

CANADA / JUDGMENT

R. v. Haire

2021 BCSC 2367

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Supreme Court of British Columbia

DECIDED

2 December 2021

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2021 BCSC 2367 R. v. Haire

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Haire,

2021 BCSC 2367

Date: 20211202

Docket: 68905

Registry: Chilliwack

Regina

v.

Michael Larence Haire

Before: The Honourable Justice MacNaughton

Oral Reasons for Judgment

Voir Dire #2: Section 24(2) of the Charter

Counsel for the Crown:

D. Tsui

Counsel for the Accused:

V. Michaels

Place and Date of Trial/Hearing:

New Westminster, B.C.

October 22, 2021

Place and Date of Judgment:

New Westminster, B.C.

December 2, 2021

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Introduction

- [1] Michael Larence Haire is charged, on a two-count indictment, with the offences of making available and possessing child pornography contrary to s. 163.1(3)-(4) of the Criminal Code, R.S.C. 1985, c. C-46 [Code] (the "Offences"). The charges arise from evidence obtained during searches of a number of digital devices seized from Mr. Haire's residence located at 201-2238 Whatcom Rd. in Abbotsford (the "Residence").
- [2] In late July 2018, a video file containing child pornography was uploaded to Instagram by a user of a Telus Communications Inc. internet protocol address (the "Upload"). Instagram reported the Upload to the American National Center for Missing and Exploited Children which, in turn, reported it to the Canadian National Child Exploitation Coordination Centre ("NCECC"). NCECC then forwarded it to the Abbotsford Police Department's Internet Child Exploitation Unit (the "APD" and "ICE").
- [3] Det. Nugent was the ICE officer assigned to investigate the Upload, and, after a preliminary investigation, he swore an affidavit in support of obtaining a search warrant.
- [4] According to the admissions filed pursuant to s. 655 of the Code, and marked as Ex. A on a voir dire to consider Mr. Haire's Canadian Charter of Rights and Freedoms [Charter] challenge, after Det. Nugent obtained a search warrant, seven members of the APD searched Mr. Haire's Residence for almost three hours, and seized 32 items in total, 30 of which were digital. Following the seizure, the APD made mirror images of more than 20 of the digital devices.

- [5] A forensic examination of the digital items seized revealed that they were Mr. Haire's property. The APD found images and videos constituting child pornography on six of the devices or hardware seized.

Mr. Haire's Challenge of the Search Warrant

- [6] The trial commenced on May 3, 2021. Mr. Haire challenged the validity of the search warrant pursuant to s. 8 of the Charter and sought an order excluding the evidence obtained pursuant to it under s. 24(2) of the Charter.
- [7] As explained in my reasons, *R. v. Haire*, 2021 BCSC 1308, I proceeded with a voir dire and permitted Mr. Haire's counsel to cross-examine Det. Nugent.
- [8] These reasons should be read in conjunction with my earlier ones.
- [9] Briefly, after hearing the evidence of Det. Nugent, and the submissions of counsel, I determined that considered as a whole, the ITO was incomplete as it did not afford the issuing justice an opportunity to appropriately balance and consider Mr. Haire's privacy interest in maintaining the integrity of his personal digital records. The amplified information in the ITO did not raise its contents above a suspicion. It did not provide the issuing justice with a sufficiently credible factual basis to conclude that evidence of the Offences would be found at the Residence. At para. 90 of the reasons, I set out the deficiencies in the information provided by Det. Nugent to the issuing justice. In summary, the deficiencies included Det. Nugent's failure:
- a) to disclose that the Upload was likely from a cell-phone, which made it less likely that evidence of the Offences would remain at the Residence more than a month later;
 - b) to disclose that the device linked to the Upload, and identified by Telus, was of no evidentiary value or that, if it was password-protected, anyone with knowledge of the password could have made the Upload; and
 - c) to close off other investigative avenues or gaps in the information.
- [10] As a result, I concluded that the search warrant breached Mr. Haire's rights under s. 8 of the Charter.
- [11] The parties next appeared before me to make submissions on whether, despite the breach of Mr. Haire's s. 8 rights, the evidence found during the search of his electronic devices should be admitted.

The Grant Legal Framework

- [12] The Supreme Court of Canada, in *R. v. Grant*, 2009 SCC 32 at para. 71, explained the analysis that is required under s. 24(2) of the Charter.

- [13] The analysis involves addressing three distinct lines of inquiry and, ultimately, a balancing of the interests represented by the lines of inquiry as against the long-term reputé of the administration of justice.
- [14] The three lines of inquiry are:
- a) the seriousness of the Charter-infringing state conduct;
 - b) the impact of the breach on the accused's Charter-protected interests; and
 - c) society's interest in the adjudication of the case on its merits.
- [15] The focus of the inquiry under s. 24(2) is long-term and prospective. It involves maintaining the integrity of, and confidence in, the justice system. The inquiry is objective, and focuses on whether "a reasonable person, informed of all relevant circumstances and the values underlying the Charter, would conclude that the admission of the evidence would bring the administration of justice into disrepute": Grant at para. 68.
- [16] As the Supreme Court of Canada said in Grant at para. 69, a finding that there has been a Charter breach means that damage has already been done to the administration of justice. Section 24(2) starts from that proposition and seeks to ensure that evidence obtained through that breach causes no additional damage to the reputé of the justice system.
- [17] The first stage of the Grant analysis considers the seriousness of the violation of the accused's rights. As explained by Justice Cromwell in R. v. Côté, 2011 SCC 46 at para. 47, the more serious or deliberate the state conduct constituting the Charter breach, the greater the need for courts to dissociate themselves from that conduct by excluding the evidence linked to it.
- [18] The second line of inquiry considers the extent to which the seriousness of the breach impacted the accused's Charter-protected interests. The impact may range from fleeting and technical to profoundly intrusive: Grant at para. 76. The more serious the impact on the accused's constitutional rights, the more the admission of the evidence is likely to bring the administration of justice into disrepute: Côté at para. 47.
- [19] The third line of inquiry considers society's interest in an adjudication of the criminal matter on its merits. It asks whether the truth-seeking function of the criminal process would be better served by admission or exclusion of the evidence. The reliability of the evidence, and its importance to the Crown's case, are key factors. Admission of unreliable evidence will not serve the accused's fair trial interests nor the public's desire to uncover the truth. Excluding reliable evidence may undermine the justice system's truth-seeking function and render the trial unfair from the public's perspective. The importance of the evidence to the Crown's case is corollary to the inquiry into reliability. Admitting evidence of questionable reliability is more likely to bring the administration of justice into disrepute where it forms the whole of the prosecution's case, but excluding highly reliable evidence may more negatively affect the truth-seeking function of the criminal law process where the

effect is to "gut" the prosecution's case.

- [20] After considering these lines of inquiry, in making a s. 24(2) determination, a court must balance its assessment of each of the Grant factors to determine whether, having regard to all of the circumstances, admission of the evidence would bring the administration of justice into disrepute: *R. v. Reilly*, 2021 SCC 38.

The Seriousness of the Charter-Infringing State Conduct

- [21] Various decisions have described the evaluation of the seriousness of the state's conduct on a spectrum, or fault line, in which, at the lowest end, is blameless conduct and, at the highest, is conduct that blatantly disregards Charter rights. Sloppy police work falls somewhere in the middle: *R. v. Herta*, 2018 ONCA 927 at para. 64.
- [22] In this case, there was no evidence that the police intentionally pursued a course of conduct designed to circumvent the Charter. The accused presented no evidence that Det. Nugent prepared the ITO to intentionally mislead the issuing justice.
- [23] I am satisfied that Det. Nugent honestly believed that the information he provided to the issuing justice was sufficient to justify the warrant issuing. I accept that he, and the officers involved in the search, searched believing that they were doing so pursuant to a validly issued warrant.
- [24] Mr. Haire did not allege that the officers conducted their search outside the scope of the warrant.
- [25] Nevertheless, I determined that the ITO provided by Det. Nugent in support of the search warrant was deficient in a number of respects, not for what it said, but for what it did not.
- [26] As Grant makes clear "ignorance of Charter standards must not be rewarded or encouraged and negligence or wilful blindness cannot be equated with good faith": Grant at para. 75; *R. v. Smith*, 2005 BCCA 334 at para. 61.
- [27] While Det. Nugent's conduct did not conform with the Charter, I would not characterize it as either a wilful or flagrant disregard of the Charter rights in issue, nor do I think he acted negligently or with wilful blindness. He turned his mind to the need for a warrant and applied for it. At most, he did not consider the possible importance of other information that he had or the gaps in the investigation. The omissions were not egregious or flagrant. There was no evidence that he deliberately left information out of the ITO.
- [28] Further, this is not a case involving multiple breaches of Mr. Charter rights.
- [29] In this case, I would put the seriousness of the Charter-infringing conduct closer to the blameless or good faith end of the spectrum.

The Impact of the Breach on Mr. Haire's Charter---Protected Interests

- [30] This case involved a search of Mr. Haire's Residence and his possessions, and the seizure, and then search, of a large number of his personal devices.
- [31] As set out in my earlier reasons at para. 23, in this case, the scope of the warrant sought was broad, and resulted in the seizure of a significant number of Mr. Haire's electronic devices. After seizure, as set out in paras. 28-32 of my earlier reasons, the steps taken by the police to search the digital devices was highly intrusive and included making a mirror image of most of the digital devices seized. The making of a mirror image involved copying 100% of the contents and data from each device.
- [32] The Supreme Court of Canada has made clear that an unauthorized entry into a person's home by state actors is a serious privacy breach: *R. v. Feeney*, [1997] 2 S.C.R. 13, [1997] 6 W.W.R. 634; *R. v. Silveira*, [1995] 2 S.C.R. 297 at paras. 153-154, 124 D.L.R. (4th) 193. Both a person's home and their digital devices attract a heightened expectation of privacy: *Silveira* at para. 153; *R. v. Morelli*, 2010 SCC 8 at para. 2.
- [33] As Justice Fish wrote in *Morelli* at paras. 2-3:
- [2] It is difficult to imagine a search more intrusive, extensive, or invasive of one's privacy than the search and seizure of a personal computer.
- [3] First, police officers enter your home, take possession of your computer, and carry it off for examination in a place unknown and inaccessible to you. There, without supervision or constraint, they scour the entire contents of your hard drive: your emails sent and received; accompanying attachments; your personal notes and correspondence; your meetings and appointments; your medical and financial records; and all other saved documents that you have downloaded, copied, scanned, or created. The police scrutinize as well the electronic roadmap of your cybernetic peregrinations, where you have been and what you appear to have seen on the Internet -- generally by design, but sometimes by accident.
- [34] Individuals have a very high expectation of privacy in their digital devices, much as they do in their homes. Consequently, the impact on Mr. Haire of an unwarranted search of his home and digital devices is serious. This line of inquiry suggests an exclusion of the evidence.

Society's Interest in Adjudication on the Merits

- [35] The evidence in issue in this case is highly relevant and reliable. It was found on devices belonging to Mr. Haire and he has admitted, for the purposes of this voir dire, that "[i]mages and videos constituting child pornography were located on six of the devices or hardware seized".
- [36] The Offences are serious, as Justice Cromwell wrote in *R. v. Spencer*, 2014 SCC 43 at para. 80:

- [80] Society has both a strong interest in the adjudication of the case and also in ensuring that the justice system remains above reproach in its treatment of those charged with these serious offences. If the evidence is excluded, the Crown will effectively have no case. The impugned evidence (the electronic files containing child pornography) is reliable and was admitted by the defence at trial to constitute child pornography. Society undoubtedly has an interest in seeing a full and fair trial based on reliable evidence, and all the more so for a crime which implicates the safety of children.
- [37] It is also not disputed that, without the evidence, the Crown's case against Mr. Haire would collapse.
- [38] This third line of inquiry suggests that the evidence should be admitted.

Counsel Submissions

- [39] The parties agree that this case will turn on my assessment of the seriousness of the state's Charter-infringing conduct. In the final analysis, the two other lines of inquiry pull against each other. The impact on Mr. Haire's privacy interests favours exclusion of the evidence. The seriousness of the Offences and the public interest in their adjudication favours inclusion of the evidence.
- [40] The parties disagree about where Det. Nugent's conduct falls on the spectrum of police misconduct, from serious and flagrant breaches of a person's rights at one end of the spectrum, and minor technical breaches at the other.
- [41] Mr. Haire submits that Det. Nugent's conduct was careless and negligent since he failed to make full, frank, and fair disclosure to the justice.
- [42] The Crown contends that Det. Nugent's conduct was closer to the good faith end of the spectrum since Det. Nugent provided the information he thought he needed to in order to obtain a warrant. The Crown submits that his conduct was not wilful or flagrant.

The Balancing of Interests in this Case

- [43] Ultimately, the question is whether, on balance, the admission of the evidence obtained would bring the administration of justice into disrepute, with a focus on the long-term interest of maintaining the integrity of our justice system.
- [44] The assessment is case specific, and no two cases present the same facts.
- [45] I have considered all of the cases relied on by Mr. Haire and *R. v. Mollon*, 2017 BCSC 2481, relied on by the Crown and distinguished by Mr. Haire. I conclude that the nature of the Charter-infringing state conduct in *Mollon* was more technical than in this case. Nonetheless, the court in *Mollon* found that the description of the image that triggered the investigation did not meet the elements of an offence of child pornography. I would describe the nature of the breach as almost equivalent to the breach here. The decision is helpful because it arose in very similar circumstances, and the evidence on which the police relied

on in support of a search warrant was very similar to the evidence Det. Nugent had in this case. Justice Crossin did not exclude the evidence.

- [46] Here, the police proceeded in violation of Mr. Haire's Charter rights. However, they did so with an honest belief in the lawfulness of their conduct. That conduct cannot be described as egregious, flagrant, or abusive. The search was a serious infringement of Mr. Haire's privacy interests. The material found, as a result of the search of Mr. Haire's digital devices, is child pornography. It is likely to be determinative of the case, and its reliability is not in issue. To exclude it would "gut" the Crown's case.
- [47] Having regard to all of the circumstances, I conclude that the admission of the evidence would not bring the administration of justice into disrepute and that, while the serious impact of the breach on Mr. Haire's privacy interest weighs heavily in favour of excluding the evidence, the strong public interest in the adjudication of this criminal trial on its merits weighs strongly in favour of the admission of the evidence. The police misconduct was not at a level that the court needs to distance the justice system from it in order to preserve its repute.
- [48] Det. Nugent's conduct was not at the egregious end of the culpability spectrum. His conduct was the omission of evidence from the ITO, and the failure to follow certain lines of inquiry that were available to him in advance of seeking the warrant. His conduct was closer to the lower end of culpable police behaviour. Ultimately, it is this factor that persuades me that, on balance, the admission of the evidence would not undermine the repute of the administration of justice in the long term.
- [49] I dismiss Mr. Haire's application to exclude the evidence.

"MacNaughton J."

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Prepared on 29 October 2026 · Esheria