

CANADA / JUDGMENT

R. v. Haire

2021 BCSC 1308

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2021 BCSC 1308 R. v. Haire

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Haire,

2021 BCSC 1308

Date: 20210702

Docket: 68905

Registry: Chilliwack

Regina

v.

Michael Larence Haire

Before: The Honourable Madam Justice MacNaughton

Oral Reasons for Judgment

Voir Dire #1: Section 8 of the Charter

Validity of Search Warrant

Counsel for the Crown:

D. Tsui

Counsel for the Accused:

V. Michaels

Place and Date of Trial/Hearing:

New Westminster, B.C.

May 3-5, 2021

Place and Date of Judgment:

New Westminster, B.C.

July 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. 161.1(3)-(4) of the Criminal Code, R.S.C. 1985, c. C-46 [Code] (the "Offences"). The Offences involve an upload to Instagram of a six-second video of children engaged in sexual activity (the "Upload").
- [2] In October 2020, Mr. Haire gave notice of his intention to apply under ss. 8, 24(2) of the Canadian Charter of Rights and Freedoms for an order excluding the Crown's evidence obtained pursuant to a search warrant. Mr. Haire challenged the validity of the search warrant pursuant to which the evidence leading to the charges was obtained.

- [3] On May 3, 2021, at the commencement of trial, counsel for Mr. Haire provided a revised Charter notice, refining the grounds for his challenge. Counsel advised that the Crown had agreed to proceed with Mr. Haire's Charter challenge first, and consented to him cross-examining Det. Keith Nugent of the Abbotsford Police Department ("APD"), the affiant who swore the Information to obtain the warrant ("ITO"). Depending on my decision, and if necessary, they would then proceed to argument under s. 24(2) of the Charter.
- [4] There is no issue that Mr. Haire has standing to challenge the search warrant. There is also no issue that the content of the Upload meets the definition of child pornography in s. 163.1(1) of the Code.
- [5] After hearing submissions, I agreed to proceed with a voir dire in which Det. Nugent would be cross-examined. I was satisfied that Mr. Haire had demonstrated an appropriate foundation for the cross-examination. In particular, he had established a reasonable likelihood that a voir dire would assist in determining the Charter issues. The proposed cross-examination of Det. Nugent was to be brief, and limited to the grounds set out in Mr. Haire's amended Charter notice, which, in turn, related to matters about which Det. Nugent was cross-examined at the preliminary inquiry. Counsel agreed that a Charter decision about the admissibility or exclusion of the evidence obtained pursuant to the warrant would be dispositive of the case.
- [6] The particular grounds set out in the amended Charter notice concerned matters that Mr. Haire said were known, or ought to have been known, to Det. Nugent when he swore the ITO, and are relevant to the reliability of the information in it. There is no suggestion that Det. Nugent intentionally misled the issuing justice. I will return to the grounds for the challenge later in these reasons.

The Basis for the Search Warrant

The Evidence in the ITO in Support of Det. Nugent's Belief that Evidence of the Offences Would be Found at Mr. Haire's Residence

- [7] According to Det. Nugent's affidavit of September 12, 2018, he has been employed with the APD since April 2007. In November 2017, he was assigned to APD's Internet Child Exploitation ("ICE") Unit.
- [8] On July 28, 2018, at 08:57 hours, a video file containing child pornography content was uploaded to Instagram by a user of a Telus Communications Inc. ("Telus") internet protocol address: 2001:569:7090:4f00:24a2:56b:3d84:8566 (the "IP Address"). Telus was the Internet Service Provider ("ISP").
- [9] Instagram reported the Upload to the American National Center for Missing and Exploited Children ("NCMEC"). NCMEC determined that Telus was the ISP for the IP address and the region for the IP address was Abbotsford, BC.

- [10] On July 30, 2018, NCMEC sent a report to the Canadian National Child Exploitation Coordination Centre ("NCECC"), which then forwarded the information to the APD for further investigation.
- [11] Det. Nugent was the ICE officer assigned as the primary investigator. On August 9, 2018, he reviewed the information package from the NCECC and the video file. In the ITO, he describes the content of the video file. He determined that the uploaded video file met the Code definition of child pornography and sets out the basis for his determination.
- [12] Also on August 9, Det. Nugent queried the IP address on a website called Maxmind and confirmed Abbotsford as the location for the IP Address and that the ISP was Telus. He sought a production order requesting the Telus customer account information associated to the IP Address.
- [13] Det. Nugent reviewed the NCMEC report. Instagram advised NCMEC that the user, or the person, that it was reporting was Maddie Mackenzie and the email address associated to the user was minke3000@gmail.com. The username associated to the user was Maddie.mack3000.
- [14] On August 13, 2018, Det. Nugent obtained the production order from a judicial justice and sent it to Telus.
- [15] On August 27, 2018, Telus emailed Det. Nugent, advising that Michael Haire was the customer name associated with the IP address and providing a residential address of 201-2238 Whatcom Rd. in Abbotsford (the "Residence"). Telus provided Mr. Haire's date of birth, and telephone number, and advised that the IP address was active as of August 23, 2018.
- [16] In the ITO, Det. Nugent says that, as a result of queries he made on September 10, 2018, in the Police Resource Information Management Environment ("PRIME"), on Facebook, and in the Canadian Police Information Centre ("CPIC") database, and based on surveillance he conducted on September 11, 2018, he has reasonable grounds to believe that Mr. Haire lived at the Residence.
- [17] Det. Nugent says that PRIME recorded Mr. Haire as having the same date of birth, address, and phone number as those provided by Telus. PRIME records that, in January 2018, Mr. Haire, the Vice Principal at William Fraser Middle School, requested the APD to attend the school about a student-related incident.
- [18] In the ITO, Det. Nugent says that PRIME recorded Mr. Haire as "the only individual listed as being associated to the address".
- [19] In para. 16 of the ITO, Det. Nugent swears:

I have reasonable grounds to believe that on July 28, 2018, at 0857 hours, a Video File with child pornography content was uploaded onto Instagram from a user of the IP Address. The uploaded Video File met the definition of child pornography as set out by the [Code]. As such I believe that a user of the IP Address committed the following named offences:

- a) Making Available Child Pornography contrary to Section 163.1(3) of the [Code]; and
- b) Possession of Child Pornography contrary to Section 163.1(4) of the [Code].

[20] At paras. 34-35, Det. Nugent explains that, on September 10, 2018, he went to the multi-level condominium building in which the Residence was located. He contacted a member of the strata council and obtained a key and fob to access the building. He also conducted open source queries for the Residence, determined it was for sale, and confirmed that fact with the Realtor.

[21] At paras. 36-37, Det. Nugent outlines the surveillance he conducted linking Mr. Haire to the Residence.

[22] At para. 38, Det. Nugent says that, based on the information in the ITO, he has reasonable grounds to believe that Mr. Haire lives at the Residence and "to believe that evidence of the Offences will be present in the possession of the user of the IP Address at the Residence".

(i) At para. 39, Det. Nugent says that he has reasonable grounds to believe that the items sought in the warrant will afford evidence related to the Offences and, at para. 40, he explains the reasons for his belief.

The Scope of the Search Warrant

[23] Det. Haire sought a search warrant to enter the Residence and seize the following items, as set out in Appendix A to the ITO:

- a) all electronic processing devices, computers, computer devices, cell phones capable of accessing the Internet, gaming consoles, and external devices capable of analyzing, creating, displaying, converting, storing or transmitting electronic or magnetic computer impulses or data, and to conduct a digital forensic analysis of each device;
- b) any digital images, videos, computerized graphic or data files that would constitute child pornography as defined by s. 163.1(1) of the Code;
- c) computerized files or documents including address and phone books, portfolios, electronic mail, video, and Internet history that may assist in identifying the user and or owner of the equipment used at the time the named offences were committed;
- d) computer files or hard copy documents that will afford evidence of access and/or control of the premise and computer, including personal phone books, phone bills, Internet bills, income tax documents, personal/family photos, passwords, social networking pages and email addresses;

- e) items such as passwords that will assist with the forensic analysis of the devices seized; and
- f) external electronic storage devices which could contain any of the above items including floppy diskettes, removable hard drives, CD's, DVD's and any other media which is capable of storing magnetic coding.

[24] On September 13, 2018, Judicial Justice Blackstone issued the search warrant in the terms sought by Det. Nugent.

Admissions on Voir Dire

[25] Pursuant to s. 655 of the Code, the Crown and Counsel for Mr. Haire agreed to a number of facts and documents as follows.

The Search of the Residence

- [26] On September 13, 2018, Det. Nugent, five other regular members of the APD, and Special Cst. Neil Bains, a digital forensic examiner, attended at the Residence. The Residence is a condominium in a development with other condominiums positioned above, below, and adjacent to Unit 201. Upon entry, the Residence was found to be the residence of Mr. Haire.
- [27] The police arrived at the Residence at 17:35 hours, intending to conduct a search of the premises. The search was complete by 20:17 hours, at which time they departed. The search was conducted pursuant to a search warrant issued by Judicial Justice I. Blackstone on September 12, 2018, based on the ITO sworn by Det. Nugent. The search warrant and the ITO were marked as Ex. B on this voir dire.

The Items Seized and the Search of the Items

- [28] The execution of the search warrant resulted in the seizure of 28 items listed and numbered on the Major Incident Flowchart ("Flowchart") marked as Ex. C on this voir dire. Item 2 consists of five separate items (three Panasonic video cassettes, one JVC cassette, and one Fujitsu hard drive). Accordingly, although the Flowchart lists 28 items, it actually consisted of 32 items in total. Two "non digital" paper items were seized: Items 26 and 28.
- [29] At the APD digital forensics lab, Special Cst. Bains used forensic software and hardware to make a mirror image of most of the digital items seized. In order to produce a mirror image, Cst. Bains made a digital copy of 100% of the contents and data of each item. From the mirror images, photos and videos were uploaded onto a software program used by law enforcement called LACE. Det. Nugent then examined the photos and images uploaded to LACE in order to determine whether they contained child pornography. This is a process referred to as categorization.

- [30] The items of which a mirror image was made are Flowchart numbers 2 (Fujitsu hard drive only), 3-16, 20-25, and 27. Apart from the paper exhibits (numbers 26 and 28), the other digital items were not mirror imaged. They were, however, examined by either Special Cst. Bains or Det. Nugent looking for evidence of child pornography. These items were as follows: 1, 2 (3 Panasonic video cassettes, 1 JVC cassette), 18, and 19.
- [31] Images and videos constituting child pornography were located on six of the devices or hardware seized. They were on Items 2, 13, 20, 21, 23, and 24 in the Flowchart. With respect to Item 2, child pornography was located only on the Fujitsu hard drive.
- [32] A forensic examination of all of the digital items seized revealed that they were Mr. Haire's property.

The Charter Challenge

- [33] Section 487 of the Code requires a justice issuing a warrant to be satisfied, by information on oath, that there are reasonable grounds to believe that there is in a building, receptacle, or place anything that there are reasonable grounds to believe "will afford evidence with respect to the commission of an offence". The standard is one of reasonable probability or reasonable belief. Reasonable grounds are said to exist at the point at which credibly-based probability replaces suspicion: *R. v. Liu*, 2014 BCCA 166 at para. 39, citing *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 at 167.
- [34] The state's interest in investigating criminal activity may conflict with an individual's right to privacy. While all searches may engage the constitutional protection against unreasonable search and seizure under s. 8 of the Charter, searches of electronic devices present special challenges because of the potential for broad intrusion into intensely personal and private affairs. As Justice Fish wrote for the majority in *R. v. Morelli*, 2010 SCC 8:
- [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.
- [35] The cases address these challenges by imposing safeguards with respect to the searches. For example, in *R. v. Vu*, 2013 SCC 60 at paras. 45-49 [Vu SCC], the Court determined that express authority to search electronic storage media must be set out in a warrant.
- [36] In this case, the grounds for Mr. Haire's challenge were set out in paras. 3(b), (c), and (c.i) of his Charter notice:
- b) That Det. Nugent's ITO did not provide reasonable grounds to believe that evidence of the ["[O]ffences"] would be found at the Residence.
- c) Alternatively, if there were reasonable grounds to believe that evidence of the [O]ffences would be found at the Residence, the ITO did not provide reasonable grounds to believe that evidence of the [O]ffences would be found in a search of a computer or other electronic devices.

c.i) Alternatively, to the grounds in paras 3b and c, if there were reasonable grounds to believe that evidence of the [O]ffences would be found at the Residence, or would be found on an electronic device located at the Residence, the search warrant is insufficient because the scope of the seizure authorized in it is overly broad. It permits a seizure and search of items and material going beyond those properly supported by the ITO as evidence of the [O]ffences.

The Applicable Legal Principles

- [37] The challenge to the warrant in this case is sub-facial. Mr. Haire cross-examined Det. Nugent in an effort to demonstrate that the grounds set out in the ITO, as amplified on review, were incapable of supporting the warrant.
- [38] The parties agreed about the applicable legal principles. I summarize them in the following paragraphs.
- [39] An ITO seeking a warrant to search for evidence of possession of child pornography must provide reasonable grounds for the issuing justice to believe that the alleged offender possesses, or possessed, digital files of an illegal image, and that evidence of that possession will be found in the place to be searched when the warrant is sought.
- [40] An ITO seeking a warrant to search for evidence of making available child pornography must provide reasonable grounds for the issuing justice to believe that the alleged offender took steps to make available to others an illegal image that they had possession of and that evidence of the making available will be found in the place to be searched when the warrant is sought.
- [41] The search warrant must be objectively justified. The issue is whether, on the facts set out in the ITO, as amplified by Det. Nugent's evidence in cross-examination, there was sufficient credible and reliable evidence on which the issuing justice could conclude that there were reasonable and probable grounds to believe that evidence of the Offences would be found at the Residence at the time of the search.
- [42] I am required to review the issuing justice's decision, applying the test set out in *R. v. Garofoli*, [1990] 2 S.C.R. 1421 at 1452. The search warrant is presumptively valid and in compliance with s. 8 of the Charter. The onus is on Mr. Haire to show, on a balance of probabilities, that his s. 8 rights have been violated.
- [43] The standard of review of the issuing justice's decision is a deferential one. As explained in *R. v. Araujo*, 2000 SCC 65, citing *Garofoli*, and *Morelli* at para. 40, the question is not whether I would have issued the warrant but whether the authorizing justice could reasonably have done so: see also *R. v. Vickerson*, 2018 BCCA 39 at para. 65; *Vu* SCC at para. 16.

- [44] In addressing the question of whether the issuing justice could reasonably have issued the warrant, I must consider the totality of the circumstances set out in the ITO. This involves consideration the information in the ITO as a whole, with a common sense non-technical approach. As the Court of Appeal explained in *R. v. Lam*, 2002 BCCA 99 at para. 10, each piece of information or evidence colours others, and a fuller picture emerges by considering all of the evidence together.
- [45] My focus is on the information available to the authorizing justice when the warrant was applied for, not information acquired afterwards.
- [46] A reviewing court does not undertake its review solely based on the ITO presented to the issuing justice. Erroneous information must be excluded, and the reviewing court may consider amplification evidence--evidence presented in the voir dire to correct minor errors in the ITO as opposed to deliberate attempts to mislead the authorizing justice: *Morelli* at para. 41.
- [47] Amplification evidence is not additional information to retroactively authorize a search that was not initially supported by reasonable and probable grounds: *Araujo* at para. 59.
- [48] The "reasonable grounds" standard does not require proof of a prima facie case, or proof beyond a reasonable doubt. Instead, as explained in *R. v. Vu*, 2011 BCCA 536 at para. 39, aff'd (on this point) *Vu* SCC at paras. 9-18, and in *Liu* at para. 37, the standard contemplates a credibly-based, or reasonable, probability. Justice Deschamps described the standard in her dissenting reasons (but not on this point) in *Morelli* at paras. 127-129, quoting *Hunter* at 167, as the point at which credibly-based probability replaces suspicion.
- [49] I must also take into account that an authorizing justice may draw reasonable inferences from the evidence in the ITO. The deferential standard governing the review means that the question is not whether I would draw a suggested inference, but whether the authorizing justice could reasonably have done so based on the contents of the ITO: *Vu* SCC at paras. 16-17.
- [50] Because investigators apply for search warrants ex parte, they are required to make full and frank disclosure of all material facts, whether in favour of, or against, the warrant issuing: *R. v. Ling*, 2009 BCCA 70 at paras. 38, 40.
- [51] There are two other legal principles relied on by Mr. Haire: the rules against narrative and conclusory statements. These principles, sometimes conflated, address distinct concerns.
- [52] The rule against narrative requires that the affiant properly source the information set out in the ITO. As explained in *Criminal Code (Re)*, [1997] O.J. No. 4393 (Gen. Div.) at para. 8:

8 It is insufficient for an applicant to simply state conclusions, opinions and facts without providing the court the source or origin for [those] conclusions, opinions or facts. The credibility and reliability of the assertions are inextricably linked to the investigative resources themselves.

- [53] The rule against conclusory statements requires that an affiant not simply recite conclusory statements on matters material to the application for a warrant without setting the factual underpinning that would allow the authorizing justice to evaluate the factual basis for the conclusions: *R. v. Belanic*, 2019 BCSC 1411 at para. 14.

Application of the Legal Principles to this Case

- [54] Child pornography offences evoke strong emotional responses, particularly where it is alleged that a person in a position of trust engages in them. As Justice Fish wrote in *Morelli* at para. 9, child pornography offences "generate widespread condemnation and intense feelings of disapprobation, if not revulsion." It is for that reason that Justice Fish highlighted the particular vigilance required of a justice issuing a search warrant, or reviewing the issuance of a search warrant, in child pornography cases. It is with that vigilance in mind that I consider the parties' positions in this case.

Positions of the Parties

Mr. Haire's Position

- [55] As I have said, Mr. Haire challenges the warrant because he argues that there was no basis on which the issuing justice could have concluded that evidence of the Offences would be found at the Residence. He does not challenge that there were reasonable grounds to believe that the Offences had been committed.
- [56] Mr. Haire submits that, in this case, the grounds to believe that there would be evidence at the Residence are weaker than those in the other child pornography cases he distinguishes, or in those on which the Crown relies, and in which the warrants were upheld. Mr. Haire urges the opposite result in this case.
- [57] Mr. Haire does not argue that Det. Nugent acted in bad faith, or that the ITO was intentionally misleading. Rather, he submits that Det. Nugent left out information known to him, which, if included in the ITO, would have led the issuing justice to conclude that there was not a credibility-based, or reasonable probability that evidence of the Offences would be found at the Residence.
- [58] In particular, Mr. Haire submits that Det. Nugent should have disclosed that he believed that the Upload was made by a cell phone, an inherently a mobile device, and less likely to be found in any one place at any given time and even less likely to be found at the Residence 48 days after the Upload. He also submits that Det. Nugent should have disclosed that, in response to the production order, Telus advised him that the internet device associated with the IP Address was a router or modem. Mr. Haire submits that was important because Det. Nugent testified during the voir dire that, from his experience in other investigations, a router or modem was of no evidentiary value. Det. Nugent acknowledged that, when the warrant was executed, the APD did not seize the router or modem from the Residence.

- [59] Alternatively, Mr. Haire submits that, if I find that there were reasonable grounds for the warrant to be issued, those grounds did not support a search for, and seizure of, every electronic device in the Residence or to search the devices for any files constituting child pornography. He submits that, on the information that was available to the issuing justice, there was no basis on which to draw a reasonable inference as to the presence of any other child pornography. The single Upload that led to the investigation did not provide a basis to believe that there was other contraband at the Residence.

The Crown's Position

- [60] The Crown acknowledges that the ITO in this case was not perfect. It was not lengthy or detailed. However, it submits that it met the legal requirement of setting out the material facts fully, frankly, and concisely.
- [61] The Crown submits that there is a high bar for overturning a warrant, and that to accede to Mr. Haire's position, and conclude that there were no grounds to issue the warrant, I must reject multiple reasonable inferences that the issuing justice could have made.
- [62] The Crown submits that the fact that the ITO did not allege that Mr. Haire made the Upload is not significant. A warrant is an investigative tool to find evidence of the elements of an offence including the identity of the user of the IP address and who made the Upload.
- [63] The Crown argues that the two pieces of additional information Mr. Haire says should have been in the ITO were not necessary and that, taken as a whole, there was reliable evidence, that could reasonably be believed and, on the basis of which, the authorization could have issued.

Discussion and Analysis

- [64] In his introductory remarks, counsel for Mr. Haire criticized the lack of detail in Det. Nugent's ITO about the number of courses he had taken or the number of investigations he had engaged in. In my view, nothing much turns on that in this case as Mr. Haire is not challenging Det. Nugent's conclusion that the Upload amounted to child pornography. Nor does Det. Nugent make any propensity-type statements in the ITO with respect to the habits of child pornography users which, if made, might need to be grounded in Det. Nugent's training or experience.
- [65] Mr. Haire distinguished a number of cases in which search warrants were upheld in the context of child pornography offences. I agree with his submission that in most of those cases, there was more evidence connecting the subject of the residential search warrant to child pornography activities.

- [66] For example, in *R. v. Ballendine*, 2011 BCCA 221, the ITO established that, in 2005, Mr. Ballendine purchased from a distributor, more than 24 child pornography videos at a cost of almost \$1,000. Mr. Ballendine argued that his purchase did not provide a reasonable basis on which to believe that evidence would exist at his residence when the search warrant was sought two years later.
- [67] At para. 53 of *Ballendine*, the court said that:
- [53] a reasonable-grounds determination is based on a practical, non-technical, and common-sense assessment of the totality of the circumstances: that determination includes a consideration not only of when the Marzola videos were ordered, but also their contents, how they were ordered, the number ordered, and the cost.
- [54] Merely because information is "dated" does not mean it is "stale". While the length of time that has passed is to be taken into account in a reasonable-grounds determination, it is but one factor.
- [Citations omitted.]
- [68] In *R. v. Burke*, 2013 ONCA 424, the ITO said that Mr. Burke was detected sharing child pornography on a network, over a period of eight months. That information suggested that he was a long-term user, and the court determined that it was not unreasonable to believe that illegal images were associated, on multiple occasions, with his IP address.
- [69] In *R. v. Ward*, 2012 ONCA 660, the reviewing court found that the ITO provided strong evidence from which it could be inferred that someone using the appellant's computer, at his residence, had accessed or downloaded child pornography on eight occasions, six in one month and two the following. The court determined that these allegations provided a basis on which a justice could reasonably infer that there was a reasonable probability that child pornography had been accessed and stored on a computer at the residence: at para. 113.
- [70] The ITO also provided technical evidence that files downloaded by the appellant to a computer were recoverable even if the appellant had deleted the files. That evidence formed a basis for an inference that the prohibited material remained on the computer long after it was downloaded and could be recovered if police had access to the computer. Finally, the ITO provided detailed evidence from the affiant that, in his experience, individuals who access and possess child pornography on their computers keep the images for long periods of time and rarely delete their collections: at paras. 114-115.
- [71] In *R. v. Wonitowy*, 2010 SKQB 346, investigators learned that a computer, later determined to be at the accused's residence, was downloading and allowing others to upload a number of child pornography videos. Through a peer-to-peer investigation, the affiant used a software program to generate an IP History report. The report showed that the computer had made child pornography available to other members of a network on 11 occasions about seven months before the warrant issued.

- [72] The court determined, on a common sense basis, that the accused was interested in child pornography, and that it was more than a fleeting curiosity, and it was probable that he would preserve the child pornography.
- [73] In *R. v. Neveu*, 2005 NSPC 51, the ITO disclosed a credibly-based probability that, on three occasions, the accused purchased 30 days of computer access to three different child pornography websites. The ITO also disclosed a credibly-based probability that the accused would download child pornography images from the websites and store them on his computer or on external storage devices.
- [74] In *R. v. Brown*, 2019 BCCA 346, NCMEC reported to the Vernon RCMP that a user, Wayne Douglas, was engaged in sexually explicit internet chats with teenaged girls from the Philippines. Through social media and computer-related inquiries, the RCMP concluded that Wayne Douglas was the accused, Wayne Douglas Brown.
- [75] The ITO contained the following information linking Mr. Brown to the offences: he lived at the Vernon residence with shared access to it and a private bedroom; he had recently been in Calgary, and IP addresses used in the offences had been located in Calgary and Vernon; he owned a laptop, and it was located in his bedroom; he had access to Wi-Fi in his bedroom; he was married to a 22-year-old woman in the Philippines and spent half a year there; and he planned to travel to the Philippines in the near future: at para. 24.
- [76] In all of the aforementioned cases, the ITO provided a stronger link between the residential address, the offences, and the accused.
- [77] In this case, there was no evidence connecting Mr. Haire to child pornography activities. What the ITO disclosed, as amplified by Det. Nugent's evidence on the voir dire, was that a user, likely using a cell phone, uploaded a six-second child pornography video to Instagram via a modem or router associated with Mr. Haire's IP address. The modem or router was of no evidentiary value.
- [78] The following information in the ITO linked Mr. Haire to the Residence:
- (a) based on September 10, 2018 CPIC inquiries, Mr. Haire's driver's licence linked him to Residence;
 - (b) based on September 11, 2018 surveillance, Mr. Haire lived at the Residence;
 - (c) based on a PRIME query, in January 2018, Mr. Haire requested the APD's attendance at the William Fraser Middle School as a result of a student incident, and the address recorded in PRIME was the Residence.
- [79] From that information, I accept that the issuing justice could reasonably have inferred that Mr. Haire lived at the Residence on July 28, 2018, the date of the Upload.

- [80] In addition, the ITO explained that "IP Addresses can change over time, but are often assigned to the same customer for months or even years without change". Based on the Telus response to the production order, Mr. Haire was the Telus customer associated with the IP address at the Residence. As of August 23, 2018, the IP Address was active. A device associated with the IP Address had been the source of the Upload on July 28, 2018.
- [81] From that information, and building on the reasonable inference that Mr. Haire live at the Residence on July 28, 2018, I accept that the issuing justice could reasonably have inferred that Mr. Haire's IP Address was active on July 28, 2010.
- [82] In addition, the following reasonable inferences were available to the issuing justice.
- [83] The issuing justice could have made a common sense inference that the person who uploaded the video would have retained a copy of it. Retention of child pornography videos or images offers those that view them the prospect of continuing enjoyment. They are unlike other contraband--drugs, guns, or stolen goods--that are more likely to be sold than retained.
- [84] The issuing justice could also have made a common sense inference that the step of uploading the child pornography video to Instagram had the effect of sharing it with others and made it more likely that the uploader retained a copy to upload it on a different occasion, or to a different platform.
- [85] Even if the Upload had been made from a cell phone, as Det. Nugent believed, given the ubiquitous use of electronic devices, and the sharing of information between multiple devices, a common sense inference could have been made that the Upload could may been stored on the user's other electronic devices.
- [86] However, based on the totality of the information in this case, I do not accept that the issuing justice had reasonable and probable grounds to issue a warrant to search all electronic devices and storage media at Mr. Haire's Residence.
- [87] The Crown relied on R. v. Van Humbeck, 2019 BCSC 1590. I agree that it is a case which is most factually similar to this. However, what distinguishes Van Humbeck is that the ITO identified Mr. Van Humbeck as a person the officer believed guilty of possessing, distributing, and making available child pornography. On that basis, Justice Gomery was satisfied that it was open to the issuing justice to conclude that credibly-based probability replaced suspicion that electronic storage media at Mr. Van Humbeck's home would furnish evidence that he was in possession of child pornography: para. 28.
- [88] In Det. Nugent's affidavit, based in the information available to him, he was only able to say that he had reasonable grounds to believe that "on July 28, 2018, at 0857 hours, a Video File with child pornography content was uploaded onto Instagram from a user of the IP Address ... As such I believe that a user of the IP Address committed the [Offences]" (Emphasis added).

- [89] Thus, while there was evidence on which the issuing justice could have reasonably inferred that Mr. Haire was lived at the Residence, and was the owner of the IP Address, there was no other evidence connecting Mr. Haire as the user.
- [90] Considered as a whole, the ITO was incomplete:
- (a) it did not disclose Det. Nugent's belief that the Upload was made from a cell phone, an inherently mobile device, which was less likely to remain at the Residence. In cross-examination, Det. Nugent agreed that the most common method of uploading videos to Instagram was by cell phone;
 - (b) it disclosed that the Upload was 48 days before the execution of the warrant, but when considered in light of Det. Nugent's belief that the Upload was made by a cell phone, the delay should have raised concerns about the continuing likelihood of evidence of the Offences remaining at the Residence;
 - (c) it did not disclose that the device referenced by Telus in the production order was a router/modem that, according to Det. Nugent, was of no evidentiary value and would not assist in the investigation. The issuing justice may have proceeded on an understanding that the device referred to was a computer or a laptop;
 - (d) it disclosed that the user for the Upload was "Maddie Mackenzie" whose user name was Maddie.mack 300 and whose email address was listed as minke3000@gmail.com;
 - (e) it did not disclose any steps to investigate Maddie Mackenzie and whether she existed;
 - (f) it did not disclose how many people lived at the Residence, or the size of it, despite Det. Nugent speaking to the president of the strata corporation and the fact that the Residence was listed for sale and he had contacted the listing agent. Any number of individuals could have been at the Residence on July 28, 2018;
 - (g) it disclosed the PRIME record relating to Mr. Haire but that was of limited evidentiary value because, as Det. Nugent agreed in cross-examination, PRIME only records police contacts associated with the Residence. As a result, Det. Nugent's statement in para. 31(b) of the ITO that "Haire was the only individual listed as being associated to the [Residence], appropriately interpreted, in the context of PRIME, meant that Mr. Haire was the only individual associated with the Residence with whom the police had prior contact; and
 - (h) it did not disclose that, as acknowledged by Det. Nugent in cross-examination, assuming the router or modem was password protected, anyone within range of the router or modem at the Residence, who knew the password, could have made the Upload. The ITO did not disclose whether the router or modem required a password.
- [91] While a search warrant is an investigative tool and police are not required to exhaust all investigative routes before seeking a search warrant, in the circumstances of this case considered as a whole, the ITO 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. The search warrant breached Mr. Haire's rights under s. 8 of the Charter.

[92] As a result of my conclusion, it is not necessary for me to consider Mr. Haire's alternative argument about the over-breadth of the warrant.

"MacNaughton J."

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