"The ABCs of Search Warrant Review"

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Introduction

In this age of "sophisticated criminals and complex crimes", the search warrant[1] has become an indispensible and increasingly utilized weapon in the arsenal of the police. Mounting a section 8 *Charter* challenge to a search warrant can be a difficult and frustrating experience. Every stage of a search warrant case can present challenges that test the mettle of defence counsel. However, it is respectfully submitted that there are three major organizing principles that one must bear in mind when approaching a search warrant review. Understanding them well will help to rationalize the rest and will assist counsel in tackling the evidential "pick and shovel" work that must be done if success is to be achieved. In this article, I will attempt to identify these organizing principles and interrelate them to more complex principles which flow from them. I will also touch on the peculiar procedural aspects of a Section 8 review in this context.[2] Throughout, I will attempt to offer practical tips and guidance at each stage of the process, from start to finish.

A Search Warrant is an Investigative Tool

The Supreme Court of Canada has made it clear that a search warrant is not just a means of gathering evidence, it is an "investigative tool".[3] This is an important conceptual principle from which a number of others flow. Chief among them is the notion that during the investigative phase, the police must be given latitude to search for all evidence that is relevant to the commission of an offence.[4] Courts are sensitive to the fact that circumstances change during police investigations. Investigative leads can emerge unexpectedly and new evidence may be discovered that transforms what was once mere suspicion into "reasonable and probable grounds". Thus, successive applications for search warrants are not prohibited. This is so, even where a prior refusal of the warrant has occurred.[5] It is not necessary for the police to name an accused or target a person in a search warrant.[6] All that is required is reasonable and probable grounds, established under oath, to believe that *an offence* has been committed and that *evidence with respect to* that offence *will be found* at the *place* to be searched. While mere suspicion and conjecture is never enough, the "reasonable and probable grounds" standard does not require the police to have proof

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[1] All references to "search warrant" in this paper should be understood to mean a conventional section 487 *Criminal Code* search warrant. There are differences between this type of warrant and others, such as a section 11 *CDSA* warrant. Those differences will not be addressed. Nor will the telewarrant provisions contained in 487.1(1). It goes without saying that counsel should familiarize themselves with the details of the operative statutory provision in any search warrant case.

[2] I will not be addressing manner of search issues. Counsel are advised to review the recent decision in *R. v. Cornell,* [2010] S.C.J. No. 31 regarding the "no knock" entries.

[3] *Descôteaux v. Mierzwinski,* [1982] 1 S.C.R. 860 at p.891.

[4] Including evidence to rebut a possible defence: see *CanadianOxy Chemicals Ltd. v. Canada (Attorney General),* [1998] S.C.J. No. 87 at para. 21.

[5] *R. v. Colbourne* (2001), 157 C.C.C. (3d) 273 (Ont. C.A.). The affiant on the second search warrant affidavit should disclose both the *new* evidence and the prior refusal in his affidavit. A failure to mention the prior refusal will not *automatically* vitiate the second warrant (see *R. v. Eng,* (1995) 56 B.C.A.C. 18), but it may result in invalidity if the non-disclosure of the prior refusal was deliberate and designed to mislead the second justice: see *Colbourne, supra.*

[6] *R. v. Lubell,* [1973] O.J. No. 179 (H.C.J.) at para.3, *Regina v. Sanchez et al.*, [1994] O.J. No. 2260 (Gen.Div.) at paras. 36-37.

beyond a reasonable doubt or even a *prima facie* case in order to obtain a search warrant. All that is required is credibly-based probability: a "practical, non-technical and common-sense probability as to the existence of the facts and inferences asserted."[7]

The investigative phase is *different* from the trial phase. Thus, the "legal precision of drafting expected of pleadings at the trial stage is not the measure of quality required in a search warrant information."[8] An affiant is not expected or required to include every minute detail of the police investigation over a number of months and even of years in his affidavit.[9] More importantly perhaps, the exclusionary rules of evidence that normally apply at a criminal trial *do not* apply to the content of a search warrant affidavit. An affiant may draw on a number of information sources in the formulation of her reasonable and probable grounds that would never be admissible at a criminal trial. She is entitled to rely on hearsay information,[10] including confidential informer and anonymous tipster information. As part of the evidential mix establishing reasonable and probable grounds, she may even rely on a target's prior contacts with police and his prior convictions provided that they are relevant to the application.[11]

Therefore, it is essential that defence counsel identifies, requests and obtains full disclosure of the investigation that led up to and culminated with the search warrant application. More often than not, the initial crown disclosure brief in a "search warrant case" is singularly focussed on the post-execution phase. It is left to the defence to identify and pursue the pre-issuance disclosure that is required to properly prepare for a Section 8 challenge to the warrant. In *R. v. Pires* [2005] S.C.J. No. 67 at paragraph 26, the Supreme Court spoke of the defence being "entitled to *all* material in the possession or control of the Crown that is *potentially* relevant to the case." In addition, the Court adverted to the potential usefulness of the "contents of the investigative file" to the defence in two ways: First, by permitting the defence to "compare the contents of the investigative file ... to the authorization's supporting material to ascertain whether anything throws doubt on the reasonable believability of the latter." Second, by "provid[ing] the defence with possible third-party avenues of inquiry".

Upon receipt of the initial disclosure brief in a search warrant case, counsel must review it carefully and note all the deficiencies. Timely requests should be made for copies of the actual signed search warrant and a copy of the sworn Information to Obtain ("I.T.O.").[12] Upon review of

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[7] *Sanchez, supra* at para.29.

[8] *Ibid* at para.20.

[9] *R. v. Araujo,* [2000] 2 S.C.R. 992 at para.46.

[10] *Regina v. Agensys International Inc.* (2004), 187 C.C.C. (3d) 481 (Ont. C.A.) at para.43; *R. v. Okeke,* [1999] O.J. No. 3693 (Gen. Div.) at para. 23; *United States of America v. Barbarash,* [20002] B.C.J. No. 2803 (S.C.) at paras. 20-21. The officer must, however, present the hearsay in such a way to permit the issuing justice to make a judicial assessment of its credibility and reliability. Reliance only on the last person in the hearsay chain renders the information insufficient to justify the exercise of jurisdiction. For the same principle in operation in the warrantless search context see *R. v. Cheecham,* (1989), 51 C.C.C. (3d) 498 at 501 (Sask. C.A.).

[11] *R. v. Debot* (1986), 30 C.C.C. (3d) 207 (Ont. C.A.); aff'd [1989] 2 S.C.R. 1140 at paras. 52-53 (hearsay) and paras. 56-58 (reputation evidence and prior record). This is not to say that stayed or withdrawn charges that have no probative value to the investigation and that are included solely to prejudice a target of the search are properly included in an Information to Obtain: see *Criminal Code (Re),* [1997] O.J. No. 4393 (S.C.J.), *R. v. MacDonald,* [2005] O.J. No. 551 (S.C.J.) at para.54, and *R. v. Johnson,* [2005] B.C.J. No. 2169 (Prov. Ct.).

[12] There is a debate in the jurisprudence as to whether the crown should immediately take steps to unseal an I.T.O. that is subject to a sealing order, or whether it can wait until a *Stinchcombe* request is made by the defence. It is my respectful view that defence counsel should immediately make a disclosure request for a copy of the I.T.O., and take the position that it is the crown's responsibility to bringing any unsealing application necessary for it to comply with its

the I.T.O., it is incumbent on counsel to carefully comb through it[13] and to request copies of all of the affiant's pre-issuance investigative notes, the notes of any assisting officers or sub-affiants, witness statements, video surveillance tapes, photographs, documents, computer checks, expert reports and any other source materials relied upon by the affiant. It is also important to request copies of any investigative materials that the affiant may have reviewed *but chose not to rely upon* in her affidavit. This affords another route for determining whether the affiant strategically omitted any material information from the I.T.O.[14]

The Issuance of a Search Warrant is a Judicial Act

The issuance of a search warrant is a "judicial act".[15] An issuing justice must not act as a "rubber stamp".[16] It does not matter that the affiant believes that reasonable grounds exist for the search. What matters is whether the issuing justice properly satisfied herself that reasonable grounds exist for the search based on the evidence under oath in the I.T.O. [17] Section 8 of the *Charter* demands that the person who authorizes the search arrives at this conclusion "in an entirely neutral and impartial manner."[18] The issuing justice must bring to this task "an awareness that constitutional rights are at stake" and understanding that he occupies the role of "guardian of the law and of the constitutional principles protecting privacy interests".[19]

Accordingly, there must be "no real or apprehended perception of partiality" that infects the application process.[20] It is improper for the issuing justice to review a draft of the I.T.O. and to advise the police as to how to best frame the grounds.[21] The justice is "not to be co-opted into partnership with the government in the drafting of further and better materials."[22] "Judge shopping" by the police brings the administration into disrepute and, if proven, will invalidate the warrant.[23] Finally, it is improper for a justice to permit an insufficient I.T.O. to be supplemented

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Stinchcombe obligations: see *R. v. Osei*, [2007] O.J. No. 768 (S.C.) at para.24 and *R. v. Beck*, 2008 ONCJ 403 (CanLII).

[13] Where the I.T.O. has been very heavily edited by the crown, defence counsel would be well-advised to consider bringing an application for judicial review of crown editing pursuant to *R. v. Durette*, [1994] 1 S.C.R. 469 at paras. 44-45. It is essential that defence counsel read Doherty J.A.'s dissent in the Court of Appeal judgment, as it was adopted by the Supreme Court of Canada: see *R. v. Durette*, [1992] O.J. 1044 (C.A.). Proceeding to a review, arguing insufficiency based on crown over-editing of the I.T.O. entails significant risk to the defence under s.24(2) of the *Charter*: see *R. v. Blake*, [2010] O.J. No. 48 (C.A.).

[14] See *R. v. Morelli*, [2010] S.C.J. No. 8 at paragraph 58 where Mr. Justice Fish notes that the affiant may not engage in the strategic omission of relevant and material information; unless full disclosure of the pre-issuance investigative phase is made to the defence, it will be very difficult if not impossible to establish that the officer *knew or ought to have known* (see *Pires, supra* at para.41) of relevant and material information but deliberately withheld it from the issuing justice.

[15] *Hicks v. McCune*, [1921] O.J. No. 147 (C.A.) at para.24; *A.G.N.S. v. MacIntyre* (1982), 65 C.C.C. 92d) 129 (S.C.C.); *R. v. Pastro* (1988), 42 C.C.C. (3d) 485 (Sask. C.A.) at p.496.

[16] *Restaurant Le Clémenceau Inc. v. Drouin (Judge)*, [1987] 1 S.C.R. 706 at paras. 5-6.

[17] *Re Worrall*, [1965] 2 C.C.C. 1 (Ont. C.A.) at p. 5.

[18] *Hunter v. Southam*, [1984] 2 S.C.R. 145 at para. 32.

[19] *Regina v. Araujo*, [2000] S.C.J. No. 65 at para.29.

[20] *Regina v. Baylis*, [1988] S.J. No. 414.

[21] *R. v. Gray*, [1993] M.J. No. 248 (C.A.).

[22] See *Criminal Code (Re)*, [1997] O.J. No. 4393 (Gen Div.) and *Re Criminal Code*, [2002] S.J. No. 54 (Prov. Ct.) at para.27.

[23] See the discussion in *R. v. Pilarinos and Clark*, [2001] B.C.J. No. 2540 (S.C.). It is improper to apply for a second search warrant application before a different justice of the peace based on the *exact same* evidence that was utilized on the prior refusal: see *R. v. Eng*, (1995) 56 B.C.A.C. 18, *R. v. Chan*, [2003] O.J. No. 188 (S.C.J.), *R. v. Park*, [2007]

by unsworn verbal input from the affiant. [24] Accordingly, defence counsel should give serious thought to obtaining a copy of any audio-taped recordings made during the search warrant application process.

The issuance of a search warrant involves an exercise of jurisdiction that is conferred by a statute. It is essential, therefore, that the exercise of jurisdiction meets all of the requirements of the statutory provision. This raises questions of "facial validity". Defects on the face of a search warrant may render it invalid. Therefore, it is essential that counsel obtain an actual copy of the search warrant and carefully inspect it for deficiencies. The following guidelines may assist:

- The s.487 search warrant must be addressed to a "peace officer" or "public officer...who is named".[25]

- It must contain a sufficiently accurate description of the "building, receptacle or place" to avoid an impermissible delegation of the judicial function to the police.[26] Errors in the address of the property to be searched may render the search warrant invalid.[27]

- The description of the offence in the search warrant must be "sufficiently clear to enable the person whose premises are being searched to know the exact object of the search."[28] A section 487 cannot authorize a search for evidence in respect of the commission of a "suspected offence".[29]

- The items to be searched for cannot include an intangible.[30] Their description must not be "so broad and vague as to give the searching officers *carte blanche* to rummage through the premises of the target",[31] and the items to be searched must be items that "will" afford evidence of the offence.[32]

- The section 487 search warrant must contain a time period for execution.[33] Counsel should double-check to confirm that it was executed during the time specified for execution on the face of the search warrant.[34]

O.J. No. 3921 (S.C.). But see *R. v. Duchcherer,* [2006] B.C.J. No. 733 (C.A.). Our Court of Appeal in *R. v. Colbourne, supra,* left it to another day to tackle this issue: see para.42.

[24] *R. v. Silverstrone,* [1991] B.C.J. No. 2259 (C.A.); *R. v. Breakell,* [2000] S.J. No. 41 (Prov. Ct.); *Re Worral,* [1965] 2 C.C.C. 1 (Ont. C.A.); *R. v. Chum Limited,* [1989] N.J. No. 3 (C.A.); *R. v. Celmaster,* [1994] B.C.J. No. 287 (S.C.).

[25] It is not objectionable to address the search warrant to "all or any police officers of the Ontario Provincial Police": see *R. v. Solloway and Mills,* (130), 53 C.C.C. 271 (Ont. C.A.), *R. v. Benz,* [1986] O.J. No. 227 (C.A.). However, if the warrant is directed to a "public officer", section 487 requires that officer to be named in the warrant. A failure to comply with a statutory naming requirement is a serious defect: see *R. v. Genest,* [1989] S.C.J. No. 5 at para. 42.

[26] *R. v. Parent,* [1989] Y.J. No. 15 (C.A.); *Re Yoner,* [1969] B.C.J. No. 363 (S.C.).

[27] See *R. v. Silvestrone,* [1991] B.C.J. No. 2259 (C.A.); *R. v. Suetta,* [1984] S.J. No. 704; *R. v. Sparks,* [2006] N.J. No. 27 (C.A.).

[28] *Re United Distillers Ltd.* (1946), 88 C.C.C. 338 (B.C.S.C.).

[29] *R. v. Branton* (2001), 154 C.C.C. (3d) 139 (Ont. C.A.).

[30] See *Re Banque Royale du Canada and the Queen* (1985), 18 C.C.C. (3d) 98 (Que. C.A.).

[31] *R. v. Church of Scientology* (No. 6) (1987), 31 C.C.C. (3d) 449 (Ont. C.A.).

[32] *R. v. MacDonald,* [1992] N.B.J. No. 585 (C.A.).

[33] *R. v. Genest,* [1989] S.C.J. No. 5 at para. 42.

[34] Note that a Section 487 *Criminal Code* warrant must be executed by "day" (defined as the period between 6:00 a.m. and 9:00 p.m. in section 2 of the *Code*) unless specific authorization is sought by the affiant and granted by the issuing Justice pursuant to section 488 of the *Code*: see *R. v. Sutherland* (2000), 150 C.C.C. (3d) 231 (Ont. C.A.). For an example of a case where there was a defect in the time for execution see *R. v. Tooze,* [1995] O.J. No. 2947 (Prov. Ct.).

The "sufficiency" of the I.T.O. is also best understood against the backdrop of the "judicial act" principle. It is not enough for a police officer to swear that she has reasonable grounds. The I.T.O. must contain sufficient detail to support a judicial determination of whether the reasonable and probable grounds standard has been met.[35] If it fails to do so, the search will be found to be unreasonable under section 8 even if the officers who executed the warrant believed that they were lawfully authorized by the warrant to conduct the search.[36] It is essential that the affiant sets out not only the evidence to support reasonable grounds to believe that an offence has been committed, but also to support reasonable grounds to believe that evidence in respect of the offence *will be* found at the place to be searched if the proposed warrant is granted. This requires that the information relied upon by the affiant is sufficiently current to sustain this belief. If the evidence in this regard in the I.T.O. was too "stale", the warrant will be invalidated.[37]

The judicial function of the issuing justice thus demands that an affiant scrupulously "source" all of his assertions in the I.T.O. to an investigative resource. It is insufficient for an affiant to set out "conclusions, opinions and facts without providing the court the source or origin for such conclusions, opinions or facts. The credibility and reliability of the assertions are inextricably linked to the investigative resources themselves."[38] In the context of assessing the probative value of confidential informer information in an I.T.O. this principle becomes extremely important. In the Ontario Court of Appeal decision in *R. v. Debot* (1986), 30 C.C.C. (3d) 207 at pp.218-219, Mr. Justice Martin explained:

> ....The underlying circumstances disclosed by the informer for his or her conclusion must be set out, thus enabling the justice to satisfy himself or herself that there are reasonable grounds for believing what is alleged. I am of the view that such a mere conclusory statement made by an informer to a police officer would not constitute reasonable grounds for conducting a warrantless search or for making an arrest without warrant. Highly relevant to whether information supplied by an informer constitutes reasonable grounds to justify a warrantless search or an arrest without warrant are whether the informer's "tip" contains sufficient detail to ensure it is based on more than mere rumour or gossip, whether the informer discloses his or her source or means of knowledge and whether there are any indicia of his or her reliability, such as the supplying of reliable information in the past or confirmation of part of his or her story by police surveillance.[39]

The Search Warrant Application is an Ex Parte and In Camera Process:

A search warrant application is brought *ex parte* and the hearing occurs *in camera* before a

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[35] *C.B.C. v. New Brunswick (A.G.)* (19991), 67 C.C.C. (3d) 544 (S.C.C.); *Sanchez, supra,* at para.20; *Pastro, supra,* at p.496. In *R. v. Turcotte,* [1987] S.J. No. 734 (C.A.), the Court held that there must be sufficient detail to satisfy the issuing justice: (1) that an offence has been committed or is suspected of being committed; (2) that the location of the search is a building, receptacle or place; (3) that the item sought will provide evidence of the commission of the offence or that the possession thereof is an offence of itself; (4) that the grounds stated are current so as to lead credence to the reasonable and probable grounds; and, (5) that there is a nexus between the various considerations set out.

[36] *R. v. Harris and Lighthouse Video Centres Ltd.* (1987), 35 C.C.C. (3d) 1 (Ont. C.A.).

[37] See *Turcotte, supra; R. v. Adansi,* [2008] O.J. No. 1202 (Prov. Ct.).

[38] *Re Criminal Code,* [1997] O.J. No. 4393 (Ont. Gen. Div.) at paras. 8 and 10; see also *R. v. Christianson,* (1986) 26 C.C.C. (3d) 391 (Sask. C.A.) at p.396.

[39] See also *R. v Garofoli* [1990] 2 S.C.R. 1421 at paras. 67-68; *R. v. Pastro, supra,* at p.517-18; *R. v. Hosie* (1996), 107 C.C.C. (3d) 385 (Ont. C.A.) at p. at 392; *R. v. Zammit* (1993), 81 C.C.C. (3d) 112 (Ont. C.A.) at p.120-121.

justice of the peace or a judge. [40] The ordinary checks and balances of the adversarial system do not operate in this process. The issuing justice is completely dependent on the search warrant affiant to provide him with truthful, accurate and reliable evidence in the I.T.O. to justify the exercise of his jurisdiction. The individuals whose privacy interests may be compromised by the proposed search warrant are deprived of any representation or opportunity to challenge the evidence advanced by the affiant in support of the warrant.[41]

As a result of the *ex parte* nature of the process, a special duty is imposed on a search warrant affiant to make "full, fair and frank" disclosure of all material facts in the I.T.O. In *United States of America v. Friedland*, [1996] O.J. No. 4399 (Gen. Div.) Mr. Justice Sharpe explained the duty to make "full, fair and frank" disclosure in practical terms at para.27:[42]

> ...[The] party is not entitled to present only its side of the case in the best possible light, as it would if the other side were present. Rather, it is incumbent on the moving party to make a balanced presentation of the facts in law. The moving party must state its own case fairly and must inform the Court of any points of fact or law known to it which favour the other side. The duty of full and frank disclosure is required to mitigate the obvious risk of injustice inherent in any situation where a Judge is asked to grant an order without hearing from the other side.

More recently, in *R. v. Morelli,* [2010] S.C.J. No. 8, Mr. Justice Fish fleshed out the concept of "strategic omission" in practical terms and explained how this concept fits within this affiant's duty to make full, fair and frank disclosure:

> When seeking an *ex parte* authorization such as a search warrant, a police officer -- indeed, any informant -- must be particularly careful not to "pick and choose" among the relevant facts in order to achieve the desired outcome. The informant's obligation is to present all material facts, favourable or not. Concision, a laudable objective, may be achieved by omitting irrelevant or insignificant details, but not by material non-disclosure. This means that an attesting officer must avoid incomplete recitations of known facts, taking care not to invite an inference that would not be drawn or a conclusion that would not be reached if the omitted facts were disclosed.[43]

These principles help to inform the central task of defence counsel in preparing and executing a "sub-facial" attack on a search warrant. Counsel will have to undertake a careful comparative analysis of the I.T.O. and the pre-issuance investigative disclosure. Material misstatements in and omissions from the I.T.O. must be identified and the materiality of their impact on issuance must be assessed.

It must be borne in mind that there is a "spectrum of misconduct" that search warrant affiants may engage in. It is the ultimate goal of the defence to demonstrate that a search warrant affiant deliberately and materially misled the issuing justice and thereby subverted the prior judicial authorization process. Deliberate deception practiced upon an issuing justice by an affiant

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[40] *A.G.N.S. v. MacIntyre* (1982), 65 C.C.C. (2d) 129 (S.C.C.) at 141.
[41] See para. 26 of *Friedland, infra.*
[42] Approved of in *Araujo, supra,* at para.46.
[43] *Morelli, supra,* at para.58.

requires that a clear message be sent by the reviewing court to the police.[44] However, mistakes, errors, even errors that have a fraudulent effect, *will not automatically* invalidate an entire search warrant.[45] Instead, erroneous information is "excised" from the I.T.O.[46] If, after excision of the erroneous information is performed, "sufficiently reliable" information remains upon which the issuing justice *could* have reasonably issued the warrant, then there will be no section 8 violation and the warrant will be upheld.[47] If, however, what remains in the I.T.O. is not sufficiently reliable to uphold the warrant, the next step is to see whether the crown will apply to "amplify" the I.T.O. However, "amplification" *does not* go so far as to permit the crown to retroactively add new or better grounds into the I.T.O. that the affiant failed to include in the first place. What is contemplated, however, is the correction of "minor, technical error[s]" made in the I.T.O., despite good faith on the part of the police.[48]

The concepts of "excision" and "amplification" ought to guide defence counsel in the preparation of a sub-facial attack on a search warrant in a number of respects. Defence counsel must be able to gauge whether the excisions that they will propose to the reviewing judge are going to be productive, *i.e.,* ultimately render the I.T.O. invalid. Cross-examination must be carefully geared to demonstrating that the affiant acted deliberately and with the intention of misleading. Confidence in the reliability of the affiant must be shaken.[49] It must always be remembered that the evidence that emerges from cross-examination is capable of being used for or against the defence on the section 8 search warrant challenge. If all the cross-examiner achieves is a demonstration that the affiant made good faith technical errors, this will amount to handing the crown a basis upon which to request amplification of the I.T.O. with the very answers elicited by defence counsel on cross-examination. Thus, the cross-examiner will have to exercise judgment as to which areas of cross-examination are worth pursuing, and which areas are better left untouched either because they will ultimately be unproductive or too dangerous to embark upon.

Procedure on Review

Where the objective of defence counsel is not to seek the return of the items seized, but to exclude the evidence seized pursuant to the search warrant at trial under section 24(2) of the *Charter*, the challenge to the search warrant must be brought before the trial judge.[50] The onus is on the applicant to establish that the search was "unreasonable".[51]

There is no automatic right to cross-examine a search warrant affiant at either a preliminary hearing or a trial. Leave of the Court is required to permit the applicant to engage in such cross-

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[44] See *R. v. Sismey* (1990), 55 C.C.C. (3d) 281 (B.C.C.A.), *R. v. Donaldson* (1990), 58 C.C.C. (3d) 294 (B.C.C.A.), *R. v. Morris* (1998), 134 C.C.C. (3d) 539 at p. 553 and *Araujo, supra* at 54.

[45] *R. v. Bisson,* [1994] S.C.J. No. 112; *Araujo, supra,* at para. 54.

[46] *R. v. Lajeunesse,* [2006] O.J. No. 1445 at para.8; *Bisson, supra.* It should be noted that excision also applies to illegally obtained information relied upon in an I.T.O. Evidence obtained by the police during the investigative phase in violation of the *Charter* must also be excised. The court must then decide whether the warrant could have been reasonably granted on the remaining information in the I.T.O.: See *R. v. Grant,* [1993] S.C.J. No. 98 at para.50., *R. v. Laurin,* [1997] O.J. No. 905 (C.A.). Where such evidence forms the *sole* basis for the issuance of the warrant, the warrant will be invalidated because it will have been rendered "insufficient" post-excision: see *R. v. Kokesch,* [1990] 3 S.C.R. 3 and *R. v. Ricketts,* [2000] O.J. No. 1369 (C.A.).

[47] *R. v. Bisson,* [1994] S.C.J. No. 112; *Araujo, supra* at paras. 54-57.

[48] *Aruajo, supra* at paras. 57 and 59; *Plant, supra*; *R. v. Lajeunesse, supra* at para.8; *Morelli, supra* at paras.. 42-43.

[49] See, for example, *R. v. Bogiatzis,* [2003] O.J. No. 3335 (S.C.).

[50] *R. v. Zevallos* (1987), 37 C.C.C. (3d) 79 (Ont. C.A.).

[51] *Hunter v. Southam, supra; R. v. Collins,* [1987] S.C.J. No. 15.

examination. In *Garofoli, supra,* the Supreme Court of Canada developed a comprehensive guide to this approach. The Court specifically rejected the highly restrictive prerequisites to cross-examination that were developed by the United States Supreme Court in *Franks v. Delaware* 438 U.S. 154 (1978).[52] Instead, Mr. Justice Sopinka writing for the majority in *Garofoli* held:[53]

> Leave should be granted when the trial judge is satisfied that cross-examination is necessary to enable the accused to make full answer and defence. A basis must be shown by the accused for the view that the cross-examination will elicit testimony tending to discredit the existence of one of the pre-conditions to the authorization, as for example the existence of reasonable and probable grounds.

In *R. v. Williams* [2003] O.J. No. 5122, Rosenberg J.A. speaking for the Ontario Court of Appeal observed that the test for permitting cross-examination of an affiant "is not a stringent one".[54] The Court noted that the applicants had made out a case for cross-examination based, in part, on conclusory statements in the affidavit about the utility of undercover operations and other investigative techniques

The Supreme Court of Canada affirmed the *Garofoli* standard in *R. v. Pires,* [2005] S.C.J. No. 67 (S.C.C.). At paragraph 40 of her judgment Madam Justice Charron, speaking for the Court, commented:

> ....[I]t is not necessary for the defence to go further and demonstrate that cross-examination will be successful in discrediting one or more of the statutory preconditions for the authorization. Such a strict standard was rejected in Garofoli. A reasonable likelihood that it will assist the court to determine a material issue is all that must be shown.

Justice Charron also observed at paragraph 44 of her judgment that the "insufficiency of the affidavit, on its face, may suffice to show a basis for cross-examination" and cited with approval the decision of Rosenberg in *R. v. Williams, supra,* on this point.

The leave to cross-examine requirement also applies at a preliminary hearing: See *R. v. Dawson* (1998), 123 C.C.C. (3d) 385 (C.A.).

The defence must set out a factual basis to support the application for leave to cross-examine the affiant. A Notice of Application and supporting factum is routinely required for such applications. Unless counsel comes to the application with a strong grasp on the I.T.O. and the pre-issuance disclosure, he will be unable to articulate the proposed areas of cross-examination and how they will be *likely to assist the court* in determining a material issue, such as reasonable and probable grounds. While a "script" of the proposed cross-examination is not required, if counsel fails to present some factual basis to satisfy the Court that cross-examination is warranted, he or she runs the risk of leave being refused.[55]

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[52] *i.e.,* a *prima facie* evidence of fraud, misleading disclosure or material non-disclosure.
[53] at para.88.
[54] at para. 11.
[55] *R. v. Trang,* [2003] A.J. No. 63 (Q.B.); see also the decision of Hill J. in *R. v. Pham,* [2009] O.J. No. 4296 (S.C.).

If leave to cross-examine is granted, it should be noted that the trial judge has the discretion to define the areas and direct the scope of cross-examination in advance if he or she considers it advisable to do so.[56] In other words, the ability to curb prolixity is not the only limit on cross-examination that can be imposed.

Finally, it is important to appreciate that a search warrant review is not a hearing *de novo.* The reviewing judge is not entitled to substitute her own view of whether the warrant should have issued for that of the issuing judge.[57] It is incorrect for the reviewing judge to decide the issue based on a determination of whether he or she *would* have issued the warrant.[58] Instead, the reviewing judge must determine whether based on the record, as amplified on review, sufficiently reliable" information remains upon which the issuing justice *could* have reasonably issued the warrant.[59] If so, there is no basis to interfere and the warrant will be upheld.[60] If not, a section 8 violation is made out and the search warrant must be quashed.

The task of a reviewing judge is difficult work. It is important that defence counsel provides as much assistance as possible to the reviewing judge in this exercise. Submissions should not focus on *minutiae* but on the affidavit as a whole. Reviewing judges greatly appreciate it when defence counsel takes the time to prepare a draft of the excisions that ought to be made to the affidavit. Filing it with the rest of your materials helps to narrow disagreements with the crown, focus arguments, and helps everyone to understand why it is that you take the position that the warrant cannot be sustained if the excisions you propose are accepted by the reviewing judge. It also helps to focus your own preparation for arguments in relation to any crown applications for amplification.

Conclusion

The preparation and execution of a section 8 *Charter* challenge to a search warrant can be a daunting task for even experienced criminal litigators. There is no doubt that success on such a motion demands the dogged pursuit of disclosure, disciplined preparation, a firm grasp on the law and strong advocacy skills. However, one should never lose sight of the fact that it is often the simplest arguments that are the most effective and likely to succeed in this context. Hopefully this article will make it a little easier for counsel who are thinking about challenging a search warrant in the near future.

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[56] *R. v. Silvini,* [1997] O.J. No. 63 (C.A.) at paras. 9-10.
[57] *Re Church of Scientology (No.6)* (1987), 31 C.C.C.(3d) 449 (Ont.C.A.); *Garofoli, supra* at para.56.
[58] *R. v. Durling* (2006), 214 C.C.C. (3d) 49 (N.S.C.A.) at para.22.
[59] *Garofoli, supra* at para.56; *Araujo, supra* at paras. 54-57.