

SUPREME COURT OF YUKON

Citation: *R v Nowazek*, 2016 YKSC 65

Date: 20160801
S.C. No.: 15-01502
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

And

BRIAN GEORGE NOWAZEK

Before Mr. Justice T. Ducharme

Appearances:

David A. McWhinnie

Counsel for the Crown

Joanna Phillips

Benjamin Tarnow (via telephone)

Counsel for the Defence

REASONS FOR JUDGMENT

[1] DUCHARME J. (Oral): Mr. Nowazek is before me on charges of accessing child pornography, possession of child pornography, possession of explosive substance, and a variety of firearms offences.

[2] At the request of the Crown, he was summonsed to attend at a s. 810 peace bond hearing before a Territorial Court judge. Over his protest, he was placed on a recognizance that required, among other things, that he provide the police access to his home and to his computer.

[3] After that hearing, the police attended at his home, accessed his computer, and saw indications that he had been accessing child pornography sites. They then got a

search warrant based on that information and, the following day, conducted a warranted search of his home. He was placed under arrest.

[4] Mr. Nowazek has brought a s. 8 *Charter* motion seeking to have all the evidence, whether it was a result of the first search or the warranted search, excluded from his trial on the basis of his s. 8 violation. He had consented to the search but only did so because of the requirements of the recognizance imposed by the Territorial Court judge.

[5] The s. 810 hearing, in fact, was not conducted. The recognizance was imposed and the hearing was adjourned so that Mr. Nowazek could get counsel.

[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.

[8] It is my understanding, Mr. McWhinnie, without that evidence, the Crown cannot proceed?

[9] MR. MCWHINNIE: That's correct, sir. We've considered the alternatives, in terms of what next to do if this was your ruling. In the circumstances, it seems to the Crown that it would be inappropriate not to have the matter concluded, in light of your ruling, immediately. And so in the circumstances, you having excluded the real evidence from the case, the Crown will call no further evidence and invite the Court to dismiss.

[10] THE COURT: Okay.

[11] Mr. Nowazek, stand up, sir. I find you not guilty of counts 1 through 8 on the Indictment.

DUCHARME J.