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Challenging the Lawfulness of Searches

A panel discussion with: Judge Jetté, Oren Bick, Daniel Song and Matthew Nathanson

Outline

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Standing

For s. 8 this is defined as having a reasonable expectation of privacy.

R. v. Edwards, [1996] 1 S.C.R. 128 – territorial privacy

R. v. Tessling, 2004 SCC 67 – informational privacy

R. v. Marakah, 2017 SCC 59 – informational privacy

R. v. Jones, 2017 SCC 60 – reliance on the Crown's theory

Charter Notice: Content

Things to include:

- Sections of the *Charter* relied on.
- Summary of the facts and law:
  - Outline of expected evidence (based on disclosure and/or client interview).
  - Statement of the governing legal principles (including case law and/or statute) that will apply to this evidence.
  - Explain facial deficiencies of warrant / ITO.
  - Identify the impugned paragraphs of the ITO and basis for excision (i.e., misleading statements, conclusory statements, unlawfully obtained information).
  - Identify the names of potential affiants or sub-affiants to be called and outline proposed areas and bases for *Pires and Lising* application.
- Clearly state the remedy sought.

Charter Notice: Timing

- At the arraignment. It will be the basis for your scheduling discussions.

- Parties should be able to rely on the *Charter* notice to determine:
  - Length of the *voir dire*
  - Complexity of the *voir dire* – are multiple *voir dires* required with gaps in between?
    - E.g., distinct *voir dires* to litigate excision if allegation is that information was obtained in violation of the *Charter*
  - Timing of the *voir dire* – when are the necessary witnesses available?

Vukelich Hearings

R. v. Cody, 2017 SCC 31, approved of the "screening hearing" contemplated by *R. v. Vukelich* (1996), 108 C.C.C. (3d) 193 (B.C.C.A.).

The onus is on the defence to justify a request for a *Charter voir dire.*

The threshold is fairly low: a "reasonable prospect of success".

The best way to avoid a *Vukelich* hearing is to provide a detailed *Charter* notice.

What if the *Vukelich* hearing will take as long as (or longer than) the *voir dire* itself?

- Crown should consider cost vs. benefit: if defence is mounting a facial attack estimated to take one day with no evidence, then does an additional half-day or full-day Vukelich hearing enhance trial efficiency?

Reviewing Search Warrants

The most common attack on a search warrant focuses on the sufficiency of the Information to Obtain (ITO).

The test on review is whether the warrant **could** have issued, after excision and amplification: *R. v. Garofoli*, [1990] 2 S.C.R. 1421 at para. 56; *R. v. Araujo*, 2000 SCC 65.

This type of *voir dire* (whether in respect of a search warrant or any other kind of judicial authorization) is commonly referred to as a *Garofoli* hearing.

An attack on the sufficiency of the ITO can be either facial or sub-facial:

- Facial validity is concerned only with challenging the sufficiency of the ITO as it was presented to the issuing justice, and the validity of the warrant as authorized.
- Sub-facial validity focuses on what should have been (or should not have been) in the ITO presented to the issuing justice (after excision and amplification).

Practice Tips: Reviewing Search Warrants

Remember to read the warrant and ITO carefully.

- What is the offence(s) for which the police claim they have reasonable grounds?
- What did the warrant authorize?
  - Place(s) to search
  - Items to search/seize
  - Timing and manner of search
- What is the "standard" for the authorization?
  - Search warrant = "reasonable and probable grounds" vs. tracking warrant = "reasonable suspicion" or "reasonable and probable grounds" depending on circumstances
- Did the authorizing body have the authority to grant the warrant (e.g., PCJ or SCJ)?

Facial Attacks

No evidence is called on a facial attack.

A facial attack accepts all of the facts on the ITO as true, but says that they were not sufficient to meet the statutory prerequisites: had the issuing justice been doing their job properly, the warrant could not have issued.

- Check the statutory prerequisites of the authorization.
  - Section 11 *CDSA*
  - Section 487 *Criminal Code*

Practice Tips: Facial Attacks

First, familiarize yourself with the statutory prerequisites for the particular form of judicial authorization.

- For a search warrant: reasonable grounds to believe that stated items will be found in a stated place and will afford evidence of a state offence.

Second, read the ITO with these prerequisites in mind.

Don't forget to look past the obvious!

- In a drug case, for example, a typical ITO devotes most of its time to establishing grounds to believe that the target of the search has committed a CDSA offence.
  - But are there grounds to believe that evidence of the offence will be found in the place to be searched? *R. v. Liu and Le*, 2014 BCCA 166.
  - Are there grounds to believe that the objects to be searched for are evidence of an offence?

Other helpful cases:

R. v. Rocha, 2012 ONCA 707; *R. v. Vaz*, 2015 BCSC 728; *R. v. Lui*, 2011 BCSC 1266; *R. v. Szilagyi*, 2018 ONCA 695

Sub-facial Attacks

A sub-facial attack attempts to challenge the factual foundation of the ITO, usually through cross-examination of the affiant (with leave of the court) but sometimes through other means.

The affiant has a duty in an *ex parte* hearing to provide "full, frank and fair" disclosure of material facts.

- This includes facts that are potentially exculpatory or helpful to the accused / target.

If a sub-facial attack is successful, the erroneous information is either excised or amplified.

Applications to Cross-Examine the Affiant

These are sometimes referred to as *Pires and Lising* applications.

R. v. Pires and Lising, 2005 SCC 66: the test is whether there is a reasonable likelihood that cross-examination of the affiant will elicit testimony of probative value to the issue for consideration by the reviewing judge.

- Don't overlook *World Bank Group v. Wallace*, 2016 SCC 15: the "issue for consideration" on a *Garofoli* application is not just whether information set out in the ITO is wrong, but also whether the affiant knew or ought to have known the true facts.

Applications to Cross Affiant, cont.

Residual discretion to set aside a warrant even if the warrant is upheld after a *Garofoli* review:

- *R. v. Morris* (1998), 134 C.C.C. (3d) 539 (NSCA): Cromwell J.A. held that an affiant's conduct may be so misleading and subversive of the prior judicial authorization process to permit a court to exercise its residual discretion to sets aside the warrant.
- The BCCA hasn't affirmed this power (see, e.g., *R. v. Beaumont*, 2018 BCCA 342), but many other courts of appeal have recognized it: *R. v. Paryniuk*, 2017 ONCA 87; *R. v. Evans*, 2014 MBCA 44; *R. v. McElroy*, 2009 SKCA 77; *R. v. Phung*, 2013 ABCA 63.
- Lower courts in British Columbia have recognized and exercised this residual discretion to set aside a warrant where "the goal of persuasion [overcomes] the duty of candour": *R. v. Gardner*, 2015 BCSC 801 at para. 80; See also *R. v. Maton*, 2005 BCSC 330.

Sub-facial Attacks: Excision

Excision: the reviewing court disregards portions of the ITO that were inaccurately stated, conclusory, or obtained unlawfully (e.g., in violation of the *Charter*).

World Bank Group v. Wallace, 2016 SCC 15: factual errors should only be excised (or amplified) if the affiant knew or ought to have known the true facts at the time the ITO was sworn.

- *Garofoli* itself is a good example of this: Garofoli's proposed cross-examination aimed to show not only that Garofoli was in Florida at the time of an alleged meeting in Hamilton, but also that the affiant ought to have known this.

Conclusory statements without a factual foundation must be excised. See ***R v Ferguson***, 2018 BCSC 378 at paras 65-70 for a good summary on conclusory statements

Sub-facial Attacks: Amplification

Amplification: the reviewing court re-writes or expands upon portions of the ITO that were inaccurately or incompletely stated.

- Relevant information that the affiant knew or should have known that were omitted and should have been included in the ITO.
- The Crown cannot "amplify" or supplement the grounds in the ITO by examining the affiant, except to correct minor or technical errors made in good faith when drafting the ITO: *R. v. Araujo*, 2000 SCC 65 at para. 59.
- "Amplification" evidence can be used to correct "good faith errors of the police", not deliberate attempts to mislead the authorizing justice: *R. v. Morelli*, 2010 SCC 8 at para. 41.
- More recent examples of excision vs. amplification: *R. v. Booth*, 2019 ONCA 970; *R. v. Thiessen*, 2020 BCCA 85.
- The ITO cannot "amplify" and supplement what is ultimately authorized by the search warrant: *R. v. Ting*, 2016 ONCA 57 at para. 59.

Excision and Amplification, cont.

In addition to considering the excision or amplification of inaccurate information, a reviewing court must also excise information obtained in breach of the accused's *Charter* rights: *R. v. Grant,* [1993] 3 S.C.R. 223; *R. v. Plant*, [1993] 3 S.C.R. 281; and *R. v. Wiley*, [1993] 3 S.C.R. 263.

Excision is **automatic** without a s. 24(2) analysis: *R. v. Grant*, [1993] 3 S.C.R. 223 at paras. 54-55.

- See *R. v. Jaser*, 2014 ONSC 6052, for a critique of automatic excision.

Upon excision and amplification of the ITO, the reviewing justice applies the *Garofoli* test to determine if the warrant **could** have issued.

Practice Tips: Sub-facial Attacks

Unconstitutionally obtained evidence in ITO

- Make a list of the pieces of evidence that are said to add up to reasonable grounds for the warrant.
- Can any single piece of evidence be characterized as crucial to the issuance of the warrant? Perhaps two or three pieces of evidence together can be so characterized?
- Look for viable constitutional attacks on the avenues of investigation that led to the most important pieces of evidence.

Combination of both types of excision

- See *R. v. Plant* for an example of this.

Section 24(2)

Consider, at the outset, whether the best you can do is establish a technical breach. Is your client likely to get a remedy?

Even if the warrant is not set aside, if there were *Charter* breaches resulting in excision of paragraphs in the ITO, consider arguing a temporal or causal nexus of the *Charter* breaches to the discovery of evidence and argue exclusion of evidence: *R. v. Grant*, [1993] 3 S.C.R. 223.

Do you need an adjournment before you argue s. 24(2)?

Should you call evidence on the s. 24(2) hearing?

- Crown: call the affiant to demonstrate good faith following a successful facial attack?
- Defence: call your client, or another witness, to illuminate the impact of the breach?