
CANADA / JUDGMENT

R. v. Grandison

2017 BCSC 1067

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Supreme Court of British Columbia

DECIDED

12 May 2017

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2017 BCSC 1067 R. v. Grandison

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Grandison,

2017 BCSC 1067

Date: 20170512

Docket: 36757-2

Registry: Duncan

Regina

v.

Derek James Grandison

Before: The Honourable Mr. Justice Bracken

Oral Ruling on Voir Dire

Counsel for the Crown

appearing by teleconference:

T. Johnson

Counsel for the Accused:

R. Morahan

Place and Date of Trial/Hearing:

Victoria, B.C.

October 3 - 7, 2016

October 11 - 13, 2016

Place and Date of Judgment:

Victoria, B.C.

May 12, 2017

- [1] THE COURT: The accused is charged that on or about September 18, 2013, at or near Duncan, British Columbia, he did unlawfully possess cocaine for the purpose of trafficking contrary to s. 5(2) of the Controlled Drugs and Substances Act. In this voir dire, he applies to have two warrants quashed, a general warrant and a search warrant issued under the Controlled Drugs and Substances Act. He also seeks the exclusion of all of the evidence obtained through the execution of those warrants. The general warrant was issued September 19, 2013, and a search warrant was issued September 20, 2013. The accused relies on ss. 7 and 8 of the Charter of Rights and Freedoms.

Background Facts

- [2] In the course of their investigation, the police obtained several warrants and orders. They began with an initial application on July 11, 2013, for a number recorder warrant pursuant to s. 492.2(1); a production order for phone records for phone number 250-802-3442, a number associated to the accused, that order was pursuant to s. 492.2(2); and an assistance order under s. 487.02; and a sealing order pursuant to s. 487.3.
- [3] On July 12, 2013, the courts authorized a number recorder warrant for phone number 250-802-3442, a production order, and a tracking warrant with respect to the cellphone associated to that number.
- [4] On August 28, 2013, the police obtained a tracking warrant for several vehicles; on September 19, 2013, the police obtained a general warrant; and on September 20, 2013, the police obtained a search warrant. As a result of the general warrant and search warrant, the police went onto a residential property at 6562 Bell McKinnon Road in Duncan and recovered a backpack. Upon examination, the backpack contained approximately two kilograms of cocaine. The search warrant was utilized to seize and retain the backpack and its contents.
- [5] The warrants were obtained in the course of investigation that began with information that the accused and his father, Philip Grandison, were selling drugs and handguns in the Duncan and Nanaimo areas. Information was received from a confidential informant described in the Information to Obtain as Informant A. The informant was believed to be reliable for the reasons set out in the affidavit of Constable Jeff Lawson of the Victoria City Police, who is a member of the Combined Forces Special Enforcement Unit.

- [6] The investigation ended with the arrest of the accused on September 20, 2013. The police allege that on September 19, 2013, they observed the accused placing a backpack on the Bell McKinnon Road property which is located behind a car dealership in Duncan, British Columbia. The accused then left the property without entering the house. The property is owned by the owners of the dealership, but was believed to be rented by the accused.
- [7] The property is fairly large and there were some bushes covering portions of the property. The house was not occupied, although a light on the front porch was on.
- [8] After observing the accused with the backpack on the property, the police obtained the general warrant.
- [9] The general warrant authorized the police to enter onto the property to locate the backpack, to remove it from the property, to examine it, photograph the contents, and obtain samples from any substance found in the backpack that might assist in the investigation. The warrant provided under para. 1(4) [as read in]:

After the contents of the backpack are examined, the following may occur depending on the contents of the backpack: put the backpack ...

A word is missing there. Presumably it is "back" [as read in]:

... and the police would wait for someone to pick it up; put the backpack [again] back and leave it there after knowing what the contents are, and if no one comes to get the backpack and there is a considerable amount of a controlled substance in the bag, a search warrant is to be obtained to get the backpack.

- [10] Under authority of the general warrant, the police entered the property and searched for and recovered a backpack in some bushes. The backpack was removed from the property, searched, and the police found two separate vacuum-sealed kilos containing white powder believed to be cocaine.
- [11] The police took the backpack to a police vehicle that was on the adjacent car dealership property. They retained the backpack in the police vehicle along with its contents and did not at any time return it to the property where it was found. Instead, the police sought and obtained a search warrant under the Controlled Drugs and Substances Act.
- [12] The search warrant provided that [as read in]:

There are reasonable grounds for believing that the following items will afford evidence of the offences: one, a blue backpack and all the contents inside including the white powder inside of the backpack, and that there are reasonable grounds for believing that the said items or some part of them are on the property at 6562 Bell McKinnon Road, Duncan, British Columbia. The search warrant authorized the police to enter the property between 2 a.m. and 6 a.m. on September 20, 2013.

- [13] As the police investigation progressed, the affidavits from the warrants and orders drew on the information obtained through previous warrants and orders. The accused argues that some of the key information that was contained in the general warrant and the search warrant should be excised from the Information to Obtain on the ground that the information was obtained unlawfully.

Submissions of the Accused

- [14] The accused submits that the general warrant and the search warrants contravene ss. 7 and 8 of the Charter. The accused attacks the warrants on several grounds. He alleges that the police used the general warrant when they should have sought a search warrant as the clear object of the warrant was to find out what was in the backpack and to take possession of it.
- [15] The accused submits that once the information derived from unlawful sources is excised from the Information to Obtain, the remaining material is not sufficient to support the warrant as it contains information that amounts only to suspicions and that the contents of the Information to Obtain falls short of reasonable and probable grounds.
- [16] The accused also alleges that the Information to Obtain contains "misdemeanors of events and uncorroborated allegations that are not supported by the evidence."
- [17] One example provided is that the Information to Obtain contains an allegation that confidential information was received that the accused was "currently" selling drugs and guns. In fact, the accused argues that the word "currently" indicated that the offences were ongoing. However, the accused says no information was provided as to the date of the information or its source.
- [18] The accused raises several other allegations respecting the Information to Obtain for the general warrant that he says are not corroborated or attributed to any source.
- [19] He also challenges some evidence of the police surveillance of the accused and his father. The surveillance took place on August 13th and 14th in the Duncan area and in Vancouver where the accused's father was observed meeting with an individual and, when the accused's father was ultimately arrested, he was found in possession of two kilograms of cocaine.
- [20] The accused argues that there is no evidence of any common intention between the accused and his father and that the evidence of surveillance that included the accused had no useful value and demonstrated only perfectly innocent activity on the part of a father and his son.
- [21] The accused next says that at least some of the information related to the surveillance and information received from the tracking warrants and production orders issued on July 12, 2013, was obtained unlawfully. The accused submits the tracking and production orders were not properly obtained or executed and, as a result, any information should be excised from the general warrant Information to Obtain.

- [22] The accused says that Sergeant Isaac, one of the lead investigators in this matter, testified under oath at the preliminary inquiry of the accused's father, Philip Grandison. The accused says that Sergeant Isaac testified that the police only had suspicions that the accused was committing an offence at the time the general warrant was obtained and, therefore, the police could not have had a sufficient basis for the general warrant.
- [23] Sergeant Isaac testified on the voir dire and, while the words he used at the preliminary inquiry of Philip Grandison suggest that the police had suspicions rather than reasonable and probable grounds, his evidence at this voir dire was clear that he believed the police had sufficient reasonable and probable grounds to obtain the warrant. In any event, Sergeant Isaac was not the affiant of the Information to Obtain.
- [24] The accused also argues that the police should have obtained a search warrant rather than a general warrant. The accused says that the only purpose of the general warrant was to allow the police to surreptitiously enter the Bell McKinnon Road property to find out what was in the backpack and to take possession of it in the event it contained drugs. He submits that this was not an authorization for a special investigative technique. It was, rather, a search of the property for drugs, but without satisfying the requisite grounds to obtain a search warrant.
- [25] The accused submits that the Information to Obtain the general warrant contains allegations derived from the cellphone tracking warrant, the recorder warrant, and the production order, all of which were issued July 12, 2013, and all of which are challenged as being improperly executed or issued.
- [26] The evidence gathered from the police surveillance is also challenged because the accused alleged it, too, derives from those warrants and the production order.
- [27] The accused says that, as a result, large segments of the Information to Obtain the general warrant should be excised and submits that the remainder of the material in the Information to Obtain would not be sufficient to support the issuance of the general warrant and would not withstand analysis under the Garofoli test.

The Tracking Warrant

- [28] The tracking warrant was issued pursuant to s. 491.1(2) of the Criminal Code. That section requires the issuing justice to be satisfied that:

... there are reasonable grounds to suspect that an offence has or will be committed under this or any other Act of Parliament and that tracking the location of one or more transactions or the location or movement of a thing, including a vehicle, will assist in the investigation of the offence.

- [29] Section 492.1(3) provides that:

The warrant authorizes the peace officer or public officer, or a person acting under their direction, to install, activate, use, maintain, monitor and remove the tracking device, including covertly.

[30] The accused argues that the tracking warrant should not have been authorized for these reasons [as read in]:

- (a) the cellphone tracking warrant procedure did not include the installation of a tracking device by a named peace officer;
- (b) the cellphone tracking procedure utilized by the investigators was not described in the ITO and was a material non-disclosure that misled the justice;
- (c) the cellphone tracking procedure being used in this case could not have been authorized by s. 787.01; and,
- (d) the cellphone tracking assistance order could not have been ordered pursuant to s. 487.02. There was virtually no evidence of the assistance that was "reasonably required."

[31] In addition, the accused argues that the warrant was executed in a manner contrary to the Criminal Code because the information was obtained by employees of the service provider and not by police officers who are authorized to conduct the search.

The Number Recorder Warrant

[32] The accused makes similar arguments respecting the number recorder warrant. He submits [as read in]:

- (a) the affiant specifically requested a warrant for a named peace officer to install the recorder warrant;
- (b) the procedure for the recording of data did not include the use of a recorder warrant or the installation by a named peace officer;
- (c) the recorder procedure was not described to the justice and it was a material non-disclosure;
- (d) the recorder assistance could not have been made as there was no evidence of the procedure being adopted and there was a serious failure to describe the process which was a material non-disclosure.

[33] Again, the accused submits that the warrant was not properly executed as the information was obtained and provided by employees of the service provider.

The Production Order

- [34] Finally, the accused challenges the production order. In an earlier decision in this matter indexed at 2016 BCSC 1712, it was decided that s. 487.102 must be read as though the warrant required reasonable and probable grounds to believe that an offence was committed and that documents or data is in the possession or the control of the service provider that will afford evidence respecting the commission of the offence. That is the standard now applicable in the relevant section pursuant to amendments made by Parliament in 2014.
- [35] Thus, the accused submits that if the derived evidence in the Information to Obtain the general warrant is removed, what remains cannot support the general warrant and it must therefore be quashed. The search then becomes a warrantless search. The accused says that the evidence obtained cannot be admitted as to do so would bring the administration of justice into disrepute.

Submissions of the Crown

- [36] The Crown submits that the general warrant and the search warrant are valid and that the evidence obtained should be admitted.
- [37] The Crown notes that the accused challenges the tracking warrant only on the basis that the wording of s. 492.1(2) requires the actual installation of the device on the cellphone being tracked.
- [38] The Crown next argues that even if the tracking warrant is found to be invalid, the surveillance evidence of Philip Grandison on August 14, 2013, is not derived from what the police learned from the tracking warrant or any other of the orders produced on July 12, 2013.
- [39] The Crown says that, in any event, the evidence that was obtained by means of the tracking warrant was insignificant.

Production Order

- [40] The Crown argues that nothing in the Information to Obtain in support of the general warrant relies on information the police obtained from the use of the production order. The Crown submits that the only relevance of the information is with respect to any analysis under s. 24(2) of the Charter.
- [41] The Crown submits there is no basis to excise from the Information to Obtain in support of the general warrant any of the information derived from any of the previous orders for warrants.

General Warrant and Search Warrant

- [42] The Crown then says that the fact that the police kept the backpack in their possession while waiting for the search warrant to be issued is not fatal to the validity of the warrant.
- [43] The Crown argues that, by means of the search warrant, the police sought and obtained authority to retain the backpack and its contents. The Information to Obtain in support of the search warrant properly described what was to be seized, that is, the backpack. The Information to Obtain also says that the warrant properly identifies the location where the backpack was initially found and thus the affected privacy interest of the accused is clear. The Crown submits that the police acted properly throughout by seeking judicial authorizations for each step taken in the investigation that impacted the accused's privacy.
- [44] The Crown also submits that even if there is a residual discretion to quash the warrant where reasonable and probable grounds in the Information to Obtain are established, it should not be exercised in this case as even if there was an error by the police, it was inadvertent and made in good faith rather than an intentional error on the part of the police intended to mislead the court or to conceal material evidence.

Discussion

- [45] The accused's submissions rest on the argument that large portions of the Information to Obtain in support of the general warrant were derived from violations of the accused's security of the person and unlawful searches contrary to s. 7 and 8 of the Charter of Rights and Freedoms.
- [46] He submits that if the challenged portions of the Information to Obtain are excised, the portions that survive are insufficient to support the warrant and, therefore, it should be quashed. In the event the warrant is quashed, the accused says that the evidence recovered, specifically the backpack and its contents, must be excluded from evidence.
- [47] The Crown says that even if the cellphone tracking warrant was invalid, the evidence obtained was not significant. It says further there was no foundation for the accused's assertion that the August 14, 2013 surveillance of Philip Grandison was somehow enabled by the cellphone tracking warrant. The Crown notes that the information obtained places the accused at a different geographic area at the time. The Crown submits that the cellphone tracking warrant was properly issued and supported by information set forth in the Information to Obtain and thus is valid.
- [48] Section 492.1 of the Criminal Code provides that a tracking warrant may be obtained when a justice "is satisfied by information on oath that there are reasonable grounds to suspect that an offence has been or will be committed and that information relevant to the commission of the offence can be obtained through the use of a tracking device."

[49] The reasonable suspicion standard was discussed in *R. v. Chehil*, 2013 SCC 49, at paras. 26 and 27. The court said:

[26] Reasonable suspicion derives its rigour from the requirement that it be based on objectively discernible facts, which can then be subjected to independent judicial scrutiny. This scrutiny is exacting, and must account for the totality of the circumstances. In *Kang-Brown*, [Justice] Binnie . . . provided the following definition of reasonable suspicion, at para. 75:

The "reasonable suspicion" standard is not a new juridical standard called into existence for the purposes of this case. "Suspicion" is an expectation that the targeted individual is possibly engaged in some criminal activity. A "reasonable" suspicion means something more than a mere suspicion and something less than a belief based upon reasonable and probable grounds.

[27] Thus, while reasonable grounds to suspect and reasonable and probable grounds to believe are similar in that they both must be grounded in objective facts, reasonable suspicion is a lower standard, as it engages the reasonable possibility, rather than probability, of crime. As a result, when applying the reasonable suspicion standard, reviewing judges must be cautious not to conflate it with the more demanding reasonable and probable grounds standard.

[50] The Information to Obtain in support of the general warrant was sworn by Constable Gaboury-Wigley. The Information to Obtain was extensive and detailed the facts of the investigation conducted by the police. It described the information obtained from a confidential informant, the surveillance information, and how the information the police hoped to obtain might further assist them in their investigation.

[51] The warrant authorized the police to monitor or have monitored the location associated to telephone number 250-802-3442 associated to the accused.

[52] The warrant also authorizes the police to track the users of the telephone by monitoring locations as monitored by Telus Communications, the service provider for the telephone.

[53] By the terms of the warrant, Telus was ordered to provide all necessary assistance including information and facilities needed. Telus was further ordered to generate and send signals to the cellular phone to determine its location.

[54] The accused argues that the section clearly contemplates the "installation" of a device on or in the telephone, whereas the tracking in this case relied on technology that was preinstalled on the phone, not by the police, but by the manufacturer of the telephone.

[55] The Crown says the actual installation of a device in or on the telephone is not required. The Crown referred to *R. v. Edwards*, 2014 ONSC 6323, where the court referred without comment to what appear to be similar types of monitoring of what the court referred to as "pre-existing devices." However, there is no clear statement accepting or rejecting the methodology used.

- [56] The Crown also referred to the approach taken by Justice Abella in *R. v. TELUS*, 2013 SCC 16, at para. 77. The court there held that the substance of the investigative technique and not its formal trappings or technology was to be the focus of attention.
- [57] The Crown says that reliance on existing technology meets the requirements of the section in that the procedural safeguards of the accused's privacy interests were preserved. The Crown argues that should be the primary concern when interpreting s. 492.1, not the technical means by which the search is carried out.
- [58] I agree with the Crown on this issue. The section as drafted appears to contemplate now outdated technology perhaps related to a tracking device placed on a vehicle. However, the section now clearly contemplates the use of a tracking device that is part of the pre-existing technology of the cellular phone and does not require the police to in some way acquire possession of the telephone and actually install some piece of technical hardware upon it.
- [59] The section should be given a purposive interpretation focussed on the privacy interest to be protected and not on the technical means utilized by the police or the service provider to carry out the terms of the warrant.
- [60] I also find that the authorizing judge, an experienced trial judge, could not have been misled as to the method, given the clear terms of the warrant that make no suggestion of the actual installation of a device to the telephone. I find that the definition of a tracking device under s. 492.2(4) is sufficiently broad to include pre-installed technology that can be used by a service provider to track the location of the telephone.
- [61] Finally, I am satisfied that the contents of the Information to Obtain clearly satisfy the standard of a reasonable suspicion contained in s. 492.1. The information from the tracking warrant, limited as it is, was lawfully obtained pursuant to the tracking warrant.

The Number Recorder

- [62] With respect to the number recorder warrant for phone number 250-802-3442, the accused submits that the warrant has similar flaws that he argued were fatal to the cellphone tracking warrant.
- [63] The warrant was authorized July 12, 2013, and authorized a named police officer or any other peace officer acting in good faith to "install, maintain, monitor or have monitored, and remove a number recorder."
- [64] The accused argues that the justice was misled because the technical procedure was not fully described in the Information to Obtain and thus there was a material non-disclosure.
- [65] For the reasons outlined above respecting the technical procedures regarding the cellphone tracking warrant, I find that the number recorder warrant was valid and amply supported by the Information to Obtain. The information obtained by the number recorder warrant was, therefore, obtained lawfully.

The Production Order

- [66] Next, the accused challenges the validity of the production order that was also issued July 12th, 2013. The accused first correctly argues that the production order had to meet the standard of reasonable and probable grounds to believe as noted in my earlier decision in this matter indexed at 2016 BCSC 1712 at para. 27.
- [67] The accused argues that the Information to Obtain alleges an offence date of July 1, 2013, at Nanaimo, British Columbia. He says that there is no evidence to suggest that any offence had taken place at that date or at Nanaimo, British Columbia.
- [68] The accused said that the production order provided the police with evidence of phone calls between the accused and his father on August 13th and 14th. He says that those phone calls were what led the police to conduct surveillance on August 13 and 14, 2013, that led to the arrest of Philip Grandison and the seizure of two kilograms of cocaine.
- [69] The production order was one of the three warrants issued that day on the strength of a single Information to Obtain sworn by Constable Jeff Lawson. In para. 20 of the Information to Obtain, Constable Lawson stated that the confidential informant referred to as Source A provided information on July 4, 2013, that the accused was supplying heroin to "a lot of people" in the Nanaimo area.
- [70] In my view, that information based upon a confidential source the police believed to be credible is capable of supporting the allegation of offences being committed on July 1, 2013, at Nanaimo.
- [71] The accused says that the information from the production order led the police to conduct surveillance. The Crown denies that. The Crown says that on the evidence of Sergeant Isaac, who was the lead officer on the surveillance on those days, the surveillance occurred irregularly and not every day.
- [72] Sergeant Isaac said in his evidence on the voir dire that the decision to conduct surveillance was a team decision. The decision relied upon all available information known to the police and the availability of members to actually conduct surveillance on any given day. While the telephone calls were a factor, they were not the only factor. The Crown points out that the content of those calls was unknown and the only triggering factor that drew the police attention was that the calls occurred at an unusual time, being late in the evening, something that was untypical of the accused's telephone pattern.
- [73] I am satisfied there was sufficient evidence in the Information to Obtain sworn by Constable Lawson that justified the issuance of the production order upon the requisite reasonable and probable grounds standard. I find any information revealed to the police through the production order was lawfully obtained and therefore admissible.

The Vehicle Tracking Warrant

- [74] The accused next challenges a vehicle tracking warrant issued August the 28th, 2013, for nine automobiles and trucks which were either owned by the accused or someone he knew or to which he had access to. The accused's girlfriend owned at least one of the vehicles and that was the only vehicle that was actually tracked with a device installed by the police. The vehicle was described as a red Cavalier that the accused typically drove. The information that this was a vehicle typically used by the accused was contained in the initial information from the confidential informant.
- [75] Once again, the requisite standard for issuance of the vehicle tracking warrant is that the police have a reasonable suspicion that an offence has been or will be committed and that relevant information can be obtained by means of a vehicle tracking warrant.
- [76] The vehicle tracking warrant was clearly instrumental in leading the police to the property on Bell McKinnon Road where the search ultimately took place.

Should some paragraphs of the General Warrant ITO be excised?

- [77] The Crown submits, and I agree, that there is ample evidence in the Information to Obtain to justify the issue of the general warrant. The police had information the accused was using the vehicle upon which the device was affixed. The information was, to a large extent, based on the information of the confidential informant. Such information from an informant believed to be reliable may be sufficient in itself; see *R. v. Edwards* above at para. 27.
- [78] The accused argues that the surveillance of the accused's father should be excised from the Information to Obtain the general warrant as there is nothing to connect the accused to his father's activity on August 14, 2013. The surveillance revealed that the accused spoke to his father, or at least someone used the telephone late in the evening of August 13th, and that the accused drove his father to a car rental agency on the morning of August 14th.
- [79] The accused argues that those are normal activities that any family might do. I agree, but the information should not be removed simply for that reason. The observations of the police constituted information that the authorizing judge was entitled to consider along with all of the other contents in the Information to Obtain. Thus, I do not consider it necessary to excise that material from the Information to Obtain.
- [80] In this case, there was other evidence that while not compelling on its own, provided a sufficient basis to satisfy the reasonable suspicion threshold. I find that the evidence from the vehicle tracking warrant was lawfully obtained and is admissible.
- [81] Given my findings, I am not prepared to excise any of the paragraphs from the Information to Obtain in support of the general warrant.

Review of the Authorization

- [82] I find that all of the information that found its way into the Information to Obtain was obtained by lawful authorizations issued by the justices to assist in the investigation. With respect to the review of the authorization, the law is clear as to the duties of the reviewing judge with respect to warrants and orders authorizing invasions of privacy. The appropriate standard of review was stated in *R. v. Araujo*, 2000 SCC 65, at para. 51.
- [83] The reviewing court should not set the authorization aside unless, on the whole of the material submitted, there is no basis for the issuance of the order; see *R. v. Garofoli*, [1990] 2 S.C.R. 1421, at para. 56.
- [84] The material must be reviewed as a whole and the court should not expect a standard of perfection in the drafting of the Information to Obtain; see *R. v. Montgomery*, 2016 BCCA 379, at para. 117.
- [85] In reviewing the Information to Obtain in support of the general warrant and considering the totality of the material, I find that the facts were and are clearly set out and could be readily assessed by the issuing judge. I am satisfied that the Information to Obtain in support of a general warrant is sufficient to justify the issuing of the general warrant. In the result, the evidence obtained pursuant to the general warrant is admissible.
- [86] As noted, once the police discovered the cocaine in the backpack, Constable Gaboury-Wigley was instructed to seek a search warrant under the Controlled Drugs and Substances Act. She did so and prepared an extensive Information to Obtain a Search Warrant which built on the previous Informations to Obtain and the information gathered throughout the investigation. Added to that was the knowledge of what was found in the backpack when it was recovered through the authority of the general warrant. She also advised that accused had been arrested.
- [87] She then stated that she had "... reasonable and probable grounds to believe that there is cocaine in the backpack at 6562 Bell McKinnon Road, Duncan, B.C." She sought and obtained a search warrant for that property and requested that the warrant be authorized to be executed at night so as to prevent loss or destruction of the evidence.
- [88] A telewarrant authorizing the search was issued just after 2 a.m. on September 20, 2013. The police then went onto the property, not to conduct a search but to simply affix a copy of the warrant to the door of the house that they knew or at least believed to be empty and unused.
- [89] At the time the warrant was issued, the backpack was not on the property. It was in the possession of the police, either in a police car or on the adjacent property or en route to the RCMP detachment in Duncan. That was information known to Constable Gaboury-Wigley. She at least knew that the backpack and its contents had been removed from the property and were being held by the police. She agreed that she could have confirmed where the drugs were at the time the warrant was actually requested and issued.

- [90] To the extent that the Information to Obtain misstated where the drugs were, the issuing justice was clearly misled. However, had the justice been told that the backpack and cocaine had been removed from the property pursuant to a general warrant and were in the hands of the police and that a warrant was now sought to allow retention of the contents and the cocaine, there is little doubt that the seizure would still have been authorized.
- [91] Thus, had the Information to Obtain been amplified with the correct information, in my view, there would be no change in the issuing justice's decision to authorize the warrant to seize the cocaine and the backpack.
- [92] The Crown says that the police were authorized to remove the backpack from the Bell McKinnon Road property pursuant to the general warrant and, once they found the drugs, they had no obligation to put it back. Assuming without deciding that a search warrant was required to retain the cocaine, the police should simply have set out clearly that they had entered the property pursuant to the authority of the general warrant, stated what they found, and where it was being held. The authority to seize and retain the items could then have been sought and, as I have found, would clearly have been authorized.
- [93] I am satisfied that the police acted in good faith and without any intent to mislead or hide information from the justice. The police at all times through the investigation sought and obtained judicial authorizations at every step. I find that the misstatements in the Information to Obtain a Search Warrant arose as a result of confusion on the part of Constable Gaboury-Wigley as to what exactly was required to authorize the police to hang onto the drugs that they had found on the property. Therefore, I find that the Information to Obtain as amplified by the evidence on the voir dire is sufficient to support the issuance of the warrant to search and I find it was lawfully issued and executed.
- [94] If I am wrong in that conclusion, I would find that the warrantless search was conducted in good faith by the officers and would not exclude the evidence recovered pursuant to s. 24(2) of the Charter.

Search Warrant vs. General Warrant

- [95] The accused finally argues that the police should have sought a search warrant in the first instance rather than a general warrant. The submission is that the police misused the procedure given that they simply targeted the backpack and wanted to search it. In those circumstances, the accused says obtaining a search warrant on the requisite grounds was the appropriate route to follow. The accused argues that the police sought to avoid the proper process by adopting a process they perceived to be easier. I disagree.

[96] In my view, the circumstances and material in this case justified the use of a general warrant. While a search warrant would clearly have authorized a search of the property and allowed the police to seize the backpack, had the backpack been empty, the fact of the search once known would have ended the investigation. The police were, in my view, entitled to follow an investigative technique that they believed to be appropriate to the continuation of the investigation and, therefore, to follow the course that they did.

Does the Court have residual discretion to quash the General Warrant?

[97] The Crown further submits that if the Information to Obtain pursuant to the general warrant satisfies the Garofoli test, the court has no residual jurisdiction to quash the warrant. It says that even if such discretion exists, it should be used sparingly and argues that it is only an extraordinary remedy that should be used only in circumstances where the conduct is so egregious that amounts to a deliberate subversion of the process of a prior judicial authorization.

[98] The Crown referred to *R. v. Bisson* (1994), 94 C.C.C. (3d) 94, a decision of the Supreme Court of Canada. In that case, the police included information in the Information to Obtain an authorization that was provided by an individual who later recanted the information. The fact of the recantation was not included in the affidavit. The trial judge held that by withholding that information the police misled the authorizing judge and quashed the warrant. The Court of Appeal reversed. The court held that even intentional or fraudulent errors in the Information are only factors to be considered by the reviewing judge and do not lead to automatic vitiation of the authorization; see para. 2.

[99] The Crown also referred to *R. v. Montgomery*, 2016 BCCA 379, at para. 100, where the court in referring to the residual discretion issue stated:

This concept is sometimes referred to as the "residual discretion" to hold invalid an otherwise valid authorization (or warrant) when the affiant has deliberately given false material statements or omitted material facts. It is sufficient for the purposes of the present appeal to note that this Court has yet to decide whether such discretion exists [citations omitted] ...

[100] The Crown argues that the issues raised by the accused respecting the authorizations issued prior to the general warrant do not rise to the level of intentional misstatements designed to violate the accused's privacy. As such, the material obtained from the authorization forms a legitimate part of the Information to Obtain the general warrant. As I have found, the previous authorizations from which information was obtained and parts of it used to obtain the general warrant, in my view, did not violate the accused's s. 7 and 8 Charter rights, but I agree that any errors that did occur were unintentional.

[101] However, there may be cases where the conduct of the police is such that it constitutes serious misconduct and an abuse of the court's process, but even so, the courts have been reluctant to quash a warrant that satisfies the test in *Garofoli*.

[102] In this case, some of the material challenged was obtained through the prior authorizations, but there is nothing to show that the police acted through improper motive or with the intent to mislead the authorizing justice. There is nothing in the nature of intentional non-disclosure or fraud. In my view, there is nothing to justify the excising of material from the Information to Obtain the general warrant. Even if the court does have jurisdiction to quash the general warrant by an exercise of residual discretion, I find there is nothing in this case that would justify doing so.

[103] Therefore, the evidence seized by the police is admissible. The application to establish a breach of the accused's ss. 7 and 8 Charter rights is therefore dismissed.

"J. K. Bracken, J."

The Honourable Mr. Justice Bracken

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Prepared on 26 October 2026 · Esheria