analysis of the evidence as it pertains to the essential elements of the two alleged offences with the view to determine whether there's some evidence on each and every essential element of the charges.

It should be stressed that at this juncture the court is not deciding on the ultimate issue of whether or not the Crown discharged its legal burden of establishing all of the essential elements beyond a reasonable doubt, but, rather, whether the evidence, if believed, could reasonably support an inference of guilt. As stated, this requires me to weigh the evidence in the sense of assessing whether it is reasonably capable of supporting the inferences that the Crown asked the trier of fact to draw. This weighing, however, is limited.

Possession of child pornography, the 163.1(4). The meaning of possession in relation to the electronic form of child pornography was thoroughly discussed in *R. v. Morelli*, 2010 S.C.C. 8, in which Fish, J.A., at paragraphs 14 to 16 observed:

> 14 In my view, merely viewing a web browser, an image stored in a remote location on an internet, does not establish the level of control necessary to find possession. Possession of illegal images requires possession of the underlying data files in some way. Simply viewing images online constitutes the separate crime of accessing child pornography created by Parliament in section 163.1(4.1) of the *Criminal Code*.
>
> 15 For the purposes of the *Criminal Code* possession is defined in section 4(3) to include personal possession, constructive possession and joint possession. Of these three forms of culpable possession, only the first two are relevant here. It is undisputed that knowledge and control are essential elements common to both.
>
> 16 On an allegation of personal possession, the requirement of knowledge comprises two elements. The

> accused must be aware that he or she has physical custody of the thing in question and must be aware, as well, of what that thing is. Both elements must co-exist with an act of control (outside of public duty), *Beaver v. The Queen*, [1957] S.C.R. 531, at pp. 541-42.

In the present case the Crown alleges that Mr. Seguin had personal possession of the child pornography between March 1st, 2009, and March 25th, 2009, therefore the Crown must prove:

(a) physical contact with or manual control over the material in question;

(b) knowledge of the material's nature or character; and

(c) a measure of control over the material, whether exercised or not.

In *Morelli*, *supra*, the Supreme Court of Canada clarified what the subject matter of possession is, whether it is the image or the file. At paragraph 19 the court stated:

> Essentially there are, thus, two potential objects of possession of an image in a computer, the image file and its decoded visual representation on screen. The question is whether one can ever be said to be in culpable possession of the visual depiction alone or whether one can only culpably possess the underlying file. Canadian cases appear implicitly to accept only the latter proposition, that possession of an image in a computer means possession of the underlying data file, not its mere visual depiction.

What this means is that it is not essential for the Crown to prove that the images were ever viewed, as possession of an image in a computer means possession of the underlying data file, not its mere visual depiction.

Evidence relating to the element of physical contact. The Crown must prove that the accused had personal contact or control over or/with the files. In *R. v. Braudy*, [2009] O.J. No. 347, Stinson, J., commented upon this element of possession at paragraph 47:

> To the extent that courts have considered this element, however, they have found that the prosecution is merely required to show contact or control in the narrow physical sense. It is merely required, in other words, to show that the material was on a computer with which the accused had contact or to which the accused had access.

In the present case, Mr. Seguin's admission that he owns the computer; that he formatted it and installed a new operating system; that the account name was under the name "Greg"; and that he regularly used it is evidence which establishes this element.

Evidence relating to knowledge of the material's nature or character. As stated in *Morelli, supra*, at paragraph 16:

> The requirements of knowledge comprises of two elements, the accused must be aware that he or she has physical custody of the thing in question and must be

> aware of what the thing is. Both elements must co-exist with an active control (outside of public duty).

It is important to stress that the accused must have a specific awareness of the presence of the child pornography files on the computer and must further be aware that it contains images with a criminal character. It is not necessary, however, that the accused had viewed the images or be aware of what makes it illegal. It is, rather, an awareness of the nature of the content (*R. v. Garbett*, [2008] O.J. No. 917).

Knowledge can be proven conclusively by evidence that the accused viewed the images. Alternatively, it can be proven by inference based on the surrounding evidence (*Braudy, supra,* at paragraph 51).

As previously mentioned, this case is a circumstantial one, so I must consider proof by inference, which involves consideration of the evidence in its entirety, including Mr. Seguin's statement, the surrounding evidence obtained from the investigators and the evidence of the forensic examiner. I must conduct a limited weighing of the evidence.

In *R. v. Tresierra*, [2006] B.C.J. No. 1593. Smith, J.'s, observations at paragraphs 7 and 8 are apposite:

> The data on a computer hard drive does not easily lend itself to a determination of whether an accused has accessed prohibited material contained on a hard drive.

> Nevertheless, inferences in this regard can be drawn from the ownership of, access to and usage of the computer itself. Knowledge may also be proved by both direct and circumstantial evidence. There is no direct evidence of knowledge in this case. There is, however, circumstantial evidence that provides proof of the facts or circumstances from which inferences may be drawn to establish other facts such as knowledge.

As noted by the Crown, there are several cases that have considered factors relevant to determine knowledge or inadvertence of files on a computer. For example: see *R. v. Braudy, supra, R. v. Garbett, supra*, and *R. v. Tresierra, supra*. Some of those factors include the following: the accused admitted to ownership of the computer (*Braudy, supra,* at paragraph 52 and *Tresierra, supra* at paragraph 7 and 8); the forensic report identifying the main account name "Greg" (*Braudy, supra*, at paragraph 46 and 47); history of the accused's frequent use of the computers (*Braudy, supra,* at paragraph 52 and *Garbett, supra,* at 42); the frequency between accessing and moving of files, elaborate filing system of files (*R. v. Missions*); the presence of the files on a computer for an extended period of time (*R. v. Chalk,* [2001] O.J. No. 4627 at paragraph 26); concealing the files in cryptic or obscure folder names or location (*Braudy, supra,* at paragraph 74); the use of secure wiping software, the use of setting that delete records of the user's activities (*Braudy, supra,* at paragraph 75); evidence of the accused's interest in the

materials (*Braudy, supra,* at paragraph 77); and the accused's level of computer skill (*Braudy, supra*, at paragraph 62 to 67).

Factors which are generally in favour of inadvertent possession include the following: the existence of a previous owner of the computer (*Braudy, supra*, at paragraph 53); multiple persons with access to the computer, in light of their familiarity with computers (*Braudy, supra*, at paragraph 53); evidence of misleading file names causing inadvertent downloading (*Braudy, supra,* at paragraph 53); evidence of automated downloading or caching while web browsing (*Braudy, supra,* at paragraph 53); and evidence of popup sites, spyware, viruses (*Braudy, supra*, at paragraph 53).

In *Braudy, supra,* the court also made the following comments at paragraphs 53 to 55:

> 53 In weighing these factors, I recognize the unique features of electronic data that make it possible for material to wind up on a computer without the user's knowledge. Files may be left behind by a previous owner or another user, they may be downloaded on the basis of misleading information as to their contents. Alternatively, they may be downloaded inadvertently by web browsing software popup sites or spyware.
>
> 54 At the same time, the court should not place too much emphasis on these possibilities for at least two reasons. First, knowledge does not require that material be received through inadvertence. It merely requires awareness on the part of the user that the material is

> present. For example, *R. v. Chalk*, [2001] O.J. No. 4627, where the trial judge did not find that the accused had downloaded the child pornography onto the hard drive, he was still found guilty of possessing it.
>
> 55 Second, as noted in *R. v. Jenner* (2005), 195 C.C.C. (3d) 364, a para. 21 (Man. C.A.), triers of fact ought not attach weight to exculpatory theories in the absence of evidence to support these theories. Thus, where there is little evidence to support the inadvertent downloading theory, the normal presumption that one intends the consequences of one's actions will apply, *R. v. Missions*, [2005] N.S.J. No. 177 at paragraph 21 (C.A.)

Some evidence supporting knowledge. Having considered the evidence in its totality, I am satisfied that there is some evidence of knowledge on the part of Mr. Seguin, that he was aware of the content of the material in question, that it was, indeed, child pornography.

The evidentiary basis for this finding includes the following: Mr. Seguin owned and used the seized computer during the relevant time in 2009. Mr. Seguin only had one computer in his house, which he shared with his partner, as mentioned in his caution statement. The computer was located in the living room; the main account was named Greg. The Greg account was logged into 142 times between February 17th, 2009, and March 24th, 2009. Mr. Seguin admitted to having an interest in child pornography. He admitted to having access, downloaded and stored child pornography in the past. He admitted to accessing child pornography off websites. He admitted to having saved child pornography

for two or three days. He admitted to opening files with child pornography names with frequency.

Mr. Seguin admitted accessing child pornography on or about March 2nd, 2009. This is corroborated by the original investigator's evidence. Mr. Seguin admitted to having a problem in the past and being aroused by younger girls and masturbating to images of them. The large number of files, 2,590 images, recovered from the computer that were created at different times. The creation dates on 1,920 of the files labelled as deleted files and one other file. Dates include March 4th, 7th, 23rd, 2009, with numerous time stamps over several hours on each date.

These creation dates can represent the time when the files were downloaded off the internet. The earliest creation date was March 4th, and Special Constable Rawding confirmed that the computer's clock was accurate so that the time stamps are correct. The evidence that child pornography has an accurate file name describing its contents about 75 to 80 percent of the time. Mr. Seguin admitted to seeing files with child pornographic names; the evidence of the cache files suggests the user accessed a website that contained child pornography.

Mr. Seguin's working knowledge of a computer is also a consideration. He received the computer from his father and had to fix it before it would work. Mr.

Sequin reinstalled the operating system of the computer. Mr. Seguin was familiar with the file sharing programs. He had experience using file sharing programs. A file sharing program was running when the investigators first examined the computer. Frostwire peer-to-peer software was present on the computer at the time of seizure. Mr. Seguin admitted using Frostwire for a period of six months prior to the search. He admitted using several file sharing programs. He knew how to search for files and he used file sharing to download adult pornography. Mr. Seguin stated he used the file sharing program called 4Share.

The final element, a measure of control over the material, requires proof that Mr. Seguin had power or authority over the item, whether exercised or not (*Morelli, supra,* at paragraph 137). Control can often be established by evidence of downloading, copying, storing or organizing the files (*Garbett, supra*, at paragraph 48 and *Braudy, supra*, at paragraphs 88 to 90). Other factors, such as duration in which the files were present on the computer and the frequency between the creation and access time and date stamps between files would lead to an inference of control. The available time and date in the metadata consisting of the recorded creation, access and deletion dates are an important factor in the evidence to consider.

DECISION

Having considered the whole of the evidence, I am satisfied for the purposes of this motion that there is some evidence of Mr. Seguin having a measure of control over the material in question, based on all of the evidence I have already mentioned; particularly Mr. Seguin's admissions of accessing, downloading and storing child pornography.

The Crown alleges control existed at a time between the point of formatting the computer up to some point just before the search. The exact point of deletion is not known. However, there is some evidence that it can be relied upon to be after the known creation dates of March 4th and March 7th.

With respect to the charge of accessing child pornography, the Supreme Court in *Morelli, supra*, explained the difference between accessing and possession of child pornography, at para. 25 in these terms:

> Parliament in section 163.1(4.1) of the *Criminal Code* has made accessing illegal child pornography a separate crime different from possession. In virtue of section 163.1(4.2) a person accesses child pornography by "knowingly causing the child pornography to be viewed by or transmitted to himself or herself".
>
> Parliament's purpose in creating the offence of accessing child pornography, as explained by then Minister of Justice, was to "capture those who intentionally view child pornography on the internet but where the legal motion of possession may be problematic". (Hon. Anne McLellan, *House of Commons Debates*, vol. 137, 1st Sess., 37th Parl., May 3, 2001, at p. 3581).

Fish, J.A., also noted that the automatic caching of a file to the hard drive does not, without more, constitute possession. He further added at paragraph 37:

> In the present case, the charge is not based on the appellant using this cache to possess child pornography. It is hardly surprising that most computer users are unaware of the contents of their cache, how it operates or even its existence. Absent that awareness, they lack the mental or fault element essential to a finding that they culpably possess the images in their cache. Having said that, there may be rare cases where the cache is knowingly used as a location to store copies of image files with the intent to retain possession of them through the cache.

In the present case, the creation of the cache is some evidence of accessing, as it is a file that is created by the software during Mr. Seguin's use of the internet browser. Sections 163.1(4.2) defines accessing as knowingly causing child pornography to be viewed by or transmitted to oneself. Accordingly, the Crown needs to only prove that Mr. Seguin viewed images or transmitted the images to himself knowing that they were child pornography (*Morelli, supra,* at paragraphs 25 to 27). The knowledge component is the same as the knowledge component required in proving possession. The major difference is that accessing requires either viewing or transferring (i.e. copying it) of the image, but does not require that the accused have contact and control over the underlying data file.

DECISION

Having considered all of the evidence, including all of the evidence earlier discussed in respect to Mr. Seguin's knowledge of the material in question, I am satisfied, for the purposes of this motion, that there is some evidence that Mr. Seguin viewed the material in question. Particularly when one considers the following: the large number of images found on the computer; the known interest in child pornographic materials and his admission to viewing and masturbating to such materials; he admitted obtaining some of this child pornography on websites; and the expert evidence that a single image of child pornography was found in the web browser cache and that this file would have been created by a browser when viewing a page on the internet.

The specific cache file found on the computer was never deleted from the computer. It was present on the computer at the time of the search. The Crown does not allege that Mr. Seguin had possession of that file. However, the presence of that file is some evidence that Mr. Sequin accessed the image on the date it was created, March 23rd, 2009. As explained by the expert, that file would only have ended up there if the user had accessed a web page with that image in it. When one considers that evidence, coupled with Mr. Seguin's admission that he had previously accessed child pornography through websites, one can reasonably infer that Mr. Seguin accessed that material.

DECISION

In conclusion, it is important to stress that my role on this directed verdict motion is not to decide whether the Crown proved each and every essential element of the offences beyond a reasonable doubt, but, rather, only that there is some or any evidence upon which a reasonable jury properly instructed could return a verdict of guilty. Consequently, for these reasons, I dismiss the application for a directed verdict.

HOSKINS, J.P.C.