COURT OF APPEAL OF YUKON

Citation: *R. v. Nowazek*,
2018 YKCA 12

Date: 20180918
Docket: 16-YU785

Between:

Regina

Appellant

And

Brian George Nowazek

Respondent

Restriction on publication: Publication of information that could disclose the identity of the complainant or witness has been prohibited by court order pursuant to s. 486.4 of the *Criminal Code*.

Before: The Honourable Chief Justice Bauman
The Honourable Madam Justice Cooper
The Honourable Mr. Justice Fitch

On appeal from: An order of the Supreme Court of Yukon, dated August 1, 2016 (*R. v. Nowazek*, 2016 YKSC 65; 2017 YKSC 8 (additional reasons), Whitehorse Docket 15-01502).

Counsel for the Appellant:	Noel Sinclair
No one appearing on behalf of the Respondent:	
Amicus Curiae:	Bibhas Vaze
Place and Date of Hearing:	Whitehorse, Yukon May 7, 2018
Place and Date of Judgment:	Vancouver, British Columbia September 18, 2018

Written Reasons by:
The Honourable Mr. Justice Fitch

Concurred in by:
The Honourable Chief Justice Bauman
The Honourable Madam Justice Cooper

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Summary:

Crown appeal from the acquittal of the respondent on child pornography and firearms-related charges. The respondent received a summons to attend court in response to an application pursuant to s. 810.1 of the Criminal Code. The police did not seek an arrest warrant. The application was adjourned to allow the respondent an opportunity to obtain counsel. Pending resolution of the application on its merits, the Territorial Court judge before whom the respondent appeared made an interim recognizance order with a condition that required the respondent to allow the police access to his home for the purpose of ensuring compliance with the order, including a condition designed to prevent him from accessing or possessing child pornography. Relying on the terms of the interim recognizance order, the police entered the respondent's residence, searched his computers and found evidence that he had "visited" child pornography websites. The respondent did not consent to the search and, prior to the entry, the police did not have sufficient grounds to obtain a warrant to search the respondent's home. On the basis of the information gathered in the initial search, the police obtained and executed a search warrant on the respondent's residence. At trial, the respondent sought exclusion of the evidence thereby obtained pursuant to ss. 8 and 24(2) of the Charter. The trial judge found there was no jurisdiction to impose an interim recognizance order on the respondent pending resolution of the s. 810.1 application because the respondent appeared before the Territorial Court judge in response to a summons. In any event, the judge found that the conditions of the recognizance authorizing the police to enter the respondent's residence and search his home and computers fell outside the scope of the conditions authorized by s. 810.1. The information relied on to obtain the warrant was derived from the initial search of the respondent's residence authorized by an invalid recognizance order. Once the results of the initial search were excised from the ITO, there was no basis upon which the search warrant could have issued. In the result, the warrant was quashed and the search was found to have been conducted in breach of the respondent's s. 8 rights. The judge excluded the unconstitutionally obtained evidence pursuant to s. 24(2). Held: Crown appeal dismissed. There is no jurisdiction to impose an interim recognizance order on a person summoned to attend court in response to an application pursuant to s. 810.1. Further, the conditions requiring the respondent to allow the police unfettered access to his home to ensure compliance with the terms of the order exceeded the type of conditions that may be imposed under s. 810.1(3.02). The judge correctly concluded that the respondent's s. 8 rights were breached. He considered all of the appropriate factors in conducting the s. 24(2) analysis. He was not obliged to hear viva voce evidence concerning the seriousness of the child pornography offences. The record demonstrates that the judge was aware of the seriousness of the offences and conducted the s. 24(2) analysis on that footing. He did not prevent the Crown from describing the offending material in issue. He was entitled, in the exercise of his trial management powers, to direct the attention of the Crown on the Charter voir dire to the issues upon which the application was likely to turn. There is no basis upon which this Court could properly interfere with the judge's conclusion that admission of the evidence would bring the administration of justice into disrepute.

Reasons for Judgment of the Honourable Mr. Justice Fitch:

I. INTRODUCTION

[1] The Crown appeals the acquittal of Brian George Nowazek by a judge of the Supreme Court of Yukon on charges of accessing child pornography, possessing child pornography, possessing explosive substances, and various other firearms-related offences. The Crown submits that the trial judge erred in excluding under s. 24(2) of the *Charter* evidence obtained in a search of Mr. Nowazek's home. The Crown seeks an order setting aside the acquittal and directing a new trial.

[2] The excluded evidence was obtained by the police in the execution of a search warrant on Mr. Nowazek's home on July 17, 2014. The information to obtain the search warrant (ITO) included the browser history of Mr. Nowazek's laptop. The police acquired this browser history on July 16, 2014, when they entered Mr. Nowazek's home and searched his personal computers. In conducting this initial search, the police relied on the conditions of an interim recognizance imposed on Mr. Nowazek by a Territorial Court judge pending the hearing of an application for an order under s. 810.1 of the *Criminal Code*, R.S.C. 1985, c. C-46 (*Code*). That order required Mr. Nowazek to allow the police access to his home for the purposes of ensuring his compliance with terms designed to prevent him from accessing or possessing child pornography.

[3] Three main issues arise on this appeal. The first is whether there was jurisdiction to impose an interim recognizance on Mr. Nowazek pending resolution of the s. 810.1 application. The trial judge concluded that no such jurisdiction existed because Mr. Nowazek appeared before the Territorial Court judge in response to a summons. The judge found that a person must be arrested and taken before a judge before an order can be made releasing that person on a recognizance with conditions. In the result, the judge held that the interim recognizance order was invalid.

[4] Assuming jurisdiction exists to impose an interim recognizance order on a defendant summoned to court in response to an application made under s. 810.1, the second issue on appeal is whether a judge can add conditions to the order that require a defendant to submit to searches of his or her home and personal computer. The trial judge found that such conditions fall outside the scope of the conditions authorized by s. 810.1.

[5] The information relied on to obtain the warrant was derived primarily from evidence gathered during the July 16 search of Mr. Nowazek's home and personal computers said to have been authorized by the interim recognizance order. Once the results of the July 16 search were excised from the ITO, there was no basis upon which the search warrant could have issued. In the result, the warrant was quashed and the search of July 17, 2014, was found to have been conducted in breach of Mr. Nowazek's s. 8 *Charter* rights.

[6] The judge excluded the unconstitutionally obtained evidence pursuant to s. 24(2). The third issue on appeal is whether the judge erred in principle by excluding the evidence without hearing about the nature of the offending images alleged to have been viewed or possessed by Mr. Nowazek. The Crown says the judge could not properly evaluate the seriousness of the child pornography offences without hearing evidence about this.

[7] Once the evidence was excluded (the child pornography and the evidence pertaining to the firearms) the Crown conceded that there was no basis upon which Mr. Nowazek could be convicted of any of the offences charged. An acquittal followed.

[8] For the reasons that follow, I agree with the trial judge that the Territorial Court judge before whom Mr. Nowazek appeared in response to the s. 810.1 application had no jurisdiction to make an interim recognizance order. In the event, however, that I am wrong in that conclusion, I will explain why I would have concluded that the condition requiring Mr. Nowazek to allow his bail supervisor or the police unfettered access to his home to ensure compliance with the other terms

of the order exceeded the type of conditions that may be imposed under s. 810.1(3.02).

II. BACKGROUND

a. Overview of Section 810.1

[9] Section 810.1 of the *Code* is not a punitive provision; it is a preventative provision designed to protect children from being victimized by sexual abusers: *R. v. Budreo* (2000), 142 C.C.C. (3d) 225 at paras. 25-30 (Ont. C.A.), leave to appeal ref'd [2000] S.C.C.A. No. 542. It reflects Parliament's reasoned determination that "the state should not be obliged to wait until children are victimized before it acts": *Budreo* at para. 37.

[10] Section 810.1(1) provides that any person who fears on reasonable grounds that another person will commit a sexual offence against a child may lay an information before a provincial court judge. Under s. 810.1(2), a judge who receives an information may cause the parties to appear before the court.

[11] Section 810.1 is found in Part XXVII of the *Code* (Summary Convictions). Section 795 of the *Code* (also found in Part XXVII) provides, among other things, that the provisions of Part XVI (Compelling Appearance), in so far as they are not inconsistent with Part XXVII, apply to summary conviction proceedings including an application for a recognizance order under s. 810.1. Section 507, which is found in Part XVI, provides a judge with two options for compelling a defendant in s. 810.1 proceedings to appear: a summons or an arrest warrant. Mr. Nowazek was summoned to appear in response to the s. 810.1 application.

[12] If the judge who hears the application is satisfied that a person (the informant) fears on reasonable grounds that the person against whom the application is brought (the defendant) will commit a designated sexual offence against a person or persons under the age of 16 years, the judge may order that the defendant enter into a recognizance to keep the peace and be of good behaviour: s. 810.1(3).

[13] Subsection 810.1(3.02) of the *Code* provides that the judge may add "any reasonable conditions to the recognizance that the judge considers desirable to secure the good conduct of the defendant", including any of the conditions enumerated therein.

b. Mr. Nowazek's History

[14] Mr. Nowazek was convicted in the 1990s in Arizona for sexual offences involving children. He received a ten-year sentence of imprisonment for those offences. He relocated to Whitehorse after his release.

[15] In 2009, Mr. Nowazek was convicted in the Territorial Court of one count of possessing child pornography and a number of firearms offences after the police found a large collection of child pornography in his home (see *R. v. Nowazek*, 2009 YKTC 51). In reasons for sentence, the judge said the offending images depicted explicit sexual contact between adults and children, including penetrative and non-penetrative activity. The judge noted that Mr. Nowazek, who was then 60 years of age, was at a loss to explain his behaviour but acknowledged its compulsive nature and his inability to control it. Mr. Nowazek conceded through counsel that he was at high risk to reoffend and in need of specialized treatment. The judge found that Mr. Nowazek had a tendency to minimize his previous criminal behaviour, asserting that he was set up by law enforcement. In addition, the judge found that Mr. Nowazek represented a significant risk to the safety of the community, particularly to children, if left untreated and unsupervised.

[16] For these offences, Mr. Nowazek received a sentence of time served (after being credited 24 months for pre-sentence custody) and a three-year probation order that required him to attend counselling, allow a probation officer to access his home to ensure compliance with the order, and refrain from possessing internet-connected devices.

[17] While the probation order expired in 2012, Mr. Nowazek continued to be registered under the *Sex Offender Information Registration Act*, S.C. 2004, c.10, and was known to the police at the material time. He was also subject to an order made

pursuant to s. 161 of the *Code* prohibiting him from: (1) attending public parks, playgrounds, daycare centres, schools and other places where children could reasonably be expected to be present; (2) seeking employment, whether for remuneration or not, that involved being in a position of trust or authority towards a child; and (3) using a computer system for the purpose of communicating with a child.

c. Events Leading up to the s. 810.1 Application

[18] On July 10, 2014, Whitehorse RCMP received a complaint from a concerned parent that Mr. Nowazek was engaging in suspicious interactions with young children. The complainant told the RCMP that Mr. Nowazek gave candy to his eight-year-old son and four-year-old daughter, as well as two other children. The parent confronted Mr. Nowazek about what he had done and asked Mr. Nowazek if he was a sex offender. He said Mr. Nowazek denied this.

[19] Further investigation revealed that Mr. Nowazek offered a bicycle to a seven-year-old neighbourhood boy. The boy's description of the bicycle matched a bicycle seen by the RCMP on Mr. Nowazek's property. Open-source investigation conducted by the police established that Mr. Nowazek had advertised a "lifelike baby doll" for sale. The advertisement said this: "When you feel [the doll's] lifelike skin she almost comes alive". Mr. Nowazek had also posted an online advertisement seeking new accommodation with internet access.

[20] Based on this information, confirmatory statements obtained from the children involved, and Mr. Nowazek's history of offending, an information was sworn in Territorial Court on July 11, 2014, initiating an application against Mr. Nowazek under s. 810.1(1). The informant asserted a reasonably grounded fear that Mr. Nowazek would commit a sexual offence against children.

[21] On July 14, 2014, the police obtained a summons to compel Mr. Nowazek to appear. They did not seek an arrest warrant. Pursuant to s. 509 of the *Code*, the summons required Mr. Nowazek to appear before a Territorial Court judge on July 16, 2014, in response to the s. 810.1 application.

d. Appearance on July 16, 2014

[22] In accordance with the summons, Mr. Nowazek appeared before Judge Block of the Territorial Court of Yukon on July 16, 2014. He denied any wrongdoing and requested an adjournment to retain counsel, which was granted.

[23] Crown counsel confirmed that Mr. Nowazek was at large and appearing in court pursuant to a summons, but sought an order requiring him to enter into an interim recognizance pending the hearing of the application on its merits. Crown counsel made the following submissions on the court's jurisdiction to make such an order:

> I would suggest to the Court that you do have jurisdiction to impose a process on Mr. Nowazek.
>
> If you refer to s. 810.1(3.1), that allows the Court, at its discretion, to commit the defendant to prison if he fails or refuses to enter into the recognizance. We're not, of course, in the circumstances of this case suggesting that as a reasonable measure in the circumstances. However, it is the Crown's position that some supervision during this interim period is required, given the circumstances of this case.

Section 810.1(3.1) provides that a provincial court judge may commit a defendant to prison for a term not exceeding 12 months if the defendant fails or refuses to enter into a recognizance made after the application is heard and granted.

[24] Given Mr. Nowazek's criminal record and risk to reoffend, his reluctance to engage in sex offender treatment, and his recent interactions with children, the Crown argued that public safety required the imposition of conditions until the application could be heard.

[25] Mr. Nowazek contested the imposition of an interim recognizance order. He maintained that he "did nothing wrong" and posed no threat to the community.

[26] The Territorial Court judge noted the "legitimate concerns" of the Crown about public safety and decided that Mr. Nowazek should be subject to supervision pending the s. 810.1 hearing, which was scheduled to take place on July 25, 2014. Having come to this conclusion, he also said that Mr. Nowazek's freedom "should

not be inordinately affected". He ordered Mr. Nowazek to enter into a recognizance with a number of conditions recommended by the Crown, including the following:

> (8) You are prohibited from the possession, purchase or viewing of any pornographic materials featuring or having any reference to children.
>
> (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.

[27] The judge made the following comments to clarify Condition 9:

> … [Y]ou 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. … If you use any other device that they don't have access to, you'll be in breach of this recognizance.

e. The RCMP Searches of Mr. Nowazek's Home and Computers

[28] After the hearing before Judge Block on July 16, Mr. Nowazek went directly home to find RCMP officers waiting for him. He was given no opportunity to bring himself into compliance with Condition 9. The police informed him that they intended to search his residence "as per the recognizance". Mr. Nowazek allowed the RCMP into his home, where they searched several computers, including a laptop with a browser history reflecting "visits" to child pornography websites. Mr. Nowazek was arrested for child pornography offences under s. 163.1 of the *Code*. The RCMP took Mr. Nowazek into custody and secured his residence pending the outcome of an application for a search warrant.

[29] The Crown made two concessions on the *Charter voir dire* relevant to the search conducted on July 16: (1) that Mr. Nowazek did not consent to the search; and (2) that, prior to the July 16 search, the police did not have sufficient grounds to obtain a warrant to search Mr. Nowazek's home.

[30] Relying on the evidence gathered on July 16, the police obtained a warrant to search Mr. Nowazek's home on July 17, 2014, and executed it that day. In the course of executing the search warrant, the police found child pornography, various prohibited firearms, ammunition and an explosive substance.

[31] On the basis of the evidence seized in the search of July 17, 2014, Mr. Nowazek was charged with accessing and possession of child pornography, as well as a number of firearms-related offences.

[32] On July 21, 2014, Mr. Nowazek was detained in custody following a contested judicial interim release hearing.

III. TRIAL JUDGMENT

[33] Mr. Nowazek brought a pre-trial application asserting violations of his sections 7 and 8 *Charter* rights in the manner in which the evidence was obtained. He argued there was no jurisdiction to impose an interim recognizance order on a defendant summoned to court in response to an application pursuant to s. 810.1. In the alternative, he argued that the conditions imposed upon him exceeded the scope of what is permissible under s. 810.1(3.02). He sought exclusion of the evidence under s. 24(2) of the *Charter*.

[34] The judge made clear at the outset of the application that he did not question the reasonableness of the decision to impose a recognizance order on Mr. Nowazek given his history and the conduct underlying the application. Rather, he invited submissions on: (1) the jurisdiction to impose a recognizance on someone summoned to attend court; and (2) if jurisdiction existed, whether the conditions imposed in this case were authorized by s. 810.1(3.02). He made this clear in the following exchanges with Crown counsel:

> … I want to be clear, I understand why Justice Block imposed the conditions that he did, it makes sense in all sorts of ways, but that's not the question. The question is whether he – whether he had the jurisdiction to impose the conditions whether or not the conditions were merited in this case.
>
> …

> [Mr. Nowazek's] got a demonstrated history that makes out the concern, and moreover, I suspect that if they had actually proceeded to the 810 hearing, that the applicant would have succeeded, the recognizance would have been made, and we wouldn't be here.

[35] In response to Mr. Nowazek's application to exclude the evidence, the Crown sought to adduce testimony from RCMP officers about the nature of the child pornography seized from Mr. Nowazek's home. The following exchange took place between the judge and Crown counsel:

> THE COURT: … I had understood that you wanted to call some RCMP officers on this. Why do I need to hear from them?
>
> THE CROWN: We're hearing from them to establish the nature and quality of the evidence that was located, as well as ---
>
> THE COURT: It's pornography and guns. Why --- we get three days here. Why do we need to waste time hearing from RCMP officers? They acted in good faith, they relied on an order, they find firearms, explosives and pornography. What else are they going to tell me? And they didn't have grounds for a search warrant.
>
> THE CROWN: Yes. That's it.
>
> THE COURT: That's it?
>
> THE CROWN: We can launch right into argument, but the Crown wanted –
>
> THE COURT: Okay.
>
> THE CROWN: – to have the members available.
>
> THE COURT: Okay. I take it you don't need to hear from the RCMP officers, Mr. Tarnow?
>
> MR. TARNOW: Well, I think we just covered my cross-examination. They didn't have grounds for the search warrant.

[36] Later in the argument of the *Charter* motions, the judge engaged Crown counsel in a further discussion of s. 24(2) in the event he found there was no jurisdiction to make the interim recognizance order, or concluded that the order was made with jurisdiction but that the conditions of the recognizance were overly broad:

> THE COURT: Why is it that – I mean, maybe I'm being too curt here, but isn't – doesn't your argument really boil down to, gee, it's child porn and child porn's bad? Because my difficulty is if you think – if you look at some of the Supreme Court of Canada cases where they have excluded a station wagon of cocaine, cocaine is bad, too. I'm not sure how the fact that it's child porn and weapons helps you in terms of the exclusion of the evidence.

> THE CROWN: Cocaine is bad; however, child pornography is depicting the sexual abuse of children, which the Crown submits is – is quite serious and more serious in a different way …
>
> …
>
> THE COURT: Well, so … you're saying there's a huge public interest in having the matter proceed to trial.
>
> THE CROWN: Yes.

[37] In the result, the judge did not hear evidence from the investigating officers as to the precise nature of the offending materials found in Mr. Nowazek's home nor does it appear that he viewed the offending images himself.

[38] In a brief oral ruling delivered August 1, 2016, and indexed as 2016 YKSC 65, the judge said this:

> [6] For reasons to follow, I find that there was a violation of Mr. Nowazek's s. 8 rights, firstly, because, as he was not arrested at the time of the 810 hearing, the Territorial Court judge erred in imposing a recognizance when Mr. Nowazek had not been under arrest; and two, I find that the conditions imposed by the Territorial Court judge went beyond the scope of what are appropriate conditions to be imposed in such circumstances.
>
> [7] Turning to s. 24(2), I do not question that the RCMP acted in good faith. The offence is a serious offence, but the search of Mr. Nowazek's home and his computer was a serious violation of his s. 8 rights. As a consequence, while the child pornography evidence, the explosives, and the various firearms are reliable evidence and are powerfully demonstrative of guilt, nonetheless, in the circumstances of the case, they must be excluded from the trial.
>
> [Emphasis added.]

[39] Following the trial judge's decision to exclude the evidence, the Crown invited the entry of acquittals on all charges and initiated this appeal.

[40] The reasons to follow were given by the trial judge on February 7, 2017. They are indexed as 2017 YKSC 8.

[41] In explaining why he concluded that the Territorial Court judge lacked jurisdiction to order Mr. Nowazek to enter into an interim recognizance, the judge said this:

> 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 [under s. 495 of the Code – Arrest without warrant by peace officer]. 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." [In a footnote, the judge noted that this is consistent with s. 509 and Form 6 of the *Code* – Summons to a Person Charged with an Offence]. 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". But as Mr. Nowazek was not in custody, he was not properly subject to any form of judicial release.

[42] The judge rejected the submission made by the Crown before the Territorial Court judge that s. 810.1(3.1) authorized imposition of the interim recognizance. He held, correctly in my view, that s. 810.1(3.1) of the *Code* was of no assistance to the Crown: RFJ at para. 19. Section 810.1(3.1) allows a judge to commit a defendant to prison if the defendant fails to enter into a recognizance. It applies only after the s. 810.1 application is heard and decided in favour of the applicant. It had no application to the circumstances that existed on July 16, and is of no assistance in determining whether the Territorial Court judge had jurisdiction to impose an interim recognizance on a defendant summoned to court in response to the application.

[43] The judge also rejected the Crown's position that jurisdiction to impose conditions on Mr. Nowazek's release could be found in s. 515 of the *Code* governing judicial interim release. Section 515 appears in Part XVI and, as I have noted, applies to s. 810.1 proceedings "with any necessary modifications" by virtue of s. 795 of the *Code*. Section 515 is triggered when an accused is "taken before a justice". The Crown pointed to various decisions in which courts relied on s. 515 to impose conditions on a defendant's release pending the hearing of an application under s. 810.1, or a similar peace bond provision. The judge distinguished the cases relied on by the Crown on the basis that they all involved defendants who had been arrested and were in custody when they were taken before a justice: RFJ at paras. 21-24.

[44] The judge concluded that s. 515 does not confer jurisdiction to impose an interim recognizance on a defendant in s. 810.1 proceedings who appears pursuant to a summons and seeks an adjournment to retain counsel. The judge observed that "the language in s. 515 clearly and repeatedly contemplates an accused who is in custody and is seeking release": RFJ at para. 22. The judge also relied on *R. v. Goikhberg*, 2014 QCCS 3891, in which Cournoyer J. held that a person who is summoned to court is not "taken before a justice" within the meaning of s. 515 and therefore is not subject to the judicial interim release regime.

[45] The judge also concluded that the conditions of the recognizance allowing the RCMP to search Mr. Nowazek's home and computer (Conditions 9 and 10) went beyond the kind of conditions authorized by s. 810.1: RFJ at para. 34. Although the wording of Condition 9 was somewhat unclear, the judge found that it was intended to authorize the RCMP to search Mr. Nowazek's computer: RFJ at paras. 25-26. Read in conjunction with Conditions 8 and 10, that is a reasonable interpretation of Condition 9 and I do not understand the Crown to suggest otherwise.

[46] In support of his conclusion that Conditions 9 and 10 were invalid, the judge cited *R. v. Budreo* (1996), 27 O.R. (3d) 347 at 376 (Ont. Gen. Div.) [*Budreo* (1996)] affirming the decision of Then J., who held that "where there has been no offence and only a likelihood of harm proven, the restrictions imposed in the name of preventative justice can only be relatively slight".

[47] The judge also relied on *R. v. Shoker*, 2006 SCC 44, in which the majority of the Court noted that a probation term requiring an offender to submit to searches of his or her home would effectively override legislated standards for the issuance of search warrants. In the trial judge's view, "[t]hat is exactly what occurred here both in terms of the search of Mr. Nowazek's home and his computer": RFJ at para. 33.

[48] Because the recognizance was invalid, the judge found that the search on July 16 was a warrantless search. As noted earlier, the Crown conceded that the police lacked the requisite grounds to obtain a search warrant when they conducted the July 16 search and that Mr. Nowazek did not consent to the search. He only

allowed the RCMP to enter his residence and search his computer because he believed the conditions of the recognizance required him to do so. The judge commented that "[t]he Crown did not really attempt to justify this warrantless search" and concluded that the search could not be justified in law: RFJ at para. 37.

[49] The judge correctly concluded that his task was to determine, based on the record that was before the issuing justice, as amplified on review, but without reference to any excised information, whether the issuing justice could properly have issued the search warrant: *R. v. Araujo*, 2000 SCC 65 at paras. 51-53. He held that once the results of the July 16 search were excised from the information to obtain, there was no longer a sufficient basis upon which the search warrant could have been granted. Again, I do not understand the Crown to take issue with this conclusion.

[50] In the result, the warrant was quashed. The judge found that the search was in violation of Mr. Nowazek's s. 8 rights.

[51] Applying *R. v. Grant*, 2009 SCC 32, the judge held that the appropriate remedy was to exclude the evidence seized in the July 17 search pursuant to s. 24(2) of the *Charter.* The judge reiterated that the RCMP had acted in good faith. He acknowledged in his initial oral ruling (2016 YKSC at para. 7) the seriousness of the offence and recognized that the impugned evidence was both highly reliable and essential to the Crown's case. The state conduct, however, was serious, as it amounted to a warrantless search of Mr. Nowazek's home and computer. The impact on Mr. Nowazek's *Charter*-protected interests was significant. He had a high expectation of privacy in relation to his residence and personal computer, which was "compromised by an intrusive police search": RFJ at para. 47.

[52] Mr. Nowazek absconded after his acquittal. An order was made by a judge of this Court on November 21, 2017, permitting the appeal to proceed in his absence. Unsuccessful efforts were made to locate Mr. Nowazek shortly before the hearing. *Amicus curiae* was appointed to assist the Court in the resolution of the issues on appeal.

IV. ISSUES ON APPEAL

[53] The issues on appeal are:

a) Did the trial judge err in finding that the Territorial Court judge had no jurisdiction to impose an interim recognizance on Mr. Nowazek pending resolution of the s. 810.1 hearing because Mr. Nowazek appeared in response to a summons?

b) Did the trial judge err in finding that Conditions 9 and 10 of the interim recognizance went beyond the type of conditions authorized by s. 810.1?

c) Did the trial judge err in finding that the RCMP breached Mr. Nowazek's s. 8 *Charter* rights?

d) Did the trial judge err in excluding the evidence under s. 24(2) of the *Charter* without giving the Crown the opportunity to tender evidence respecting the nature of the child pornography found on Mr. Nowazek's computer?

V. DISCUSSION

[54] In my view, the trial judge correctly concluded that the Territorial Court judge had no jurisdiction to impose an interim recognizance on Mr. Nowazek. The evidence gathered by the police to support the issuance of a search warrant was derived from the authorizing conditions of an invalid recognizance. The search warrant could not have issued without the evidence gathered on July 16. The search of Mr. Nowazek's home and computers was warrantless and constituted an infringement of his s. 8 rights. In my view, the judge made no reviewable error in the manner in which he dealt with the s. 24(2) application or in his decision to exclude the fruits of the search.

[55] Even if the Territorial Court judge had jurisdiction to impose an interim recognizance, I would also have concluded that the conditions allowing the police to enter and search Mr. Nowazek's home and computer went beyond the conditions that are authorized by s. 810.1(3.02).

a. Jurisdiction to Impose an Interim Recognizance

1. Legislative Scheme as of July 2014

[56] When the interim recognizance order was imposed on Mr. Nowazek, s. 810.1 provided, in material part, as follows:

> Where fear of sexual offence
>
> 810.1 (1) Any person who fears on reasonable grounds that another person will commit an offence under section 151 or 152, subsection 153(1), section 155 or 159, subsection 160(2) or (3), section 163.1, 170, 171, 171.1, 172.1 or 172.2, subsection 173(2) or 212(1), (2), (2.1) or (4) or section 271, 272, 273, 280 or 281, in respect of one or more persons who are under the age of 16 years, may 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.
>
> Appearances
>
> (2) A provincial court judge who receives an information under subsection (1) may cause the parties to appear before a provincial court judge.
>
> Adjudication
>
> (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.
>
> Duration extended
>
> (3.01) However, if the provincial court judge is also satisfied that the defendant was convicted previously of a sexual offence in respect of a person who is under the age of 16 years, the judge may order that the defendant enter into the recognizance for a period that does not exceed two years.
>
> Conditions in recognizance
>
> (3.02) The provincial court judge may add any reasonable conditions to the recognizance that the judge considers desirable to secure the good conduct of the defendant, including conditions that
>
> (a) prohibit the defendant from having any contact — including communicating by any means — with a person under the age of 16 years, unless the defendant does so under the supervision of a person whom the judge considers appropriate;
>
> (a.1) prohibit the defendant from using the Internet or other digital network, unless the defendant does so in accordance with conditions set by the judge;
>
> (b) prohibit the defendant from attending a public park or public swimming area where persons under the age of 16 years are present or can reasonably be expected to be present, or a daycare centre, schoolground or playground;
>
> (c) require the defendant to participate in a treatment program;

> (d) require the defendant to wear an electronic monitoring device, if the Attorney General makes the request;
>
> (e) require the defendant to remain within a specified geographic area unless written permission to leave that area is obtained from the provincial court judge;
>
> (f) require the defendant to return to and remain at his or her place of residence at specified times; or
>
> (g) require the defendant to abstain from the consumption of drugs except in accordance with a medical prescription, of alcohol or of any other intoxicating substance.
>
> …
>
> Condition — reporting
>
> (3.05) The provincial court judge shall consider whether it is desirable to require the defendant to report to the correctional authority of a province or to an appropriate police authority. If the judge decides that it is desirable to do so, the judge shall add that condition to the recognizance.
>
> Refusal to enter into recognizance
>
> (3.1) 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.

[57] Sections 810.1(5), 810(5), and 795 operate to import the provisions of Part XVI (on compelling the appearance of an accused) into proceedings under s. 810.1. Section 810.1(5) states that s. 810(5) applies to recognizances made under s. 810.1. Section 810(5), in turn, says that the "provisions of this Part apply, with such modifications as the circumstances require, to proceedings under this section". The words "this Part" refer to Part XXVII of the *Code* (Summary Convictions). Section 795, also found in Part XXVII, incorporates the provisions of Part XVI of the *Code*. It reads as follows:

> 795. The provisions of Parts XVI and XVIII with respect to compelling the appearance of an accused before a justice … in so far as they are not inconsistent with this Part, apply, with any necessary modifications, to proceedings under this Part.
>
> [Emphasis added.]

[58] Part XVI includes provisions on compelling the appearance of an accused through an arrest warrant or summons, as well as provisions on judicial interim release. It creates a ladder of increasingly coercive measures to compel the

appearance of an accused in court and, where necessary, to protect the public pending trial. At the low end of the ladder is, for example, the issuance of an appearance notice by a peace officer. At the high end of the ladder are arrest and pre-trial detention. Part XVI requires courts and peace officers to employ the least coercive measures possible in the circumstances of each case.

[59] To obtain an arrest warrant or summons, an information must first be sworn. Section 504 provides for the laying of an information before a justice by any one who believes on reasonable grounds that a person has committed an offence.

[60] Section 507 applies when a justice receives an information laid under s. 504 in a public prosecution:

> 507(1) Subject to subsection 523(1.1), a justice who receives an information laid under section 504 … shall …
>
> (a) hear and consider, *ex parte*,
>
> (i) the allegations of the informant, and
>
> (ii) the evidence of witnesses, where he considers it desirable or necessary to do so; and
>
> (b) where he considers that a case for so doing is made out, issue … either a summons or a warrant for the arrest of the accused to compel the accused to attend … to answer to a charge of an offence.
>
> …
>
> (4) Where a justice considers that a case is made out for compelling an accused to attend before him to answer to a charge of an offence, he shall issue a summons to the accused unless the allegations of the informant or the evidence of any witness or witnesses taken in accordance with subsection (3) discloses reasonable grounds to believe that it is necessary in the public interest to issue a warrant for the arrest of the accused.
>
> [Emphasis added.]

[61] Under s. 503(1), a peace officer who arrests a person with or without a warrant "shall cause the person to be detained in custody and … taken before a justice to be dealt with according to law". Once a person is "taken before a justice", the judicial interim release regime under s. 515 is triggered:

> 515 (1) Subject to this section, where an accused who is charged with an offence other than an offence listed in section 469 is taken before a justice, the justice shall … order, in respect of that offence, that the accused be

> released on his giving an undertaking without conditions, unless the prosecutor … shows cause … why the detention of the accused in custody is justified or why an order under any other provision of this section should be made …
>
> (2) Where the justice does not make an order under subsection (1), he shall, unless the prosecutor shows cause why the detention of the accused is justified, order that the accused be released
>
> > (a) on his giving an undertaking with such conditions as the justice directs;
> >
> > (b) on his entering into a recognizance before the justice, without sureties, in such amount and with such conditions, if any, as the justice directs but without deposit of money or other valuable security;
> >
> > (c) on his entering into a recognizance before the justice with sureties in such amount and with such conditions, if any, as the justice directs but without deposit of money or other valuable security;
> >
> > (d) with the consent of the prosecutor, on his entering into a recognizance before the justice, without sureties, in such amount and with such conditions, if any, as the justice directs and on his depositing with the justice such sum of money or other valuable security as the justice directs; …
> >
> > ...
>
> [Emphasis added.]

[62] Section 515(10) sets out the circumstances in which pre-trial detention of an accused is justified:

> (10) For the purposes of this section, the detention of an accused in custody is justified only on one or more of the following grounds:
>
> > (a) where the detention is necessary to ensure his or her attendance in court in order to be dealt with according to law;
> >
> > (b) where the detention is necessary for the protection or safety of the public, including any victim of or witness to the offence, or any person under the age of 18 years, having regard to all the circumstances including any substantial likelihood that the accused will, if released from custody, commit a criminal offence or interfere with the administration of justice; and
> >
> > (c) if the detention is necessary to maintain confidence in the administration of justice, having regard to all the circumstances, including
> >
> > > (i) the apparent strength of the prosecution's case,
> > >
> > > (ii) the gravity of the offence,
> > >
> > > (iii) the circumstances surrounding the commission of the offence, including whether a firearm was used, and

> (iv) the fact that the accused is liable, on conviction, for a potentially lengthy term of imprisonment or, in the case of an offence that involves, or whose subject-matter is, a firearm, a minimum punishment of imprisonment for a term of three years or more.

2. Case Law

[63] In a line of cases beginning with *R. v. Allen* (1985), 18 C.C.C. (3d) 155 (Ont. C.A.), appellate courts have, with one recent exception, consistently held that a person named in an information under s. 810.1 (or another peace bond provision) can be subject to court-issued process under s. 507 and the judicial interim release regime in s. 515.

[64] In *Allen*, the Court concluded that s. 507(4) (then s. 455.3(4)) was applicable to proceedings under s. 810 (then s. 745), even though the named defendant is not "charged with an offence". When *Allen* was decided, s. 455.3(4) provided that a justice receiving an information "shall cause the parties to appear". Section 728 (now s. 795) made the provisions of the *Code* on compelling the appearance of an accused applicable *mutatis mutandis* to proceedings under what is now s. 810. As a result, the Court concluded that s. 455.3(4) (now s. 507(4)) authorized a justice to issue a warrant for the arrest of a defendant in s. 810 proceedings.

[65] In *R. v. Wakelin* (1991), 71 C.C.C. (3d) 115 (Sask. C.A.), the Court went a step beyond *Allen* and concluded that s. 515 of the *Code* is applicable in s. 810 proceedings. The Court noted that s. 795 makes the provisions of Part XVI, including s. 515, applicable "with such modifications as the circumstances require". Given the power to issue an arrest warrant under the peace bond provisions of the *Code*, the Court concluded (at para. 16) that "it would be anomalous if the judicial interim release provisions did not apply" to s. 810 proceedings. The Court found it was a reasonable modification to read the words "an accused who is charged with an offence" in s. 515 to include a person against whom an information has been laid under s. 810. In the result, the Court concluded that a judge has authority to release a defendant in s. 810 proceedings on an undertaking with conditions pending the hearing of the s. 810 application.

[66] In *Budreo*, the Ontario Court of Appeal was asked to reconsider its decision in *Allen*. The defendant was a diagnosed paedophile who had just been released from prison after serving sentences for sexual offences involving children. He refused to consent to the imposition of a recognizance under s. 810.1. The defendant attended court voluntarily on police instructions. On the same day, a police officer swore an information under s. 810.1 that she had reasonable grounds to fear the appellant would commit sexual offences against children. The judge determined to issue process and concluded that the defendant's attendance in court to answer to the application should be compelled by an arrest warrant. The defendant was arrested outside the courtroom pursuant to a warrant issued under s. 507(4) of the *Code.* With the defendant now in custody, he was taken before the judge for a show cause hearing to determine whether he should be released on bail pending resolution of the s. 810.1 application. The defendant eventually agreed to the release conditions sought by the Crown and the s. 810.1 hearing was adjourned to a date one week later. He then applied for a declaration that ss. 810.1 and 507(4) violated the *Charter*.

[67] The Court affirmed the correctness of its decision in *Allen*. As in *Wakelin*, the Court in *Budreo* concluded that s. 795 contemplates the modification of ss. 507 and 515 to apply to proceedings commenced by the laying of an information under s. 810.1, even though a defendant to a s. 810.1 information is not "an accused charged with an offence": paras. 59-62.

[68] The Court emphasized that s. 507(4) requires a justice to issue a summons whenever possible. The judge may issue an arrest warrant only where necessary in the public interest, which, in the s. 810.1 context, means where the defendant will not otherwise attend court or poses an imminent risk to the safety of children: para. 66. The Court also noted that, if an arrest warrant is issued and the defendant is brought before a justice, s. 515 demands the release of the defendant without conditions unless the Crown can show cause for a more restrictive order. The justice must exercise his or her discretion under s. 515 "judicially and bearing in mind the

limited conditions that can be imposed following a successful s. 810.1 application": para. 67.

[69] The Court found that the availability of pre-hearing detention in s. 515 did not render s. 810.1 overbroad, notwithstanding that detention is more severe than any sanction available to the court at the conclusion of a successful s. 810.1 application (unless the defendant refuses to enter into the recognizance):

> [46] … Pre-trial arrest or even pre-hearing detention may be necessary to secure the defendant's attendance at the hearing or to prevent harm to children pending a hearing because of a defendant's unwillingness to comply with reasonable terms of release. In short, as I have already said, pre-trial arrest and detention may be needed in some cases to ensure the integrity and viability of the s. 810.1 proceedings themselves.

[70] The Court emphasized that pre-hearing detention will only be justified in unusual circumstances in s. 810.1 proceedings. It also pointed to s. 515(10), which circumscribes judicial discretion to order pre-hearing detention by setting out the circumstances in which detention is justified.

[71] In *R. v. Cachine*, 2001 BCCA 295, the Court followed *Allen*, *Wakelin*, and *Budreo* and confirmed that ss. 507 and 515 apply in proceedings under s. 810.2. As in the previous cases, the defendant was arrested pursuant to a warrant issued under s. 507, taken before a justice and released on a recognizance with conditions pending resolution of the application. *Cachine* therefore stands for the narrow proposition that a judge may impose an interim recognizance with conditions on a defendant who is arrested and taken before a justice following the institution of a peace bond application.

[72] The exception to this otherwise consistent line of authority is *R. v. Penunsi*, 2018 NLCA 4, application for leave to appeal granted [2018] S.C.C.A. No. 73. In that case, the Court held that s. 810.2 (and, by necessary extension, s. 810.1) does not authorize a judge to compel the appearance of a defendant by issuing an arrest warrant and that s. 515 is not, as a consequence, engaged at all in proceedings of this kind.

[73] Writing for the Court, Hoegg J.A. disagreed with the decisions in *Allen*, *Budreo*, *Wakelin* and *Cachine*: at para. 77. Among other things, she noted that Parliament had enacted (in ss. 810(2), 810.1(2) and 810.2(2)) special provisions to compel appearances on recognizance applications. In each instance, a justice who receives an information has the power to cause the parties to appear before a provincial court judge. Although she recognized that ss. 810(2), 810.1(2) and 810.2(2) do not identify the mechanism or procedure by which such appearances are to be effected, she concluded that it would not have been necessary to enact ss. 810(2), 810.1(2) and 810.2(2) if Parliament intended Part XVI to apply by operation of s. 795. She reasoned as follows:

> [50] … The special provisions [ss. 810(2), 810.1(2) and 810.2(2)] show Parliament's acknowledgement that a defendant to a peace bond Information is of a different character than a defendant to a criminal charge. Part XVI applies to Part XXVII only insofar as it is not inconsistent with it. The different provisions for compelling appearances regarding peace bond proceedings are an obvious inconsistency with the Part XVI provisions for compelling appearances of accuseds and defendants. It "may" have been open to Parliament to rely on the procedures for compelling appearances in Part XVI to apply to peace bond proceedings, but it chose not to do so because of the fundamental difference between defendants to proceedings respecting criminal charges and those to respecting peace bonds. … Parliament made a choice not to rely on the provisions of Part XVI to compel appearances respecting peace bond Informations. Permitting a judge to issue a warrant of arrest under section 810.2(2) would be, in my view, inconsistent with Parliament's scheme respecting peace bonds. The Crown's argument fails to recognize this inconsistency. If the Crown's position were to prevail, the special provisions for compelling appearances in the peace bond provisions would be rendered pointless, thereby offending the presumptions against tautology and of consistent expression, and would override an inconsistency of the kind envisioned in section 795 of the *Code.*

[74] Further, Hoegg J.A. concluded that the modifications that would be required to the language of ss. 507 and 515 to bring a defendant to a peace bond application within the scope of these provisions would be "substantial and go well beyond mere changes in detail". She held that the effect of the modifications would be to treat people whom others fear in the same way as those who have been criminally charged, and that to do so would be "simply wrong": paras. 51-57.

[75] Hoegg J.A. further found "something both illogical and absurd about a process which permits more restrictive sanctions on a defendant's liberty before

hearing than would be possible after hearing": para. 58. This point was considered in *Budreo* in response to an argument that applying ss. 507(4) and 515 to a s. 810.1 hearing violates s. 7. As noted, the Court in *Budreo* concluded that a "provision for pre-hearing arrest and detention is needed to preserve the integrity of the s. 810.1 proceedings … [by ensuring] … the attendance of a defendant at the hearing or to protect children from the possibility of serious harm pending the hearing": para. 64.

[76] After analyzing the scope of the power to arrest without warrant under s. 495 of the *Code* and the common law power to arrest to prevent an apprehended breach of the peace (discussed in *Brown v. Durham Regional Police Force* (1998), 43 O.R. (3d) 223, 167 D.L.R. (4th) 672 (C.A.), leave to appeal to SCC granted but appeal discontinued, [1999] S.C.C.A. No. 87, [2000] 2 S.C.R. vi), Hoegg J.A. concluded that "[i]nterpreting section 810.2(2) to include the power of arrest would make it easier to arrest a person for not committing an offence than it would be to arrest a person for committing an offence": para. 69. Citing *R. v. Storrey*, [1990] 1 S.C.R. 241, she concluded that arresting persons on "the lower standard of fear is not in accordance with the jurisprudence respecting grounds for arrest and would not, in my view, provide the necessary 'important protection' from 'the abuses and excesses of a police state'": para. 69.

[77] Hoegg J.A. concluded that *Allen*, *Budreo*, *Wakelin* and *Cachine* did not grapple with these issues and were wrongly decided.

[78] Finally, the Court in *Penunsi* relied on a 2002 amendment to Part XVI of the *Code* in concluding that *Allen* and its progeny are, in any event, no longer good law. The amendment, made after *Allen*, *Wakelin*, *Budreo*, and *Cachine* were decided, added s. 507.1 for private prosecutions and narrowed the application of s. 507 to public prosecutions. A private prosecution is a prosecution where the information is laid by a private citizen, and stands in contrast with a public prosecution, where the information is laid by a police officer, public officer, the Attorney General or the Attorney General's agent, as specified in s. 507.

[79] Section 507.1 sets out additional procedural requirements when a member of the public lays an information in a private prosecution. Section 507.1(2) provides for the issuance of process to compel the appearance of the accused in a private prosecution:

> (2) A judge or designated justice to whom an information is referred under subsection (1) and who considers that a case for doing so is made out shall issue either a summons or warrant for the arrest of the accused ...

Section 507.1(9) provides that subsections (1) to (8) do not apply in respect of informations laid under ss. 810 or 810.1.

[80] The Court in *Penunsi* found that s. 507.1(9) "specifically excludes the power of arrest from applying to section 810 and 810.1 proceedings": para. 72. As a consequence of this amendment, the Court concluded that *Allen*, *Wakelin*, and *Budreo*, which involved proceedings under ss. 810 and 810.1, should no longer be followed.

[81] I respectfully disagree with much of the reasoning in *Penunsi* and with the conclusion of the Court that neither s. 810(2) nor s. 810.1(2) authorizes a judge to compel the appearance of a defendant by issuing a warrant of arrest. I note that *Penunsi* was not followed in *R. v. Schafer*, 2018 YKTC 12 at paras. 27, 28 and 31.

[82] In my view, most of the concerns raised in *Penunsi* were, in fact, considered in previously decided cases. Second, I do not think it meaningfully advances the analysis to compare the power of arrest without warrant to the power of a judge to issue an arrest warrant under s. 507(4) in respect of an information sworn under s. 810.1 when it is necessary in the public interest to do so. Nor do I accept that it will be "easier" to obtain an arrest warrant for a s. 810.1 defendant who has not committed an offence than it would be to arrest a person for committing an offence. First, a provincial court judge who receives an information under s. 810.1(1) exercises a discretion in determining whether to issue process. This discretion is reflected in the permissive language of s. 810.1(2). Second, as held in *Budreo*, where process does issue, the circumstances in which it will be "necessary in the

public interest" to issue an arrest warrant will be limited to cases in which proceeding in this fashion is necessary to preserve the integrity of the s. 810.1 proceedings. This will only be so when a case has been made out by the informant that the defendant will not otherwise attend court or that the defendant poses an imminent risk to the safety of children: para. 66.

[83] The enactment of s. 507.1(9) does nothing, in my view, to detract from the authoritativeness of *Allen*, *Wakelin*, and *Budreo*. It appears that s. 507.1(9) simply exempts proceedings under ss. 810 and 810.1 from the additional safeguards for private prosecutions in s. 507.1, even where the s. 810 or 810.1 information is laid by a member of the public. Trotter J. (as he then was) reached the same result in *R. v. Konjarski*, 2015 ONSC 3999 at para. 6:

> Proceedings under s. 810 are different from the more elaborate procedure under s. 507.1 … Section 507.1 provides for a pre-enquete hearing before process may issue … However, this procedure does not apply to proceedings under s. 810 (see s. 507.1(9)).

In my view, the enactment of s. 507.1(9) did not change the law in relation to compelling a defendant's appearance in proceedings under s. 810.1.

[84] More generally, I am of the view that the reasoning set out in *Penunsi* does not take sufficient account of the context in which peace bond applications occur and the public protection concerns that animate these proceedings. In addition, while s. 810.1(2) and its companion provisions authorize a provincial court judge who receives an information sworn under subsection (1) to cause the parties to appear before a provincial court judge for hearing, it is silent on the mechanics through which that appearance is to be achieved. That gap is filled by s. 795 which imports Part XVI, including s. 507(4) and 515, into s. 810.1 proceedings.

3. Parties' Positions

[85] The Crown relies on *Allen*, *Wakelin*, *Budreo*, and *Cachine* in support of its position that the Territorial Court judge had jurisdiction to order Mr. Nowazek to enter into an interim recognizance pending the hearing of the s. 810.1 application. The Crown submits that the judge made a "distinction without a difference" when he

distinguished those cases on the basis that Mr. Nowazek appeared pursuant to a summons, not an arrest warrant. The Crown contends that Mr. Nowazek was "compelled by court process to appear and thereafter he was under the Territorial Court's section 515 jurisdiction". In the Crown's submission, the judge's reading of "taken before a justice" in s. 515 was unduly narrow and fails to account for the "*mutatis mutandis* nature of judicial interim release procedures described in section 810.1".

[86] The Crown also says the judge's interpretation will lead to over-reliance on arrest in proceedings under s. 810.1 and in related contexts. The Crown says this result would be at odds with the preference for the minimally intrusive liberty restrictions reflected in Part XVI of the *Code.*

[87] The *amicus* submits the trial judge was correct to find that the Territorial Court judge had no jurisdiction to impose an interim recognizance on Mr. Nowazek. However, the *amicus* says this Court should find that judges have jurisdiction to impose an interim recognizance on a summoned defendant in s. 810.1 proceedings where strictly necessary to prevent imminent harm. The *amicus* refers to the jurisprudence on preventative arrest, including *Brown*, in support of this submission.

4. Analysis

[88] In my view, a judge cannot apply the judicial interim release provisions in s. 515 to a defendant who appears in response to a summons in s. 810.1 proceedings. Section 515 is triggered when an accused is "taken before a justice". A summoned defendant is neither in custody nor "taken before a justice". By contrast, the defendants in *Allen, Wakelin, Budreo*, and *Cachine* were arrested and, once taken before a justice, s. 515 governed their release pending the hearing of the Crown's application for a recognizance. For this reason, those cases are factually distinguishable from the case at bar.

[89] I am fortified in this conclusion by two decisions: *Goikhberg* and *R. v. Hebert* (1984), 54 N.B.R. (2d) 251 (C.A.).

[90] In *Goikhberg*, Justice Cournoyer concluded that a summoned person is neither “taken before a justice” nor “in custody”. The circumstances of the case were a bit unusual. Mr. Goikhberg was already in custody on a prior conviction when he appeared in response to a summons to answer new criminal charges. His attendance in court was procured by means of an order issued pursuant to s. 527 of the *Code* (Procedure to Procure the Attendance of a Prisoner). Because he was incarcerated on the prior conviction, the Crown did not oppose release, but the judge made no release order: para. 79. More than two years later, in anticipation of Mr. Goikhberg’s statutory release date in respect of the prior conviction, the Crown attempted to bring a bail review application under s. 521 of the *Code*. The Crown contended that a material change of circumstances justified Mr. Goikhberg’s detention pending the trial of the new criminal charges.

[91] Justice Cournoyer found that there was no bail status to review. As he explained, Mr. Goikhberg appeared in response to a summons and, as a result, had not been released on bail:

> 79. Contrary to the submissions by the prosecution, no decision was made by the Quebec Court judge on September 26, 2011 to release Mr. Goikhberg. He was not released without conditions under s. 515. Had it been the case, an undertaking pursuant to Form 12 would have been signed by him.
>
> 80. This is quite logical because when a summons is used to compel the appearance of an accused, the person comes before the court at large. Mr. Goikhberg didn’t have to be released as he was not in custody in the current file.
>
> 81. If no order was made under s. 515 *Cr. C.* on September 26, 2011 to release Mr. Goikhberg, then it would appear that the prosecution is without any recourse.
>
> …
>
> 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.
>
> …
>
> 92. The prosecution made a conscious decision not to seek Mr. Goikhberg’s detention in this file and choose instead to compel him to attend court through a summons. S. 521 does not provide a review mechanism in such circumstances. The use of an order under s. 527 does not alter the situation.

> 93. Under our constitutional regime, a court may not judicially create a bail review mechanism that does exist.
>
> [Emphasis added.]

[92] *Hebert* supports the same conclusion. In that case, the court held that a person who appears pursuant to an appearance notice is not "taken before a justice" within the meaning of s. 515. An appearance notice is a summons-like process issued by the police rather than a judge: The Honourable Justice Gary T. Trotter, *The Law of Bail in Canada*, 3rd ed. (Thomson Reuters Canada, 2017) at 2-35 to 2-37. The Court found that the words "taken before a justice" refer to a person in custody following arrest: para. 5.

[93] I acknowledge the existence of countervailing authority to the effect that an accused who is already in custody may be brought before a justice on a s. 527 order for a show cause hearing even if the initial document used to compel the accused was a summons: *R. v. Onalik*, 2006 NLTD 108; *R. v. Katirtzogloy*, [1989] O.J. No. 1872 (H.C.). I prefer the reasoning in *Goikhberg*. In any event, I note that all three of these judgments address a situation that does not arise here: specifically, whether a person in custody who is brought before the court pursuant to an order made under s. 527 can be said to be "taken before a justice" within the meaning of s. 515. It is unnecessary to resolve that point in this case.

[94] Based on the foregoing, I conclude that a person charged with a criminal offence is not "taken before a justice" within the meaning of s. 515 and subject to a release order when that person appears in court pursuant to a summons.

[95] The same conclusion applies to a person named in an information under s. 810.1. In my view, it would go beyond the "necessary modifications" contemplated by s. 795 to find that s. 515, though inapplicable to a summoned person who is charged with an offence, has special application to a summoned defendant in s. 810.1 proceedings. The word "necessary" must be understood as limiting the reach of s. 795: see the discussion in *R. v. Z. (D.A.)*, [1992] 2 S.C.R. 1025 at 1045-1046, concerning the limiting nature of the phrase "where the context requires". In

my view, reading s. 795 to incorporate the bail provisions of s. 515 in the case of a defendant summoned to court in response to an application under s. 810.1 is unnecessary. I say this because a judge may issue a warrant for the arrest of a defendant in s. 810.1 proceedings in appropriate circumstances. Once the defendant is arrested and taken before the court, s. 515 is engaged and conditions of release may be imposed.

[96] I see no contradiction between this conclusion and the conclusion reached in the *Allen* line of cases. The interpretive scope to be given to a statutory phrase like "with any necessary modifications" (or like phrases contemplating the application of a provision in a different context with such modifications as the circumstances require) is context-dependent. In the *Allen* line of cases, there would be no mechanism through which a person arrested on a peace bond application could be released on bail, and no framework governing release, unless the bail provisions of the *Code* applied. In that context, the modification was both necessary and required. In my view, the same cannot be said in this context because, as I have said, a mechanism exists through which high-risk offenders can be detained and subject to release on bail pending the hearing of a recognizance application – the issuance of an arrest warrant under s. 507 and a show cause hearing under s. 515.

[97] If the integrity of the proceedings, including protection of the public, demands that a defendant in s. 810.1 proceedings be detained or subject to conditions of release pending the hearing of the Crown's application for a recognizance, the police must seek a warrant for the person's arrest. A summons does not trigger the s. 515 judicial interim release regime.

[98] Once an information has been sworn under s. 810.1, the judge exercises a discretion in determining whether to "cause the parties to appear before a provincial court judge". The exercise of this discretion permits the weeding out of unfounded informations under which a person may be summoned or arrested: *Budreo* (1996) at paras. 151-157; aff'd *Budreo* (Ont. C.A.) at paras. 54-58. If the judge decides to exercise his or her discretion to cause the parties to appear, s. 507 is engaged.

Section 507(4) provides that, upon being satisfied that a case is made out for compelling the appearance of an accused, the judge shall summons the accused unless the informant's allegations or the evidence before the judge provide "reasonable grounds to believe that it is necessary in the public interest to issue a warrant for the arrest of the accused".

[99] As noted earlier, *Budreo* provides guidance on the circumstances in which the issuance of an arrest warrant is constitutionally compliant and "necessary in the public interest" in proceedings under s. 810.1:

> [66] … Because a hearing under s. 810.1 can only result in the defendant being required to enter into a recognizance, the circumstances in which it would be "necessary in the public interest" to issue an arrest warrant will be limited to cases where that process is necessary to preserve the integrity of the s. 810.1 proceedings. The justice will require the informant to make out a case that the defendant will not otherwise attend court or that the defendant poses an imminent risk to the safety of children, which s. 810.1 is designed to protect.
>
> [Emphasis added.]

[100] The court in *Budreo* also emphasized that, if the judge decides to issue an arrest warrant, s. 515 demands the release of the defendant on a simple undertaking without conditions unless the prosecutor shows cause for a more intrusive order. As discussed, the court warned that pre-hearing detention will only be appropriate in "unusual circumstances" in the s. 810.1 context:

> [68] … Indeed, it will be a rare case where it would enhance confidence in the administration of justice to detain a defendant who is not alleged to have committed any crime and who can only be required to enter into a recognizance at the conclusion of the proceedings.

I agree with the views expressed in *Budreo.*

[101] I do not accept the submission of the Crown that because an interim recognizance cannot be imposed on a defendant summoned to court this will result in over-reliance on arrest in proceedings under s. 810.1. In my view, the framework set out herein does nothing to undermine the preference in Part XVI for minimally intrusive means to compel the appearance of an accused. The Crown's argument overlooks the fact that, under the above-noted framework, the defendant's

attendance is procured pursuant to s. 507 of the *Code*. A summons is the default option under s. 507. If the police cannot persuade a judge that a warrant for the defendant's arrest is necessary, the judge has no choice but to issue a summons. In such cases, the fact that an arrest warrant is not necessary in the public interest suggests that the risk posed by the defendant is insufficient to justify restrictions on the defendant's liberty pending a s. 810.1 hearing.

[102] I find it unnecessary to discuss the law of preventative arrest as suggested by the *amicus.* The issue in this case revolves around the application of ss. 507 and 515 in the context of s. 810.1 proceedings. The power to arrest to prevent the commission of an indictable offence under s. 495(1)(a) and the common-law power to arrest for an apprehended breach of the peace arise where no information has been laid and no court-issued process has been sought. In this case, as in *Allen, Wakelin, Budreo* and *Cachine*, the proceedings began with the laying of an information. The police then sought court-issued process to compel the defendant to appear. As a result, the applicable provision is s. 507(4).

[103] Turning to this case, I conclude that the Territorial Court judge lacked jurisdiction to impose an interim recognizance on Mr. Nowazek pending the hearing of the s. 810.1 application. If imposing restrictions on Mr. Nowazek's liberty was necessary to preserve the integrity of the s. 810.1 proceedings (because, for example, he posed an imminent risk to children), the police could have sought an arrest warrant. It is unclear to me why they did not do so. Given Mr. Nowazek's history and the conduct motivating the application, it is likely that an arrest warrant would have issued had one been sought.

[104] It must be recalled that, at the relevant time, Mr. Nowazek was an untreated sexual offender who was, by his own admission, unable to control his deviant sexual impulses. In 2009, he was determined to be a high risk to reoffend, particularly in relation to children. The evidence supplied overwhelming grounds for concern that Mr. Nowazek was attempting to befriend children with offers of candy and other gifts. The children he approached appear to have been complete strangers to him. There

was a considerable body of evidence in this case that the defendant posed an imminent risk to the safety of children.

[105] In summary, when the police swear an information under s. 810.1(1), they have two choices. The first is to seek a summons. The second is to seek an arrest warrant. In this case, the police opted for the former route. As a result, it was not open to the Crown to invoke the judicial interim release regime when Mr. Nowazek appeared in response to the summons.

[106] As a final comment, I recognize that it is not at all unusual on a first appearance in a case of this kind for a defendant to seek an adjournment of the recognizance application to retain counsel. Adjournments to facilitate the retention of counsel are routinely granted. That is what happened here. Unanticipated delay in the resolution of the application may not have been in the contemplation of the informant when a summons was sought to compel the attendance of the defendant in response to the application. It is conceivable that the informant might have determined not to seek an arrest warrant under s. 507 because the hearing itself was expected to occur within a very short time. When an adjournment of the hearing is granted, the length of time in which a defendant will remain in the community without being bound by judicially imposed conditions may materially change the informant's assessment of whether an arrest warrant is necessary in the public interest.

[107] What can be done in this situation? The point was not argued before us but it seems to me that s. 512 is available to fill any public interest gap that might be thought to arise.

[108] Section 512(1) provides that where a justice "has reasonable and probable grounds to believe that it is necessary in the public interest to issue … a warrant for the arrest of the accused", he or she may do so "notwithstanding that … (b) a summons has previously been issued under subsection 507(4)". Consistent with the *Allen* line of cases, it seems entirely appropriate to read s. 512 to include a defendant in s. 810.1 proceedings. In the result, it would appear to be open to the

police to seek an arrest warrant despite the fact that a summons has previously been issued under s. 507(4): see *R. v. Chung et al*. (1975), 26 C.C.C. (2d) 497 (B.C.C.A.); *R. v. Verdun*, [2010] O.J. No. 4125 (S.C.J.).

b. Jurisdiction to Impose Terms

[109] Even if I am wrong in concluding that the Territorial Court judge lacked jurisdiction to impose an interim recognizance on Mr. Nowazek pending the s. 810.1 hearing, I would have concluded that the conditions requiring Mr. Nowazek to submit to searches of his home and computer were unauthorized by s. 810.1.

1. Law

[110] In *Budreo*, the appellant challenged the constitutional validity of s. 810.1(3), which authorized a judge to impose certain restrictions on a defendant's liberty. At the time *Budreo* was decided, s. 810.1(3) read as follows:

> (3) The provincial court judge before whom the parties appear may, if satisfied by the evidence adduced that the informant has reasonable grounds for the fear, order the defendant to enter into a recognizance and comply with the conditions fixed by the provincial court judge, including a condition prohibiting the defendant from engaging in any activity that involves contact with persons under the age of fourteen years and prohibiting the defendant from attending a public park or public swimming area where persons under the age of fourteen years are present or can reasonably be expected to be present, or a daycare centre, schoolground, playground or community centre, for any period fixed by the provincial court judge that does not exceed twelve months.

[111] The Ontario Court of Appeal agreed with Then J. that the words "community centre" were inoperative but found s. 810.1(3) to be otherwise valid. In the court's view, it was constitutionally permissible to impose restrictions preventing a defendant in s. 810.1 proceedings from attending places or participating in activities where children may reasonably be expected to be present. Such restrictions represent a reasonable balancing of a defendant's liberty interests and the state's interest in protecting young children. The words "community centre" were overbroad in the absence of some qualification, as there may be times and places at which children cannot reasonably be expected to be present at a community centre: *Budreo* (1996) at paras. 63-64, aff'd *Budreo* (Ont. C.A.) at paras. 40-41.

[112] The court in *Budreo* found that a judge's discretion to impose conditions not specifically enumerated in s. 810.1(3) was limited to "those conditions similar to the specified examples": para. 41. Accordingly, a judge could restrict a defendant's attendance at a place where children are likely to be present, but could not require a defendant to take the drug Luperon. Because s. 810.1 does not create an offence, the court noted that a broader interpretation, such as one allowing a judge to order a defendant to take a particular drug, would "raise serious *Charter* concerns": para. 41. See also *Noble c. Teale*, [2005] Q.J. No. 17295 (Sup. Ct.), in which the judge followed *Budreo* and found that the residual power to impose other conditions in s. 810.2 was limited to conditions similar to those specified in s. 810.2.

[113] In *Shoker*, the Supreme Court of Canada considered the validity of a term of probation requiring the probationer to provide samples of bodily substances. The majority concluded that the impugned term was unauthorized by the *Code* provisions in force at the time. Section 732.1(3) set out various optional conditions a judge could include in a probation order. One of the enumerated conditions was a condition requiring an offender to abstain from using drugs or alcohol. The Crown argued that the authority to impose an abstention term necessarily implied the authority to impose a term requiring the probationer to provide bodily samples. The majority of the Court disagreed, explaining that "the jurisdiction to impose enforcement terms cannot simply flow from the power to impose an abstention condition": para. 20.

[114] The majority also concluded that the judge lacked jurisdiction to impose the impugned term under the residual clause in s. 732.1(3), which provided that a judge could order a probationer to "comply with such other reasonable conditions as the court considers desirable … for protecting society and for facilitating the offender's successful reintegration into the community". The majority found that it was "reasonable to infer that additional conditions imposed under the residual power would be of the same kind as the listed conditions": para. 22. None of those listed conditions were "aimed at facilitating the investigation of suspected breaches of probation": para. 14.

[115] In finding that the impugned condition fell outside the scope of the residual clause in s. 732.1(3), the majority said this:

> [22] … [C]onditions 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.
>
> [23] The sentencing judge's jurisdiction can be no greater in respect of the seizure of bodily samples. The seizure of bodily samples is highly intrusive and, as this Court has often reaffirmed, it is subject to stringent standards and safeguards to meet constitutional requirements. …
>
> …
>
> [25] The establishment of these standards and safeguards cannot be left to the discretion of the sentencing judge in individual cases. There is no question that a probationer has a lowered expectation of privacy. However, it is up to Parliament, not the courts, to balance the probationers' *Charter* rights as against society's interest in effectively monitoring their conduct. …
>
> [26] For these reasons, I would conclude that there is no statutory authority for requiring Mr. Shoker to submit bodily samples. In the absence of a legislative scheme authorizing the seizure of bodily samples, the enforcement of abstention conditions must be done in accordance with existing investigatory tools. …
>
> [Emphasis added.]

[116] Since *Budreo* and *Shoker* were decided, s. 810.1 has been amended on numerous occasions to expand the list of enumerated conditions that may be imposed on a defendant in s. 810.1 proceedings. The primary amendments to the material parts of s. 810.1, set out herein at para. 56, were enacted pursuant to the *Tackling Violent Crime Act*, S.C. 2008, c. 6, which deleted the previous version of 810.1(3) and replaced it with a number of provisions, including ss. 810.1(3)-(3.05). The only aspects of the provisions set out in para. 56 that were not included in the 2008 amending legislation were ss. 810.1(3.02)(a) and (a.1). Subparagraphs (a) and

(a.1) were added to s. 810.1(3.02) by the *Safe Streets and Communities Act*, S.C. 2012, c. 1, s. 37. Both of these amending acts came into force prior to July 16, 2014.

[117] Section 810.1(3.02) has been further amended twice since July 16, 2014. The amendments added three further enumerated conditions to the subsection. Paragraphs (h) and (i) were added to s. 810.1(3.02) by the *Response to the Supreme Court of Canada Decision in R. v. Shoker Act*, S.C. 2011, c. 7, s. 9:

> 9. Subsection 810.1(3.02) of the Act is amended by striking out "or" at the end of paragraph (*f*) and by adding the following after paragraph (*g*):
>
> (*h*) require the defendant to provide, for the purpose of analysis, a sample of a bodily substance prescribed by regulation on the demand of a peace officer, a probation officer or someone designated under paragraph 810.3(2)(*a*) to make a demand, at the place and time and on the day specified by the person making the demand, if that person has reasonable grounds to believe that the defendant has breached a condition of the recognizance that requires them to abstain from the consumption of drugs, alcohol or any other intoxicating substance; or
>
> (*i*) require the defendant to provide, for the purpose of analysis, a sample of a bodily substance prescribed by regulation at regular intervals that are specified, in a notice in Form 51 served on the defendant, by a probation officer or a person designated under paragraph 810.3(2)(*b*) to specify them, if a condition of the recognizance requires the defendant to abstain from the consumption of drugs, alcohol or any other intoxicating substance.

[118] The *Response to the Supreme Court of Canada Decision in R. v. Shoker Act* did not come into force until "a day or days to be fixed by order of the Governor in Council" (s. 14). The relevant Order in Council, PC 2014-1449, (2014) C Gaz II, 4014, was not registered until December 31, 2014, and stipulated that the act would come into force 90 days later. Paragraphs (h) and (i) therefore came into force on April 1, 2015, after the interim recognizance was imposed on Mr. Nowazek.

[119] Similarly, paragraph (b.1) was added to s. 810.1(3.02) by *An Act to amend the Criminal Code and the Corrections and Conditional Release Act (restrictions on offenders)*, S.C. 2014, c. 21, s. 4:

> 4. Subsection 810.1(3.02) of the Act is amended by adding the following after paragraph (*b*):
>
> (*b.1*) prohibit the defendant from communicating, directly or indirectly, with any person identified in the recognizance, or refrain from going to any place

> specified in the recognizance, except in accordance with the conditions specified in the recognizance that the judge considers necessary; …

That act came into force three months after the day upon which it received royal assent, which was June 19, 2014. As such, subparagraph (b.1) was also not in force on the date the interim recognizance was imposed.

2. Parties' Positions

[120] The Crown says the trial judge erred in relying on *Shoker* to find that Conditions 9 and 10 went beyond the kind of conditions authorized by s. 810.1. The Crown points to the amendments to s. 810.1 since *Budreo* and *Shoker* were decided. The Crown says that, consistent with *Budreo* and *Shoker*, these enumerated conditions must guide interpretation of the residual power to impose other reasonable conditions in the opening words of s. 810.1(3.02). Because some of the post-amendment listed conditions facilitate the investigation and enforcement of suspected breaches of a s. 810.1 recognizance, for instance the conditions now authorized by ss. 810.1(3.02)(h-i), the Crown says the judge could have relied on the residual power in s. 810.1(3.02) to impose other enforcement-oriented conditions, such as Conditions 9 and 10. The Crown also says Conditions 9 and 10 were justified to secure Mr. Nowazek's good conduct, facilitate enforcement of the other conditions of the recognizance, and protect the community from the risk posed by Mr. Nowazek.

[121] The *amicus* says the conditions imposed on Mr. Nowazek were impermissible because there was no evidence that he posed any risk of imminent harm. In particular, the *amicus* says Condition 10, which required Mr. Nowazek to allow the RCMP to search his home, was inappropriate because there was no evidence that he was imminently at risk of engaging in harmful activities inside his residence. The *amicus* contends that the fears set out in the information could have been addressed by conditions preventing any contact between Mr. Nowazek and children.

3. Analysis

[122] In my view, the conditions requiring Mr. Nowazek to submit to searches of his home and computer went beyond the type of conditions authorized by s. 810.1 in July 2014.

[123] As discussed, I assume for the purpose of this appeal that Condition 9, read in the context of Conditions 8 and 10, authorized the police to search Mr. Nowazek's computer. I need not decide whether the other aspects of Condition 9, including those requiring Mr. Nowazek to provide his IP address to the police and sign releases allowing service providers to disclose information to the police, were authorized by s. 810.1(3.02)(a.1) and, if so, whether terms of this type are *Charter*-compliant.

[124] The opening words of s. 810.1(3.02) provide that a judge may, in addition to the enumerated conditions, "add any reasonable conditions to the recognizance that the judge considers desirable to secure the good conduct of the defendant". Because none of the enumerated conditions provide for the imposition of a condition that would allow the police to search an individual's home or personal computer, the authority for such a condition, if any, must flow from the residual power in the opening words of s. 810.1(3.02). In accordance with the direction given in *Shoker* and *Budreo*, the enumerated conditions in s. 810.1(3.02) must be taken as providing guidance in interpreting the scope of the residual power to impose other reasonable conditions.

[125] I agree with the Crown that the conditions enumerated in the current version of s. 810.1(3.02) are more intrusive than those that existed when *Budreo* and *Shoker* were decided.

[126] For instance, s. 810.1(3.02)(a.1) – which came into force after *Budreo* and *Shoker* were decided but before July 2014 – authorizes a condition prohibiting the defendant from using the Internet or other digital network, unless the defendant does so in accordance with conditions set by the judge.

[127] With respect, however, to ss. 810.1(3.02)(b.1), (h) and (i), I note that these enumerated conditions did not come into force until after July 16, 2014. In light of the dates upon which paragraphs (h) and (i) came into force, it is not open to the Crown to argue, as it did in this case, that they could have been relied on by the judge as evidence of Parliamentary intent "to condone aspects of enforcement in s. 810.1 orders" as of July 2014.

[128] In any event, the open-ended language of the residual power in s. 810.1(3.02) cannot be relied on to override the regular scheme for search warrants in relation to a defendant's home or personal computer. To find otherwise would allow police to circumvent the requirement for a search warrant, as the police did in this case. This would subject a defendant in proceedings of this kind to different standards than those set by Parliament for the issuance of a search warrant: *Shoker* at para. 22. Establishing *Charter*-compliant standards for searches of an individual's home and personal computer must be left to Parliament, not to the discretion of judges in individual cases: *Shoker* at para. 25.

[129] If the police suspect that a defendant is committing an offence under s. 811 of the *Code* by breaching the terms of a s. 810.1 recognizance, they must resort to "the usual investigatory techniques and manner of proof as any other offence": *Shoker* at para. 20. The residual power to impose conditions cannot be used to create by proxy a search warrant for the purpose of investigating suspected breaches of a recognizance order.

[130] In the result, to the extent that Conditions 8, 9 and 10, read together, required Mr. Nowazek to submit to searches of his home and personal computer, they were not authorized by s. 810.1.

[131] I have no doubt that a judge faced with the vexing problem of attempting to craft appropriate conditions that allow for the supervision of a high-risk defendant's internet activities in a minimally intrusive and *Charter*-compliant way would be assisted by the creation of an evidentiary record that canvasses currently existing options. In the absence of such a record, or the submissions of counsel on point, it

would, in my view, be inappropriate for this Court to embark on a more detailed analysis of the problem in this case.

c. Breach of Mr. Nowazek's s. 8 *Charter* Rights

[132] The police conduct in this case infringed Mr. Nowazek's right to be free from unreasonable search and seizure under s. 8 of the *Charter*. Because the interim recognizance was invalid, the police had no lawful authority to search Mr. Nowazek's home and computer on July 16. The Crown conceded that the police lacked grounds to obtain a search warrant prior to the July 16 search. There was no basis upon which the warrant to search Mr. Nowazek's home on July 17 could have been issued once the fruits of the July 16 search are excised from the ITO.

d. Exclusion of the Evidence under s. 24(2) of the *Charter*

[133] In my view, the trial judge made no reviewable error in excluding the evidence gathered from Mr. Nowazek's home and computer devices.

[134] The applicable framework for the exclusion of evidence under s. 24(2) of the *Charter* is found in *Grant*. At para. 71, the majority set out a three-step framework for determining whether evidence should be excluded under s. 24(2):

> When faced with an application for exclusion under s. 24(2), a 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 (admission may send the message the justice system condones serious state misconduct), (2) the impact of the breach on the *Charter*-protected interests of the accused (admission may send the message that individual rights count for little), and (3) society's interest in the adjudication of the case on its merits.

[135] In this case, the judge found that the police acted in good faith in searching Mr. Nowazek's home. He recognized that the police relied on the authorizing conditions of the interim recognizance order. He nonetheless found that the seriousness of the *Charter*-infringing state conduct "strongly favour[ed] the exclusion of the evidence": RFJ at para. 45. There was a basis upon which he could come to this conclusion. As noted earlier, RCMP officers were waiting at Mr. Nowazek's home when he returned from the hearing before the Territorial Court judge on July

16. The conditions allowing the police to search his home and computers were intended ensure his compliance with the other terms of the recognizance, but Mr. Nowazek was given no opportunity to bring himself into compliance with the recognizance before the search occurred. In effect, the police used what was designed to be a preventative order as an investigative tool to search for evidence of wrongdoing in Mr. Nowazek's home and on his personal computers.

[136] The judge found that the impact of the warrantless searches on Mr. Nowazek's Charter-protected interests was serious: RFJ at paras. 46-47. The evidence obtained was not otherwise discoverable. The police had no grounds to obtain a search warrant before the July 16 entry into Mr. Nowazek's home. The judge characterized the conduct of the police as a "grave invasion" of Mr. Nowazek's privacy interests. As stated in *R. v. Morelli*, 2010 SCC 8 at para. 105, "it is difficult to imagine a more intrusive invasion of privacy than the search of one's home and personal computer." See also *R. v. Vu*, 2013 SCC 60 at para. 40.

[137] The judge acknowledged that the evidence gathered in breach of the *Charter* in this case was both reliable and indispensable in the sense that the Crown could not proceed with the prosecution of Mr. Nowazek without it. However, reliability cannot render evidence admissible regardless of how it was obtained: *Grant* at para. 80.

[138] The child pornography and firearms offences alleged in this case were extremely serious. Society has a compelling interest in the adjudication on the merits of cases involving crimes implicating the safety of children: *R. v. Spencer*, 2014 SCC 43 at para. 80.

[139] In *Grant*, the majority explained that the seriousness of the alleged offence "has the potential to cut both ways" in the s. 24(2) analysis:

> [84] It has been suggested that the judge should also, under this line of inquiry, consider the seriousness of the offence at issue. Indeed, Deschamps J. views this factor as very important, arguing that the more serious the offence, the greater society's interest in its prosecution (para. 226). In our view, while the seriousness of the alleged offence may be a valid consideration, it has the potential to cut both ways. Failure to effectively

> prosecute a serious charge due to excluded evidence may have an immediate impact on how people view the justice system. Yet, as discussed, it is the long-term repute of the justice system that is s. 24(2)'s focus. As pointed out in *Burlingham*, the goals furthered by s. 24(2) "operate independently of the type of crime for which the individual stands accused" (para. 51). And as Lamer J. observed in *Collins*, "[t]he *Charter* is designed to protect the accused from the majority, so the enforcement of the *Charter* must not be left to that majority" (p. 282). The short-term public clamour for a conviction in a particular case must not deafen the s. 24(2) judge to the longer-term repute of the administration of justice. Moreover, while the public has a heightened interest in seeing a determination on the merits where the offence charged is serious, it also has a vital interest in having a justice system that is above reproach, particularly where the penal stakes for the accused are high.

[140] In *R. v. Paterson*, 2017 SCC 15, the majority of the Court explained the proper approach to balancing the seriousness of the offence in the s. 24(2) analysis:

> [55] … The public interest in maintaining a justice system "above reproach" has helpfully been explained by Doherty J.A. in *R. v. McGuffie*, 2016 ONCA 365, 348 O.A.C. 365, at para. 73:
>
> > On the one hand, if the evidence at stake is reliable and important to the Crown's case, the seriousness of the charge can be said to enhance society's interests in an adjudication on the merits. On the other hand, society's concerns that police misconduct not appear to be condoned by the courts, and that individual rights be taken seriously, come to the forefront when the consequences to those whose rights have been infringed are particularly serious . . . . [Citations omitted.]
>
> [56] It is therefore important not to allow the third *Grant* 2009 factor of society's interest in adjudicating a case on its merits to trump all other considerations, particularly where (as here) the impugned conduct was serious and worked a substantial impact on the appellant's *Charter* right. In this case, I find that the importance of ensuring that such conduct is not condoned by the court favours exclusion. As Doherty J.A. also said in *McGuffie*, at para. 83, "[t]he court can only adequately disassociate the justice system from the police misconduct and reinforce the community's commitment to individual rights protected by the *Charter* by excluding the evidence. . . . This unpalatable result is the direct product of the manner in which the police chose to conduct themselves."
>
> [Emphasis added.]

[141] The judge concluded that the third *Grant* factor favoured inclusion of the evidence but held that it could not outweigh the impact of the first two factors: RFJ at para. 50. He relied on *R. v. McGuffie*, 2016 ONCA 365 (RFJ at para. 63) for the proposition that, if the first and second factors favour exclusion of the evidence, the

third factor “will seldom, if ever, tip the balance in favour of admissibility”. He was on firm jurisprudential ground in coming to this conclusion. *McGuffie* was referred to with approval in *Paterson*.

[142] Where a trial judge has considered the proper factors, an appellate court should accord deference to the judge’s ultimate determination under s. 24(2): *Grant* at para. 86. I am satisfied that the trial judge considered the proper factors in this case.

[143] It is clear that the judge understood the seriousness of the offence and undertook the s. 24(2) analysis with this firmly in mind. In his oral reasons of August 8, 2016, he acknowledged that the “offence is a serious offence”: 2016 YKSC 65 at para. 7. Further, it is apparent that he took into account the gravity of the offence in balancing the various factors in the *Grant* test. As I have noted, he concluded that the third *Grant* factor favoured inclusion of the evidence.

[144] In my view, the judge’s impugned comments were intended to direct the Crown to the issues upon which the *Charter* application was likely to turn. He was entitled to direct counsel to those issues in the exercise of his trial management powers. I see no reviewable error in the way in which the judge exercised his discretion to manage the *Charter voir dire*.

[145] The Crown submits that the judge was obliged to hear evidence about or view for himself the offending material on the *Charter voir dire*. In support of this position, the Crown relies on *R. v. J.J.P*., 2017 YKSC 66 where Veale J., in the context of a sentencing proceeding, concluded that a judge should ordinarily view photographs and videos that are the subject matter of the offence. I do not agree that the judge was obliged to hear *viva voce* evidence about the precise nature of the offending images seized from Mr. Nowazek’s computer or view them himself, nor do I think *J.J.P.* provides any assistance to the Crown on this point.

[146] It was obvious in this case that the alleged offences were very serious. The *Charter voir dire* was conducted on that footing. The judge did not prevent the Crown

from describing the subject matter of the child pornography offences. Further, the judge was not sentencing Mr. Nowazek and was not required, in the context of the s. 24(2) application, to engage in the sort of finely calibrated assessment of moral culpability that is undertaken in a sentencing context. I would, for this reason, distinguish *J.J.P.* from the circumstances of this case.

[147] In summary, I see no grounds upon which this Court could properly interfere with the trial judge's conclusion that the seriousness of the state conduct underlying the constitutional infringement and the impact that conduct had on Mr. Nowazek's *Charter*-protected interests justified the exclusion of the evidence, notwithstanding the seriousness of the offence. As discussed in *Paterson*, the third *Grant* factor must not overwhelm the other two factors, particularly where, as here, the impact on the accused's *Charter*-protected interests is significant. Accordingly, although the judge recognized that the offences in this case were grave, he determined that exclusion of the evidence was necessary to preserve the public's "confidence that invasions of privacy are justified, in advance, by a genuine showing of probable cause": *Morelli* at para. 111. He was entitled to come to this conclusion. In my view, no grounds for interference with the judge's s. 24(2) ruling have been shown.

VI. CONCLUSION

[148] Mr. Nowazek was subject to intrusive, warrantless searches of his home and personal computer. His reasonable expectation of privacy in relation to both was very high. In light of the seriousness of the breach of Mr. Nowazek's s. 8 rights and the impact of that breach on his *Charter*-protected interests, the trial judge made no reviewable error in excluding the evidence gathered in the searches of his home and computer pursuant to s. 24(2) of the *Charter*. The Crown conceded that without this evidence Mr. Nowazek had to be acquitted of the offences charged.

[149] I would, in the result, dismiss the appeal.

"The Honourable Mr. Justice Fitch"

I AGREE:

"The Honourable Chief Justice Bauman"

I AGREE:

"The Honourable Madam Justice Cooper"