

SUPREME COURT OF YUKON

Citation: *Steele (Re)*,
2023 YKSC 80

Date: 20230119
S.C. No. 159/21
Registry: Whitehorse

IN THE MATTER OF AN APPLICATION REGARDING FEARON STEELE

Before Justice K. Wenckebach

Counsel for the Crown

Andreas Kuntz appearing for Kevin Gillespie

Appearing on his own behalf

Fearon Steele

This decision was delivered in the form of Oral Reasons on January 19, 2023. The Reasons has since been edited for publication without changing the substance.

REASONS FOR DECISION

[1] WENCKEBACH J. (Oral): The Royal Canadian Mounted Police is investigating Fearon Steele for the offences of unauthorized computer use, mischief in relation to computer data, and the interception of private communications. The RCMP seized computers, a smart phone, and peripherals belonging to Mr. Steele in May 2021. Under the *Criminal Code*, R.S.C., 1985, c. C-46 (“*Criminal Code*”), the police are permitted to retain items they have seized for only three months. However, pursuant to s. 490(3)(a) of the *Criminal Code*, the police can apply to court to extend the period in which they may continue to detain the items.

[2] Here, the Crown obtained an order permitting the RCMP to further detain the items granted until December 29, 2022, and is now applying for an additional detention order. Mr. Steele opposes the application and asks, except for one computer, for the items to be returned.

[3] In accordance with s. 490(3)(a), the Court may make an order for the detention of items when it is satisfied, having regard to the complex nature of the investigation, that the order is warranted. The issue before the Court, therefore, is whether the complexity of this investigation warrants a further detention order until June 29, 2023.

[4] In determining the complexity of the investigation, the Court may examine the work that has yet to be done, the estimated time of completion, and whether it should reasonably have been done earlier (*Canada Revenue Agency v Nathaniel Okoroafor*, 2010 ONSC 2477 at para. 19).

[5] An investigation is complex if it has a number of different aspects or components which require analysis and reflection before moving forward (*Okoroafor* at para. 20).

[6] There are a variety of factors about the nature of the investigation that help to determine whether it is complex (*Okoroafor* at para. 21). The factors pertinent to this case are the involvement of computer professionals and of three RCMP offices in the investigation.

[7] In addition, the presence or absence of procrastination or bad faith, the training and experience of the individuals involved in the investigation, and whether additional resources would have sped up the investigation are also relevant factors here (*Okoroafor* at para. 22).

[8] Turning to the first factor, that is, the involvement of computer professionals, this investigation is driven by RCMP officers who are also computer professionals. The concern underlying the investigation is that Mr. Steele illegally gained access to information, such as computer passwords, for hacking and the exploitation of computer data. It is necessary to analyse the computer data on Mr. Steele's devices to investigate these concerns. The analysis, in turn, requires the involvement of computer technicians.

[9] Moreover, there are three different RCMP offices involved in the investigation located in Whitehorse, Winnipeg, and Ottawa. The investigation stems from Whitehorse but Whitehorse does not have all the necessary capabilities to analyse the computer data; thus, specialists in Winnipeg and Ottawa are also involved.

[10] Both factors help me to conclude that the investigation is complex.

[11] Regarding the other considerations, there is no evidence of procrastination or bad faith. Although the Whitehorse office of the RCMP has had the computers and peripherals since April 23, 2021, it had information of potential misuse of the computers only as of July 25, 2021. Since then, there have been no inordinate delays in the investigation.

[12] The question of the training and expertise is an interesting one. Constable Savill was candid that some aspects of the investigation, such as the application for the search warrant, took more time, as he had to update himself on aspects of cyber technology. While in some situations this could be a negative factor, here, I conclude that it is neutral. The RCMP division in the Yukon is not large and cybercrime is rare. Constable Savill testified that, to his knowledge, there has never before been a similar investigation conducted in the Yukon. Constable Savill has qualifications in computers

but it is still reasonable to expect that Constable Savill would not be as experienced or knowledgeable in these matters as other RCMP officers are in larger centres.

Constable Savill is, as far as I understand it, the lead investigator on this matter.

[13] Finally, there is no evidence that more resources should have been dedicated to the investigation. Again, Constable Savill was frank that the offices in Winnipeg and Ottawa have other more important investigations than this one. He stated, however, that they still provided the necessary analysis in a timely fashion. The timeline of their work supports Constable Savill's evidence.

[14] Mr. Steele does not argue that the investigation is not complex. Rather, he states that the RCMP had adequate time to copy the information from his computers and peripherals, except perhaps for one computer, and return them to him. They can therefore be returned at this point.

[15] In response, Constable Savill attests that if the computers and peripherals were returned now, they would be returned with all the computer data intact, including information that was potentially obtained through commission of an offence. Returning the items with all the information in place is not a viable solution. I agree.

[16] Since July 2021, the RCMP have worked to access the data on the items to determine if charges should be laid. In December 2022, Constable Savill received a report from the RCMP office in Winnipeg and estimates that he needs until the end of June to review the report and complete the investigation. He noted in his testimony that the report may point to something that requires follow-up with the Winnipeg office, which could delay the resolution of the investigation and require an application for a further

detention of the items. At this point, however, he is seeking only an order until June 29, 2023.

[17] I find that the request for an order until this time is reasonable and based on the complexity of the investigation.

[18] I therefore order that the items specified as noted in Exhibit F in the affidavit of Constable Savill be detained by the RCMP for a period ending no later than June 29, 2023, or until further order of this Court.

WENCKEBACH J.