

CANADA / JUDGMENT

R. v. Guenter

2025 BCCA 308

COURT

British Columbia Court of Appeal

DECIDED

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2025 BCCA 308 R. v. Guenter

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Guenter,

2025 BCCA 308

Date: 20250905

Docket: CA49287

Between:

Rex

Appellant

And

Eric David Guenter

Respondent

Before:

The Honourable Mr. Justice Harris

The Honourable Justice Winteringham

The Honourable Justice Edelmann

On appeal from: An order of the Provincial Court of British Columbia, dated July 19, 2023 (acquittal) (R. v. Guenter, Port Coquitlam Docket 107513-1).

Counsel for the Appellant:

S.E. Elliott, K.C.

M. Barrenger

Counsel for the Respondent:

S. Wright

Place and Date of Hearing:

Vancouver, British Columbia

June 26, 2025

Place and Date of Judgment:

Vancouver, British Columbia

September 5, 2025

Written Reasons by:

The Honourable Justice Winteringham

Concurred in by:

The Honourable Mr. Justice Harris

The Honourable Justice Edelmann

Summary:

The Crown appeals an acquittal from a charge of possession of child exploitation material, contrary to s. 163.1(4) of the Criminal Code. The acquittal followed a ruling that the warrant authorizing the search of the respondent's residence infringed his rights under s. 8 of the Charter, as the warrant did not disclose reasonable grounds to believe that evidence of the offence would be located at the residence; the evidence was excluded under s. 24(2) and the charge was dismissed. Held: appeal allowed. The acquittal is set aside and a new trial is ordered. The reviewing judge erred by failing to consider common-sense inferences that were available to the judicial justice issuing the warrant.

Reasons for Judgment of the Honourable Justice Winteringham:

Overview

- [1] This case involves the lawfulness of a search of a residence where an investigator believed the resident possessed child exploitation material on electronic devices. The resident was identified despite the use of a Virtual Private Network ("VPN"), sometimes used to mask the physical location of the user. On July 19, 2023, a Provincial Court judge dismissed a charge of possession of child exploitation material contrary to s. 163.1(4) of the Criminal Code, R.S.C. 1985, c. C-46. The dismissal came after the judge ruled on a voir dire that the search warrant

for the respondent's residence should not have been issued because the information to obtain the warrant did not disclose reasonable grounds to believe that evidence of the offence would be located at the residence: *R. v. Guenter*, 2023 BCPC 170 ("RFJ"). As such, the judge concluded the search of the appellant's residence infringed s. 8 of the Canadian Charter of Rights and Freedoms [Charter] and determined the evidence was not admissible under s. 24(2). The ruling left the Crown without evidence to support the charge and the judge acquitted the respondent.

- [2] The Crown appeals the acquittal and raises three grounds: (1) the judge misstated and misapplied the test for reviewing a warrant for Charter compliance and impermissibly conducted a "fresh" assessment; (2) the judge impermissibly reweighed the evidence and applied the incorrect test on review by holding that, absent "case-specific information", the Information to Obtain ("ITO") did not establish the respondent used or kept electronic devices at his residence; and, (3) the judge committed a reversible error in finding that the search warrant was invalid, which was an unreasonable finding given the information in the ITO. The Crown seeks an order overturning the acquittal and an order for a new trial. For the reasons set out below, I agree, with respect, that the judge made the second error asserted.

Background

Investigation

- [3] In August and September 2020, Google provided a series of 23 reports to a U.S. non-profit organization, the National Centre for Missing and Exploited Children (NCMEC). Together, the reports indicated that on August 29, 2020, a Google Drive account uploaded 254 files of child exploitation material to the "online Google Drive infrastructure" (Google Drive cloud storage account). Google Drive accounts allow users to store files on Google servers in the cloud, as well as to synchronize files across their devices and to share files.
- [4] Google informed NCMEC that the listed user for this Google Drive account was "Eric Guenter" with the email address [redacted] and a phone number that had been verified in December 2019, probably by the account user. Google also provided NCMEC with the Internet Protocol ("IP") address that the user had utilized to upload the child exploitation material. An IP address is a numerical identifier assigned to a device that connects to the Internet and is associated with the physical location at which the Internet is accessed and media is uploaded.
- [5] In this case, however, the IP address was routed through a VPN. The VPN masks the physical location of the user. The IP address therefore only pointed towards the address of the VPN service (LeaseWeb USA) with a physical location in the United States.

- [6] NCMEC sent Google's information to the Royal Canadian Mounted Police ("RCMP") National Child Exploitation Crime Centre (NCECC). NCECC forwarded the information to the British Columbia Integrated Child Exploitation Unit (BC ICE) because the phone number associated with the Google Drive account contained a British Columbia area code. In turn, BC ICE provided the information to Ridge Meadows RCMP and Cst. Brushett was assigned to investigate.
- [7] Cst. Brushett selected and viewed some of the files that had been uploaded and stored to Google Drive by the account user. He confirmed the files contained images that met the definition of child pornography[1] as set out in s. 163.1(1) of the Criminal Code. Cst. Brushett's investigation revealed three additional pieces of information relevant to the user's identity and whereabouts:
- a) The email address for this Google Drive account--[redacted] was associated with the respondent, whose full name is Eric David Guenter, according to a 2013 police file.
 - b) Based on information entered in a police database in 2007, the phone number for the Google Drive account was associated with the respondent. As of October 20, 2020, the number was still listed with the Insurance Corporation of British Columbia ("ICBC") as the respondent's phone number.
 - c) The respondent's driver's license and information in police databases showed his residential address as a home located in Pitt Meadows (the "Residence"). On November 13, 2020, and February 2, 2021, the police drove by the Residence and saw a vehicle that was registered to the respondent.

Information to obtain

- [8] The ITO was affirmed by Cst. Brushett on February 2, 2021, containing the information set out above. Additionally, Cst. Brushett included information about his experience and expertise dealing with computers. He explained how electronic devices retain information and log activity, as well as how users store and transfer data on these devices, stating the following:
- a) Computers (including cellphones and tablets) can retain information for a long time and can easily store thousands of pictures, videos, and other digital files.
 - b) Computers often keep automated logs of different activities performed by users involving images, videos, and other types of files.
 - c) A file that is deleted or moved to another storage medium is not necessarily lost, and depending on the operating system and configuration, can be recovered in part or in full by a forensic examination.

- d) Computers are a significant expense and meant to last for many years; even when replaced, people usually keep their old computer to back up information from the new computer or as a secondary device, and users typically transfer data from their old computer to their new computer.
- [9] Cst. Brushett provided information about the storage and transfer of files, including in the context of investigations involving child exploitation material. He stated that people often keep or organize electronic files in a combination of locations, including storage devices like fixed or external hard discs, USBs, older "back-up" devices, and cloud-based sites. In his experience investigating these offences, content is often found on more than one device.
- [10] Based on this information, Cst. Brushett affirmed he had reasonable grounds to believe that some or all of the following items would be found at the Residence and would afford evidence of the investigated offence (possession of child pornography):
- a) electronic and computer devices capable of accessing the Internet, including smart phones, tablets, laptops, and home computers;
 - b) electronic storage devices including fixed hard discs, removable hard drives, CDs, DVDs, and other devices that are capable of storing digital media; and
 - c) documents of residency and other documents that provide the names of people who lived at the Residence at the time the offence was committed.
- [11] Cst. Brushett specifically explained the basis for his belief that the items would be found at the Residence, including: the Google Drive account user "Eric Guenter" used the same IP address to upload all the files of child exploitation material; the user's true IP address was hidden through the use of a VPN; the account user's phone number and email address matched the respondent's information in police databases; police checks showed the respondent's residential address; and police surveillance confirmed a vehicle registered to the respondent was parked at this address.
- [12] A judicial justice issued a search warrant for the Residence on February 2, 2021. The search warrant authorized the search for the items listed in the ITO including all computer and electronic storage devices. The warrant was executed the following day and the police seized 13 devices. Further judicial authorizations were obtained to search those devices. The resulting forensic examination located child exploitation material on four of the devices.

Application to quash the search warrant

- [13] At the outset of the trial, the respondent applied to exclude the evidence alleging the search warrant for the Residence was invalid and that the subsequent search of the devices breached his rights under s. 8 of the Charter. The judge granted leave to cross-examine the affiant. Neither party sought to use the testimony to amplify the information supporting the issuance of the warrant.

- [14] The respondent focused his challenge of the warrant on the use of the VPN. Unlike in many child exploitation material investigations, the police in this case could not link the IP address to the place for which the warrant was sought because the perpetrator had used a VPN. The respondent submits that this gap in information left only a suspicion that it was the respondent who had uploaded the files, as opposed to someone else (such as a hacker). The respondent contends that, as a result, there was insufficient information to establish that any evidence would be found at the Residence.

Voir dire ruling

- [15] In reasons for judgment released on July 19, 2023, the judge allowed the respondent's application, finding a breach of s. 8 of the Charter, and excluding the evidence under s. 24(2) of the Charter.
- [16] The judge considered the information affirmed in support of the ITO. The police had identified the accused based on the username, email address, and phone number associated to the Google Drive account where child exploitation material was stored: at para. 20. Cst. Brushett had reported that there was no further information about the accused's email address beyond 2013, that the phone number was still used with ICBC on October 20, 2020, and the home address of the accused was based on his B.C. driver's licence and information in police databases: at paras. 22-24. Finally, the police had passed by the Residence on November 13, 2020 and on February 2, 2021, and observed a vehicle registered to the accused: at para. 25.
- [17] Although Cst. Brushett had asserted that evidence of the offence would be found at the Residence since electronic devices store information for a "long period of time", the judge found that Cst. Brushett did not explain why he believed the electronic device(s) used in the offence would be located at the place searched: at paras. 26-27.
- [18] The judge found that there was no dispute that the ITO established reasonable grounds to believe an offence was committed, and that it was reasonable to believe that evidence of the offence would still exist on the devices in question: at para. 30. The judge stated, " the validity of the search warrant turns on whether the ITO established a reasonable probability that the electronic device used in the offence would be found at [the respondent's] residence" and the strength of the ITO therefore relied on the link between the accused and the offence: at paras. 28-31.
- [19] The judge found the information in the ITO did not establish grounds to believe that evidence of the offence would be found at the Residence: at para. 33. This was because there was nothing in the ITO indicating where the offence was committed--it could have happened at a workplace or some other location--and for a valid search warrant, the ITO must establish a link between the evidence sought and the named location: at paras. 35-36. Without information that the offence was committed at the Residence, that the accused stored electronic devices at that location, or an explanation as to why the affiant believed the

devices would be at that location, the judge found the ITO was based on suspicion: at para. 36. The judge concluded the search warrant "should not have been issued" and accordingly, the search infringed s. 8 of the Charter: at para. 37. The judge excluded the evidence following his s. 24(2) analysis: at paras. 45-49.

On Appeal

- [20] The Crown asserts the judge made the following legal errors in finding a breach of s. 8 of the Charter:
- a) He misstated and misapplied the test for reviewing a search warrant for Charter compliance.
 - b) He impermissibly reweighed the evidence and applied the wrong test on review by rejecting or failing to consider inferences reasonably open to the issuing justice based on the information in the ITO.
 - c) He committed a reversible error in finding the search warrant was invalid, an unreasonable finding in light of the totality of the information set out in the ITO.
- [21] With respect, I agree that the judge made the second error asserted. It is thus not necessary to determine the other errors alleged.

Legal Framework

Test for issuing a search warrant

- [22] Section 487(1)(b) of the Criminal Code permits a justice to issue a warrant authorizing a peace officer to search a place for a thing and to seize it, where the justice is satisfied there are reasonable grounds to believe the thing is in that place and will afford evidence with respect to the commission of an offence. Section 487(1)(b) describes the items that can be the subject of the search as those that "will afford evidence with respect to the commission of an offence". This broad wording encompasses "all materials which might shed light on the circumstances of an event which appears to constitute an offence": *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 S.C.R. 743, 1999 CanLII 680 at para. 15.
- [23] A justice issuing a warrant at first instance is tasked with determining whether there are reasonable grounds to believe the statutory preconditions for issuance of the warrant are met: *Hunter v. Southam*, [1984] 2 S.C.R. 145, 1984 CanLII 33 at 168. The reasonable grounds standard requires something more than mere suspicion but something less than the standard applicable in civil matters of proof on the balance of probabilities: *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40 at para. 114. Reasonable or credibly-based probability contemplates a practical, non-technical, and common-sense evaluation of the probability of the existence of facts and asserted inferences: *R. v. Henareh*, 2017 BCCA 7 at para. 39, citing *R. v. Sanchez* (1994), 93 C.C.C. (3d) 367 at 367, 1994 CanLII 5271 (Ont. S.C.).

- [24] The justice may draw reasonable inferences from the evidence in the ITO--it need not state the obvious: *R. v. Vu*, 2103 SCC 60 [Vu SCC] at para. 16; *R. v. Reilly*, 2020 BCCA 369 at paras. 46-49, *aff'd* 2021 SCC 38; *R. v. Sadikov*, 2014 ONCA 72 at paras. 81-82, 88. The inference does not need to be the only or most compelling one available: *R. v. Hafizi*, 2016 ONCA 933 at paras. 56, 60. For example, in *R. v. Kalonji*, 2022 ONCA 415 and *R. v. Okezie*, 2025 ONCA 77, the inference that a target would likely store a firearm at his home (or in his car) was available as a matter of common-sense: *Kalonji* at para. 30, *Okezie* at para. 7.

Standard of review for s. 8 Charter challenge

- [25] Where a search is challenged under s. 8 of the Charter on the basis that the authorizing warrant lacked reasonable grounds, the reviewing judge must start with the presumption that the warrant is valid. This Court, in *R. v. Bridgen*, 2022 BCCA 429, described the judge's assessment on a warrant review as follows:
- [3] Where the search warrant is later challenged under s. 8 of the Charter, its validity is presumed and the onus is on the accused to show that the search was not reasonable. The reviewing judge does not carry out a review of the authorization *de novo* and does not substitute [their] view for that of the authorizing judge. Again, the question is whether the issuing judge could have properly authorized the warrant.

[Italics in original.]

- [26] The judge must ask whether there was at least some evidence before the issuing judge that might reasonably be believed, on the basis of which the search warrant could have issued: *Vu* at para. 16; *R. v. Loewen*, 2016 BCCA 351 at para. 34; *R. v. Perkins*, 2021 BCCA 9 at para. 13; *Sadikov* at paras. 84-85.

Standard of review for Court of Appeal

- [27] The Crown's appeal against an acquittal is restricted to questions of law alone: Criminal Code, s. 676(1)(a). The judge's application of the standard of review for reviewing a warrant is a question of law: *R. v. Araujo*, 2000 SCC 65 at para. 18; *R. v. Shepherd*, 2009 SCC 35 at para. 20. The question of whether that application is correct is discussed in *R. v. Le*, 2019 SCC 34, where Justices Martin and Brown, for the majority, stated the standard of review as follows:
- [23] Before engaging in any analysis in this appeal, it is necessary to identify the applicable standard of review. Questions of law on an appeal attract a standard of correctness ([*Shepherd*] at para. 18). Questions of fact attract a palpable and overriding error standard (para. 18). The application of the law to a given factual matrix, that is, whether a legal standard is met, amounts to a question of law and attracts a correctness standard (*Shepherd*, at para. 20; [*R. v. Grant*, 2009 SCC 32] at para. 43).

See also *R. v. Mackey*, 2020 ONCA 466:

- [54] By contrast, a reviewing judge is not to decide whether he or she would have issued the warrant but, rather, is to determine whether the ITO, as excised and amplified, provides sufficient credible and reliable evidence upon which the issuing judge could be satisfied that there were reasonable grounds to issue the warrant: *R. v. Garofoli*, [1990] 2 S.C.R. 1421, at p. 1452; *R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253, at paras. 40-41; *R. v. Ebanks*, 2009 ONCA 851, 97 O.R. (3d) 721, at para. 21, leave to appeal refused, [2010] S.C.C.A. No. 84.
- [55] The Crown's appeal against acquittals is restricted to questions of law alone: Criminal Code, s. 676(1)(a). The trial judge's application of the standard of review for reviewing a warrant is a question of law: [Araujo] at para. 18; [Shepherd] at para. 20. The question is whether that application is correct: [Le] at para. 23.
- [28] In *Bridgen*, Justice Newbury described the standard of review for this Court:
- [7] Where the ruling of the reviewing judge is appealed, the appeal court must show deference to the reviewing judge in the same way as the reviewing judge must show deference to the authorizing judge. As stated by Charron J.A., as she then was, in *R. v. Grant* 1999 CanLII 3964 (ON CA), [1999] 132 C.C.C. (3d) 531 (Ont. C.A.), lve to app dism'd 27243 (25 January 2001):

This court is also a reviewing court and the test in *Garofoli* is applicable on this appeal. In addition, the usual deference is owed to the findings of the trial judge in her assessment of the record "as amplified on the review" and her disposition of the s. 8 application. In the absence of an error of law, a misapprehension of the evidence or a failure to consider relevant evidence, this court should not interfere with the trial judge's conclusion. [At para. 18.]

[Underlining omitted.]

- [29] The Crown commenced their submissions at the hearing of the appeal by articulating their position about the applicable standard of review. The Crown refined their position somewhat from that expressed in the factum, presented almost a year ago. The Crown's position is that the standard of review is correctness. With respect to cases suggesting a deferential standard, the Crown distinguished those cases as involving different aspects of the *Garofoli* review, such as where an affiant is challenged on their assertions in an ITO and the reviewing judge must make credibility findings to sort out the evidence presented during the *Garofoli* hearing and where such evidence may not have been before the issuing justice. In those circumstances, deference may be owed to the reviewing judge's findings of fact.
- [30] The Court of Appeal for Ontario, in *Kalonji*, neatly captured the standard of review applicable in a case such as this. In *Kalonji*, the Crown appealed the trial judge's ruling quashing a search warrant for a residence on the basis that the ITO did not disclose reasonable and probable grounds to believe that firearms would be found in that location. The evidence was excluded and the respondents were acquitted. One ground of appeal from acquittal was the Crown's assertion that the trial judge erred in her s. 8 analysis by applying the wrong standard of review and by failing to consider reasonable inferences that could be drawn from the ITO.

[31] The Court commenced its discussion of the applicable standard of review as follows:

[19] To begin, the principles that apply when reviewing a warrant are well settled. The question is not whether the reviewing justice would have issued the warrant, but whether the issuing justice could have: [Garofoli] at p. 1452; [Araujo] at para. 51. The test is "whether there was reliable evidence that might reasonably be believed on the basis of which the authorization could have issued": Araujo, at paras. 51, 54; [Morelli] at para. 40. The reviewing court is to consider whether there was sufficient credible and reliable evidence to permit the issuing justice to find reasonable and probable grounds to believe that an offence had been committed and that evidence of that offence would be found at the specified time and place: Morelli, at para. 40. An appellate court owes deference to the findings of a reviewing judge in their assessment of the record as amplified on the review, and to their disposition of a s. 8 application. An appellate court should decline to interfere with the reviewing judge's decision, absent an error of law, a misapprehension of evidence or a failure to consider relevant evidence: [Sadikov] at para. 89.

[Emphasis added.]

[32] Here, the Crown submits, and the respondent does not disagree, that the standard of review is correctness because this appeal is about the application of the legal standard to a particular factual matrix. In this case, neither party sought to amplify or correct the record that was presented to the issuing justice. Rather, the Crown contends that the trial judge erred in his application of the law to the facts and thereby committed an error of law reviewable on a correctness standard. I agree with the standard of review asserted by the Crown.

Discussion

[33] Before turning to discuss the error alleged, I highlight that the task before the trial judge was not an easy one. Unlike in cases involving review of warrants relating to tangible items that are stored in physical spaces (such as firearms), the judge in this case was dealing with electronic devices, digital files, and cloud storage. Further complicating the task, the respondent's IP address--which would typically be used to link the location to the offence--was masked by the use of a VPN, a detail the respondent conceded gave the appearance of someone taking steps to conceal their location.

[34] As I have said, it is my view that this appeal falls to be determined on the second ground raised. I turn to it now.

Did the judge err by failing to consider common-sense inferences that could be drawn from the ITO?

- [35] On a Garofoli review, the question is not whether the reviewing justice would have issued the warrant, but whether the issuing justice could have. The reviewing court is to consider whether there was sufficient credible and reliable evidence to permit the issuing justice to find reasonable and probable grounds to believe that an offence has been committed and that evidence of that offence would be found at the specified time and place: Morelli at para. 40.
- [36] The Crown submits the judge erred in law by re-weighting the evidence so as to usurp the discretion properly accorded an issuing justice on review. The Crown says this ground is demonstrated by the following two errors relating to inferences that were reasonably available to the issuing justice: (1) the judge erred in rejecting the common-sense inference that the respondent kept electronic devices at the Residence, holding that this inference could not be drawn absent "case-specific information"; and, (2) the judge erred in failing to appreciate that the use of a VPN to make uploads not only constituted the sort of case-specific information he had (incorrectly) required, but in any event, further supported the reasonable inference that the respondent kept electronic devices at the Residence.
- [37] The Crown points to the following passage as capturing the alleged error:
- [36] However, in the absence of any information that the offence was committed at the location, that [the respondent] used or stored electronic devices at that location, or any explanation as to why the affiant believed that electronic devices would be found at that location, the ITO was based on suspicion.
- The Crown says that rejecting these inferences led the judge to conclude the warrant was issued on mere suspicion.
- [38] The respondent takes the contrary position, submitting that the judge was correct when he held that a generalized assumption that a person keeps electronic devices at their home could not serve as a substitute for evidence that the respondent used or stored electronic devices at that location. He says the judge correctly found that the ITO did not provide an explanation as to why the affiant believed that electronic devices would be found at that location, and that there was no case-specific evidence to establish such a belief.
- [39] A brief review of some of the authorities demonstrate, in my respectful view, that the judge erred by requiring more from the affiant, effectively elevating the standard of proof, and by finding the ITO "was based on suspicion", when there were available reasonable inferences to be drawn from the ITO.
- [40] First, this case is similar to Vu. In Vu, the police obtained a search warrant to investigate theft of electricity at a residence. The warrant authorized the police to search for, among other things, documents identifying ownership or occupancy of the residence. The trial judge held the ITO did not support the portion of the warrant authorizing the police to search for documents identifying ownership or occupancy of the residence because the ITO did not contain a statement by the officer that there were reasonable grounds to believe that

such documents would be found in the residence, nor any facts to support such a belief on his part: *R. v. Vu*, 2010 BCSC 1260 [Vu BCSC] at para. 54. The judge recognized that the issuing justice could make reasonable inferences based on information in the ITO. However, she held that there was no evidence to justify the inference that documents indicating ownership or occupancy would be found in the house; she concluded that a justice could not reasonably have issued a warrant to search the house for such documents and quashed this part of the warrant: Vu BCSC at paras. 58-59.

- [41] On appeal, this Court held that the judge had erred by finding the ITO was incapable of supporting the inference that evidence of the offence would likely be found inside the residence: *R. v. Vu*, 2011 BCCA 536 [Vu BCCA]. Despite stating the proper test on review, the judge's analysis showed that she went beyond determining whether the justice could have drawn the inference and erroneously reweighed the evidence to determine whether, had she been the issuing justice, she would have drawn the same inference. This Court held that it was open to the issuing justice to reasonably infer that the sought-after documents would be found in the house: Vu BCCA at para. 41. On further appeal, the Supreme Court of Canada agreed the judge had erred by reweighing the grounds in the ITO and substituting her view of the sufficiency of the evidence for that of the issuing justice. For the Court, Justice Cromwell stated:
- [9] I agree with the Court of Appeal that the facts provided in the ITO were sufficient to support a reasonable inference on the part of the issuing justice that documentation evidencing ownership or occupancy would be found in the residence
- [42] Kalonji demonstrates another example of this type of error. After setting out the correct test for review and noting the ability of an issuing justice to draw reasonable inferences, the judge held that it could not be inferred on reasonable grounds that the accused would keep guns at either of his two residences: *R. v. Donaldson*, 2020 ONSC 4611 [Kalonji ONSC] at para. 31. The judge noted that the complainant had seen guns only in the accused's vehicle and there was "no case specific information" linking guns to the residences: Kalonji ONSC at para. 28. The judge concluded the search warrants were invalid and the searches of the residences breached s. 8 of the Charter.
- [43] The Court of Appeal for Ontario allowed the Crown's appeal, finding the judge erred by not finding the evidence was capable of supporting the inference that there were reasonable grounds to conclude the respondent kept guns at his residences. In doing so, the judge had erred by requiring direct evidence to establish a link between the guns and the residences: Kalonji at para. 29. The Court found that information in the ITO--the accused was seen with guns in his vehicle and he lived at the residences--permitted a common-sense inference that guns would be found at either residence; the accused himself was the link that supported this inference: Kalonji at para. 30. The Court noted that rejecting this common-sense inference and requiring direct evidence that there were guns at the residences raised the reasonable grounds threshold to the level of "more likely than not" or "on a balance of probabilities": Kalonji at paras. 28-29.

- [44] In *Okezie*, the Court of Appeal for Ontario affirmed that case-specific information is not required, finding that the trial judge had not erred in drawing an available common-sense inference that the appellant would likely store the firearm at his home or in his car: *Okezie* at para. 7, citing *Kalonji* at para. 30. The Court rejected the appellant's argument that there was no "case-specific" information that supported the search of his home and car; rather, the inference that the appellant still possessed the gun, because he had been unaware that he was videotaped with the gun four days earlier, was available to the issuing justice. The Court, in dismissing the appellant's appeal, concluded:
- [7] It was therefore likely that the gun was still in his possession. As was found by the trial judge, in these circumstances, the issuing justice could reasonably infer that the appellant had stored the firearm in a comparatively private location, such as a home or car. We see no error in this approach.
- [45] Lastly on this point, *R. v. Hamouth*, 2023 ONCA 518, demonstrates another example of reasonable inferences being drawn without the need for "case-specific" information. In *Hamouth*, the appellant was charged with multiple firearms-related offences, all of which arose from the execution of a search warrant at a residential address. The search warrant was obtained as part of an investigation into the appellant's son. The Court of Appeal for Ontario made the following statements regarding inferences:
- [11] Accordingly, the only question for the trial judge was whether there existed sufficient reliable evidence in the ITO, that could reasonably have been believed, upon which the warrant could have issued: *Araujo*, at para. 54. When applying this test, reviewing justices must remain mindful of the fact that affiants need not state the obvious reasonable inferences that arise from information in an ITO. This is because, whether spelled out or not, it is open to issuing justices to take these inferences into account. Therefore, when determining whether an authorization could have issued, reviewing justices must consider all of the information that was available to the issuing justice, as well as any reasonably available inferences that the issuing justice may have drawn from that information: [Vu SCC] at para. 16.
- [Emphasis in original.]
- [46] In *Hamouth*, the Court found the judge's reasons in dismissing the s. 8 application demonstrated that he stayed true to his task as a reviewing justice, stating:
- [20] In my view, having regard to all of the information, the trial judge did not err in reaching the conclusion that the issuing justice could have drawn a reasonable, common-sense inference that the appellant's son was not only in possession of firearms, but that, based on his established connection to the subject residence, he may have been storing them at that location.

- [47] In the case at bar, the judge recognized that an issuing justice can draw reasonable inferences from the ITO: at para. 36. However, the judge rejected the reasonably available, common-sense inference that the respondent kept electronic devices at the Residence. As in Kalonji, the trial judge's approach (requiring "case-specific" information) operated to erroneously inflate the reasonable grounds test to something akin to requiring proof on a balance of probabilities.
- [48] In this case, the respondent concedes that the ITO revealed that his account accessed the child exploitation materials identified by NCMEC and BC ICE. He says, however, it is not enough that an individual's account was used for an unlawful purpose. Typically, the police would obtain an IP address linking the user to a location. It is this absence of information, submits the respondent, that raises concerns about the state intruding into people's homes with nothing more to connect them to the unlawful act.
- [49] In my view, the inference that the account user (who there were reasonable grounds to believe was the respondent) would access the account using the electronic devices as described by Cst. Brushett, and that those devices would be located at the Residence, was available to the issuing justice. This was a common-sense, reasonable inference available from the information contained in the ITO such that the authorization could have been issued. As I have said, I have concluded that the judge erred by rejecting the reasonably available, common-sense inference that the respondent kept electronic devices at the Residence.
- [50] As stated earlier, the judge accepted that the Google Drive account belonged to the respondent and that, at the time the ITO was sworn, it was reasonable to believe that evidence of the offence would still exist on the device used to upload the child exploitation material: at paras. 21-22, 30-32. The judge identified the key issue, therefore, as being whether the ITO set out reasonable grounds to believe that evidence of the offence would be found at the Residence: at para. 32.
- [51] In the ITO, Cst. Brushett set out the basis for his belief that the sought-after devices would be found at the Residence. He stated: (1) the user information for the Google Drive account matched information the police had on file for the respondent; and (2) the uploads were made via a VPN that allowed the user to "mask their real IP address". The Crown framed this submission in its factum:

The foundation for this chain of reasoning is the reasonable inference that, as defence counsel conceded, the use of a VPN to make the uploads indicated that the Google Drive account user "appear[ed] to be taking steps to conceal their location." The information in the ITO supported the same inference, namely, that the account user appeared to be trying to mask their true IP address, and thereby to hide the physical location from which their device was uploading the child pornography.

[Footnotes omitted.]

- [52] The Crown submits that it was thus open to the issuing justice to further infer that the physical location the account user was trying to hide, through use of a VPN, was a place to which they were associated, most likely their residence. The Crown concedes that this is not the only inference available. However, it is one inference that was reasonably available in the circumstances. This inference was strengthened by another reasonable inference--that a person is most likely to keep and handle child pornography at a secure and private place like their home. The information indicating that the respondent's cloud account had uploaded the child exploitation material, combined with the use of the VPN, thus provided a firm basis upon which the issuing justice could infer that the upload was made from the Residence.
- [53] The respondent counters this submission. He contends that the use of the VPN is simply akin to putting on a mask and that the Crown invites the Court to speculate about the purpose of the VPN in this case. The respondent submits that the Crown's submission does not answer the judge's concern about the absence of information establishing reasonable grounds that the evidence would be found at the Residence.
- [54] It is my view that had the judge applied the correct standard of review, he could have concluded that the use of a VPN was capable of supporting the inference that the child exploitation material was uploaded from the Residence. This reasonable inference would in turn provide a basis to believe that the respondent kept and used electronic devices at the Residence. That is, the information showing that the respondent's cloud account had uploaded the child exploitation material, combined with the use of a VPN, provided a basis--a reasonable inference--upon which the issuing justice could conclude that the upload was made from the Residence.
- [55] In sum, it is my view, with respect, that the trial judge erred by failing to consider all of the information that was available to the issuing justice, including the reasonably available inference (that the respondent would keep electronic devices at the Residence) that the issuing justice may have drawn from the information.

Conclusion

- [56] Given my conclusion on the second ground, there is no need to address the appellant's remaining grounds of appeal.
- [57] For a Crown appeal to succeed, it must be shown that the error of law "might reasonably be thought, in the concrete reality of the case at hand, to have had a material bearing on the acquittal": *R. v. Graveline*, 2006 SCC 16 at para. 14. However, the Crown is not required to persuade an appellate court that the verdict would necessarily have been different: *Graveline* at para. 14. The trial judge's error in this case resulted in the exclusion of the evidence. In my view, this meets the necessary threshold and warrants a new trial.

Disposition

[58] For the reasons set out above, I would allow the appeal, set aside the judge's order excluding the evidence, set aside the acquittal, and order a new trial on the single count in the Indictment.

"The Honourable Justice Winteringham"

I AGREE:

"The Honourable Mr. Justice Harris"

I AGREE:

"The Honourable Justice Edelman"

[1] The respondent was charged with an offence in the Criminal Code which uses the terminology "child pornography". Where possible, I have tried to use "child exploitation material": see R. v. S.J.H., 2024 BCCA 134 at para. 8, footnote 1.

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