"A Practitioner's Guide to Search Warrant Review"

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Introduction

Preparing and executing a section 8 *Charter* challenge to a search warrant can be a difficult and frustrating experience for even senior criminal litigators. If you ask most criminal law practitioners what the secret to success is on a search warrant review, many will say "killer cross-examination", "mastery of the facts and law" or "a winning factum". While each of these answers is no doubt correct, in actual fact, none of them provide the best answer. More often than not, success in reviewing a search warrant comes down to excellent critical and strategic analysis in the planning, preparation and execution phases of these cases. Excellence in the preparation of written materials, the execution of cross-examination, and the synthesis of final submissions all flow from this. The objective of this article is to highlight the importance of critical and strategic thinking in this context for criminal law practitioners, and to provide practical guidance where possible.

Fundamental Best Practices Count in this Context

Criminal defence lawyers who enjoy consistent success tend to follow a series of best practices from start to finish in their preparation and execution of a criminal case. By following these practices, they are able to master the facts, and spot the procedural, evidentiary and substantive issues that they can ultimately use to their client's advantage. They can be summarized as follows:

First, they meticulously review the disclosure to ensure that it is complete.

Second, they pursue what is missing and ought to be disclosed with diligence and determination.

Third, they *read* the completed disclosure brief *carefully*, with an eye for detail and an understanding of the relevance and materiality of the evidence in the brief.

Fourth, they *distill* the case down to its fundamental core and then build up a comprehensive defence theory and narrative based on evidence that is in the state's possession and evidence that they obtain through their own independent investigation.

Fifth, they carefully think about how the trial will unfold and make considered strategic decisions about whether to have a preliminary hearing, how to conduct that preliminary hearing, the conduct of pre-trial motions, and whether to proceed with a judge alone or a judge and jury.

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Sixth, before stepping foot in a courtroom, they know what their final submissions to the trial judge or jury will be and how each and every cross-examination and examination-in-chief must unfold in order to substantiate their final submission.

Seventh, they don't stop preparing, adjusting and recalibrating their examinations and submissions, until they are all done.

These practices take on a heightened significance in the search warrant review context, because of the core legal principles that drive the procedure before the reviewing court and inform the reviewing judge's ultimate legal analysis. While reasonable doubt can sometimes be generated by "kicking up the dust", that type of approach is doomed to fail in a search warrant review. Counsel who take on these files owe it to themselves and their clients to educate themselves on the unique legal principles in this context, and their implications on the planning, preparation and execution phases of counsel's work. Those principles can be summarized as follows:

- The Applicant bears the burden of proof to invalidate a search based on prior judicial authorization pursuant to s. 8 of the *Charter* on a balance of probabilities.[1]

- It is <u>not</u> necessary for the police to target a person in a search warrant.[2] 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 *at the time of the search warrant's issuance*.[3]

- 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 RPG that would never be admissible at a criminal trial, *e.g.* hearsay information,[4] association evidence, prior contacts with police and his prior convictions provided that they are relevant to the application.[5]

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[1] *R. v. Collins*, [1987] 1 S.C.R. 265, at paras. 21-22.
[2] *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.
[3] *R. v. Turcotte*, [1987] S.J. No. 734 (C.A.).
[4] *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: see *R. v. Cheecham*, (1989), 51 C.C.C. (3d) 498 at 501 (Sask. C.A.).
[5] *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, for example, *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.).

- 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. [6] The test is whether any reliable evidence remains upon which the search warrant *could* have issued.[7]

- There is no automatic right to cross-examine a search warrant affiant at either a preliminary hearing or a trial. Detailed, reasonable notice must be given to the crown and Court, failing which can lead a Court to decline hearing the application.[8]

- Leave of the Court is required to permit the applicant to engage in such cross-examination. 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 … 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.

  The leave to cross-examine requirement also applies at a preliminary hearing.[9]

  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.[10]

  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.[11] In other words, the ability to curb prolixity is not the only limit on cross-examination that can be imposed.

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[6] *Re Church of Scientology (No.6)* (1987), 31 C.C.C.(3d) 449 (Ont.C.A.); *R. v. Garofoli* (1990), 60 C.C.C. (3d) 161 (S.C.C.).
[7] *R. v. Araujo*, [2000] S.C.J. No. 65 at paras. 57-59, *R. v. Morelli*, [2010] 1 S.C.R. 253 (S.C.C.), at paras. 42-43, *R. v. Nguyen* (2011), 273 C.C.C. (3d) 37 at para.57.
[8] *R. v Montague*, 2010 ONCA 141.
[9] See *R. v. Dawson* (1998), 123 C.C.C. (3d) 385 (C.A.).
[10] *R. v. Trang*, [2003] A.J. No. 63 (Q.B.), *R. v. Pham*, [2009] O.J. No. 4296 (S.C.).
[11] *R. v. Silvini*, [1997] O.J. No. 63 (C.A.) at paras. 9-10.

- Cross-examination of the affiant by the Applicant is a two-way street. Evidence elicited on cross-examination that is helpful to a damaging to the Applicant's position will amplify the record, even if that means otherwise sparse evidence is enhanced.[12]

- Mistakes, errors, even errors that have a fraudulent effect, *will not automatically* invalidate an entire search warrant.[13] Instead, erroneous information is "excised" from the I.T.O.[14] If, after excision of the erroneous information is performed, sufficient 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.[15]

- However, if 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. [16]

- The I.T.O. is to be examined as a whole that is with respect to the totality of the circumstances. The court is not to analyze isolated passages.[17]

- Key to the finding of a s.8 violation and the exclusion of evidence under s.24(2) is establishing that the police engaged in fraud, negligence, carelessness and lack of candour in the prior judicial authorization process.[18]

It should be immediately apparent from the foregoing summary that to be successful on a search warrant challenge, counsel need to do more than just prepare. Success requires counsel to think critically and strategically throughout the planning, preparation and execution phases of a finely tuned attack. What follows is a discussion of the kind of critical thinking and strategic planning that is demanded of counsel at each phase of a search warrant review.

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[12] *R. v. Madrid*, (1994), 48 B.C.A.C. 271 (B.C.C.A.) at paras. 60, 67. See also Hubbard, Brauti and Fenton, "Wiretapping and Other Electronic Surveillance", Canada Law Book, at page. 8−34.12.
[13] *R. v. Bisson*, [1994] S.C.J. No. 112; *Araujo, supra*, at para. 54.
[14] *R. v. Lajeunesse*, [2006] O.J. No. 1445 at para.8; *Bisson, supra.*
[15] *R. v. Araujo, supra* at para. 54, *R. v. Morelli*, *supra* at para. 40, *R. v. Vu*, 2013 SCC 60 at para.16.
[16] *Aruajo, supra* at paras. 57 and 59; *R. v. Lajeunesse, supra* at para.8; *Morelli, supra* at paras. 42-43, *R. v. Voong*, [2013] B.C.J. No. 2625 (C.A.). The crown cannot re-examine as of right and it is limited in scope: see the helpful comments of Frankel J.A. in *R. v. Wilson*, 2011 BCCA 252 at paras. 65-67.
[17] *R. v. Ebanks* (2009), 249 C.C.C. (3d) 29 (ONCA) at para. 28, *R. v. Campbell*, [2010] ONCA 588 at para. 23; aff'd, [2011] 2 S.C.R. 549.
[18] David Porter and Brent Kettles, "The Significance of Police Misconduct in the Analysis of S.8 Charter Breaches and The Exclusion of Evidence under s.24(2) in *R. v. Grant, R. v. Harrison* and *R. v. Morelli*" (2012) 58 C.L.Q. 510

Determining the Specific Legal Issues to be raised in the Application

There are three basic types of challenges in the search warrant context:

Facial Validity Challenge - The legal issue relates to a fundamental legal defect that is apparent on the "face" of the warrant. For example, in the context of a s.487 search warrant:

- The s.487 search warrant must be addressed to a "peace officer" or "public officer…who is named".[19]

- 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.[20] Errors in the address of the property to be searched may render the search warrant invalid.[21]

- 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."[22] A section 487 cannot authorize a search for evidence in respect of the commission of a "suspected offence".[23]

- The items to be searched for cannot include an intangible.[24] 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",[25] and the items to be searched must be items that "will" afford evidence of the offence.[26]

- The section 487 search warrant must contain a time period for execution.[27] Counsel should double-check to confirm that it was executed during the time specified for execution on the face of the search warrant.[28]

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[19] 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.

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

[21] 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.).

[22] *Re United Distillers Ltd.* (1946), 88 C.C.C. 338 (B.C.S.C.), *R. v. Church of Scientology* (No. 6) (1987), 31 C.C.C. (3d) 449 (Ont. C.A.).

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

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

[25] *Church of Scientology (No. 6), supra*.

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

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

[28] 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.).

Sub-Facial Validity Challenge – The legal issue relates to a fundamental defect "under" the face of the warrant, *i.e.*, in its I.T.O. The central thrust of this type of challenge is that the affiant failed to make "full, fair and frank" disclosure of all *material* facts in the prior judicial authorization process, and that had he done so, the search warrant *could not* have legally issued. Generally speaking, in this type of challenge, the applicant seeks to prove on a probability standard:

- That the affiant included "constitutionally deficient" evidence in the I.T.O., for example, evidence obtained by the police as a result of a breach of the accused's *Charter* rights during the course of the investigation.[29]

- That the affiant committed fraud, or included *material* misstatements and misrepresentations, erroneous and mistaken information in the I.T.O.[30]

- That the affiant *strategically omitted material information* from the I.T.O. which would have undermined a pre-condition for issuance had it been included.[31]

Execution Challenge – Did the police misconduct themselves in the *manner* in which they executed the search? For example:

- "No knock" and Excessive Force.[32]

- Deliberate Overseizure.[33]

The point to be taken from this is that unless counsel carefully deconstructs the investigative narrative leading up to the search warrant's preparation, issuance and execution, they will miss helpful, sometime obvious avenues of attack. The fact of the matter is that multi-pronged challenges can be extremely effective. The objective is not to launch an application that is "half-baked", but one that is as robust as possible.

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[29]Evidence obtained by the police during the investigative phase in violation of the *Charter* must 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.).

[30] The effect of the inclusion of this type of evidence will be discussed *infra.*

[31] *Morelli, supra,* at para.44.

[32] *R. v. Genest*, [1989] 1 SCR 59, 1989 CanLII 109 (SCC), *R. v. Silveira*, [1995] S.C.J. No. 38, *R. v. Schedel*, [2003] B.C.J. No. 143 (C.A.), *R. v. Brown*, [2003] O.J. No. 5089 (S.C.J.), *R. v. Cornell*, [2010] S.C.J. No. 31, *R v. Rosales*, 2010 ONSC 1992.

[33] *R. v. Khan*, 2005 CanLII 63749 (ONSC), *R. v. Guo*, 2009 ONCJ 184,

The Search Warrant Challenge Must Advance the Overall Trial Strategy of the Defence

One of the basic errors made by counsel who challenge a search warrant is their failure to take the time to carefully consider how it will advance their client's overall defence strategy. In order to achieve success, counsel must think about the nature, strengths and weaknesses of the prospective search warrant challenge as a part of the broader procedural, evidentiary and substantive trial issues. A failure to do so will result in costly tactical missteps, which have the potential to severely handicap an otherwise meritorious application.

Take, for example, a client who has a good "possession" defence in respect of the place that was searched/items seized, in a case where the crown has elected summarily. In this scenario, counsel might wisely choose to focus on facial validity and manner of execution issues, in order to avoid exposing the trial judge to his client's prior criminal antecedents, not to mention highly prejudicial hearsay about him that is contained in the ITO. This is most especially the case when a sub-facial challenge has only a modest chance of success at best.

A further example is offered by indictable cases where multiple sites were searched and seizures occurred at each search site. Assume that a strong sub-facial challenge exists to warrant number one, and a strong substantive "possession" defence exists in respect of the site of warrants two and three. Electing judge alone and agreeing to a *blended trial* and *voir dire* is likely not the strongest way of proceeding, tactically speaking. In this case, counsel might consider challenging warrant one on a pre-trial *voir dire,* and, in the event of success on that motion, keeping the jury for the trial proper on warrants two and three.

This is not to say that counsel should only rarely agree to a *blended trial/voir dire*. In many cases, there is little to be lost and much to be gained by taking advantage of the fact that the crown will be calling all of the evidence relevant both to the trial and search warrant challenge in-chief. For example, assuming that your client was not a person of interest or target in the ITO, there is little downside to launching a meritorious sub-facial challenge to a search warrant in a *blended trial/voir dire* that will inevitably expose the trial judge to highly prejudicial propensity evidence against an uncharged third party or a co-accused. In addition, where your client has no substantive defence, but a viable sub-facial search warrant challenge, a *blended trial/voir dire* offers the opportunity for counsel to receive the ruling of the court and, in the event of a dismissal, either entering a guilty plea or admitting the crown's case and arguing for a degree of mitigation on sentence. In cases where a meritorious appeal lies from the search warrant ruling, the latter course should be pursued to preserve the client's right of appeal.

The point here is that counsel must turn their minds and think carefully not only about the specifics of their search warrant challenge, but how they are going to strategically execute it throughout the trial process. Missteps and failures in this regard tend to have a more deleterious impact on the defence in the warrant review context than in a substantive trial, because the onus is squarely on the applicant and there are so many legal principles that operate at once that give the state a significant advantage. Put somewhat differently, the room for forgiveness that you enjoy when the onus is on the crown to prove the case beyond a reasonable doubt, simply does not exist in this context.

Keep it Clear and Simple

The importance of developing a clear and simple plan of attack cannot be stressed enough, especially on a sub-facial review. Defence counsel must remember that a convoluted and complicated sub-facial search warrant challenge is often the product of analytical failure and misunderstanding of the facts and/or law. If you keep your sub-facial challenge clear and simple (not "simplistic"), not only will it be easier for the reviewing judge to follow the evidence and your argument, it will be easier for you to meet your onus and obtain a remedy for your client under sections 8 and 24(2).

To Dawson or Not to Dawson?

The law relating to cross-examination of search warrant affiants at a preliminary hearing is set out by Carthy J.A. in *R. v. Dawson and Dawson* (1998), 123 C.C.C. (3d) 385(Ont. C.A.). According to *Dawson*, the test for leave to cross-examine at a preliminary hearing is the same test as set out in *Garofoli*, which was affirmed by the Supreme Court in *Pires.*

Putting aside the debate over whether *Dawson* remains good law in light of recent legislative changes,[34] the issue of whether one should bring a *Dawson* application, on a strategic level, requires significant and careful consideration. Some of the factors that must be weighed by counsel can be summarized as follows:

- Disclosing all of your grounds of attack to the crown and affiant early on in the proceedings, enables the crown to begin preparing for an amplification application.

- A successful *Dawson* leave application and cross-examination at the preliminary hearing, may lead to a curtailment of leave to cross-examine on the ultimate *Garofoli* before the trial judge, who, as the reviewing judge, is tasked with having to make the credibility and reliability findings that count.[35]

- A more liberal-minded jurist presiding over the preliminary hearing may afford counsel more latitude, practically speaking, than the trial judge.

- A devastating cross-examination of the affiant at the preliminary hearing, from which no recovery is possible, may end the case long before it ever gets to trial.

The decision to "*Dawson"* should not be regarded as a routine one. Counsel must turn their minds to the costs and benefits of bringing such applications. This requires a frank assessment of the strengths and weaknesses of the anticipated search warrant challenge, a

[34] See *R. v. Chartrand*, 2010 MBPC 52 for example, and the excellent discussion of this issue by Nakatsuru J. in *R. v. McLean*, [2012] O.J. No. 5321 (C.J.).
[35] Se *R. v. Cook*, [2008] O.J. No. 4764 (ONSC).

determination of what more can be realistically achieved by cross-examining at the preliminary, and a weighing of the downside risk of disclosure. Many seasoned litigators might suggest that a more effective use of the preliminary hearing might be to creatively discover evidence that will ultimately be of assistance on the ultimate search warrant challenge, without bringing a *Dawson* application.

Practical Implications of the Unique Legal Principles Operating in a Search Warrant Review

Often times, counsel fail to appreciate that their role and the expectations on them in these *voir dires* is markedly different, practically speaking, from what they are used to in a criminal trial. For starters, the obligation to adduce evidence of police malfeasance in the prior judicial authorization process falls squarely on the applicant in sub-facial attacks. A failure to discharge this obligation means that the presumption that the search warrant's issuance was lawful remains intact.[36] As the hearing is not in the nature of a *de novo* review, but rather, a focused inquiry into whether the search warrant *could* reasonably have issued, *on the whole of what remains post-excision and amplification*, defence counsel are charged with the task of distilling the I.T.O. evidence down into its *material* components and systematically obliterating each *material* basis, one at a time, until no reliable basis for the warrant's lawful issuance can be said to remain. Put another way, if your plan of attack allows for a reliable, *material* basis for issuance to remain untouched in the I.T.O., your application will very likely fail.

This reality challenges defence counsel to think about *how* to marshal the required evidence that the reviewing court will look to them to provide. If *prima facie* proof of fraud, or reckless disregard from the truth can be established through the proffer of *ab extra* evidence, then cross-examination of the search warrant affiant may be unnecessary.[37] While cross-examination of the search warrant affiant is most frequently pursued by applicants, the law and rules of practice are now crystal clear: detailed notice must be given and leave must be sought. You have no right of wide-ranging cross-examination like in a criminal trial. Instead, you bear the onus of establishing why you should be permitted to cross-examine. What this means is that defence counsel must be able to articulate a basis for the belief that a reasonable likelihood exists that the proposed lines of cross-examination will assist the court to determine a material issue. In practice, this means that you must demonstrate that you have a solid grasp on the *material* bases which grounded the issuance of the warrant, and a cross-examination plan that you can persuasively argue will have *a tendency* to undermine those bases.[38] Cross-examination plans that are weakly formulated, which closely resemble a discovery, or which are focussed on *minutia* or *immaterial* evidence in the ITO are likely going to fail on the leave application.

Even when leave to cross-examine is granted, defence counsel must understand that the results of their cross-examination can weigh both for and against the applicant on review. There is nothing worse than a cross-examination of a search warrant affiant that generates a sympathetic view of an affiant who made mistakes and omitted *immaterial* evidence, which the

[36] *Quebec (A.G.) v. Laroche*, 2002 SCC 72, *R. v. Brown*, [2011] O.J. No. 4624 (S.C.J.), at para. 7.
[37] *R. v. Garofoli* (1990), 60 C.C.C. (3d) 161 (S.C.C.) at p.197.
[38] See the discussion of Paciocco J. in *R. v. Iman*, [2012] O.J. No. 6543 (O.C.J.).

crown can then seize upon later in its amplification application. Indeed, this is a typical responding tactic that the crown regularly adopts and that you should anticipate. This injects an additional layer of required discipline in the execution phase, in terms of knowing which questions to ask, how to ask them, which questions are better left unasked and whether the evidence that will help you is available from reliable, external sources.

Again, the singular objective that counsel must aim for is the obliteration of each and every *material* assertion in the I.T.O. which sustained the lawful issuance of the search warrant in the first place. In this regard, counsel must be extremely mindful of the principle of excision. The jurisprudence is clear that errors, *even errors that have a fraudulent effect*, will not automatically invalidate the entire warrant.[39] Despite this, it has also been recognized that when the authorities deliberately subvert the pre-authorization process to the extent that the integrity of the process itself is imperiled, the reviewing judge has the power to set the authorization aside although it may be technically supportable by the evidence that remains after excision and amplification.[40] As a result, defence counsel should have a "Plan A" for establishing that the affiant or sub-affiant deliberately and intentionally set out to mislead the issuing justice in order to automatically invalidate the warrant. If this cannot be established, counsel must have a carefully crafted fallback position based on a considered plan of excision. This secondary plan cannot be properly executed, unless defence counsel has taken time in the preparatory phase, to carefully review the ITO and draft an optimally "excised" version of it, so as to guide them throughout the execution of "Plan B".

This part of the discussion raises the important issue of strategic omissions from the I.T.O. It is not enough that a search warrant affiant left out information from the I.T.O. The law is clear that the omission will only be considered to be a *material one* upon a successful showing that the omitted evidence *undermined* a pre-condition of issuance. In this case, the I.T.O. is amplified *at the defence request* to include the undermining omitted evidence.[41] Of course, if counsel cannot show that the omitted evidence had an undermining effect, then the omission is irrelevant and the amplification request of the defence should be declined.

Following excision and amplification on defence application, the reviewing court is then tasked with examining *the whole* of the remaining record. The reviewing judge must then answer the question: "Could a justice of the peace assessing all the facts on a practical, non-technical, and common-sense basis, have been satisfied there were reasonable grounds to believe that evidence of the named offence would be found at the named place to be searched." [42] If the answer is "yes", the lawful issuance of the search warrant will be sustained, no section 8 breach can be found to have occurred, and the sub-facial review application should be dismissed. This is the one legal principle that causes defence counsel the most difficulty, in practical terms, on these applications. It is not enough to approach this part of the analysis thinking like a lawyer arguing that there is a reasonable doubt that exists on the evidence. You have to go much further. You have to be able to argue, persuasively, that there is *no reliable basis* remaining to

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[39] *Bisson, supra.*
[40] *R. v. Morris* (1998), 134 C.C.C. (3d) 539 (N.S.C.A.), *Araujo*, supra at para. 54, *Lahaie v. Canada (Attorney General)*, 2010 ONCA 516 at para.41. This is a high threshold.
[41] *Morelli, supra,* at para.44.
[42] *R. v. Whitaker*, 2008 BCCA 174 at paras. 41, 42, leave to appeal ref'd [2008] S.C.C.A. No.296, [2008] 3 S.C.R. x.

support the lawful issuance of the warrant. The difference between these two positions is an expansive divide.

Even if insufficient information remains to sustain the search warrant, this does not end the matter. Defence counsel must understand that the crown may, at this point, apply to amplify the record to correct "minor, technical good faith errors" in the I.T.O. While this does not provide the crown with *carte blanche* to add new or better grounds to the I.T.O., it gives the crown a real opportunity to push the record back over the "*could* threshold" by asking the court to correct good faith errors, even those having an unintended fraudulent effect. It is at this stage that the results of defence counsel's cross-examination can come back to haunt the applicant. If all that cross-examination achieved was to demonstrate that the affiant committed a series of technical, good faith errors and mistakes, then the crown can be expected to use the transcript of that cross to persuade a judge to write a corrected version of the erroneous, excised information back into the I.T.O. This is why it is so important for counsel to keep in mind, at the outset, that his or her primary objective must be to show deliberate malfeasance. Failing this, the objective must be to demonstrate unacceptable negligence or carelessness to such a degree that any suggestion of good faith is rendered unsustainable. Not only is this essential to a determination that section 8 has been violated, it is *critical* to obtaining exclusion of the fruits of the search under the *Grant/Harrison* section 24(2) *analysis.*[43]

Conclusion

This article has touched on only a few aspects of the critical analysis and strategic thinking that criminal litigators must grapple with if they are to achieve success on a search warrant review. It is hoped that the issues that have been discussed will assist practitioners in better understanding how to best prepare for and execute a search warrant review, and thereby improve their clients' prospects of success.

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[43] David Porter and Brent Kettles, "The Significance of Police Misconduct in the Analysis of S.8 Charter Breaches and The Exclusion of Evidence under s.24(2) in *R. v. Grant, R. v. Harrison* and *R. v. Morelli*" (2012) 58 C.L.Q. 510.