SUPREME COURT OF YUKON

Citation: *R. v. Nowazek,* 2017 YKSC 8

Date: 20170207
S.C. No. 15-01502
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

Plaintiff

And

BRIAN GEORGE NOWAZEK

Defendant

Before Mr. Justice T. Ducharme

Appearances:
David A. McWhinnie and Joanna Phillips — Counsel for the Crown
Benjamin Tarnow (via telephone) — Counsel for the Defence

REASONS FOR JUDGMENT

INTRODUCTION

[1] The applicant, Mr. Nowazek, has previously been convicted of sexual offences involving children, possession of child pornography as well as a number of firearms offences. He is now before the Court on charges of accessing child pornography, possessing child pornography, possession of an explosive device and various firearms and ammunition offences.

[2] On July 10, 2014, the Whitehorse RCMP received complaints about Mr. Nowazek having contact with some young children. On July 11, 2014, an information for an application under s 810.1(1) for a peace bond based on a fear that he might commit a sexual offence involving persons under the age of 16 was drafted

and sworn. On July 14, 2014, a summons was drafted, sworn and served on Mr. Nowazek with an appearance date of July 16, 2014.

[3] On July 16, 2014, Mr. Nowazek appeared before Deputy Territorial Court Judge Block. Mr. Nowazek denied doing anything wrong and he asked for an adjournment so that he might retain counsel. Judge Block granted the adjournment but, at the request of the Crown, imposed an "interim recognizance" that included the following conditions:

> (9) You are not to possess any computer, computer software or computer peripherals such as an internet enabled cell phone or any other devices capable of downloading pictures from the internet, except as their mobile numbers, IP addresses, usernames and passwords are provided to Cpl. Waldner or his designate. You must also provide to Cpl. Waldner written releases sufficient to authorize any service provider to disclose your usage information and records to Cpl. Waldner.
>
> (10) You shall allow your Bail Supervisor or the Royal Canadian Mounted Police access to your home to ensure your compliance with the conditions of this order.

[4] After court, when Mr. Nowazek returned to his home at [redacted], he found officers from the Whitehorse RCMP. They informed him that they intended to search "as per the recognizance". The officers found a website browser history indicating that various child pornography websites had been accessed. Consequently, Mr. Nowazek was arrested for possession of child pornography and later for accessing child pornography.

[5] The RCMP then obtained a search warrant for Mr. Nowazek's home and computer and executed it on July 17, 2014. It was on the basis of what was seized during this search that Mr. Nowazek has been charged.

[6] Mr. Nowazek submits that the Territorial Court Judge lacked the jurisdiction to require him to enter into the recognizance and erred in including the terms that he did. He attacks the validity of the July 16, 2014 recognizance on the basis that it was invalid and provides no basis for the search. He attacks the validity of the July 17, 2014 search warrant on the basis that it could not have been obtained but for the information obtained from the unconstitutional search the previous day. As a remedy, Mr. Nowazek seeks a stay of the proceedings or alternatively he seeks to have all the evidence seized from these searches excluded from his trial.

II. Issues

(1) Did the Territorial Court Judge have the jurisdiction to order Mr. Nowazek to enter into a recognizance?

(2) Did the Territorial Court Judge err in imposing the conditions of the recognizance that he did?

(3) Was the July 16, 2014 search of Mr. Nowazek's house a violation of his rights under s. 8 of the *Charter*?

(4) Was the July 17, 2014 search of Mr. Nowazek's house a violation of his rights under s. 8 of the *Charter*?

(5) If the searches are unconstitutional what is the appropriate remedy?

III. FACTS

(A) The Initial Complaint About Mr. Nowazek

[7] A Mr. D.F. contacted the RCMP in Whitehorse on July 10, 2014, reporting that his 8 year old son, K., and his four year old daughter, M., had been given candy by someone he suspected to be a registered sex offender who was living at [redacted]. He

further alleged there were two other children present at the same time and that they were also given some candy. D.F. went to [redacted], the home of Mr. Nowazek and spoke to him. Mr. Nowazek admitted giving candy to the children but said he was just being nice. When asked by D.F., Mr. Nowazek denied being a registered sex offender.

[8] Further investigation revealed that on a separate occasion, Mr. Nowazek came out of his house and offered a bicycle to a 7 year old boy, R.A., who was playing outside. The young boy said he did want the bicycle but that he would have to ask his father first. The boy was able to describe the bicycle and this description matched that of a bicycle observed by the RCMP on Mr. Nowazek's property where he lived alone.

[9] The police also had information that Mr. Nowazek had advertised a doll for sale on Kijiji. Mr. Nowazek had also published an ad looking for a new house in which he indicated that he needed a place that has internet access.

(B) The Swearing Out of the s. 810.1(1) Information

[10] The RCMP swore out an information for a peace bond pursuant to s. 810.1 of the *Criminal Code*, R.S.C. 1985, c. C-46, on the basis that "D.F. fears that Brian Nowazek will commit an offence under sections 151, 152,170, 173(2) and 271 of the *Criminal Code* in respect of his children both under the age of fourteen years, in that Brian Nowazek did on or about the 10th day of June *(sic)* in the year 2014 at or near the City of Whitehorse in the Yukon Territory invite D.F.'s children to his property contrary to s. 810.1 of the *Criminal Code*."[1]

[1] I note that this allegation is not contrary to s. 810.1 of the *Criminal Code* since no order had been made under s. 810.1. However, this was not germane to the issues in this appeal.

(C) The Summonsing of Mr. Nowazek

[11] According to s. 495(1)(a) of the *Criminal Code*, a peace officer may arrest without warrant a person who has committed an indictable offence or who, "on reasonable grounds," he believes has committed or is about to commit an indictable offence. The statutory requirement of "reasonable grounds" means that: (1) the police officer effecting the arrest must *subjectively* believe that he or she has reasonable and probable grounds to arrest the accused; and (2) this belief must be *objectively* reasonable, in the sense that a reasonable person in the position of the officer must be able to conclude that there were, indeed, reasonable and probable grounds for the arrest. In oral argument before me, the Crown conceded that the RCMP did not have reasonable grounds to arrest Mr. Nowazek and no attempt was made to do so under s. 507(4) of the *Criminal Code*. Rather, he was served a summons requiring him to attend court for the hearing of the RCMP's application under s. 810.1.

(D) The Initial Hearing Before the Territorial Court Judge

[12] Mr. Nowazek showed up to court as required by his summons. Mr. Nowazek asked for an adjournment to obtain counsel which was granted. He also denied any wrong-doing, and indicated that he did not wish to enter into a recognizance.
Mr. Sinclair for the Crown suggested that "the Court impose what would be, in effect, an interim recognizance on Mr. Nowazek"[2] and adjourn the proceedings to permit him to retain counsel. Mr. Sinclair provided the Judge with a draft of the proposed conditions. In support of this submission, Mr. Sinclair purported to rely upon s. 810.1(3.1) of the *Criminal Code*. Mr. Sinclair concluded his submissions by saying that "public safety

[2] Transcript pg. 1, lines 21 and 22.

demands that Mr. Nowazek be subject to some conditions which would protect the public with respect to his release."[3] [Emphasis added.] Mr. Nowazek denied having done anything wrong and he contested the suggestion that he be placed on a recognizance.

[13] Judge Block then listened to Mr. Nowazek who denied any wrongdoing and suggested that the children had lied when they suggested that they had been invited or enticed and D.F. had lied in his statement to police. Judge Block then stated:

> I'm not going to give the Crown all of the conditions that they request here, but I think it's appropriate that there be some limits on your behaviour until this is determined by an appropriate court who hears all of the evidence and in which you and your instructed counsel can call evidence, if necessary, and make the appropriate cross-examination.
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> My goal here is to both address the, I think, legitimate concerns that the Crown has here because you have a demonstrated history which is of great concern, for reasons that I don't have to belabour, and nevertheless recognize that you should be supervised while on release but your freedom should not be inordinately affected [Emphasis added.]

[14] Judge Block then outlined the conditions that he was going to impose and he told Mr. Nowazek that "failure to sign that recognizance would enmesh you in a whole series of further problems that you don't want."[4]

(E) The July 16, 2014 Search of Mr. Nowazek's Home

[15] On July 16, 2014, RCMP officers attended at Mr. Nowazek's residence and informed him that they intended to do a search "as per the recognizance". They

[3] Transcript pg. 6, lines 26 to 28. In its written submissions, the Crown suggested that Judge Block ordered Mr. Nowazek to enter into the recognizance "of his own volition". This position is clearly incorrect. Mr. Sinclair requested the recognizance, provided Judge Block with a draft of its proposed terms and argued that it was permitted under the *Criminal Code* and was necessary to preserve public safety.

[4] Transcript pg. 10

searched Mr. Nowazek's laptop and found a website browser history that indicated a history of visits to child pornography websites. Mr. Nowazek was arrested for possession of child pornography.

[16] Mr. Nowazek allowed the RCMP into his house and gave them access to his computer because he believed that he was required to do so by the recognizance he had just entered into. The Crown conceded in oral argument before me that the police did not have the requisite grounds to obtain a search warrant for Mr. Nowazek's home.

(F) The July 17, 2014 Search of Mr. Nowazek's Home

[17] The search on July 17, 2014, was conducted under the authority of a search warrant. The information to obtain the search warrant ("ITO") included the results of the search of Mr. Nowazek's computer on July 16, 2014. In reviewing the sufficiency of the ITO, "[t]he question is not whether the reviewing court would itself have issued the warrant, but whether there was sufficient credible and reliable evidence to permit a justice of the peace to find reasonable and probable grounds to believe that an offence had been committed and that evidence of that offence would be found at the specified time and place."[5] While the ITO included information about Mr. Nowazek's history and the allegations about his recent interaction with the above-mentioned children, the only basis for the conclusion that a crime had been committed and that evidence of that crime would be found in his residence was the information obtained by the police on July 16, 2014.

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[5] *R. v. Morelli*, [2010] 1 S.C.R. 253 at para. 40.

IV. LEGAL ISSUES

(A) Did the Territorial Court judge have the jurisdiction to order Mr. Nowazek to enter into a recognizance?

[18] The problem in this case is a simple one. Mr. Nowazek attended court on July 16, 2014, pursuant to a summons. He was not under arrest and the Crown conceded before me that the RCMP lacked the grounds to arrest him. All a summons does is require a person to attend a particular court at a specified date and time. This is set out in s. 810.1(2) of the *Criminal Code* which provides that "[a] provincial court judge who receives an information under subsection (1) may cause the parties to appear before a provincial court judge."[6] The issuance of a summons does not mean that the person who is summonsed is in custody or otherwise subject to a release by the court before which he appears. The person who is summonsed can only be released upon a recognizance if they have been arrested or a recognizance is otherwise provided for in the *Criminal Code*. Unfortunately, neither the Crown nor the Judge in this case recognized this basic fact and both of them discussed imposing terms on Mr. Nowazek's "release".[7] But as Mr. Nowazek was not in custody, he was not properly subject to any form of judicial release.

[19] Mr. Sinclair, for the Crown, argued before Judge Block that the imposition of such conditions was justified by s. 810.1(3.1) of the *Criminal Code* which provides:

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[6] This is also consistent with s. 509 pf the *Criminal Code* which provides, in part, that:

> A summons issued under this Part shall
> …
> (b) set out briefly the offence in respect of which the accused is charged; and
> (c) require the accused to attend court at a time and place to be stated therein and to attend thereafter as required by the court in order to be dealt with according to law.

These provisions are reflected in Form 6 of the *Criminal Code*.

[7] *Supra*, paras 12 and 13.

> The provincial court judge may commit the defendant to prison for a term not exceeding twelve months if the defendant fails or refuses to enter into the recognizance.

But this is clearly of no assistance to the Crown in this case as this provision only comes into force after the adjudication of the s. 810.1 information and a determination that the judge will order that the defendant enter into a recognizance. No such determination was made with respect to Mr. Nowazek, this recognizance was imposed before any evidence was heard or any ruling was made.

[20] The other possible basis for this recognizance is the jurisprudence that addresses the applicability of the bail provisions in s. 515 to peace bond applications under s. 810 of the *Criminal Code* given the provisions of s. 795 and s. 810 (5) of the *Criminal Code* which provide:

> s. 795 The provisions of Parts XVI and XVIII with respect to compelling the appearance of an accused before a justice, and the provisions of Parts XVIII.1, XX and XX.1, in so far as they are not inconsistent with this Part, apply, with any necessary modifications, to proceedings under this Part.
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> s. 810 (5) The provisions of this Part apply, with such modifications as the circumstances require, to proceedings under this section.

[21] In particular, the Crown relies on the appellate decisions of *R. v. Allen* (1985), 18 C.C.C. (3d) 155 (Ont. C.A.); *R. v. Wakelin* (1992), 71 C.C.C. (3d) 115 (Sask. C.A.); *R. v. Budreo* (2000), 142 C.C.C. (3d) 225 (Ont. C.A.); and *R. v. Cachine*, 2001 BCCA 295, 154 C.C.C. (3d) 376 (B.C.C.A.) to support this position. There is also the decision of *R. v. Newfoundland and Labrador (Provincial Court Judge)* (2015), N.J. No. 337 (N.L.S.C.) which purports to follow these appellate decisions.

[22] It is true that some of the language in these decisions could be construed as supporting the Crown's argument that the Judge could order Mr. Nowazek to enter into a recognizance. However, it is important to note that in all of these cases, the subject of the s. 810 hearing had been arrested, they had not simply appeared in response to a summons. Moreover, the language in s. 515 clearly and repeatedly contemplates an accused who is in custody and is seeking release. As such, while these cases make it clear that s. 515 is applicable to s. 810 hearings, they do not provide that s. 515 gives a judge jurisdiction to impose a recognizance on a person who, like Mr. Nowazek, is not in custody.

[23] I am comforted in this conclusion by the decision of Cournoyer J. in *R. v. Goikhberg* 2014 QCCS 3891, [2014] Q.J. No. 8164 ,where he stated:

> 50 A plain reading of Part XVI therefore reveals that a person may be compelled to appear before a justice to answer to a criminal charge without the person being detained in custody but "[t]he route that an individual will typically travel to the courtroom depends on whether the police decide to carry out an arrest and hold the person in custody for a bail hearing, or decide instead to pursue less coercive options for compelling the person's attendance in court".
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> 51 In short, the police may compel the appearance of a person by means of an appearance notice, a promise to appear or a recognizance.
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> 52 The police may also use a court-issued process: a summons or an arrest warrant unless it proceeds to arrest the person without a warrant. A summons is the preferred mechanism unless there are reasonable grounds to believe that it is necessary in the public interest to issue a warrant for the arrest of the accused.
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> 53 Pursuant to s. 503, a person arrested with or without a warrant is detained in custody and is to be taken before a justice to be dealt with according to law.

> 54 A summons serves the purpose of Part XVI of compelling the person to appear before the court. Form 6 of the *Criminal Code* commands the person to attend court and to attend thereafter as required by the court, in order to be dealt with according to law.
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> 55 A summons has nothing to do with judicial interim release because in such a case, the person is not taken before a justice but appear before the court under the compulsion of the summons. The person is not in custody. There is no implicit or unsigned undertaking to appear. The person is legally compelled to appear. [Emphasis added]
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> 56 In contrast, the accused released under s. 515(1) has to give an undertaking without conditions pursuant to Form 12 or with conditions under s. 515(2) depending on the circumstances. Form 12 makes it clear that the undertaking is made in order to "be released from custody". The undertaking is to attend court at a specified date and to attend after that as required by the court.
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> 57 Again, the sole difference between a person compelled by a summons and a person release under s. 515(1) is that, in the latter case, the person is released from custody which is unnecessary in the former case because the person is not in custody. [Emphasis added]
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> …
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> 85 Again, a person who appears compelled by a summons does not have to be released because she is not detained in custody. Such a person is not *taken before a justice to be dealt with according to law*, but merely compelled to attend court.
> [Italicized emphasis in the original. Underlined emphasis added.]

[24] Thus, I conclude that as Mr. Nowazek had not been arrested and the RCMP lacked the necessary grounds for his arrest, it was a jurisdictional error for Judge Block to impose a recognizance on him.

(B) Did the Territorial Court Judge err in imposing the conditions of the recognizance that he did?

[25] As mentioned above, the Crown concedes that the RCMP did not have the requisite grounds to search Mr. Nowazek's home or computer. Nonetheless, the Territorial Court Judge gave the police the power to search Mr. Nowazek's home and computer. In explaining condition 9 of the recognizance the Judge stated:

> My proposal is not to ban you from having access to the internet. But I think I can monitor any illegitimate purpose – by requiring that if you have access to a computer or the internet, that the IP address, your username and password for any such device should be provided to … Cpl Waldner … or his designate. And what that means is that you will be in breach of the law if you use any computer device that Cpl. Waldner or his designate are not able to search electronically and monitor your use of. I think invading your privacy to that extent is certainly legitimate. If you use any other device that they don't have access to, you'll be in breach of this recognizance.
> [Emphasis added]

[26] This makes it clear, although arguably the precise language of the recognizance does not, that according to the recognizance, the RCMP were to be entitled to search Mr. Nowazek's computer. The Judge set no limits as to what use could be made of any information obtained by the police as a result of such searches.

[27] In *Budreo*, the appellant, who had a long record of sexual offences against young boys, was released from prison after serving a sentence for sexual assault. The Crown sought a recognizance under s. 810.1. The appellant sought to challenge the section's constitutionally under ss. 7 and 9 of the *Charter*. The Court upheld the constitutionality of the provisions.

[28] In *Budreo* both the trial judge and the Court of Appeal commented on the types of conditions a judge can impose under s. 810.1. In upholding the constitutional validity of the section, the trial judge ruled that the provision should be restrictively construed and that the phrase “community centre” in the listed condition should be struck out on constitutional grounds for being too broad. At para. 71, he commented directly on the type of conditions appropriate in the context of a s. 810.1 application:

> ... where there has been no offence and only a likelihood of harm proven, the restrictions imposed in the name of preventive justice can only be relatively slight. Indeed, it would be difficult to countenance a procedure that had as its final disposition the detention or imprisonment of a person simply because of their criminal proclivities: *Morales*, *supra*, at p. 736. In contrast, the restrictions found ins. 810.1 would not prevent a person from living a reasonably normal life. While they do infringe that person's liberty interest, they do so in a manner that is moderate and circumscribed. I am supported in this conclusion by *Heywood*, *supra*, at p. 790. As Cory J. noted in reference to the dangerous offender provisions:
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> If indeterminate detention in order to protect the public does not per se violate s. 7, then it follows the imposition of a lesser limit on liberty for the same purpose will not in itself constitute a violation of s. 7.
>
> A fortiori a carefully drafted peace bond section with limited conditions will not in itself offend s. 7.
> [Emphasis added.]

[29] The Court of Appeal agreed with Justice Then’s analysis and the narrowing of s. 810.1 to delete community centres from the list of valid conditions. At para. 41, the Court outlined the types of conditions they believed Parliament contemplated in drafting this provision:

> …accepting Then J.'s deletion of community centres, the restrictions contemplated by s. 810.1 are narrowly targeted to meet Parliament's objective. The only places a defendant

> may be prohibited from going are where children under age 14 are or can reasonably be expected to be present; and the only activities a defendant may be prohibited from engaging in are those involving contact with children under 14. By limiting the scope of s. 810.1 in this way, I do not accept the submission of the provincial Crown that s. 810.1(3) authorizes the court to impose broader restrictions on a defendant's liberty than activities, areas or places where children are likely to be found. Subsection 810.1(3) provides that a judge may "order the defendant to enter into a recognizance and comply with the *conditions* fixed by the provincial court judge, *including*" the specified conditions (emphasis added). The specified conditions following the word "including" are examples of the kinds of conditions that can be imposed. The context of s. 810.1 and its overall purpose suggest that the word "including" is used to limit the scope of the general term "conditions" to those conditions similar to the specified examples. On this interpretation, a judge could prohibit a defendant from going to a recreation hall where young children were likely to be present but could not, for example, require a defendant to take the drug Luperon, however desirable that may be. This interpretation, in my view, not only appropriately reflects the context and purpose of s. 810.1, it also accords with Charter values. A broader interpretation, permitting the judge to order a defendant to take a course of treatment or to take a particular drug, under a provision that does not create an offence would raise serious Charter concerns. Under the narrower interpretation I have adopted, the restrictions contemplated by s. 810.1 are not overbroad.
> [Italicized emphasis in original. Underlined emphasis added.]

[30] In *R. v. Shoker,* 2006 SCC 44, [2006] 2 S.C.R. 399, at para. 3, the Supreme Court of Canada held that a judge has a broad discretion to determine appropriate conditions of probation. The Court's comments on the types of conditions that are or are not appropriate in the sentencing context are instructive here. The Court held, for example, that there is no authority under the Code to authorize a search and seizure of bodily substances as part of a probation order. In coming to this conclusion, the

Supreme Court commented on general tools of statutory interpretation that may be of some assistance in this case. The Court stated at paras. 13-14:

> [13] Before discussing the issue that arises in this case, I wish to make a few general comments about the power to impose optional conditions under s. 732.1(3). The residual power under s. 732.1(3)(h) speaks of "other reasonable conditions" imposed "for protecting society and for facilitating the offender's successful reintegration into the community". Such language is instructive, not only in respect of conditions crafted under this residual power, but in respect of the optional conditions listed under s. 732.1(3): before a condition can be imposed, it must be "reasonable" in the circumstances and must be ordered for the purpose of protecting society and facilitating the particular offender's successful reintegration into the community. Reasonable conditions will generally be linked to the particular offence but need not be. What is required is a nexus between the offender, the protection of the community and his reintegration into the community.
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> [14] The residual power to craft individualized conditions of probation is very broad. It constitutes an important sentencing tool. The purpose and principles of sentencing set out in ss. 718 to 718.2 of the *Criminal Code* make it clear that sentencing is an individualized process that must take into account both the circumstances of the offence and of the offender. It would be impossible for Parliament to spell out every possible condition of probation that can meet these sentence objectives. The sentencing judge is well placed to craft conditions that are tailored to the particular offender to assist in his rehabilitation and protect society. However, the residual power to impose individualized conditions is not unlimited. The sentencing judge cannot impose conditions that would contravene federal or provincial legislation or the Charter. Further, inasmuch as the wording of the residual provision can inform the sentencing judge's exercise of discretion in imposing one of the listed optional conditions as I have described, the listed conditions in turn can assist in interpreting the scope of "other reasonable conditions" that can be crafted under s. 732.1(3)(h).
> [Emphasis added.]

[31] The Court's comments at para. 22 with regards to the imposition of conditions intended to facilitate evidence gathering are particularly instructive:

> ...the residual provision must be read in context. Since it provides for "other" reasonable conditions, the listed conditions under ss. 732.1(3)(a) to (g.2) can assist in delineating the scope of the residual provision. It is noteworthy that the fulfillment of any of the listed conditions can have no incriminating consequence for the probationer..... Section 732.1(3)(h) speaks of "other reasonable conditions". It is reasonable to infer that additional conditions imposed under the residual power would be of the same kind as the listed conditions. However, conditions intended to facilitate the gathering of evidence for enforcement purposes do not simply monitor the probationer's behaviour and, as such, are of a different kind and, because of their potential effect, absent the probationer's consent to such conditions, raise constitutional concerns. For example, could Mr. Shoker be compelled, as a condition of his probation, to make his home available for inspection on demand to better monitor the prescription against the possession of alcohol or drugs? Such a condition in effect would subject him to a different standard than that provided by Parliament for the issuance of a search warrant. In my view, it could not reasonably be argued that the sentencing judge would have the jurisdiction to override this scheme under the authority of the open-ended language of s. 732.1(3)(h). It would be up to Parliament, if it saw fit, to enact any such scheme.
> [Emphasis added.]

[32] *Shoker* was decided in the context of a probation order, which is a sentencing provision where the accused has been convicted of a crime. In contrast, s. 810.1 is a preventative provision and the discretion to impose conditions is arguably narrower for that reason. As stated by Then J. in *Budreo*, when there is only a likelihood of harm proven, "the restrictions imposed in the name of preventive justice can only be relatively slight." [Emphasis added.] The provisions requiring Mr. Nowazek to permit searches of his home and of his computer are clearly not "relatively slight."

[33] Secondly, in *Shoker*, at para. 22, the Supreme Court indicates that conditions intended to facilitate the gathering of evidence for enforcement purposes go beyond what conditions for monitoring the probationer's behaviour are intended to do. Indeed they would subject the probationer to "a different standard than that provided by Parliament for the issuance of a search warrant." That is exactly what occurred here both in terms of the search of Mr. Nowazek's home and his computer.

[34] In conclusion, both conditions 9 and 10 of the recognizance went beyond the type of conditions that can be appropriately ordered under s. 810.1 of the *Criminal Code*.

(C) Was the July 16, 2014 search of Mr. Nowazek's home a violation of his rights under s. 8 of the *Charter*?

[35] The Crown conceded in oral argument before me that the police did not have the requisite grounds to obtain a search warrant for Mr. Nowazek's home. Their only authority for this search was the recognizance that Mr. Nowazek entered into before Judge Block. Mr. Nowazek allowed the RCMP into his house and gave them access to his computer because he believed that he was required to do so by the recognizance he had just entered. Thus, it cannot be said that Mr. Nowazek consented to this search. As the recognizance issued by Judge Block was invalid, the search conducted pursuant to it was warrantless and it falls to the Crown to justify the warrantless search.

[36] The Crown argues that the recognizance was valid at the time of the search and that even if this Court determines that it is not valid, such a finding is not retroactive. But in this regard, the Crown's reliance on *Canada v. Taylor*, [1990] 3

S.C.R. 892 is misplaced. That case dealt with a finding of contempt pursuant to a statute that was later found to be invalid. This is readily distinguishable from the present case. In this case, my finding that the recognizance was not valid renders the search on July 16, 2014 a warrantless search. Thus, it falls to the Crown to justify the constitutionality of this warrantless search.

[37] The Crown did not really attempt to justify this warrantless search beyond the arguments canvassed above and I find, in the circumstances of this case, that this warrantless search cannot be justified. For the reasons discussed below, all the evidence obtained from this warrantless search must be excluded.

(D) Was the July 17, 2014 search of Mr. Nowazek's house a violation of his rights under s. 8 of the *Charter*?

[38] When an accused seeks the exclusion of evidence obtained through the execution of a search warrant, the burden is upon the accused to establish: (1) that the police search was conducted in violation of the accused's right to be secure against unreasonable search and seizure, contrary to s. 8 of the *Charter;* and (2) that the evidence seized by the police as a result of the search should be excluded pursuant to the principles applicable under s. 24(2) of the *Charter*. When it is alleged that a judicially-authorized search warrant is invalid, the judicial review of the impugned search warrant begins from a presumption of validity, with the onus on the party seeking exclusion to demonstrate its alleged invalidity.[8] This is the burden that is upon the accused in the present case.

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[8] See: *Quebec (Attorney General) v. Laroche*, [2002] 3 S.C.R. 708, at para. 68; *R. v. Sadikov*, 2014 ONCA 72, 305 C.C.C. (3d) 421 at paras. 35, 83; *R. v. Campbell*, 2010 ONCA 588, 261 C.C.C. (3d) 1 at para. 45, affirmed, 2011 SCC 32, [2011] 2 S.C.R. 549, at para. 14.

[39] When a trial judge is asked to review the sufficiency of an ITO or a search warrant, the judge must not approach the question of the issuance of the search warrant *de novo*, substituting her view for that of the issuing justice. Rather, the reviewing judge must determine, based on the record that was before the issuing justice, as amplified on the review, whether the issuing justice *could* properly have issued the search warrant. The question is not whether the reviewing judge would have issued the search warrant, but whether there was sufficient information that *could* have permitted the authorizing justice to conclude that there were "reasonable grounds" justifying the issuance of the search warrant.[9]

[40] In such circumstances, the reviewing court must stay focused on the ultimate test, namely, whether on the basis of the record before the issuing justice, as amplified on review, but without reference to any excised information, there remains a sufficient basis upon which the justice could have issued the search warrant. The focus of the inquiry is on whether the record contains reliable evidence that might reasonably be believed, and on the basis of which the warrant could have issued.[10]

[41] This issue can be dealt with briefly. Once the results of the July 16, 2014 search of Mr. Nowazek's home and computer are excised from the ITO there does not remain a sufficient basis for granting a search warrant. Therefore, the search warrant must be quashed and the July 17, 2014 search is a warrantless search which, absent exigent

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[9] See: *R. v. Garofoli*, 60 C.C.C. (3d) 161 at p. 1452; *R. v. Bisson*, [1994] 3 S.C.R. 1097, at p. 1098; *R. v. Araujo*, [2000] 2 S.C.R. 992, at paras. 19, 36, 40, 50-61; *R. v. Pires*, 2000 CarswellOnt 6123*; R.v. Lising*, 2005 SCC 66, [2005] 3 S.C.R. 343 at paras. 8, 30; *R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253, at paras. 39-43; *R. v. Sadikov*, *supra* note 8 at paras. 37-38, 83, 88.

[10] See *R. v. Nguyen*, 2011 ONCA 465, 273 C.C.C. (3d) 37 at paras. 23-25; *R. v. MacDonald*, 2012 ONCA 244, 290 O.A.C. 21 at paras. 9-10; *R. v. Farrugia*, [2012] O.J. No. 6341, at para. 34; *R. v. Sadikov*, *supra* note 8 at para. 69, 85-86, 88.

circumstances, is a *prima facie* violation of Mr. Nowazek's rights under s. 8 of the *Charter*.

(E) If the searches are unconstitutional what is the appropriate remedy?

[42] According to the governing three-part analysis set out by the Supreme Court of Canada in *R. v. Grant*, the court must assess and balance the effect of admitting the evidence on society's confidence in the justice system, having regard to: (1) the seriousness of the *Charter*-infringing state conduct; (2) the impact of the breach on the *Charter*-protected interests of the accused; and (3) society's interest in the adjudication of the case on its merits.[11]

(1) Seriousness of the State Conduct

[43] As to the first prong of the test, namely, the seriousness of the state conduct, the court must consider whether the admission of the evidence would send the message to the public that the courts condone deviations from the rule of law by failing to dissociate themselves from the fruits of unlawful conduct. Accordingly, the more severe or deliberate the state misconduct leading to the *Charter* violation, the greater the need for the courts to dissociate themselves from that misconduct by excluding the evidence. The goal is not necessarily to punish the police or deter *Charter* breaches, but rather to preserve public confidence in the rule of law and its processes.[12]

[44] Accordingly, inadvertent or minor violations of the *Charter* are at one end of the spectrum, while wilful or reckless disregard of *Charter* rights is at the other. Extenuating circumstances, such as the need to prevent the disappearance of

[11] *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353;
[12] *R. v. Grant*, at paras. 72-75.

evidence, may attenuate the seriousness of police conduct. Good faith will also reduce the need for the court to disassociate itself from the police conduct, but negligence or wilful blindness is not good faith. Deliberate, willful, or flagrant disregard of *Charter* rights may require exclusion of the evidence. If the police conduct that infringed the *Charter* was part of a pattern of abuse, such conduct would support the exclusion of the evidence.[13]

[45] In the circumstances of the present case, I conclude that the police acted in good faith in relying on the recognizance of Judge Block and in obtaining a search warrant for the search of July 17, 2014. But, as the Crown concedes, they did not have the requisite grounds for a search warrant without including information from the warrantless search of the prior day. Thus the July 17, 2014 is a warrantless search. Canadians rightly expect the police to recognize the significant privacy interests in their homes and in their computers. Absent extenuating circumstances which are entirely absent in this case, a valid search warrant is required Accordingly, this first prong of the governing s. 24(2) analysis, in my view, strongly favours the exclusion of the evidence.

(2) <u>The Impact of the Charter Violation</u>

[46] As to second prong of the governing test, the impact of the *Charter* violation, the court must assess the extent to which the breach undermined the *Charter*-protected interests of the accused. Section 8 recognizes and constitutionally protects every person's right to live his or her life free of government intrusion except to the extent that the intrusion is reasonable. Personal privacy includes control over one's body and bodily substances (physical privacy), control over certain places such as

[13] *R. v. Grant*, at paras. 74-75.

one's residence (territorial privacy), and control over information about the person and/or his activities (informational privacy).[14] The more serious the impact on those protected interests, the greater the risk that admitting the evidence may signal to the public that *Charter* rights are of little value. The courts are expected to look to the interests engaged by the infringed right and examine the degree to which the violation impacted on those interests.[15]

[47] There are few, if any, settings in which a person has a greater expectation of privacy than the sanctity of his or her own home. Accordingly, the police intrusion of this important personal space in the present case is a grave invasion of the personal privacy of the accused. Indeed, residential searches strike at the very core of an accused's right to privacy. Similarly, a person has a great expectation of privacy with respect to the contents of their computers. Accordingly, any violation of s. 8 of the *Charter* in this factual context must almost invariably be viewed as a very serious breach of the accused's constitutional rights. Mr. Nowazek had a high expectation of privacy in his personal residence and in his computer, and that privacy was compromised by an intrusive police search. This second factor in the governing s. 24(2) analysis, accordingly, strongly favours the exclusion of the evidence seized on July 17, 2014.

(3) The Truth-Finding Function of the Trial

[48] As to the third prong of analysis, the court must inquire into whether the truth-seeking function of the trial is better served by admission of the evidence, or by exclusion. The court must consider not only the negative impact of the admission of

[14] *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432, at paras. 20-24.

[15] *R. v. Grant*, *supra* note 11 at paras. 76-78

the evidence, but also the impact of failing to admit the evidence. The reliability of the evidence is an important factor in this prong of the analysis. If the *Charter* breach has undermined the reliability of the evidence, this will suggest exclusion of the evidence. On the other hand, the exclusion of reliable evidence undermines the accuracy and fairness of the trial from the perspective of the public and may bring the administration of justice into disrepute. The importance of the evidence to the Crown's case is also a factor to be considered under this aspect of the inquiry. The exclusion of highly reliable evidence may impact more negatively on the repute of the administration of justice if the remedy effectively terminates the prosecution.[16]

[49] In the present case, there is no question that the evidence seized by the RCMP is an inherently reliable and objective piece of evidence that is critical to the merits of the case. If this evidence is excluded, the Crown's case must fail. If the evidence is admitted, however, the Crown would appear to be able to establish that the accused had accessed child pornography and was in possession of child pornography, guns, ammunition, explosive devices and a prohibited device. Society's interest in the adjudication of a criminal trial on its merits would be seriously undercut if highly reliable and critical evidence, such as this evidence was excluded. Accordingly, this third aspect of the governing s. 24(2) analysis clearly favours the admission of this evidence.

(4) Conclusion

[50] While the third *Grant* factor favours the inclusion of this evidence this does not outweigh the impact of the first two factors. If the first and second factors favour exclusion of the evidence the third factor “will seldom, if ever, tip the balance in favour

[16] *R. v. Grant*, *supra* note 11 at paras. 79-84.

of admissibility".[17] Thus, the evidence must be excluded. Given that the Crown cannot prove their case without this evidence, there is no need to consider the claim that Mr. Nowazek's rights under s. 7 were violated or the alternate Defence submission that the facts of this case require the charges be stayed.

V. CONCLUSION

[51] In conclusion, the evidence obtained pursuant to the search warrant executed on July 17, 2014 is excluded. The Crown concedes that without this evidence there is no basis to continue the current prosecution. I therefore order that Mr. Nowazek be released immediately unless there are any other holds on him.

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DUCHARME J.

[17] *R. v. McGuffie*, 2016 ONCA 365, 336 C.C.C. (3d) 486.