PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. Rafuse, 2021 NSPC 63

Date: 20220411
Docket: 8475080
8475081
Registry: Amherst

Between:

Her Majesty the Queen

v.

Matthew Rafuse

DECISION ON *VOIR DIRE*

Judge: The Honourable Judge Alain Bégin

Heard: 6 October 2021, in Amherst, Nova Scotia

Decision: 23 November 2021

Charges: Section**s** 163.1(4) and 163.1(4.1) *Criminal Code*

Counsel: Peter Dostal, for the Crown
Anastacia Merrigan, for the Defence

By the Court:

[1] The relevant time frame of events pertaining to the s. 8 *Charter* application by Mr. Rafuse, who was employed in the IT world, is as follows:

- December 17, 2019 the police execute a search warrant for 15 Poplar Street for evidence that Mr. Rafuse, and another individual, committed the offence of voyeurism. Various electronic devices are seized.
- On February 29, 2020 a search warrant is obtained by the police for the electronic devices seized on December 17, 2019 to be examined by the tech lab for evidence of voyeurism offences. The terms of the search are for the period of February 25, 2020 until August 25, 2020.
- April 29, 2020 Mr. Rafuse enters guilty pleas on the three voyeurism charges, and he is sentenced on a joint recommendation sentence. No forfeiture order is sought by the crown, and no request is made by the accused for the return of his electronic devices that were seized.
- On July 26, 2020 the tech lab finds suspected child pornography on the electronic devices that were sent to the lab back in February 2020.
- July 30, 2020 a search warrant is issued to search the electronic device for child pornography.
- October 16, 2020 child pornography charges are laid against Mr. Rafuse based on the search in July 2020.
- Between April 29, 2020 and October 16, 2020 Mr. Rafuse had contacted the Amherst Police to have his electronic devices that were seized returned to him.
- On March 5, 2021 the Initial Report to Justice for the search of 15 Poplar Street on December 17, 2019 is filed by the Amherst Police with the Court. The report purports to be filed in accordance with s. 489.1 of the *Criminal Code* but it is filed 14.5 months after the initial search and the items were seized. The 14.5 months could also be categorized as 444 days, or as one year, two months and 16 days.

- The Report to Justice dated March 5, 2021 lists 18 items that were seized. Interestingly, the ITO for the warrant to search the devices dated July 29, 2020 only lists 16 items seized.

[2] Corporal McNair of the Amherst Police testified that on the devices that belonged to Mr. Rafuse that were searched, the tech lab found 1387 images and one video that would meet the definition of child pornography.

Positions of the parties

[3] Counsel for Mr. Rafuse brings application for relief under s. 8 of the *Charter* based on a claim of abuse of process premised on the notion that once Mr. Rafuse had been sentenced in April 2020 that the police should have ceased looking into his seized electronics, and that any continuing search was an abuse of process. Counsel for Mr. Rafuse further submits that there was no judicial authorization for the continued search.

[4] The crown responds there was no bad faith by the police, and that the police had a duty to continue lawfully searching for further evidence of crimes. The crown submits that the sentencing hearing for Mr. Rafuse did not restrict the police from further investigations. The crown also relies on the fact that there was no formal application by the accused for the return of his property.

[5] Counsel for Mr. Rafuse asks that the search be declared unlawful and that the evidence be excluded, or that there be a stay of proceedings.

[6] The crown submits that under a *Grant* analysis that the breach was minimal, and that the harm of child pornography far exceeds any harm to Mr. Rafuse and that the evidence should not be excluded.

The relevant law

[7] Neither crown nor defence in their submissions focused on the very late filing of the Report to Justice. The abuse of process claims arguments centred on the failure to stop investigating after plea and sentence, but the *Charter* issues actually arise over the failure by the Amherst Police to file the Initial Report to Justice "as soon as practicable".

[8] The author of that Report to Justice, Constable Follows of the Amherst Police, testified that it was simply an oversight on his part as he had not been working as a police officer for very long, and that in that short time he had only dealt with one or two warrants and seizures. The reality is that the Search Warrant was actually prepared by Sergeant Galloway, a senior member of the Amherst

Police, and it was sworn by Constable Tristan Follows, so there was senior, experienced police involvement in this file from the outset.

[9] The police officer's supervisor, Sergeant Graham from the Amherst Police, testified that the initial failure to file the Report to Justice was simply an oversight that was caught many months later, and that the late filing was not part of any after-the-fact deliberate cleansing of this particular file. There is no explanation as to why Sergeant Galloway, who was initially involved in preparing the Search Warrant ITO, did not notice the failure to file the Report to Justice "as soon as was practicable" as presumably he was actively involved in this file, and he is a senior member of the Amherst Police.

[10] The sections of the *Code* that govern a Report to Justice and the detention of items seized are as follows (emphasis added):

> *Restitution of property or report by peace officer*
>
> ***489.1 (1)*** *Subject to this or any other Act of Parliament,* ***where a peace officer has seized anything under a warrant issued under this Act*** *or under section 487.11 or 489 or otherwise in the execution of duties under this or any other Act of Parliament****, the peace officer shall, as soon as is practicable,***
>
> ***(a)*** *where the peace officer is satisfied,*
>
> ***(i)*** *that there is no dispute as to who is lawfully entitled to possession of the thing seized, and*

> ***(ii)*** *that the continued detention of the thing seized is not required for the purposes of any investigation or a preliminary inquiry, trial or other proceeding,*

return the thing seized, on being issued a receipt therefor, to the person lawfully entitled to its possession and report to the justice who issued the warrant or some other justice for the same territorial division or, if no warrant was issued, a justice having jurisdiction in respect of the matter, that he has done so; or

> ***(b)*** *where the peace officer is not satisfied as described in subparagraphs (a)(i) and (ii),*
>
> > ***(i)*** *bring the thing seized before the justice referred to in paragraph (a), or*
> >
> > ***(ii) report to the justice that he has seized the thing and is detaining it or causing it to be detained***

to be dealt with by the justice in accordance with subsection 490(1).

Restitution of property or report by peace officer

(2) *Subject to this or any other Act of Parliament, where a person, other than a peace officer, has seized anything under a warrant issued under this Act or under section 487.11 or 489 or otherwise in the execution of duties under this or any other Act of Parliament, that person shall, as soon as is practicable,*

> ***(a)*** *bring the thing seized before the justice who issued the warrant or some other justice for the same territorial division or, if no warrant was issued, before a justice having jurisdiction in respect of the matter, or*
>
> ***(b)*** *report to the justice referred to in paragraph (a) that he has seized the thing and is detaining it or causing it to be detained,*

to be dealt with by the justice in accordance with subsection 490(1).

Form

(3) A report to a justice under this section shall be in the form set out as Form 5.2 *in Part XXVIII, varied to suit the case and shall include, in the case of a report in respect of a warrant issued by telephone or other means of telecommunication, the statements referred to in subsection 487.1(9).*

R.S., 1985, c. 27 (1st Supp.), s. 72

1993, c. 40, s. 17

1997, c. 18, s. 49

Detention of things seized

490 (1) *Subject to this or any other Act of Parliament, where, pursuant to paragraph 489.1(1)(b) or subsection 489.1(2), anything that has been seized is brought before a justice or a report in respect of anything seized is made to a justice, the justice shall,*

> ***(a)*** *where the lawful owner or person who is lawfully entitled to possession of the thing seized is known, order it to be returned to that owner or person, unless the prosecutor, or the peace officer or other person having custody of the thing seized, satisfies the justice that the detention of the thing seized is required for the purposes of any investigation or a preliminary inquiry, trial or other proceeding; or*
>
> ***(b) where the prosecutor, or the peace officer or other person having custody of the thing seized, satisfies the justice that the thing seized should be detained for a reason set out in paragraph (a), detain the thing seized or order that it be detained, taking reasonable care to ensure that it is preserved until the conclusion of any investigation or until it is required to be produced for the purposes of a preliminary inquiry, trial or other proceeding.***

Further detention

(2) ***Nothing shall be detained under the authority of paragraph (1)(b) for a period of more than three months after the day of the seizure, or any longer period that ends when an application made under paragraph (a) is decided, unless***

> ***(a)*** ***a justice, on the making of a summary application to him after three clear days notice thereof to the person from whom the thing detained was seized, is satisfied that, having regard to the nature of the investigation, its further detention for a specified period is warranted and the justice so orders; or***
>
> ***(b)*** ***proceedings are instituted in which the thing detained may be required.***

Idem

(3) ***More than one order for further detention may be made under paragraph (2)(a) but the cumulative period of detention shall not exceed one year from the day of the seizure, or any longer period that ends when an application made under paragraph (a) is decided, unless***

> ***(a)*** ***a judge of a superior court of criminal jurisdiction or a judge as defined in section 552, on the making of a summary application to him after three clear days notice thereof to the person from whom the thing detained was seized, is satisfied, having regard to the complex nature of the investigation, that the further detention of the thing seized is warranted for a specified period and subject to such other conditions as the judge considers just, and the judge so orders; or***
>
> ***(b)*** ***proceedings are instituted in which the thing detained may be required.***

Detention without application where consent

(3.1) *A thing may be detained under paragraph (1)(b) for any period, whether or not an application for an order under subsection (2) or (3) is made, if the lawful owner or person who is lawfully*

entitled to possession of the thing seized consents in writing to its detention for that period.

When accused ordered to stand trial

(4) *When an accused has been ordered to stand trial, the justice shall forward anything detained pursuant to subsections (1) to (3) to the clerk of the court to which the accused has been ordered to stand trial to be detained by the clerk of the court and disposed of as the court directs.*

Where continued detention no longer required

(5) *Where at any time before the expiration of the periods of detention provided for or ordered under subsections (1) to (3) in respect of anything seized, the prosecutor, or the peace officer or other person having custody of the thing seized, determines that the continued detention of the thing seized is no longer required for any purpose mentioned in subsection (1) or (4), the prosecutor, peace officer or other person shall apply to*

> ***(a)*** *a judge of a superior court of criminal jurisdiction or a judge as defined in section 552, where a judge ordered its detention under subsection (3), or*
>
> ***(b)*** *a justice, in any other case,*

who shall, after affording the person from whom the thing was seized or the person who claims to be the lawful owner thereof or person entitled to its possession, if known, an opportunity to establish that he is lawfully entitled to the possession thereof, make an order in respect of the property under subsection (9).

Idem

(6) *Where the periods of detention provided for or ordered under subsections (1) to (3) in respect of anything seized have expired and proceedings have not been instituted in which the thing detained may be required, the prosecutor, peace officer or other person shall apply to a judge or justice referred to in paragraph (5)(a) or (b) in*

the circumstances set out in that paragraph, for an order in respect of the property under subsection (9) or (9.1).

Application for order of return

(7) *A person from whom anything has been seized may, after the expiration of the periods of detention provided for or ordered under subsections (1) to (3) and on three clear days notice to the Attorney General, apply summarily to*

> ***(a)*** *a judge of a superior court of criminal jurisdiction or a judge as defined in section 552, where a judge ordered the detention of the thing seized under subsection (3), or*
>
> ***(b)*** *a justice, in any other case,*

for an order under paragraph (9)(c) that the thing seized be returned to the applicant.

Exception

(8) *A judge of a superior court of criminal jurisdiction or a judge as defined in section 552, where a judge ordered the detention of the thing seized under subsection (3), or a justice, in any other case, may allow an application to be made under subsection (7) prior to the expiration of the periods referred to therein where he is satisfied that hardship will result unless the application is so allowed.*

Disposal of things seized

(9) *Subject to this or any other Act of Parliament, if*

> ***(a)*** *a judge referred to in subsection (7), where a judge ordered the detention of anything seized under subsection (3), or*
>
> ***(b)*** *a justice, in any other case,*

is satisfied that the periods of detention provided for or ordered under subsections (1) to (3) in respect of anything seized have expired and proceedings have not been instituted in which the thing detained may be required or, where those periods have not expired,

that the continued detention of the thing seized will not be required for any purpose mentioned in subsection (1) or (4), he shall

> ***(c)*** *if possession of it by the person from whom it was seized is lawful, order it to be returned to that person, or*
>
> ***(d)*** *if possession of it by the person from whom it was seized is unlawful and the lawful owner or person who is lawfully entitled to its possession is known, order it to be returned to the lawful owner or to the person who is lawfully entitled to its possession,*

and may, if possession of it by the person from whom it was seized is unlawful, or if it was seized when it was not in the possession of any person, and the lawful owner or person who is lawfully entitled to its possession is not known, order it to be forfeited to Her Majesty, to be disposed of as the Attorney General directs, or otherwise dealt with in accordance with the law.

Exception

(9.1) *Notwithstanding subsection (9), a judge or justice referred to in paragraph (9)(a) or (b) may, if the periods of detention provided for or ordered under subsections (1) to (3) in respect of a thing seized have expired but proceedings have not been instituted in which the thing may be required, order that the thing continue to be detained for such period as the judge or justice considers necessary if the judge or justice is satisfied*

(a) *that the continued detention of the thing might reasonably be required for a purpose mentioned in subsection (1) or (4); and*

(b) *that it is in the interests of justice to do so.*

Application by lawful owner

(10) Subject to this or any other Act of Parliament, a person, other than a person who may make an application under subsection (7), who claims to be the lawful owner or person lawfully entitled to possession of anything seized and brought before or reported to a justice under section 489.1 may, at any

time, on three clear days notice to the Attorney General and the person from whom the thing was seized, apply summarily to

> ***(a) a judge referred to in subsection (7), where a judge ordered the detention of the thing seized under subsection (3), or***
>
> ***(b) a justice, in any other case,***

for an order that the thing detained be returned to the applicant*.*

Order

(11) *Subject to this or any other Act of Parliament, on an application under subsection (10), where a judge or justice is satisfied that*

> ***(a)*** *the applicant is the lawful owner or lawfully entitled to possession of the thing seized, and*
>
> ***(b)*** *the periods of detention provided for or ordered under subsections (1) to (3) in respect of the thing seized have expired and proceedings have not been instituted in which the thing detained may be required or, where such periods have not expired, that the continued detention of the thing seized will not be required for any purpose mentioned in subsection (1) or (4),*

the judge or justice shall order that

> ***(c)*** *the thing seized be returned to the applicant, or*
>
> ***(d)*** *except as otherwise provided by law, where, pursuant to subsection (9), the thing seized was forfeited, sold or otherwise dealt with in such a manner that it cannot be returned to the applicant, the applicant be paid the proceeds of sale or the value of the thing seized.*

Detention pending appeal, etc.

(12) *Notwithstanding anything in this section, nothing shall be returned, forfeited or disposed of under this section pending any*

> *application made, or appeal taken, thereunder in respect of the thing or proceeding in which the right of seizure thereof is questioned or within thirty days after an order in respect of the thing is made under this section.*

[11] Sections 489.1 and 490 of the *Code* are not merely a suggested course of action for the police to follow, but rather are a mandatory regime that must be followed by the police to ensure judicial oversight.

[12] The case law is clear that the late filing of a Report to Justice is a s. 8 *Charter* breach. There is substantial case law from Ontario that deals with this very matter, and it is (chronologically) as follows:

[13] In *R. v. Garcia-Machado*, 2015 ONCA 569, the Ontario Court of Appeal considered a matter where the Report to Justice was filed 15 weeks after the evidence was seized. The Court found that the trial judge had correctly determined that the constable's failure to file a timely report breached s. 8 but that the judge had erred in excluding the evidence. The Court stated that the accused was not deprived of use or enjoyment of items and the detention had no practical effect on him.

[14] The relevant paragraphs from *Garcia-Machado* are as follows (emphasis added):

[16] ***If a peace officer fails to file a report under s. 489.1(1), the property seized is not subject to judicial supervision during the investigation under s. 490. The real importance of s. 489.1(1) is its link to s. 490.***

[18] Under s. 490(1), the justice to whom a report is made under s. 489.1(1)(b) is required to order the return of the property to the lawful owner or a person lawfully entitled to possession of [page742] the item unless the justice is satisfied that detention of the item is required "for the purposes of any investigation or a preliminary inquiry, trial or other proceeding". In that case, the justice may order the item detained for up to three months.

[20] Section 490(3) requires an order from a judge of a superior court[1] to detain the item for more than a year, unless proceedings have been instituted in which the thing detained may be required.

[25] The trial judge noted that ***the vast majority of Ontario cases he had reviewed[2] suggest that a failure to comply with the return and report provisions in s. 489.1(1) of the Code is a breach of s. 8 of the Charter.*** *At para. 51, he wrote that the respondent [page743] had "a high expectation of privacy in the items seized, both of which contain a high level of personal and private information".*

[26] At para. 54, he cited S. Hutchison, et al., Search and Seizure Law in Canada, looseleaf (Toronto: Carswell, 2005), at p. 18-1:

> ***[I]t is often only during the ongoing detention that the governmental intrusion into the privacy interests of the individual are realized. It is detention which allows examination, copying, and forensic testing. These aspects of the seizure, as much as the initial search itself, would seem to engage the interests of the individual which s. 8 of the Charter was intended to protect. As such, the ongoing detention should meet the same constitutional standard that the original seizure is measured against, that is, reasonableness.***

[27] The trial judge concluded, at para. 55:

> *In this case, based on the authorities and the highly personal and private information at issue, I find that the police failure to report to a justice as soon as practicable rendered the otherwise valid search unlawful and unreasonable, contrary to s. 8 of the Charter.*

[30] ***The trial judge reasoned that while the constable had not acted dishonestly, in bad faith, or with wilful or reckless disregard for the law, he was careless and negligent****.*

[31] The trial judge wrote, at para. 65:

> *The breach in this case is not minor or technical, but substantive. It involves provisions of the Criminal Code that are essential to maintaining the courts' supervision of investigative steps that invade the privacy of individuals****. The police failure to comply with those provisions in this case had the effect of ousting the court from its supervisory role until after all additional investigative steps had been taken in relation to items that were being held unlawfully.***

[33] The trial judge concluded that the final Grant factor -- society's interests in adjudication on the merits -- favoured admission of the evidence. He noted that the case involved a very serious accident and significant injury to the driver and passenger. The evidence was highly reliable and very important, if not necessary, to the Crown's case.

[34] Balancing these three factors, the trial judge concluded that, because of the seriousness of the Charter breach, he must exclude the evidence.

[40] In Colarusso, at pp. 61, 63-64 S.C.R., the Supreme Court of Canada made it clear that ***s. 8 continues to apply to protect a person's privacy rights in seized items during detention of those seized items.***

[41] In that case, a coroner, acting under the Coroners Act, R.S.O. 1980, c. 93, seized a driver's blood and urine samples from a hospital in order to decide whether to hold an inquest into a death.

The police eventually took the evidence to use against the driver in a criminal proceeding. The Supreme Court concluded that the seizure, which was reasonable as long as the coroner seized the evidence, was unreasonable from the point at which the police took the evidence. At para. 91, La Forest J., writing for the majority, said this:

[I]t must be understood that the protection against unreasonable seizure is not addressed to the mere fact of taking. Indeed, in many cases, this is the lesser evil. Protection aimed solely at the physical act of taking would undoubtedly protect things, but would play a limited role in protecting the privacy of the individual which is what s. 8 is aimed at, and that provision, Hunter v. Southam Inc., 1984 CanLII 33 (SCC), [1984] 2 S.C.R. 145] tells us, must be liberally and purposively interpreted to accomplish that end. The matter seized thus remains under the protective mantle of s. 8 so long as the seizure continues.

[44] The question on this appeal is whether the Constable's failure to comply with the requirements in s. 489.1(1) to make a report to a justice as soon as practicable also rendered the continued detention of a seized item unreasonable and therefore contrary to s. 8 of the Charter.

*[45] I conclude that the answer to that question is yes. As I have explained**, it is clear that an individual retains a residual, post-taking reasonable expectation of privacy in items lawfully seized and that Charter protection continues while the state detains items it has taken. Sections 489.1(1) and 490 govern the continued detention by the state of the items seized and, I conclude, the requirement in s. 489.1(1) to report to a justice as soon as practicable plays a role in protecting privacy interests…***

*[46] It is established law that in order to be reasonable, a seizure must be authorized by law: R. v. Collins, 1987 CanLII 84 (SCC), [1987] 1 S.C.R. 265, [1987] S.C.J. No. 15, at p. 278 S.C.R.; R. v. Caslake, 1998 CanLII 838 (SCC), [1998] 1 S.C.R. 51, [1998] S.C.J. No. 3, at para. 10**. If seized property is detained without complying with s. 489.1(1), then its continued detention is not authorized by law: Backhouse, at para. 115. [page747]***

[48] As I explain below, the requirement in s. 489.1(1) to report to a justice as soon as practicable plays a role in protecting an individual's residual, post-taking reasonable expectation of privacy. I therefore conclude that the constable's clear failure to comply with that obligation breached s. 8.

[49] ***One indicator of the privacy-related role of s. 489.1(1) is the fact that the form of the warrant authorizing the initial seizure required the peace officer to comply with s. 489.1(1) ("[T]his is to authorize and require you . . . to bring [the seized things] before me or some other justice to be dealt with according to law").***

[50] A second indicator is the substance of the provision itself. ***Section 489.1(1) requires a peace officer who wishes to detain a thing seized to bring the thing before a justice or report to a justice that he or she has seized the thing. It engages judicial oversight of state-held property in which privacy interests subsist. It also ensures that a record is made of what was actually seized. Such a record may be critical if a person seeks to assert that the initial seizure was overly broad or that the state does not need the item seized for its investigation.***

[51] A third indicator of the role of s. 489.1(1) is the nature of the rights s. 490 provides to individuals whose property has been taken. Two aspects of that section are particularly important.

[52] First, ***s. 490(2) requires the state to give notice to the person from whom the detained thing was seized if the state wishes to obtain an extension beyond the initial three-month detention period. Notice gives the affected person the opportunity to argue that the nature of the investigation does not warrant further detention of the item seized. If the state does not need the item for the purpose envisaged when it seized it, and the state's continued detention of the property is not otherwise legally justified,[6] the [page748] individual's privacy interest should prevail. Moreover, notice under s. 490(2) may be the only way an affected individual learns exactly which items the state has taken.*** *For example, as the result of a peace officer's failure to make a return on the warrants,*

the defendants in Guiller were not fully apprised of what was seized until the items were introduced at trial.

*[53] In R. v. Tse, [2012] 1 S.C.R. 531, [2012] S.C.J. No. 16, 2012 SCC 16, the Supreme Court highlighted the importance of notice where privacy is at issue. Section 184.4 of the Code (the emergency intercept provisions) did not provide after-the-fact notice to individuals whose communications the police had intercepted without prior judicial authorization. The court held, at para. 85, that s. 184.4 violated s. 8 because it did not include post-intercept notice or any other specific mechanism to permit supervision of police intercept activity. Moldaver and Karakatsanis JJ., writing for the court, adopted this statement, at para. 83: "**The right to privacy implies not just freedom from unreasonable search and seizure, but also the ability to identify and challenge such invasions, and to seek a meaningful remedy." Although made in a different context, this comment is apposite. Notice under s. 490(2) may provide an affected individual with the ability to challenge the necessity of the continued detention of items seized.***

*[54] A second important aspect of s. 490 is that it provides the lawful owner of the item seized, a person lawfully entitled to possession of the item seized, or the person from whom the item was seized the right to apply for return of the item -- the meaningful remedy that Tse adverts to. **Return of the seized items reduces or eliminates the risk that the state will violate the person's residual privacy interest.** As Rosenberg J.A. noted, at para. 113 of Backhouse, s. 490's relatively summary procedure is much preferable to a more cumbersome and expensive replevin action in civil court.*

*[55**] The recording of the items seized, the right to notice and the right to apply for return of things seized confer important protections on people whose items the state holds in detention. Compliance with s. 489.1(1) is the gateway to all of these protections.** The appellant failed to report to a justice for over three months after the blood and hospital records were seized. Effective judicial oversight of property in which the appellant maintained a residual privacy interest was compromised. I*

conclude therefore ***that the constable's clear failure to comply with the requirement in s. 489.1(1) that he report to a justice as soon as practicable breached s. 8 of the Charter****. I leave for another day whether any other breach of s. 489.1(1) or any breach of s. 490 -- even if so minor or technical as to have no real impact on the [page749] judicial oversight contemplated by the sections -- would breach s. 8 of the Charter.*

[61] Second, Cole instructs that in assessing the impact of a breach, a trial judge should consider the nature of the respondent's reasonable expectation of privacy at the time of the breach. In Cole, a work-issued laptop computer was seized without a warrant. The Supreme Court, at para. 92, found that the trial judge, in assessing the impact of the breach, had failed to consider the applicant's diminished reasonable expectation of privacy in a work-issued computer. Similarly, here the trial judge failed to consider that the respondent had a minimal residual privacy interest in the blood sample and the hospital records when the reporting period under s. 489.1(1) lapsed.

[62] Third, the trial judge did not consider ***that the property seized was that specifically authorized by the warrant and that the property was used for the precise purpose for which it was obtained. No event subsequent to the issuance of the warrant necessitated a re-balancing of the respondent's privacy interest [page750] against that of the state in investigating the incident. While the respondent had an objectively reasonable expectation that the property would not be used for any purpose other than that for which it was obtained, he did not have an objectively reasonable expectation that the property seized would not be used for the very purpose for which it was lawfully obtained.***

[64] ***Fifth, the trial judge did not focus on the nature of the property at issue. The respondent was not deprived of the use or enjoyment of the items. The items at issue are much different than a smart phone or a computer. Practically, it did not matter to the respondent if the state continued to detain the items and deprived the respondent of the opportunity to have them returned.***

[15] It is important to note that Mr. Rafuse had specifically requested the return of his property from the Amherst Police (but not through a formal Court application), and that Mr. Rafuse was employed in the IT industry, so contrary to para. 64, Mr. Rafuse was deprived of the use and enjoyment of his devices, including his computer. As Mr. Rafuse was employed in the IT industry the detention of his devices would have had an effect on Mr. Rafuse.

[16] Arguably, in consideration of para. 62, the devices were taken from Mr. Rafuse for the purpose of looking for voyeurism, and not for child pornography, so the very purpose for which the items had been seized were different.

[17] The next case for guidance on this issue if *R. v. Kift*, 2016 ONCA 374 where the Ontario Court of Appeal considered a 15 day delay in filing a Report to Justice that involved an "enormous" cache of weapons. The Court held that the determination of what amounts to "as soon as practicable" is fact specific.

[18] At paragraphs 4, 9 and 10 the Court stated (emphasis added):

> *[4] We would not give effect to the appellant's submissions. We see no error in the trial judge's thorough and careful analysis. The trial judge correctly stated and applied the test for a stay that was articulated by the Supreme Court of Canada in* R. v. Babos, *2014 SCC 16, as follows:*

> ***1) There must be prejudice to the accused's right to a fair trial or the integrity of the justice system that will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome;***
>
> ***2) There must be no alternative remedy capable of redressing the prejudice; and***
>
> ***3) Where there is still uncertainty over whether a stay is warranted after steps 1) and 2), the court is required to balance the interests in favour of granting a stay, such as denouncing misconduct and preserving the integrity of the justice system, against the interest that society has in having a final decision on the merits. (para. 32)***
>
> *[9] The appellant argues further that the trial judge erred in not finding that the police failed "as soon as is practicable" to make a report to a justice under s. 489.1 of the Criminal Code concerning the items seized from the appellant, thereby breaching his s. 8 Charter rights.*
>
> *[10] We would not give effect to this argument. The trial judge correctly identified the issue to be decided as whether the police filed the report to a justice without unreasonable delay.* ***The determination of what amounts to "as soon as is practicable" for the purpose of ascertaining whether there has been unreasonable delay in reporting under s. 489.1 is a fact-specific exercise. On the evidence before her, it was open to the trial judge to conclude that the delay in reporting in the present case was not unreasonable****. We see no basis to interfere.*

[19] In *Kift* the police were dealing with a large number of weapons and ammunition. With Mr. Rafuse the police were dealing with only 18 items seized if you refer to the Report to Justice dated March 5, 2021, or only 16 items if you refer to the ITO dated July 29, 2020. Neither amount would have taken much time to

categorize and report back to the Court "as soon as practicable" as required by the *Code*.

[20] The next case for guidance is *R. v. Murray #1*, 2018 ONSC 3053 where the Court considered the term "as soon as practicable" where there was a delay of 18 days in filing the Initial Report to Justice and noted at paragraph 49 (emphasis added) that:

> *[49] The term "as soon as is practicable" is a flexible one and its interpretation depends on the surrounding circumstances.* ***Clearly the police have a duty to make the report, and compliance is important to ensure judicial oversight for the protection, not only of the accused, but other members of the public. I agree that the volume of the seizure is a relevant factor in determining the precise parameters of "as soon as practicable." The seizure of thousands of items will clearly take longer to itemize in a report than the seizure of 33 items. The nature of the items seized would also be relevant.*** *Here, however, the nature of the items is a neutral factor. They were not of a nature that took a considerable time to examine and list, so as to warrant a longer period of time for filing. On the other hand, they were not perishable, nor were they items whose ownership would likely be challenged by persons other than the accused, which would warrant a shorter period of time for filing. Finally, some allowances must be made for the usual exigencies. If an officer is busy with other more pressing matters and there is nothing about the nature of the seizure that mandates an early filing of the report, then there can be more flexibility.*

And at paras. 46-53 (emphasis added):

[46] Section 489.1(1) of the Criminal Code requires the police to prepare a report to the justice who issued the warrant (or some other justice in the same territorial division) as to what was seized under the warrant or pursuant to s. 489 of the Criminal Code, what items seized are being held, or have been returned to their lawful owners; and what items are being detained in police custody. The Code requires that this report be filed "as soon as is practicable." ***A failure to make a required report in a timely manner makes the continued detention of the seized property unlawful and may breach s. 8 Charter rights.[16]***

[47] The search in this case started on the night of April 3, 2015 and continued into April 4, 2015. The report to the issuing justice was made on April 22, 2015, a delay of 18 days. The officer acknowledged that there was a "bit of a delay" in submitting the report. He explained that he was busy, both on this case and also in preparing a triple murder/suicide for a coroner's inquest. He had not brought his notebooks for other cases he was working on to court with him and was therefore unable to provide specifics of other cases he was working on during those two weeks in 2015.

[48] Counsel for the defence submits that a delay of this length is a breach of the officer's duty to report, particularly as there were only 33 items seized and the delay is not adequately explained.

[50] ***There is a reason that this section does not require a specific period of time for a report to be made. There are simply too many variables to impose a rigid time requirement****. In this case, the report was relatively straightforward. It would have taken some period of time for the forensic team to review the items seized and for the investigative team to determine whether those items were relevant to the offence****. I would not have expected that to take more than a week, given the small number of items seized. On the other hand, there was nothing particularly time-sensitive about the nature of the items seized or the ownership rights of anybody connected to them. Officers busy with other high-priority matters cannot be expected to drop everything to file a report. The delay here was only a matter of 18 days – less than three weeks.***

[51] I was not referred to any case dealing with a delay of this limited magnitude. In R. v. Garcia-Machado, the Ontario Court of Appeal dealt with the seizure of a blood sample pursuant to a warrant and the failure of the police to make a report to the issuing justice for more than three months. The trial judge found this to be a breach of s. 8 of the Charter and excluded the results of the analysis of the blood sample from the evidence at trial, resulting in the accused being acquitted of impaired driving. The Ontario Court of Appeal ordered a new trial. The Court agreed with the trial judge that the more than three month delay was a breach of the reporting requirement (without any analysis of when it would have been required to be filed) and also that it breached s. 8 of the Charter. However, the Court of Appeal held that the evidence should still have been admissible by operation of s. 24(2) of the Charter, based on the following factors:

> *(1) the initial search had been pursuant to a warrant, such that there had already been some balancing of the accused's privacy interest;*
>
> ***(2) the accused had only a minimal residual privacy interest in the blood sample, once it had been seized;***
>
> ***(3) the property was only used for the precise purpose for which it had been obtained;***
>
> *(4) if the report had been made as soon as practicable, the justice would undoubtedly have ordered detention of the evidence;*
>
> ***(5) the nature of the items seized was such that the accused was not deprived of his enjoyment of it; and,***
>
> ***(6) this was a case of delayed compliance, not complete non-compliance.***

*[53] **If I have erred on this point, the breach was a mere technical one.** There was no bad faith on the part of the officer or officers involved and no impact on the rights of the accused, or*

> *anyone else. When the report was filed on April 22, 2015, the justice ordered the detention of all items seized until the completion of all proceedings.* ***Corey Murray has been in custody this entire time and has not been deprived of any of his property by virtue of any delay in reporting.*** *Accordingly, even if there was a breach of the reporting requirement and a breach of s. 8 of the Charter, I would admit the evidence seized under s. 24(2) of the Charter. On this point, in addition to the factors in my overall s. 24(2) analysis below, I rely on the Court of Appeal's decision in* Garcia-Machado, ***which involved a far longer delay, with the reason for the delay being systemic ignorance of the time requirement. Both of those factors make the breach in that case more serious than the case before me, while many of the other factors cited in support of the admission of the evidence apply equally to this case.***

[21] For Mr. Rafuse I make the finding in fact, and in law, that the delay of 444 days, or the delay of one year, two months and 16 days, for the filing of the Initial Report to Justice could not be considered as "delayed compliance". By the time of filing on March 5, 2021, the excessive delay without a legitimate, or legally-justifiable, reason was "complete non-compliance".

[22] Further, the breach was not a "technical breach", and Mr. Rafuse was not in custody so that he <u>was</u> deprived of his property as Mr. Rafuse had specifically requested the return of his property from the Amherst Police.

[23] As previously noted, the property was used by the police for a purpose different than that for which it was seized (child pornography versus voyeurism).

[24] The next case for guidance on this matter is *R. v. Canary*, 2018 ONCA 304 which involved a delay of 31 days in the filing of the Report to Justice. The Court provided the following guidance at paras. 44-47 (emphasis added):

> *[44] Where the police wish to keep something seized during the execution of their duties, s. 489.1(1)(b)(ii) of the Criminal Code requires that they make a report to a justice "as soon as is practicable". A report filed under s. 489.1(1)(b)(ii) allows the seized items to be dealt with in accordance with s. 490(1), which grants a justice the power to order the things seized detained or returned. The balance of s. 490 contains numerous provisions governing the continued detention, use, and return of seized property.*
>
> *[45]* ***Section 489.1(1) applies to seizures made both with and without prior judicial authorization:*** **Backhouse,** ***at para. 111. The provision fulfills an important purpose, providing the gateway to s. 490 of the Criminal Code****:* R. v. Garcia-Machado, *2015 ONCA 569, 126 O.R. (3d) 737, at paras. 15, 55;* Backhouse, *at para. 112.* ***Section 489.1 should not be conceptualized as a meaningless exercise in paperwork. Filing the initial report under s. 489.1(1) is the act that places the property within the purview of judicial oversight. It provides for a measure of police accountability when dealing with property seized pursuant to an exercise of police powers. This provides an important measure of protection to the party who is lawfully entitled to the property, but also provides a measure of protection to the police who become the custodians responsible for the property seized. Allowing for this type of oversight is particularly important in the wake of warrantless seizures, ones where no prior authorization has been given, meaning the seizures are beyond the knowledge of the judicial system.***
>
> *[46] The appellant argues that thirty-one days to file a report under s. 489.1(1) is simply too long and that a s. 8* Charter *breach is obvious on its face.*

> *[47]* ***There is an inherent flexibility built into the assessment of whether the police acted "as soon as is practicable". Determining whether this requirement has been met is a necessarily fact-specific inquiry and one that should only be answered after a careful review of all of the evidence, including any explanations for why the report was filed when it was:*** **R. v. Kift,** ***2016 ONCA 374, 349 O.A.C. 239, at para. 10.***

[25] The Court clearly confirms that importance of compliance with ss. 489.1 and 490 of the *Code*. The filing of the Report to Justice is not a "meaningless exercise in paperwork" but rather it "provides an important measure of protection to the party who is lawfully entitled to the property, but also provides a measure of protection to the police who become the custodians responsible for the property seized".

[26] A careful review of the explanation for the delay of 444 days (or a delay of one year, two months and 16 days) in the Rafuse case does not provide the Court with any valid legal excuse for such an unreasonable, and lengthy, delay considering that an experienced police sergeant was also involved in the Rafuse case from the outset.

[27] The unjustifiable delay of 444 days denied the protections that are supposed to be afforded to Mr. Rafuse by the *Code*.

[28] The final case that I will consider on this issue is *R. v. Robinson* 2021 ONSC 2446 where the Court considered a delay of 14 days in the filing of the report. The Court had the following comments (emphasis added);

> ***[9] This section mandates that if the policed are satisfied that the item seized is required for investigation or use at a proceeding, they must file a Report to Justice notifying a justice of the seizure and detention of that item. Otherwise, the item must be returned to its lawful owner.***
>
> *[10] The section applies to both warrantless seizures and items held by the police pursuant to the execution of a warrant.* ***A comprehensive supervisory scheme is set out in s. 490 of the Code, which requires the justice who receives the report to return the property unless the justice is satisfied that detention is required for investigation or a court hearing.*** *The justice may extend the detention but only up to a year, after which an order from a Superior Court of Justice judge is required: Code, s. 490(3).*
>
> *[11]* ***The courts have recognised that this procedure fulfils an important function of judicial oversight of items seized and held by the police:*** *R. v. Canary, 2018 ONCA 304, 361 C.C.C. (ed) 63, at para. 45; R. v. Garcia-Machado, 2015 ONCA 569, 126 O.R. (ed) 737, at paras. 15, 55; R. v. Backhouse (2005), 194 C.C.C. (3d) 1 (Ont. C.A.), at para. 112.*
>
> *[12] However, as the phrase itself makes clear****, there is flexibility built into the requirement of filing the report "as soon as practicable". Evaluation of this stipulation necessitates a contextual and fact specific inquiry which "should only be answered after a careful review of all of the evidence, including any explanations for why the report was filed when it was":*** *Canary, at para. 47, citing R. v. Kift, 2016 ONCA 374, 349 O.A.C. 239, at para. 10.*

> *[16]* ***The spirit and purpose of the section must also be considered. Section 489.1(1) is a mechanism which ensures judicial supervision of items seized and the return of those items if not needed. In other words, it prevents the police from unduly and unnecessarily retaining items lawfully belonging to their owner and ensuring their return.*** *In this case, the phones were not likely to be returned to Ms. Horton in the intervening 14 days because the police intended to extract information from the device.*
>
> *[76] In deciding this question, the three-part test in R. v. Grant, 2009 SCC 32, [2009] 2 S.C.R. 353, directs the reviewing court to evaluate the following three factors:*
>
> > *(a) The seriousness of the police conduct in committing the breach;*
> >
> > *(b) The impact of the breach on the applicants' Charter protected interests; and*
> >
> > *(c) Society's interests in the adjudication of the case on its merits.*
>
> *[77] In R. v. McGuffie, 2016 ONCA 365, 131 O.R. (3d) 643, at para. 63, the court found that if the first two inquiries strongly favour exclusion of the evidence, the third "will seldom, if ever, tip the balance in favour of admissibility". On the other hand, if the first two grounds "provide weaker support for exclusion of the evidence, the third inquiry will almost certainly confirm the admissibility of the evidence".*

[29] The Courts have repeatedly emphasized the need for compliance with ss. 489.1 and 490 of the *Code*. As noted, these are not suggested guidelines for the police, but mandatory provisions. There is absolutely no doubt that the delay of 444 days in filing the Report to Justice was a s. 8 breach of Mr. Rafuse's *Charter* rights.

[30] What is the remedy for the breach?

Grant **Analysis**

[31] Under the Supreme Court's decision in *R. v. Grant*, 2009 SCC 32 (CanLII), [2009] 2 SCR 353, this Court should look at three factors (emphasis added):

> (a*) Seriousness of the* Charter*-Infringing State Conduct*
>
> *[72] The first line of inquiry relevant to the s. 24(2) analysis requires a court to assess whether the admission of the evidence would bring the administration of justice into disrepute by sending a message to the public that the courts, as institutions responsible for the administration of justice, effectively condone state deviation from the rule of law by failing to dissociate themselves from the fruits of that unlawful conduct.* ***The more severe or deliberate the state conduct that led to the* Charter *violation, the greater the need for the courts to dissociate themselves from that conduct, by excluding evidence linked to that conduct, in order to preserve public confidence in and ensure state adherence to the rule of law.***
>
> *[73] This inquiry therefore necessitates an evaluation of the seriousness of the state conduct that led to the breach.* ***The concern of this inquiry is not to punish the police or to deter* Charter *breaches, although deterrence of* Charter *breaches may be a happy consequence. The main concern is to preserve public confidence in the rule of law and its processes****. In order to determine the effect of admission of the evidence on public confidence in the justice system, the court on a s. 24(2) application must consider the seriousness of the violation, viewed in terms of the gravity of the offending conduct by state authorities whom the rule of law requires to uphold the rights guaranteed by the Charter.*

> *[74] State conduct resulting in Charter violations varies in seriousness.* ***At one end of the spectrum, admission of evidence obtained through inadvertent or minor violations of the Charter may minimally undermine public confidence in the rule of law. At the other end of the spectrum, admitting evidence obtained through a wilful or reckless disregard of Charter rights will inevitably have a negative effect on the public confidence in the rule of law, and risk bringing the administration of justice into disrepute.***

[32] The failure to file the Report to Justice for 444 days was an egregious breach of Mr. Rafuse's s. 8 *Charter* rights. There was no valid or legal reason for such a delay. The delay in filing denied Mr. Rafuse of his protections under s. 490 of the *Code* for over 14 months.

> *(b) Impact on the Charter-Protected Interests of the Accused*
>
> *[76] This inquiry focusses on the seriousness of the impact of the Charter breach on the Charter-protected interests of the accused. It calls for an evaluation of the extent to which the breach actually undermined the interests protected by the right infringed. The impact of a Charter breach may range from fleeting and technical to profoundly intrusive. The more serious the impact on the accused's protected interests, the greater the risk that admission of the evidence may signal to the public that Charter rights, however high-sounding, are of little actual avail to the citizen, breeding public cynicism and bringing the administration of justice into disrepute.*
>
> *[77] To determine the seriousness of the infringement from this perspective, we look to the interests engaged by the infringed right and examine the degree to which the violation impacted on those interests. For example, the interests engaged in the case of a statement to the authorities obtained in breach of the Charter include the s. 7 right to silence, or to choose whether or*

> *not to speak to authorities (Hebert) — all stemming from the principle against self-incrimination: R. v. White, 1999 CanLII 689 (SCC), [1999] 2 S.C.R. 417, at para. 44. The more serious the incursion on these interests, the greater the risk that admission of the evidence would bring the administration of justice into disrepute.*

[33] The filing of the Report to Justice is not a "meaningless exercise in paperwork," but rather it "provides an important measure of protection to the party who is lawfully entitled to the property, but also provides a measure of protection to the police who become the custodians responsible for the property seized". The police failure to comply with the provision requiring the filing of the Report to Justice "as soon as practicable" in the Rafuse matter absolutely had the effect of ousting the Court from its supervisory role for 444 days until after all additional investigative steps had been taken in relation to items that were being held unlawfully.

[34] Mr. Rafuse had specifically requested the return of his property from the Amherst Police. Mr. Rafuse was employed in the IT industry, so Mr. Rafuse was deprived of the use and enjoyment of his devices, including his computer.

[35] Further, devices were taken from Mr. Rafuse for the purpose of looking for evidence of voyeurism, and not for child pornography, so the very purpose for which the items had been seized were different.

(c) Society's Interest in an Adjudication on the Merits

[79] Society generally expects that a criminal allegation will be adjudicated on its merits. Accordingly, the third line of inquiry relevant to the s. 24(2) analysis asks whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence, or by its exclusion. This inquiry reflects society's "collective interest in ensuring that those who transgress the law are brought to trial and dealt with according to the law": R. v. Askov, 1990 CanLII 45 (SCC), [1990] 2 S.C.R. 1199, at pp. 1219-20. Thus the Court suggested in Collins that a judge on a s. 24(2) application should consider not only the negative impact of admission of the evidence on the repute of the administration of justice, but the impact of failing to admit the evidence.

[80] The concern for truth-seeking is only one of the considerations under a s. 24(2) application. ***The view that reliable evidence is admissible regardless of how it was obtained (see R. v. Wray, 1970 CanLII 2 (SCC), [1971] S.C.R. 272) is inconsistent with the Charter's affirmation of rights. More specifically, it is inconsistent with the wording of s. 24(2), which mandates a broad inquiry into all the circumstances, not just the reliability of the evidence.***

[81] This said, public interest in truth-finding remains a relevant consideration under the s. 24(2) analysis. The reliability of the evidence is an important factor in this line of inquiry. If a breach (such as one that effectively compels the suspect to talk) undermines the reliability of the evidence, this points in the direction of exclusion of the evidence. The admission of unreliable evidence serves neither the accused's interest in a fair trial nor the public interest in uncovering the truth. Conversely, exclusion of relevant and reliable evidence may undermine the truth-seeking function of the justice system and render the trial unfair from the public perspective, thus bringing the administration of justice into disrepute.

[36] The subsequent charges of child pornography against Mr. Rafuse are serious charges. The exclusion of the images found would very likely mean that the prosecution of Mr. Rafuse on the child pornography charges would fail. However, in criminal law, the ends don't always justify the means. *Charter* breaches must be balanced with the prosecution of serious charges arising from minor breaches under the *Charter*. Serious, egregious breaches require closer scrutiny. From para. 80 of *Grant*:

> *The view that reliable evidence is admissible regardless of how it was obtained (see R. v. Wray, 1970 CanLII 2 (SCC), [1971] S.C.R. 272) is inconsistent with the Charter's affirmation of rights. More specifically, it is inconsistent with the wording of s. 24(2), which mandates a broad inquiry into all the circumstances, not just the reliability of the evidence.*

[37] The difficulty for the crown as it relates to Mr. Rafuse is that the delay in filing of the Initial Report to Justice for 444 days was an egregious and serious, and easily preventable, breach of Mr. Rafuse's rights. The violation was not minor, nor technical.

[38] All the *Grant* factors militate in favour of staying the child pornography charges against Mr. Rafuse that arose because of an easily avoidable, yet egregious, s. 8 *Charter* breach. No other remedy is sufficient in these particular circumstances considering how the administration of justice would be brought into

disrepute by permitting the charge against Mr. Rafuse to proceed after the complete disregard for his ss. 489.1 and 490 *Code* protections that were completely denied him for 444 days.

[39] The child pornography charges against Mr. Rafuse are stayed.

Alain Bégin, JPC.