COURT OF APPEAL OF YUKON

Citation: *R. v. Schafer*,
2020 YKCA 3

Date: 20200204
Docket: 18-YU836

Between:

Regina

Respondent

And

Christopher Russell Schafer

Appellant

Before: The Honourable Madam Justice D. Smith
The Honourable Mr. Justice Harris
The Honourable Madam Justice Shaner

On appeal from: An order of the Supreme Court of Yukon,
dated December 7, 2018 (*R. v. Schafer*, 2018 YKSC 52,
Whitehorse Docket 18-AP007).

Counsel for the Appellant:	G. Johannson V. Larochelle
Counsel for the Respondent:	N. Sinclair
Place and Date of Hearing:	Whitehorse, Yukon November 13, 2019
Place and Date of Judgment:	Vancouver, British Columbia February 4, 2020

Written Reasons by:
The Honourable Mr. Justice Harris

Concurred in by:
The Honourable Madam Justice D. Smith
The Honourable Madam Justice Shaner

Summary:

The appellant appealed the dismissal of his summary conviction appeal. The central issue on appeal is whether hearsay evidence is presumptively inadmissible on a peace bond application under s. 810.2 of the Criminal Code. Held: Appeal dismissed. Hearsay evidence is admissible to establish that an informant has reasonable grounds to fear the defendant will commit a serious personal injury offence. It is for the judge to assess the weight of the evidence and whether objectively it is sufficient to establish the informant's subjective fear is reasonable.

Reasons for Judgment of the Honourable Mr. Justice Harris:

[1] The issue on this appeal involves what evidence is admissible on a peace bond application under s. 810.2 of the *Criminal Code*, R.S.C. 1986, c. C-46 [*Code*]. More specifically, the issue is whether hearsay evidence is presumptively inadmissible. Pursuant to s. 810.2 of the *Code*, a peace bond may be ordered requiring a defendant to keep the peace where, on the evidence adduced, the informant has reasonable grounds to fear that the defendant will commit a serious personal injury offence, as that is defined in the *Code*. A peace bond is an instrument of preventive justice. An application for a peace bond seeks a recognizance intended to prevent future offending, not a finding of guilt for a particular offence.

Procedural History

[2] This appeal is from an order of the summary conviction appeal court dismissing the appellant's appeal against an order imposing a recognizance under s. 810.2 of the *Code*. The initial order of the judge of the Territorial Court is indexed at 2018 YKTC 18. The summary conviction appeal was dismissed by a judge of the Supreme Court in reasons indexed at 2018 YKSC 52.

[3] The issue arises in this case because the evidence relied on by the informant police officer in support of the application for a peace bond before the Territorial Court derived from risk assessment reports undertaken by Corrections Canada that were not provided to the Territorial Court judge. This led the judge to question the sufficiency of the evidence before her supporting a reasonable fear that the

appellant would commit a serious personal injury offence. The judge overcame her concerns and on the evidence adduced ordered the appellant to enter into a peace bond that included a variety of conditions, including abstinence from alcohol, drugs or other intoxicating substances.

[4] The appellant did not object to the admissibility of the hearsay evidence in the Territorial Court, and raised the issue for the first time on appeal to the Supreme Court.

[5] This appeal is from the decision of the summary conviction appeal court. This Court's jurisdiction is limited to questions of law alone. By way of procedural context, an order imposing a recognizance pursuant to s. 810 of the *Code* is initially appealed under s. 813 of the *Code*. That provision reads, in relevant part:

> 813 Except where otherwise provided by law,
>
> (a) the defendant in proceedings under this Part [Part XXVII – Summary Convictions] may appeal to the appeal court
>
> (i) from a conviction or order made against him…

[6] Section 810(5) provides that the rules under Part XXVII ("Summary Convictions"), including s. 813, apply, with such modifications as the circumstances require, to peace bond proceedings.

[7] Section 812 defines "appeal court" in Yukon as a "judge of the Supreme Court."

[8] Section 822 gives an appeal court under s. 813 its adjudicative authority. It says, in part:

> 822 (1) Where an appeal is taken under section 813 in respect of any conviction, acquittal, sentence, verdict or order, sections 683 to 689, with the exception of subsections 683(3) and 686(5), apply, with such modifications as the circumstances require.

[9] Finally, s. 839, the provision under which the current appeal is brought, provides a limited right of appeal against orders made under s. 822. Section 839 reads, in relevant part:

> 839 (1) Subject to subsection (1.1), an appeal to the court of appeal as defined in section 673 may, with leave of that court or a judge thereof, be taken on any ground that involves a question of law alone, against
>
> (a) a decision of a court in respect of an appeal under section 822; …

[10] Leave to appeal was granted in this case by Justice Bennett, in Chambers, on May 15, 2019, in reasons indexed at 2019 YKCA 12, on two grounds of appeal: the admissibility of hearsay evidence and the admissibility of certain evidence characterized by the appellant as expert evidence.

Background to the Issues on Appeal

[11] The issues on this appeal turn on the statutory interpretation of s. 810.2 of the *Code*. That section defines the issue to be decided and the test to be met before an order is made.

[12] Section 810.2 (1) reads:

> 810.2 (1) Any person who fears on reasonable grounds that another person will commit a serious personal injury offence, as that expression is defined in section 752, may, with the consent of the Attorney General, lay an information before a provincial court judge, whether or not the person or persons in respect of whom it is feared that the offence will be committed are named. [Emphasis added.]

[13] Section 752 defines “serious personal injury offence” as:

> (a) an indictable offence, other than high treason, treason, first degree murder or second degree murder, involving
>
> (i) the use or attempted use of violence against another person, or
>
> (ii) conduct endangering or likely to endanger the life or safety of another person or inflicting or likely to inflict severe psychological damage on another person,
>
> and for which the offender may be sentenced to imprisonment for ten years or more, or
>
> (b) an offence or attempt to commit an offence mentioned in section 271 (sexual assault), 272 (sexual assault with a weapon, threats to a third party or causing bodily harm) or 273 (aggravated sexual assault).

[14] Section 810.2(2) provides that a provincial court judge who receives an information laid under s. 810.2(1) may cause the parties to appear before a provincial court judge. The test to be applied in considering whether to order a defendant to enter into a recognizance to keep the peace is set out in s. 810.2(3):

> 810.2 (3) If the provincial court judge before whom the parties appear is satisfied by the evidence adduced that the informant has reasonable grounds for the fear, the judge may order that the defendant enter into a recognizance to keep the peace and be of good behaviour for a period that does not exceed 12 months. [Emphasis added.]

[15] Where the test for a recognizance has been met, and the judge is also satisfied that the defendant was previously convicted of a serious personal injury offence, the judge may order that the defendant enter into the recognizance for a period not exceeding two years. Should the defendant fail or refuse to enter into the recognizance, the judge may commit the defendant to prison for a term not exceeding 12 months. The judge may also add any reasonable conditions to the recognizance that the judge considers desirable to secure the good conduct of the defendant. For example, a judge may order the defendant to abstain from alcohol, the consumption of drugs or any other intoxicating substance.

[16] In this case, the appellant has a long and serious criminal record, as outlined in 2018 YKTC 18, at paras. 9–10. In 2003, the appellant was convicted of break and enter and sexual assault with a weapon. He was sentenced to five years' imprisonment, after credit for time served, followed by a five-year long-term supervision order. His long-term supervision order was suspended numerous times, and eventually expired in February 2018. Until that time, the appellant was either in custody or under the close supervision of the Correctional Service of Canada. It was upon the expiry of the long-term supervision order that Corporal Kirk Gale, the Crime Reduction Coordinator for RCMP "M" Division, laid an information under s. 810.2(1).

[17] The judge ordered the appellant to enter into a recognizance for two years and imposed conditions on him, including an abstention order. The appellant, who has a history of substance abuse issues, has breached those conditions on a number of occasions and been imprisoned as a result for a substantial portion of the

time under which he was subject to the peace bond. On the appeal, the appellant does not challenge the reasonableness of the conditions that were imposed. The issues raised on appeal deal exclusively with the applicable rules of evidence on a peace bond hearing.

[18] The evidence before the Territorial Court included a detailed affidavit prepared by Cpl. Gale. The affidavit included, as an exhibit, a risk assessment outlining Cpl. Gale's reasons to fear the appellant would commit a serious personal injury offence. Cpl. Gale's assessment was based on materials provided to him by Corrections Canada, although those source materials were not in evidence. The source materials included the appellant's criminal record, which the appellant admitted in the Territorial Court, and a number of risk and psychological assessments conducted by Corrections Canada personnel. Cpl. Gale adopted the affidavit in his *viva voce* testimony. The judge expressed concern about sufficiency of the evidence. She dealt with it this way at 2018 YKTC 18:

> [39] My primary concern in assessing whether or not Crown has met the burden in this case relates to the sufficiency of the evidence that was presented to me. In particular, the Crown's case rests on Cpl. Gale's summary of materials he received from Corrections Canada, effectively making it double hearsay. The failure to provide the Court with the source material raised concerns for me about whether the evidence can be said to be sufficient to satisfy me that the test has been met.
>
> [40] After much consideration, I have decided that the evidence in this case is sufficient to satisfy me that there are reasonable grounds to fear that Mr. Schafer will commit a serious personal injury offence, though reaching this conclusion would certainly have been easier had the source material upon which Cpl. Gale's affidavit is based been provided to the Court.
>
> [41] However, I have concluded that the test has nonetheless been met for the following reasons.
>
> [42] Firstly, it is clear that hearsay evidence can be considered in peace bond hearings. In *R. v. Budreo* (2000), 46 O.R. (3d) 481 (C.A), Laskin J. noted:
>
> > 53 (QL) Moreover, although an informant's fear triggers an application under s. 810.1, under subsection (3) a recognizance order can only be made if the presiding judge is satisfied by "evidence" that the fear is reasonably based. Section 810.1(3) therefore requires the judge to come to his or her own conclusion about the likelihood that the defendant will commit one of the offences listed in subsection (1). Although the "evidence" the judge relies on might include hearsay, a

> recognizance could only be ordered on evidence that is credible and trustworthy.
>
> [43] This is confirmed in *R. v. Flett*, 2013 SKQB 155, in which, following a review of the relevant case law since *Budreo*, the Court notes:
>
> > 24 These decisions at all court levels up to and including the Supreme Court of Canada confirm that s. 810 hearings are not criminal trials. The usual rules of evidence applicable in criminal trials do not apply. Hearsay evidence is admissible. The question before the judge is to determine whether or not sufficient weight can be given to the hearsay evidence to establish the reasonable and probable grounds required for the individual to swear the information to justify the fear of harm to others by the respondent.
>
> [44] I am also mindful of the fact that peace bond applications are preventative rather than punitive in nature such that it has been clearly accepted that the stringent evidentiary rules of a criminal trial do not apply. (see *Haydock v. Baker*; *R. v. Flett*)
>
> [45] Secondly, in assessing whether the hearsay evidence provided by the Crown is credible and trustworthy, I note that, beyond highlighting the dated nature of much of the evidence, the validity of the information provided through Cpl. Gale was not, by and large, called into question by the respondent.
>
> [46] And finally, the fact that so many of the risk factors identified in the admittedly dated risk and psychological assessments are clearly still evident in Mr. Schafer's own evidence bolsters the credibility and trustworthiness of the hearsay information provided.

Issues on Appeal

[19] The issue in a peace bond hearing is whether based on the "evidence adduced" the informant has reasonable grounds to fear the defendant will commit a serious personal injury offence. The appellant contends that only evidence that otherwise would be admissible at a criminal trial may be admitted to answer that question. He says hearsay evidence was improperly admitted and expert opinion evidence, in the form of Cpl. Gale's testimony, was improperly admitted without expert qualification.

[20] The appellant's argument derives from a proposition found in *R. v. McIvor*, 2008 SCC 11. At issue in *McIvor* was the evidentiary requirements for establishing a breach of conditional sentence order under s. 742.6 of the *Code*. At para. 19, in the

course of comparing breach of conditional sentence with breach of probation, the Court said of the process for prosecuting breach of probation:

> [19] … However, the *Criminal Code* is silent with respect to applicable evidentiary rules. This is not unusual. In the absence of any applicable statutory provision, hearings are simply conducted in accordance with the common law rules of evidence applicable in all criminal courts. …

[21] The appellant argues that nothing in s. 810.2 displaces the applicability of the common law rules of evidence. He says that cases holding that hearsay evidence may be admitted in support of the reasonableness of an informant's fear are wrongly decided. Those cases depend on *obiter dicta* in cases addressing other issues or statements by the Supreme Court of Canada applicable in other contexts.

[22] The summary conviction appeal judge considered and rejected these arguments. She said:

> [36] I agree with both the premise and the conclusion reached in *Flett*, specifically at para. 24, that in s. 810.2 hearings:
>
> > The usual rules of evidence applicable in criminal trials do not apply. Hearsay evidence is admissible. The question before the judge is to determine whether or not sufficient weight can be given to the hearsay evidence to establish the reasonable and probable grounds required for the individual to swear the information to justify the fear of harm to others by the Respondent.

[23] Several propositions underlie this conclusion. First, the focus of the assessment is whether the evidence underlying the informant's fear is sufficiently reliable and trustworthy to ground a reasonable belief. Second, hearsay evidence is relevant to that assessment. Third, because a peace bond hearing is not a criminal trial leading to a conviction proving the commission of an offence beyond a reasonable doubt, but rather an evaluation of the reasonableness of an informant's fear, the rules applicable in a criminal trial do not apply to the same extent. This proposition is rooted in statements found in *R. v. Zeolkowski*, [1989] 1 S.C.R. 1378, to which I will return. Fourth, the recognition by the Ontario Court of Appeal in *R. v. Budreo* (2000), 142 C.C.C. (3d) 225 (O.N.C.A.) [*Budreo* C.A.], that the evidence on a peace bond hearing might include hearsay was not *obiter dicta*.

[24] The respondent supports the summary conviction appeal court judge's reasoning. Counsel points out that the appellant did not object to the admissibility of the hearsay evidence in the Territorial Court nor challenge the reliability or trustworthiness of the hearsay evidence. The live issue was whether he was a changed person and no longer posed the risks identified in the hearsay material. Further, the respondent says that the appellant's argument on expert evidence does not raise a question of law, rather it is a question of mixed fact and law.

[25] The admissibility of hearsay evidence arose only on the summary conviction appeal. The judge nonetheless considered the issue. Leave has been granted to appeal to this Court. Given that I would dismiss the appeal, for the reasons that follow, nothing turns on the lack of objection. I do not think it is necessary to consider that issue further.

[26] Moreover, it is not necessary to decide whether the expert evidence issue is properly framed as a question of law. It is clear that the police officer's evidence is not an expert opinion. It is an assertion about his subjective state of mind based on information he has received. He is not proffering an opinion. Accordingly, I would not accede to the second ground of appeal.

[27] I turn now to deal with the appellant's principal argument on appeal, that hearsay is presumptively inadmissible on a peace bond hearing. As I have noted, the argument derives from the statement of principle referred to in *McIvor*.

[28] It is helpful to set out para. 19 from *McIvor*, from which the appellant's principle is extracted, in full:

> [19] In order to appreciate how these provisions facilitate the process, it is helpful to consider what evidentiary rules would apply if Parliament had simply been silent on these matters. Again here, a comparison to the prosecution of a non-compliant offender for breach of probation is instructive. Since breach of probation constitutes a distinct offence, the laying and prosecution of the charge proceed in the usual way. The hearing judge has the authority, upon finding the offender guilty of breach of probation (or of any other offence), to revoke the suspended sentence and impose any sentence that could have been imposed if the passing of sentence had not been suspended (s. 732.2(5)(*d*)). However, the *Criminal Code* is silent with respect

> to applicable evidentiary rules. This is not unusual. In the absence of any applicable statutory provision, hearings are simply conducted in accordance with the common law rules of evidence applicable in all criminal courts. In order to prove an alleged breach of probation, the Crown must adduce admissible evidence and prove the allegation beyond a reasonable doubt. Evidence adduced by the Crown must comply with common law evidentiary rules, including the hearsay exclusionary rule. As in other proceedings, evidence is usually presented in the form of *viva voce* testimony, and the accused has the right to cross-examine the witnesses. It is against this basic evidentiary backdrop that the provisions in question in this appeal must be considered, because it is these rules that would apply had Parliament not provided otherwise in respect of an allegation of a breach of conditional sentence order. [Emphasis added.]

[29] The appellant argues that nothing in s. 810.2 displaces the ordinary criminal law governing the admissibility of evidence. Given the effect of a peace bond hearing and its implications for constitutionally protected interests, the section should be interpreted to require that ordinary rules govern the admissibility of evidence. Accordingly, hearsay evidence is presumptively inadmissible unless it is admitted under a recognized exception to the rule and/or through application of the principled analysis. This, he argues, is entirely consistent with and promotes the purpose of peace bonds to protect the public in a manner consistent with respecting the liberty interests of a defendant protected by the *Charter*. Moreover, the result is not inconsistent with any binding authority.

[30] Respectfully, the appellant places more weight on the underlined portion of *McIvor* than it can bear. The nature of a peace bond hearing, as legislated in the *Code*, requires a flexible approach to the rules of evidence that allows a judge to rely on credible and trustworthy hearsay to determine if he or she is satisfied that the informant's fear is reasonable.

[31] In *McIvor*, the issue was the evidentiary requirements for establishing a breach of a conditional sentence order under s. 742.6 of the *Code*. Specifically, the issue for the Court was the correct interpretation of s. 742.6(4), which states:

> 742.6(4) An allegation of a breach of condition must be supported by a written report of the supervisor, which report must include, where appropriate, signed statements of witnesses.

[32] The Court concluded:

> [5] … Simply put, I conclude that the legislative scheme allows the Crown to prove the breach by adducing, *in documentary form*, the evidence it would otherwise have been required to present, in accordance with the ordinary rules of evidence, by calling witnesses to give *viva voce* evidence about the alleged breach. In turn, the supervisor's report and the statements of witnesses (if any) may contain any matter in respect of which the author of the report or of the statement could testify to if he or she were called upon to give *viva voce* evidence. [Emphasis in original.]

[33] If the supervisor could not provide a piece of information in *viva voce* testimony without violating the hearsay rule, then the supervisor could not provide that information in the written report without a signed statement from a witness who could provide admissible evidence on the fact at issue.

[34] Critical to the Court's conclusion was its determination that, in the absence of any statutory provision to the contrary, the ordinary rules of evidence applicable in criminal hearings would apply. On this point, Justice Charron compared a hearing for breach of conditional sentence and a prosecution for breach of probation coupled with a revocation hearing to lift the suspension of sentence. Breach of probation is itself a distinct criminal offence and breach of conditional sentence is not, but this does not make a breach of conditional sentence hearing "of less consequence to the offender": *McIvor* at para. 17. Justice Charron stated, citing Justice Lamer's reasons in *R. v. Proulx*, 2000 SCC 5, that an offender who breaches a condition without reasonable excuse will presumptively serve the remainder of his or her sentence in jail: *McIvor* at para. 13.

[35] Again with reference to *Proulx*, Justice Charron explained that the conditional sentence provisions demonstrated Parliament's intention that committal to prison be a real threat upon breach of condition: *McIvor* at para. 15. A conditional sentence — unlike a recognizance under s. 810 of the *Code* — is a form of criminal sentence imposed after proof of a criminal offence beyond a reasonable doubt. The conditional sentence is imposed as a meaningful alternative to incarceration, but when a condition is breached without reasonable excuse, the sentence will presumptively revert to a term of incarceration. In other words, a hearing for breach

of conditional sentence is contemplated by the original sentence imposed — it is not, like a peace bond hearing, a separate tool of preventive justice.

[36] While breach of conditional sentence shares many similarities with breach of probation, Parliament "intended that allegations of non-compliance be dealt with in a simpler and more expedited fashion under the conditional sentence regime.": *McIvor* at para. 18. Accordingly, "the prosecution of an allegation of a breach of condition is facilitated" by a number of deviations from the ordinary rules of evidence: *ibid*.

[37] In this context, the Court held that without these deviations the ordinary rules of evidence would apply, as they do on prosecution of breach of probation.

[38] I provide this context not to cast any doubt on the Court's statement, at para. 19, that hearings are conducted in accordance with the normal rules of evidence where the *Criminal Code* is silent. But context is important, and the nature of the hearing itself may in some cases contemplate a more flexible approach to the rules of evidence.

[39] In other words, the *Criminal Code* may evince an intention that a hearing be conducted on more flexible evidentiary standards because of the nature of the issue to be decided, without explicitly providing for alternative rules of evidence. *Zeolkowski* is an apt example, and one that shares many similarities with the case at hand.

[40] *Zeolkowski* dealt with the evidentiary requirements for applications for an order prohibiting possession of firearms under the *Criminal Code*. The issue was whether hearsay evidence was admissible on the ground that it would not be admissible at a criminal trial. The applicable section required the judge to hear "all relevant evidence" and to make the order if the judge is "satisfied that there are reasonable grounds to believe that it is not desirable in the interests of the safety of the person or of others that the subject of the prohibition application should possess a firearm." The case then involved whether hearsay evidence was admissible as relevant evidence on an application for a prohibition order. The Court ruled it was.

[41] As the appellant points out, the Court observed that the firearm prohibition application was not directly analogous to other hearings including peace bond hearings (see page 1385) and the evidentiary requirements under those hearings was not determinative of the issue before the Court. Nonetheless, the discussion of the Court is instructive, and a number of points are relevant to the assessment of this appeal.

[42] First, Justice Sopinka found that the nature of the judge's role on a prohibition hearing suggests that the rules of evidence were not intended to strictly apply. He said, at 1385:

> Section 98(4) enables a peace officer acting on reasonable grounds to apply to the provincial court judge for an order prohibiting a particular person from possessing a firearm. Clearly, the peace officer is not required to act solely on the basis of evidence that would be admissible at a trial (see *Eccles v. Bourque*, [1975] 2 S.C.R. 739, at p. 745; R. v. Collins, [1987] 1 S.C.R. 265, at p. 279). At the hearing of the application pursuant to s. 98(6), the provincial court judge must be satisfied that there are reasonable grounds to believe that it is not desirable in the interests of the safety of the person or of others that the subject of the prohibition application should possess a firearm. The provincial court judge thus confirms the existence of the reasonable grounds which led the peace officer to launch the application. In my opinion, it was not intended that the provincial court judge strictly apply the rules of evidence. The provincial court judge must simply be satisfied that the peace officer had reasonable grounds to believe as he or she did: in other words, that there is an objective basis for the reasonable grounds on which the peace officer acted. [Emphasis added.]

[43] In my opinion, these considerations apply with force to the issue before us. The informant (whether a peace officer or a person concerned about personal safety) is not required to act on the basis of evidence admissible at trial. The issue for the judge is whether there are reasonable grounds for the subjective fear, not whether the facts underlying that fear can be proven beyond a reasonable doubt. In these circumstances, Parliament cannot be taken to have intended that the judge strictly apply the rules of evidence. This latter point is reinforced by noting that the test for granting a peace bond is no different if the application is made by a person concerned about personal safety. It would defeat the purpose of the provisions if such a person could not rely on hearsay evidence to justify a reasonable fear of

harm, but could only secure the protection of a peace bond on strictly admissible evidence.

[44] Second, Justice Sopinka found that the fact that the burden of proof on a prohibition hearing was not proof beyond a reasonable doubt, but only proof on a balance of probabilities, suggested that the hearing was not intended to be conducted in the manner of a criminal trial even though the proceedings arose under the *Criminal Code*: at 1385–86.

[45] For these reasons, Justice Sopinka was "prepared to hold that hearsay evidence is admissible at a firearm prohibition hearing under s. 98(6) [now s. 111] unless such a result is precluded by the words 'all relevant evidence'.": at 1386. He found that "all relevant evidence" meant "all facts which are logically probative of the issue", and that the phrase did not address the question of exclusionary rules. He added:

> The effect of the exclusionary rules is left to the provincial court judge as part of the whole body of evidence on which the provincial court judge determines whether he or she is satisfied that the reasonable grounds exist. Frailties in the evidence are a matter of weight. In the case at bar, for example, the judge should properly consider what weight, if any, is to be given to the hearsay evidence. In doing so the judge should take into account the explanation, if any, for not making the best evidence available. The Crown bears the burden of proof at a s. 98(6) hearing and… in considering its weight, the judge must scrutinize the evidence to ensure that it is credible and trustworthy.

[46] Much can taken from the analysis in *Zeolkowski* that bears on a peace bond hearing. A peace bond hearing is also not a criminal trial. The Supreme Court of Canada recently described a peace bond hearing as resembling "to a certain extent a civil injunction", given that a peace bond is an instrument of preventive justice and "based on the reasonable fear of the informant, rather than the guilt of the defendant.": *R. v. Penunsi*, 2019 SCC 39 at para. 61.

[47] An informant in a peace bond hearing is not required to act solely on the basis of evidence admissible at a trial; it is sufficient to do so on the basis of evidence establishing reasonable grounds. A judge must be satisfied that there are reasonable grounds for the informant's fear. The role of the judge is to assess

whether the grounds tendered in support of the stated fear are objectively reasonable and sufficient to justify the imposition of a recognizance with terms and conditions. In my view, hearsay evidence that is credible and trustworthy is relevant to that question.

[48] Hearsay evidence is admissible, if it is probative of the existence of reasonable grounds, unless the section evinces an intention to exclude it. Just as the phrase “all relevant evidence” does not exclude relevant hearsay evidence, the use of the phrase “evidence adduced” does not evince an intention to exclude it. Finally, it is for the judge to assess the weight of the evidence and its frailties including any explanation provided for not making the best evidence available.

[49] It is important to emphasize that the hearsay evidence should be in a form that allows a judge to assess whether it is credible and trustworthy. I do not think such evidence is presumptively inadmissible given the test to meet before a peace bond is ordered. Whether the subjective belief is objectively reasonable, based on credible and trustworthy evidence, is a matter that falls to be decided by the hearing judge, weighing the evidence.

[50] The applicable standard of proof on a peace bond hearing is also not proof beyond a reasonable doubt. Instead, under s. 810.2(3), a judge must be “satisfied by the evidence adduced that the informant has reasonable grounds for the fear.” This statutory language has been viewed as importing a burden of proof on a balance of probabilities: see *Haydock v. Baker*, 2001 YKTC 502 at para. 17; *R. v. Budreo* (1996), 104 C.C.C. (3d) 245 (Ont. Ct. Gen. Div.) at para. 23 [*Budreo* S.C.]; *Vachon v. Hartland*, 2018 YKSC 23 at para. 19.

[51] In this case, as noted, the trial judge expressed concern about the sufficiency of the evidence before her. In assessing the evidence, she considered the hearsay evidence alongside the fact that no objection was taken to it, it was not contested, the appellant’s own evidence confirmed the reasonableness of the evidence, and that the live issue was whether the appellant was a changed person who no longer posed the risk reasonably supported by the hearsay evidence. In my view, the judge

committed no error in this assessment. Nothing in these reasons should be taken as endorsing the proposition that the peace officer's evidence, presented in the manner it was here, will always lay a sufficient basis to justify a reasonable fear. Whether it does so is a matter of weight for a trial judge, and is to be assessed robustly given the interests at stake.

[52] In my view, the admissibility of hearsay evidence in this case is consistent with the rules of admissibility in other circumstances involving reasonable grounds and/or a more relaxed approach to the rules of evidence. These include bail hearings (although the test is different), applications for search warrants, wiretap authorizations, and applications for firearms prohibitions. As explained above, *Zeolkowski* is an example.

[53] I also agree with the opinion of the summary conviction appeal judge that the recognition of the admissibility of hearsay evidence in *Budreo* C.A. can not be lightly set aside as *obiter dicta*. The relevant statement in *Budreo* C.A. is:

> [52] Moreover, although an informant's fear triggers an application under s. 810.1, under s-s. (3) a recognizance order can only be made if the presiding judge is satisfied by "evidence" that the fear is reasonably based. Section 810.1(3) therefore requires the judge to come to his or her own conclusion about the likelihood that the defendant will commit one of the offences listed in s-s (1). Although the "evidence" the judge relies on might include hearsay, a recognizance could only be ordered on evidence that is credible and trustworthy.

[54] This comment was made in the context of assessing the constitutionality of s. 810.1. Given the issues at stake in the constitutional challenge, the scope and nature of the contemplated hearing, the procedural safeguards and basis (including the evidentiary foundations) on which a peace bond could be ordered are all important factors informing the analysis. The observation that the evidence a judge relies on might include hearsay is not incidental to the outcome of the case. At the very least, the comment is highly persuasive. I note too that this conclusion did not attract any adverse comment in the Supreme Court of Canada's decision in *Penunsi*.

[55] This conclusion is also supported by the purposes and objects of peace bonds as they have been explained in *Penunsi*. The issue in that case was the application of the provisions relating to judicial interim release to the peace bond process. Nonetheless, the Court's reasoning illustrates the purpose and object of the peace bond regime in a manner that informs the necessary statutory interpretation. Of particular importance is the Court's affirmation that peace bonds are instruments of preventive justice, not penal justice.

[56] After describing the origin of common law peace bonds, the Court charted the development of the peace bond within the *Criminal Code*. The Court recognized that the process involved in ordering peace bonds had become more procedurally robust. The underlying rationale remained however, at para. 38:

> [38] Then J. in *Budreo S.C.* stated the policy rationale behind peace bonds:
>
> > . . . where the reasonably certain commission of an offence can be prevented, it may be in the interest of the likely offender, his potential victim and of society to prevent the offence. This is particularly true when the preventive measures employed are less restrictive than the punishment that might flow from a conviction. [p. 372]

[57] At para. 50 the Court recognized that a peace bond defendant is not in the same place as an accused person. At para. 53 the Court accepted that a defendant to a peace bond proceeding is of an entirely different character to a defendant to a criminal charge. These comments reinforce the relevance of the approach in *Zeolkowski* to the current case.

[58] The court recognized at para. 60 that the interpretation of the peace bond provisions is informed by the context and purpose of peace bonds, and the competing interests of protecting public safety and safeguarding the liberty of the defendant who is not accused of any criminal offence. At paras. 61, 63 and 80, the court said:

> [61] As discussed above, the peace bond is an instrument of preventive justice, based on the reasonable fear of the informant, rather than the guilt of the defendant. I agree with the respondent that though it is a valid expression of the criminal law power, the peace bond resembles to a certain extent a civil

injunction (R.F., at para. 8). As noted by de Villiers Prov. Ct. J. in *R. v. Gill*, [1991] B.C.J. No. 3255 (QL):

> It is true that the effect of a recognizance is to restrict the liberty of the defendant somewhat, but, as in the case of a civil injunction that restrains a defendant from committing a tort, that may also be a crime, the recognizance is not in its essence a restriction of lawful activity. [p. 6]

…

[63] When exercising the discretion whether to hold a hearing, the justice must consider whether the fear sworn to in the Information is reasonably held. It was raised before this Court that the peace bond under s. 810.2 is a "tool . . . often used when an offender is nearing their warrant expiry", or shortly after an individual has completed a custodial sentence, as was the case with Mr. Penunsi himself (I.F., Attorney General of Ontario, at para. 13; see also *R. v. Schafer*, 2018 YKTC 12, at paras. 38-39). Initiating a s. 810.2 peace bond proceeding upon a person's release from prison risks a further deprivation of liberty after the completion of a sentence already determined to be proportionate. Without further evidence that the feared conduct will occur (for example, the existence of threats or other violent conduct while in custody) a fear based solely on the offence for which a defendant is serving a sentence will not be sufficient. A s. 810.2 peace bond ordered on that basis alone would be improper. It would serve as a de facto probation order, not as a prospective tool of preventative justice.

…

[80] Practically speaking, the interim conditions regarding public safety placed on a peace bond defendant will likely form the basis for the recognizance following a meritorious peace bond application. These conditions will address, *inter alia*, concerns regarding the safety of the person whose protection is the objective of the peace bond. Judges should be mindful that a breach of interim conditions will result in a peace bond defendant — not accused of any crime — becoming subject to a criminal charge. It bears repeating that any public safety conditions should have a nexus with the specific fear sworn to in the Information. I underline this with respect to the imposition of conditions prohibiting the consumption of drugs and alcohol. Where the condition is not demonstrably connected to the alleged fear, it may merely set the defendant up for breach, especially where the defendant is known to have a substance use disorder [citation omitted]. Any condition should not be so onerous as effectively to constitute a detention order by setting the defendant up to fail [citation omitted].

[59] The Court clearly endorsed the use of peace bonds as instruments of preventive justice, recognizing that a defendant is not in the same position as a person accused of a criminal offence. This commentary on the purpose of peace bonds informs the interpretation of types of evidence admissible on a peace bond hearing. In my view, hearsay evidence is presumptively admissible in order for a

judge to assess whether reasonable grounds exist for the informant's subjective fear that a defendant will commit a serious personal injury offence.

[60] Peace bonds have, as explained in *Penunsi*, deep roots in the common law. Peace bonds were and are often ordered to protect specific individuals from risks posed to them by a defendant. Informants are often private persons. It would undermine the efficacy of peace bonds in these circumstances, as I have already noted, if hearsay evidence was presumptively inadmissible. In this case, the informant is a police officer, not an individual personally at risk. The evidentiary conditions stipulated in the *Code* for issuing peace bonds do not distinguish between these two situations.

[61] Amendments to the *Code* facilitate an officer of the state acting as an informant to protect the safety of the public generally and vulnerable potential victims, often vulnerable women and children, in particular. The ability of an agent of the state to act as an informant has been grafted onto a regime originally used principally to protect particular identifiable individuals at risk. Parliament has not created a stand alone regime governing the ordering of peace bonds at the instance of a state agent, nor has it provided for different rules for the admissibility of evidence to apply to applications initiated by a state actor.

[62] In oral submissions we heard considerable argument about the practical effect and use of peace bonds. In part these arguments reflected the warnings of the Supreme Court in para. 80 of *Penunsi* quoted above, about the potential misuse of applications for peace bonds where a person is near warrant expiry or shortly after completing a custodial sentence. The Court also expressed a concern about setting up defendants for breach of conditions, especially where they have substance abuse problems.

[63] Counsel for the appellant argued that peace bond applications are used too readily when other means of controlling risk exist and should be used. Moreover, the imposition of conditions, such as abstinence conditions, sets up defendants for failure since breaches are inevitable for persons with addictions or other substance

abuse problems. The practical result is the repeated incarceration of individuals who have completed their sentences.

[64] Counsel for the respondent presented a different perspective. He argued that peace bonds are an essential tool in an effort to protect the vulnerable in society, particularly women and children. Conditions are necessary both to provide an incentive to defendants to maintain sobriety, but also to protect victims from potential crimes resulting from impulsive behaviour often fuelled by intoxication. Counsel argues that the peace bond process is procedurally robust. In a case involving a s. 810.2 application, for example, it is supervised by crown counsel and proceeds only with the consent of the Attorney General.

[65] We are in no position to grapple with these issues on the record before us. Although they may provide some context in which the issue on appeal arises, they do no assist in resolving that issue. In this case, the appellant did not challenge the reasonableness of the condition imposed on him, the breach of which has led to periods of incarceration. The broader contextual issues referred to by counsel belong more appropriately in a constitutional challenge to the peace bond hearing process or to a re-consideration by Parliament of the peace bond scheme. The former is not before us. The latter is beyond our jurisdiction.

[66] I would dismiss the appeal.

"The Honourable Mr. Justice Harris"

I agree:

"The Honourable Madam Justice D. Smith"

I agree:

"The Honourable Madam Justice Shaner"