Date: 19981216 Docket: C.A.C. 144218

NOVA SCOTIA COURT OF APPEAL

Cite as: R.v. Morris, 1998 NSCA 229

Pugsley, Flinn and Cromwell, JJ.A.

BETWEEN:

WAYNE ROGER MORRIS Appellant	Darren R. MacLeod for the Appellant
- and -	
HER MAJESTY THE QUEEN Respondent	Marian V.R. Fortune-Stone for the Respondent
	Appeal Heard: September 10, 1998
	Judgment Delivered: December 16, 1998

THE COURT: Appeal dismissed per reasons for judgment of Cromwell, J.A.; Pugsley and Flinn, JJ.A. concurring.

CROMWELL, J.A.:

I. Introduction:

The main question on this appeal is whether the appellant, Mr. Morris, was subjected to an unreasonable search and seizure.

II. Facts and Ruling by the Trial Judge:

a. Overview:

In December of 1995, the police searched the appellant's residence in Meadowvale, Annapolis County. They found and seized a 70 gram block of cannabis resin, along with a set of scales, a hunting knife and nearly $2000 in cash. Mr. Morris was charged and tried before Haliburton, J. who found him guilty of possession of a narcotic for the purpose of trafficking contrary to s. 4(2) of the **Narcotic Control Act**, R.S.C. 1985, c. N-1.

The police had obtained a warrant for the search. At trial, Mr. Morris alleged that it had been obtained improperly and that, as a result, the search violated his section 8 **Charter** right to be free of unreasonable searches. He asked the trial judge to exclude the evidence obtained as a result of the unreasonable search. After hearing evidence and argument, the trial judge ruled that the search was not unreasonable and that he would not have excluded the evidence even if it had been.

Mr. Morris now appeals, arguing that the trial judge should have decided

that the search violated his rights and that the evidence gathered during the search ought to have been excluded.

b. Obtaining the Search Warrant:

The focus of this case is whether the warrant authorizing the search of Mr. Morris' residence was improperly obtained. The trial judge heard extensive evidence on this aspect and it is essential to review it and the trial judge's findings in some detail.

The Information to obtain the warrant was prepared by Corporal MacPhee. He attended before Justice of the Peace Paula Montgomery who issued the warrant authorizing the search of Mr Morris' residence. The Information to obtain the search warrant indicated that Corporal MacPhee had reasonable grounds to believe that cannabis marihuana, cannabis resin, scales and other paraphernalia were in Mr Morris' dwelling house, grounds, outbuildings and appurtenances. The grounds of belief were set out as follows:

> 1) I have personal knowledge of the matters hereinafter deposed to except where same are stated to be based upon information and belief and where so stated I do verily believe the same to be true.
>
> 2) THAT I was advised on the 27th, day of December 1995 by Constable Charles BABSTOCK of New Minas Detachment, whom I verily believe, that Wayne Roger MORRIS was trafficking in Cannabis Marihuana and Cannabis Resin.
>
> 3) THAT on the 27th, day of December 1995, I was advised by Constable BABSTOCK that he had received confidential information from a reliable source that Wayne Roger MORRIS in the past 48 hours had one to two pounds of Cannabis Marihuana and Cannabis Resin at his residence, and that it was kept in a back room of his trailer.

4) THAT on the 27th, day of December 1995, I was advised by Constable BABSTOCK that he has used this confidential source for the past six years and the source's information has resulted in positive searches on the Narcotic Control Act and Food and Drug Act as well as the Criminal Code. These searches have resulted in at least 25 persons being charged.

5) THAT on the 27th, day of December 1995 I checked the criminal record of Wayne Roger MORRIS and this revealed MORRIS has a record Possession of a Narcotic for the purpose of trafficking dated 20th., day of JUNE 1993 at Kentville, County of Kings, Province of Nova Scotia. (AB p. 109)

At the hearing of the appellant's **Charter** application before the trial judge, the appellant called Corporal MacPhee as a witness. Thereafter, and apparently without objection or discussion, the Crown called Constables Babstock and Hewitt. The evidence dealt with the steps leading to Corporal MacPhee's attendance before the Justice of the Peace and what happened while he was before the Justice of the Peace. It also included information which had not been placed before the justice. In the latter category, the trial judge heard evidence, for example, that Corporal MacPhee checked the RCMP Police Information Retrieval System and confirmed a Wayne Roger Morris with an address at 32 Richardson Crescent and, as well, that Corp MacPhee knew Mr Morris resided at that address and that he matched the description of "Wayne" provided by the source.

It became apparent at the hearing before the trial judge that there were errors in the Sworn Information to obtain the warrant. These errors are the basis of the appellant's challenge to the warrant and the search. I will briefly describe them.

Corporal MacPhee swore in the Information that he was advised of certain

facts by Constable Charles Babstock. This was not so. In fact, what had happened was this. On December 27, Corporal MacPhee received a telephone call from Constable Hewitt, a member of the RCMP New Minas Drug Section asking for Corporal MacPhee's help in obtaining a warrant to search Mr Morris' residence. Constable Hewitt indicated that Constable Babstock had received information from an informant. Constable Hewitt told Corporal MacPhee that the information received by Constable Babstock was that a person by the name of Wayne Roger Morris was trafficking in narcotics from his residence. Corporal Hewitt advised that he would be faxing Constable Babstock's grounds to Corporal MacPhee.

Later that day, he did so. The fax from Constable Hewitt to Corporal MacPhee is in the record. It sets out that Constable Babstock received certain information. While Constable Babstock was the ultimate police source of this information, Corporal MacPhee never spoke to him about it. It was therefore wrong for him to have stated in his Information to obtain the warrant that "he was advised ... by Constable Babstock ... whom I verily believe ...". Corporal MacPhee was not "advised" by Constable Babstock.

Corporal MacPhee drew to the attention of the Justice of the Peace that his information had, in fact, come from two members of the New Minas Detachment. The Justice of the Peace nonetheless took Corporal MacPhee's oath swearing the contents of the Information to be true and correct to the best of his knowledge. In other words, the Justice of the Peace took Corporal MacPhee's oath <u>knowing</u> that

the Information was not accurate. This also was wrong.

Corporal MacPhee swore, in the Information to obtain, that information had been received from a reliable source that "...Wayne Roger Morris in the past 48 hours had one to two pounds of cannabis ...". This was not correct. The fax to Corporal MacPhee indicated that the source had <u>not</u> identified Mr. Morris by his full name. The source indicated to Constable Babstock that a person named "Wayne" (last name unknown) was selling quantities of marihuana from a trailer in a trailer court in Greenwood. The source indicated that the residence was at 32 Richardson Drive in the trailer court. The source also provided a brief physical description of "Wayne", and said that he had a tall, thin girlfriend and one child.

On the evidence before him, the trial judge correctly found that there were inaccuracies in the Information to obtain the warrant. Specifically, he found that the references to Constable Babstock and the reference to the surname and middle name of the accused were not correct. He further found that these inaccuracies were misleading and that Corporal MacPhee knew they were misleading. The learned judge concluded, however, that Corporal MacPhee acted in "utmost good faith", that Corporal MacPhee believed what he was doing was correct and that he was following the required procedure. The trial judge accepted that Corporal MacPhee had made a choice that it was most appropriate to provide the ultimate source which was known to him, that is, Constable Babstock, rather than providing the intermediate source, Constable Hewitt.

The learned judge thought it important that there was no deliberate attempt to mislead the Justice of the Peace. Corporal MacPhee thought he was acting properly by disclosing the ultimate source rather than the person who had advised him. The trial judge found that the Information to obtain the warrant provided "...a complete and adequate basis for the issuing of a Search Warrant" because it provided strong evidence that an offence was being committed, there was a reliable source of information and the source's information was corroborated by police investigation. On this last point, the trial judge stated that "... the police were able to corroborate the information independently by verifying that the location given for this person identified only by his first name was the address of the accused and from their own independent knowledge from previous ... occasions, they were able to independently confirm that information."

Concerning the misstatements in the Information to obtain, the trial judge found that they were "... not of a material nature... They do not go to the substance of the Information. The information, as communicated by Corporal MacPhee, was innocent in that he made an interpretation ... of the best form in which to put that information."

The trial judge also considered s. 24(2) of the **Charter**, holding that if, "on a technical view the warrant was unlawful", the evidence should not be excluded. In his view, the evidence was real (as opposed to testimonial), the breach technical and committed in good faith. The admission of the evidence would not, in his

opinion, result in an unfair trial and the exclusion of the evidence would more likely bring the administration of justice into disrepute than would its admission.

III. Issues and Submissions of the Parties:

a. Factual Basis for Review of the Warrant

There is no dispute that the police actually had reasonable and probable grounds when they obtained the warrant. There is also no dispute that the Information to obtain the warrant contained errors and that the full picture of what the police knew was not placed before the Justice of the Peace. The question is whether the errors and absence of material make the warrant invalid.

This question gives rise to two related issues about the proper basis for the review of the warrant. The first is whether inaccurate or misleading material must be excised from the Information to obtain the warrant and its adequacy assessed on what remains. I will call this the excision issue. The second is whether the reviewing court is (in this case the trial judge) entitled to take into account material adduced on the review but which was not placed before the issuing justice. I will call this the amplification issue.

These two issues are related because, in this case, the Information to obtain is adequate on its face. If what is contained in it were accurate, the challenge to the warrant would fail. However, the accused adduced evidence before the trial

judge showing that not all of the statements were accurate. But that is not all it showed; the evidence adduced on behalf of Mr. Morris, as well as the additional evidence adduced by the Crown, showed that the police in fact had ample grounds to obtain the warrant but that their grounds were not properly placed before the justice. This gives rise to the two issues that I have described, namely what is to be done with the information that is shown to be incorrect (the excision issue) and with the new evidence showing what the true situation was (the amplification issue)? Some of the same evidence speaks to both issues in the sense that the evidence showing the errors also discloses the true situation.

On the excision issue, the appellant's position is that the paragraphs in the Information to obtain the warrant which contain incorrect material should be deleted and the sufficiency of the Information assessed by examining the remaining material. On the amplification issue, the appellant says that evidence should not be received after the fact to bolster the paragraphs that are struck out.

The Crown's position is that the paragraphs containing errors should not be struck out. That course should be taken only with respect to evidence obtained as a result of a **Charter** breach or statements shown to have been included with the intent to deceive the justice. The errors here, says the Crown, were not of that nature. In addition, the evidence placed before the trial judge was properly considered by him because, absent a **Charter** breach or deliberate deception, the

record may be amplified on review and the judge may consider whether, on the basis of all the material, the warrant could properly issue.

b. Exclusion of the evidence:

If the search is found to be unreasonable, the appellant submits the evidence obtained as a result of the search should be excluded. The police, argues the appellant, did not take the process to obtain the warrant seriously and the fact that they could easily have obtained a warrant had they acted properly makes the breach more, rather than less, serious.

The Crown's position is that the evidence should not be excluded. According to the Crown, any breach was nothing more that a failure to properly articulate accurately the information known to the police.

IV. Analysis

a. General Principles

(i) The right to be free of unreasonable searches:

Section 8 of the **Canadian Charter of Rights and Freedoms** provides that "Everyone has the right to be secure against unreasonable search or seizure." The purpose of this section is to protect individuals from unjustified state intrusions into their privacy : **Hunter v. Southam**, [1984] 2 S.C.R. 145.

Police searches bring into play two fundamental values in our society: the value of privacy and the value of effective crime detection. The law balances these at times competing values through rules specifying the circumstances in which a search will be reasonable. In short, a search will be reasonable if it is authorized by law, if the law itself is reasonable and if the search is carried out is a reasonable manner. **R. v. Collins**, [1987] 1 S.C.R. 265 at p. 278; (1987), 33 C.C.C. (3d) 1 at 14.

In this case, there is no challenge to the statute authorizing the search. Section 487 of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46, gave the Justice of the Peace the authority to issue the search warrant. Neither is there a challenge to the manner in which the search was carried out. The argument here is that the search was not lawful because the Justice of the Peace <u>should</u> not have issued the warrant. An unlawful search is presumptively unreasonable: **Collins, supra**.

(ii) Search Warrants:

In the case of search warrants, like this one, issued under s. 487 of the **Criminal Code**, the balance between the values of privacy and effective crime detection is achieved by establishing two main requirements. One relates to the <u>justification</u> for the search, the other to the <u>process</u> of demonstrating the justification.

As to the requirement of justification, both s. 487 of the **Code** (in the circumstances of this case) and s. 8 of the **Charter** require that the police have reasonable grounds to believe that an offence has been committed and that there is evidence of it to be found in the place of search. Section 487 provides:

> 487. (1) A justice who is satisfied by information on oath in Form 1 <u>that there are reasonable grounds to believe that there is in a building, receptacle or place</u>
>
> (a) anything on or in respect of which any offence against this Act or any other Act of Parliament has been or is suspected to have been committed,
> (b) <u>anything that there are reasonable grounds to believe will afford evidence with respect to the commission of an offence</u>, or will reveal the whereabouts of a person who is believed to have committed an offence, against this Act or any other Act of Parliament, or
> (c) anything that there are reasonable grounds to believe is intended to be used for the purpose of committing any offence against the person for which a person may be arrested without warrant,
> (c.1) any offence-related property,
>
> may at any time issue a warrant under his hand authorizing a person named therein or a peace officer
>
> (d) to search the building, receptacle or place for any such thing and to seize it, and
> (e) subject to any other Act of Parliament, to, as soon as practicable, bring the thing seized before, or make a report in respect thereof to, the justice or some other justice for the same territorial division in accordance with section 489.1.
>
> (emphasis added)

The existence of reasonable grounds is therefore critical to the balancing of the values of privacy and effective crime detection. To repeat often used words:

> The state's interest in detecting and preventing crime begins to prevail over the individual's interest in being left alone <u>at the point where credibly-based probability replaces suspicion</u>. (**Hunter** at p. 167). (emphasis added)

Without attempting to be exhaustive, it might be helpful to summarize, briefly, the key elements of what must be shown to establish this "credibly based

probability”:

(i) The Information to obtain the warrant must set out sworn evidence sufficient to establish reasonable grounds for believing that an offence has been committed, that the things to be searched for will afford evidence and that the things in question will be found at a specified place: (**R. v. Sanchez** (1994), 93 C.C.C. (3d) 357 (Ont. Ct. Gen. Div.) at 365)

(ii) The Information to obtain as a whole must be considered and peace officers, who generally will prepare these documents without legal assistance, should not be held to the “specificity and legal precision expected of pleadings at the trial stage.” (**Sanchez, supra**, at 364)

(iii) The affiant’s reasonable belief does not have to be based on personal knowledge, but the Information to obtain must, in the totality of circumstances, disclose a substantial basis for the existence of the affiant’s belief: **R. v. Yorke** (1992), 115 N.S.R. (2d) 426 (C.A.); aff’d [1993] 3 S.C.R. 647.

(iv) Where the affiant relies on information obtained from a police informer, the reliability of the information must be apparent and is to be assessed in light of the totality of the circumstances. The relevant principles were stated by Sopinka, J. in **R. v. Garofoli,** [1990] 2 S.C.R. 1421 at pp. 1456-1457:

> (i) Hearsay statements of an informant can provide reasonable and probable grounds to justify a search. However, evidence of a tip from an informer, by itself, is insufficient to establish reasonable and probable grounds.
>
> (ii) The reliability of the tip is to be assessed by recourse to "the totality of the circumstances". There is no formulaic test as to what this entails. Rather, the court must look to a variety of factors including:
>
> (a) the degree of detail of the "tip";
> (b) the informer's source of knowledge;
> (c) indicia of the informer's reliability such as past performance or confirmation from other investigative sources.
>
> (iii) The results of the search cannot, *ex post facto*, provide evidence of reliability of the information.

The fundamental point is that these specific propositions define the basic justification for the search: the existence of "credibly-based" probability that an offence has been committed and that there is evidence of it to be found in the place of search.

The second requirement for a reasonable search, in cases like this one, is that the justification for the search must be <u>demonstrated</u>, <u>before the search</u>, to an independent and impartial judicial officer, in this case, the Justice of the Peace. This is known as the requirement of "prior authorization." Its purpose is obvious and important. If the right to be free of unreasonable search and seizure is to have meaning, unreasonable searches must be <u>prevented</u>, not simply condemned after the fact. Thus, the process of prior authorization is fundamentally important for the <u>prevention</u> of unreasonable searches. It is no mere formality. As Sopinka, J. said in **R. v. Feeney**, [1997] 2 S.C.R. 13 at 47:

> The purpose of the Charter is to prevent unreasonable intrusions on privacy, not to sort them out from reasonable intrusions on an ex post facto analysis.

The prior authorization process, however, is quite fragile. When the police attend before a Justice of the Peace, no one, for obvious reasons, is there as an advocate of the interests of the target of the search. The justice of the peace will usually not be a lawyer or a judge. The circumstances under which the warrant is sought may be urgent and the process, of necessity, quite informal. This simply demonstrates that the process depends on two things: the honesty, good faith and diligence of the police when they gather and present their grounds for consideration and the independence and caution of the Justice of the Peace deciding whether to authorize the proposed search.

The nature of the process demands candour on the part of the police. They are seeking to justify a significant intrusion into an individual's privacy. This is especially so when it is proposed to search a dwelling house which has long been recognized as the individual's most private place. The requirement of candour is not difficult to understand; there is nothing technical about it. The person providing the information to the justice must simply ask him or herself the following questions: "Have I got this right? Have I correctly set out what I've done, what I've seen , what I've been told, in a manner that does not give a false impression?" : see **R. v. Dellapenna** (1995), 62 B.C.A.C. 33 (B.C.C.A.) per Southin J.A. at para 37.

In reviewing police conduct during the prior authorization process, the court's attention cannot focus solely on the particular search under consideration. It is tempting to do so, especially where, as here, police suspicions proved to be well founded. However, the purpose of the prior authorization requirement must be kept in mind. As noted, that purpose is to prevent unreasonable searches, not to condemn them after the fact. If the prior authorization process is not vigorously upheld by the courts, it will lose its meaning and effectiveness. That process is in place to protect everyone from unreasonable intrusions by the state. In considering this, or any other s. 8 case, the court must not only protect the rights of this individual, but also protect the prior authorization process which helps assure that the rights of all individuals are respected before, not after, the fact.

In summary, the requirement of reasonable grounds to believe sets the balance between individual privacy and effective law enforcement. The requirement of prior authorization prevents searches where it is not demonstrated to an independent judicial officer that such grounds exist.

(iii) The standard of review of the warrant:

The role of the trial judge in reviewing the issuance of the warrant was set out by the Supreme Court of Canada in **R. v. Garofoli, supra** at p. 1452 and applied in **R. v. Grant**, [1993] 3 S.C.R. 223 at p. 251, 84 C.C.C. (3d) 173, 24 C.R. (4th) 1 and by this Court in **R v. Veinot** (1995), 144 N.S.R. (2d) 388 (C.A.) at p. 391.

As Sopinka, J. put it in **Garofoli**, **supra** at p. 251:

> The reviewing judge does not substitute his or her view for that of the authorizing judge [or in this case Justice of the Peace] If, based on the record which was before the authorizing judge as amplified on the review, the reviewing judge concludes that the authorizing judge could have granted the authorization, then he or she should not interfere.

This appeal, as noted, gives rise to more specific questions about the nature of the role of the reviewing judge which I will address in turn.

c. Does inaccurate and misleading information invalidate the warrant?

The appellant submits that the search was unreasonable because the warrant was obtained by deliberately misleading information. Several cases are cited: **R. v. Donaldson** (1990), 58 C.C.C. (3d) 294 (B.C.C.A.); **R. v. Sismey** (1990), 55 C.C.C. (3d) 281 (B.C.C.A.); **R. v. Dellapenna , supra**; **R. v. Innocente** (1992), 113 N.S.R. (2d) 256 (C.A.); **R. v. Fletcher** (1994), 140 N.S.R. (2d) 254 (S.C.). Many other relevant authorities are collected in **Ewaschuk, Criminal Pleadings and Practice in Canada** (2d) at 3:1410 and 3:1420. **Sismey, supra**, states the rule that if the justice of the peace is "intentionally misled" the warrant cannot stand. In **Dellapenna**, the Court found that the information leading to the warrant was "... so inaccurate and misleading that the search conducted under it was unreasonable" at para 48.

It is helpful to place the appellant's submission in the context of the two

requirements for search warrants mentioned earlier: reasonable grounds of belief and prior authorization. At the level of principle, the appellant's submission amounts to this: in order to preserve the effectiveness of the prior authorization process, the warrant must be invalidated if that process has been undermined by placing inaccurate and misleading information before the Justice of the Peace. While there are certainly cases which support the appellant's argument, I am of the view the Supreme Court of Canada has now clearly ruled against it. The Court, in my opinion, has decided that presenting false or misleading material before the Justice of the Peace does not automatically vitiate the warrant. The primary focus on review is on whether the issuing justice could properly have concluded that reasonable and probable cause existed. The prior authorization process is protected in other, less inflexible ways than automatic vitiation of the warrant where it is shown that inaccurate and misleading information was presented to obtain it.

This approach was adopted in the wiretap cases, **Garofoli, supra,** and **R. v. Bisson**, [1994] 3 S.C.R. 1097; (1995), 94 C.C.C. (3d) 94. For example, in **Bisson** at p. 1098, the Court stated:

> ...errors in the information presented to the authorizing judge, whether advertent or even fraudulent, are only factors to be considered in deciding to set aside the authorization and do not by themselves lead to automatic vitiation of the ... authorization. (emphasis added)

The same principle has been adopted by the Court in search warrant cases: **R. v. Grant, supra** and **R. v .Plant**, [1993] 3 S.C.R. 28. These cases stress that errors, even fraudulent errors, do not automatically invalidate the warrant.

This does not mean that errors, particularly deliberate ones, are irrelevant in the review process. While not leading to automatic vitiation of the warrant, there remains the need to protect the prior authorization process. The cases just referred to do not foreclose a reviewing judge, in appropriate circumstances, from concluding on the totality of the circumstances that the conduct of the police in seeking prior authorization was so subversive of that process that the resulting warrant must be set aside to protect the process and the preventive function it serves. As I will discuss later in these reasons, the integrity of the prior authorization process is also protected by the approach on review to fraudulent or intentionally misleading material placed before the Justice.

The recent judgment of Esson, J.A. in **R. v. Monroe** (1997), 8 C.R. (5th) 324 (B.C.C.A.) is consistent with my interpretation of the effect of **Garofoli, Bisson**, **Grant** and **Plant** on decisions such as **Donaldson** and **Sismey**. Esson, J.A. said, at paragraph 27:

> Although it is now clear that deception of the justice will not automatically lead to the warrant being quashed, the words of Hinkson J.A., speaking for the Court in **R. v. Donaldson, supra** at 311, continue to reflect the reasons why deception must be viewed seriously:
>
> > It is not to be overlooked that an application to a justice of the peace for a search warrant is made ex parte. Thus it is essential that the police not deceive the justice as to the basis on which the search warrants are being sought.

The appellant also relies on the judgment of this Court in **Innocente, supra**, but I do not think it supports the appellant's argument. In **Innocente**, the police had sworn that certain information had been obtained from "a known and

reliable source of known reliability in the past...". In fact, the information was obtained from intercepted communications resulting from an authorized interception which the police wished to keep secret. The trial judge held the search was unreasonable and excluded the evidence. The Crown appeal to this Court concerned only the exclusion of the evidence. The ground of appeal relating to the trial judge's finding that the search was unreasonable and his quashing the search warrant were abandoned. In the context of upholding the trial judge's exclusion of the evidence, the Court relied on the deliberately misleading statements, holding that the court cannot condone the presentation to judicial officials of deliberately misleading information sworn to as true and that to do so would damage the integrity of the judicial process: per Hallett, J.A. at para. 14. The case does not stand for the proposition that if there is deliberately misleading information placed before the justice, the warrant must automatically be quashed.

In Mr. Morris' situation, as in **Grant**, there was no intention to deceive. While there were errors in the material which the police placed before the Justice of the Peace, they were not so as to fundamentally subvert the prior authorization process. I specifically disagree with the appellant's contention that the police did not take the process seriously. The evidence relating to the care taken to ensure that reasonable grounds for belief existed negates that suggestion. There was, in fact, ample basis for such belief; the requirement of credibly based probability had been reached. There were inaccurate and misleading statements made in the Information to obtain, but they were not made for the purpose of leading the justice of the peace

to think that the basis for the application was better than it was.

The trial judge did not err in refusing to find the search was unreasonable simply on the basis that there was misleading and incorrect material in the Information to obtain the warrant.

d. Should inaccurate and misleading information be excised:

The appellant submits that inaccurate or misleading information should be excluded from consideration on review.

The Supreme Court has held that, in conducting the review, evidence obtained in violation of the **Charter** must be excluded from consideration: **R. v. Grant , supra** at pp.251-252. The appellant's argument is that this principle extends to all misleading and incorrect material.

In my respectful view, the Supreme Court of Canada has also ruled against the appellant on this issue.

The leading case is **R. v Plant, supra**. In that case, the police had obtained a warrant under the **Narcotic Control Act**. They relied on three things; a tip from an unknown informant, the results of an electricity records check and observations made during a warrantless perimeter search. The warrantless search

was found to have been in breach of the **Charter**. The Court held, therefore, that the information obtained from it must be excluded from consideration on the review. That left the issues of whether the anonymous tip was sufficiently reliable to have supported or constituted a reasonable belief that a narcotics offence had been committed and whether a misstatement by the officer with respect to the address given by the anonymous informant invalidated the warrant. The Court's decision with respect to the last issue is most relevant to this appeal.

In **Plant**, the Information to obtain the warrant stated that an informant had reported marijuana being cultivated "at the residence of 2618 - 26 Street S.W". In fact, the informant had not told the police the address, but described it as a "cute house" in the 2600 block of 26th street near a house with many windows. Sopinka, J., for the majority, found that the Information to obtain gave the impression that the informant had supplied more detailed facts than was actually the case: at 298. However, the learned judge concluded that this information did not have to be excluded from consideration on review because it was not part of any deliberate attempt to mislead the issuing justice and there was nothing to indicate the misstatement was "...anything more than a good faith, albeit erroneous, attempt to draft the Information concisely by omitting reference to the step between the general tip and the conclusion as to the exact address of the residence.": at 298. While the offending paragraphs did not have to be excised, Sopinka, J. held that only the information actually provided by the informant, as amplified on review, should be

included.

Plant, in my view, stands for two propositions relevant to this aspect of the appellant's argument. First, misleading or inaccurate information does not have to be totally excluded from consideration unless it is part of a deliberate attempt to mislead the issuing justice. Second, only the part of the Information that is erroneous needs to be excluded from consideration and that material, provided it is not part of a deliberate attempt to mislead the Justice of the Peace, may be amplified by evidence on review showing the true facts.

In support of the appellant's position, we were referred to the reasons of Rosenburg, J.A. in **R. v. Hosie** (1996), 107 C.C.C. (3d) 385 (Ont C.A.). The focus of that case was whether information obtained from an informant met the threshold of being credible and corroborated by police investigation prior to seeking to conduct the search. Most relevant is the decision of the Court with respect to paragraph 5 of the Information to obtain which read as follows:

> I received information from Cpl. Campbell that a source believed reliable has advised that George HOSIE recently moved to Everts Ave, Windsor, Ontario and has established a very hightech hydroponic Marihuana growing operation. Cpl. Campbell further advised that information supplied by the source, while it has not lead to previous arrests, has been confirmed through other sources and otherwise investigated and found to be reliable.

The evidence on review revealed that the source had not provided reliable information in the past. The officer explained that what she meant to convey was that the source had proved reliable because his information was verified by another

source, although it was not clear that there were in fact two different sources. Rosenberg, J.A. concluded at p. 391:

> As to para. 5, in view of Constable Doucette's testimony, the words "believed reliable" and the entire second sentence must be deleted: see *R. v. Bisson* (1994), 94 C.C.C. (3d) 94 at pp. 95-6, [1994] 3 S.C.R. 1097, 65 Q.A.C. 241. As it is worded, para. 5 suggests that on previous occasions Campbell's source had proved reliable, albeit the information supplied by the source on these other occasions had not led to arrests. It is clear from the testimony of Constable Doucette on the *voir dire* that this is not correct. Thus, what remains of para. 5 is information from an unproven source. ..... There is no indication as to the informer's source of knowledge or how current the information is. There is no way to know whether the informer has obtained this information through personal observation as opposed to rumour or second or third-hand information.

Having found that the informant's credibility could not be assessed and that few details were provided, the Court turned to the question of whether police investigation provided sufficient corroboration. The Court concluded it did not.

The appellant submits that this case stands for the proposition that misleading statements have to be excised from consideration. While I agree that there are passages in the decision that are consistent with that submission, I do not agree that the case stands for that broad proposition. In **Hosie**, the material was not excluded from consideration simply because it was misleading. It was excluded from consideration because it was proven to be inaccurate and that the true facts, as emerged from the evidence on the review, made it clear that the informant did not meet the test of proven reliability and corroboration. In short, the decision excluded from consideration informant material where the informant was not of proven reliability and his information had not been sufficiently corroborated by police investigation. In other words, it was not shown to be sufficiently reliable to support

a reasonable belief. I also note that, in making this determination, the Court considered the evidence adduced before the reviewing judge bearing on the issue of the informant's reliability.

The appellant also relies on the judgment of the Supreme Court of Canada in **Bisson, supra**. In that case, the police seeking a wiretap authorization set out allegations made by one Lortie but failed to disclose that he had later recanted. The trial judge set aside the authorization on this basis. The Court of Appeal reversed and the Supreme Court of Canada upheld the Court of Appeal. In a brief judgment, the Supreme Court stated:

> ... The trial judge found that the affidavit material presented to the authorizing judge contained an error of non-disclosure relating to the retraction of Eric Lortie, a failure to state his age, and an error in including him as a target and accomplice. Having found such errors, the trial judge proceeded to vitiate the wire-tap authorization, finding that the police officer deliberately misled the authorizing judge. In so doing, the trial judge fell into error.
>
> As stated in *R. v. Garofoli* (1990), 60 C.C.C. (3d) 161, [1990] 2 S.C.R. 1421, 80 C.R. (3d) 317, errors in the information presented to the authorizing judge, whether advertent or even fraudulent, are only factors to be considered in deciding to set aside the authorization and do not by themselves lead to automatic vitiation of the wire-tap authorization as was done by the trial judge. The trial judge should have examined the information in the affidavit which was independent of the evidence concerning Eric Lortie, in order to determine whether in light of his finding, there was sufficient reliable information to support an authorization. (at p. 1098)

I do not think this case stands for the broad proposition asserted by the appellant. The allegations of Lortie were not ignored simply because they had been set out in a misleading way. They were ignored because he had recanted and the trial judge had found that the authorizing judge had been deliberately misled in this

regard. I think this is clear in the judgment of Proulx, J.A. in the Quebec Court of Appeal in **Bisson**, which was affirmed by the Supreme Court: (1994), 87 C.C.C. (3d) 440. Proulx, J.A., for example, at p. 457 of his reasons, quoted with approval the following statement of the Ontario Court of Appeal in **R. v. Church of Scientology (No 6)** (1987), 31 C.C.C. (3d) 449 at 528 -9:

> ... the function of the reviewing judge is to determine whether there is any evidence remaining, after disregarding the allegations found to be false and taking into consideration the facts found to have been omitted by the informant, upon which the justice could be satisfied that a search warrant should issue.
>
> (emphasis added)

I conclude that **Bisson** stands for the proposition that statements in the Information which, when considered together with the evidence adduced on review, have been proven false or otherwise insufficiently reliable should be excluded from consideration. It does not establish that every incorrect or misleading statement, regardless of how it is corrected or expanded by the evidence on review, must be so excluded.

This leads to the related issue of amplification.

e. Amplification

The issue of amplification concerns the extent to which the material contained in the Information to obtain the warrant can be supplemented by evidence adduced on the review. In this case, for example, the appellant called one, and the Crown, two witnesses on the review. The trial judge relied on the evidence adduced

on the review to find that the warrant had been properly issued. It is necessary to address this issue in some detail here because the appellant's position is that the paragraphs containing incorrect or misleading information should be struck out and that evidence on the review cannot be used to correct or supplement the allegations contained in those paragraphs.

The analysis that follows relates to the question of amplification where, as here, a search is challenged at trial under s. 8 and the warrant and the Information to obtain supporting it are valid on their face. Different considerations concerning amplification may come into play if the challenge is to the facial validity of the warrant or the Information to obtain or if the challenge is not in the context of a s. 8 challenge at trial. I do not intend to address those types of challenges in these reasons.

I begin with the decision of the Supreme Court of Canada in **R. v. Garofoli, supra.** It was a wiretap case. However, electronic interception is a search or seizure within the meaning of s. 8 of the **Charter** : see **R. v. Duarte**, [1990] 1 S.C.R. 30 and, as mentioned above, the principles developed about the review of wiretap authorizations have been applied by the Supreme Court to the review of search warrants : see e.g., **Grant, supra.**

One of the issues in **Garofoli** was whether the accused could cross-

examine the affiant of the affidavit filed in support of the application for the authorization. The Court held that the accused could do so with leave of the trial judge and that leave should be granted where necessary to permit the accused to make full answer and defence. The Court stated that the accused must show "...a basis ... for the view that the cross-examination will elicit testimony tending to discredit the existence of one of the pre-conditions to the authorization ..." : at 1465. The cross-examination should be limited "...to questions that are directed to establish that there was no basis upon which the authorization could have been granted." : at 1465

The Court in **Garofoli** contemplated that the material before the reviewing judge could have at least 3 components: the affidavit evidence in support of the authorization under review, the evidence on behalf of the accused establishing a basis for cross-examination and the evidence obtained on cross-examination. In the well-known passage setting out the standard of review, the Court referred to the examination of the "...record which was before the authorizing judge **as amplified on review**..." : at 1452. In the same passage, Sopinka, J. refers to the reviewing judge taking into account "**new evidence**". These references to "as amplified on review" and "new evidence" must be understood as, at a minimum, requiring the reviewing judge to consider these three components of the evidentiary record.

This aspect of **Garofoli** has been followed and explained in several other

wire tap cases.

In **R. v. Madrid et al** (1994), 48 B.C.A.C. 271 an issue arose as to whether evidence elicited on cross-examination of the affiant could be considered both for and against the authorization. The argument for the accused in that case was that cross-examination of the affiant could only be used to weaken the force of the affidavit evidence filed in support of the authorization but may not be taken into account to strengthen it. This proposition was doubted by McEachern, C.J.B.C. who concluded that "Evidence given on an issue in a **Garofoli** cross-examination can be probative both for and against all parties subject to all just exceptions, just as in the trial proper.": at 35. The premise of the decision is that having decided to cross-examine, the accused takes the risk inherent in the adversary process that the witness' evidence may not only be helpful to the accused, but also to the Crown.

A similar view was expressed by another panel of the same Court in **R. v. Araujo** (1998), 127 C.C.C. (3d) 315 also a wiretap case. Similar to **Madrid**, **Araujo** concluded that evidence elicited on cross-examination or review, but not placed before the authorizing judge, could be considered even if it tended to strengthen the basis for granting the authorization. To the same effect is the decision of the Quebec Court of Appeal in the wiretap case **R. v. Hiscock** (1992), 72 C.C.C. (3d) 303 in which the Court examined the affidavit and the material elicited on cross-examination in reaching its conclusion on the validity of the

authorization. **Madrid** has also been followed in **R. v. Cosgrove** (1997), 151 Nfld and PEIR 1 (Nfld SC) and **R. v. Stacey** (1996), 140 Sask R 60 (QB).

All of these were wiretap cases. What is the law relating to amplification in search warrant cases? Prior to **Garofoli**, there was authority in search warrant cases for resort to material beyond the record placed before the issuing Justice. An example is **Re Church of Scientology v. The Queen (No 6), supra**. That case held that on *certiorari* to quash a search warrant directed to a person who had not been charged, the test on review was jurisdictional error. Nonetheless, the Court permitted cross-examination of the affiant, with leave of the reviewing judge, such cross-examination to be directed to matters which would have a bearing on the informant's alleged fraud or reckless disregard for the truth: at 524. The Court also permitted the reviewing judge to take into account evidence not before the issuing justice in deciding whether the issuing justice could have had a basis for issuing the warrant. The Court stated at pp. 528-9:

> Where a motions court judge has granted leave to cross-examine an informant, as occurred in the case at bar, the possibility arises that even in the absence of a finding by the reviewing judge of fraud or a reckless disregard for the truth by the informant, there may be a finding that certain alleged material facts which may be important for their own sake or in explaining other facts alleged are false. That situation arose in the case at bar. The question then arises whether the reviewing officer should weigh the contents of the information anew in light of those findings to determine whether he or she should substitute his or her opinion for that of the justice.
>
> As discussed above, the appropriate test on a *certiorari* application is whether there was evidence upon which the justice acting judicially could have determined that a search warrant should be issued. In those circumstances, therefore, the function of the reviewing judge is to determine whether there is any evidence remaining, after disregarding the allegations found to be false and taking into consideration the facts found to have been omitted by the informant, upon which the justice could be satisfied that a

> search warrant should issue. We recognize that in such event it is not known whether the justice would have been satisfied but keeping in mind that the proceedings are not a trial involving the quilt or innocence of an accused, it is sufficient that he or she could have been satisfied.
>
> (emphasis added)

That was a *certiorari* case. The considerations are different where, as here, the review is conducted in the context of a s. 8 application by an accused at trial. The accused has the burden of showing that the search was unreasonable and that the admission of the evidence obtained as a result of the search would bring the administration of justice into disrepute. Evidence relating to the question of what the police actually knew at the time the warrant was obtained may be relevant to the issue of exclusion, but it may also reveal, correct or supplement errors in the Information to obtain even though such evidence was not placed before the issuing Justice of the Peace. It does not seem sensible to require the trial judge to artificially compartmentalize the review as would be required if only evidence showing error were admissible as regards the question of breach, but evidence showing the true facts could be considered on the issue of exclusion. Moreover, with respect to the question of whether certain statements were deliberately false or misleading, it is difficult to see how evidence relating to the true state of facts or knowledge could be separated from that relating to falsity or omission.

The Supreme Court has not discussed the issue of amplification comprehensively, but its judgment in **Plant, supra** sheds some light on the question of amplification in s. 8 cases involving challenges to search warrants. The facts of

the case have been summarized above. The amplification aspect of the case concerned the evidence adduced before the reviewing judge indicating that the facts actually obtained from the source were not as stated in the Information to obtain the warrant. Specifically, the source did not provide an address. The evidence, however, also revealed that the police had been able to locate a residence matching the description and location given by the source. The Court held that, for the purposes of review, only the information actually obtained from the source should be considered rather than the statements attributed to him in the Information to obtain the warrant. The Court added, however, that this information could be amplified by reference to the fact that the police had been able to locate a residence matching the description supplied by the source. In effect, **Plant** holds that evidence is admissible, not only to show the error, but also to show the true state of facts relating to the erroneous assertion.

The question then becomes whether this reasoning applies to evidence beyond that obtained from the examination of the affiant on the review. This broader issue of whether evidence elicited by the Crown on a *voir dire* could be so used was addressed in **R. v. Budai**, [1995] B.C.J. No 1091, a search warrant case. There, as in this case, the issue of amplification had not been identified at the time of the *voir dire* at which evidence relevant to the s. 24(2) issue had been adduced. On the *voir dire*, the affiant and other officers were called by the Crown. Braidwood, J. (as he then was) concluded that this additional evidence could be considered by

him in reviewing the issuance of the warrant. He stated at paras. 24-26:

> At the time these officers were called the issue of amplification had not been identified by counsel for the Crown. Under consideration were arguments that were to be made concerning the admissibility of evidence pursuant to s. 24(2) of the Charter of Rights and Freedoms and the question of whether or not certain items not mentioned in the warrant were authorized to be seized.
>
> However, this evidence was called, and full opportunity was afforded to counsel to cross-examine these various witnesses. I cannot see any realistic distinction in terms of the relevancy or credibility of this evidence as it would relate to a consideration under s. 24(2) of the Charter and as it may relate to the issue now identified under the heading of Amplification.
>
> Accordingly I think it is appropriate in discussing the arguments advanced by the defence to consider the information disclosed to the Justice of the Peace as amplified by the evidence tendered before me.

Braidwood, J. followed **Madrid** and noted a similar approach had been adopted in **R. v. Lindoe** (June 17, 1994, B.C.S.C.) and **R. v. Grant** (20 May, 1994, B.C.S.C.). I would refer as well to **R. v. Jarvis**, [1998] A.J. No. 651(Alta Q.B.); **R. v. Pompert**, [1994] B.C.J. No. 1050 (B.C.C.A.); **R. v. White**, [1997] O.J. No. 2464 (Prov. Ct.).

A different view was expressed by Harradence, J.A. in **R. v Carrier, supra**, a search warrant case. The majority did not think it necessary to address the question of whether “new evidence at trial could plug holes in an incomplete information for search warrant.” : at para 65. Harradence, J.A., in dissent, although he found it was not essential to his ultimate conclusion to do so, discussed this issue and concluded that “ ... [t]he review process should not amount to a second chance for the police to make their case.” At para. 19 he expressly declined to follow **Madrid**, commenting as follows:

> With the greatest respect, I decline to consider new evidence in the manner the British Columbia Court of Appeal has in **Madrid**. If evidence not contained in the "four walls" of the warrant application is adduced at a later hearing, it follows that the earlier application was not as complete as it could have been. The State has met its onus by adducing less evidence that it could have. In my view, before the State should be permitted to violate a person's right of privacy, particular in the extreme context of the State's invading a person's home, it should not aim for the bottom end of the threshold. While it is true that the State has merely to satisfy the issuing justice, this should not be the standard operating procedure of the police. I restate my earlier assertion: while it is true that a review process exists to "correct" improperly granted warrants, this is not sufficient to undo the damage done. Once the authorization is granted, the impending violation of the sanctity of the home is a car ride away. Furthermore, a review is not as broad as the decision to grant the authorization in the first place, and thus is ill-equipped to battle the spectre of sloppy or incomplete police work. Since the review is limited to the question of what whether there was any evidence before the issuing justice, I cannot see how the reviewing justice could look beyond the original information. To allow the "new" evidence - which is not new at all, but rather evidence already in the possession of the police - to be put before the reviewing justice is in essence to allow the police a second chance to make their case. This, in my opinion, is also evident in what Sopinka, J. actually said in **Garofoli**:
>
> > In this process, the existence of ... new evidence [is] relevant, but, rather than being a prerequisite to review, [its] sole impact is to determine whether there continues to be any basis for the decision of the authorizing judge. (emphasis added)

I note that this case concerned the facial validity of the Information to obtain and the focus of the case was whether it disclosed reasonable grounds of belief. As noted, I am not addressing in these reasons the role, if any, of amplification where the warrant or the Information to obtain is defective on its face.

Similar views to those of Harradence, J.A. have been expressed in **R. v. Larson** (1996), 194 A.R. 161 (Prov. Ct); rev'd on other grounds *sub nom* **R. v. Willick and Sheppard** (1998), 127 C.C.C. (3d) 346; **R. v. Lyding** (1997), 215 A.R. 185 (Prov. Ct.); **R. v. Furjes**, [1992] N.W.T.J. No. 237 (S.C.).

With respect, this view, if it is meant to apply to s. 8 challenges going behind the face of the warrant and the Information to obtain, is not consistent with Sopinka, J.'s holding in **Plant**. In considering the informer's statements, Sopinka, J. deleted the incorrect and misleading aspects but allowed them to be amplified by the evidence adduced before the reviewing judge. It is accordingly no longer possible to take the position, in the context of a s. 8 challenge which goes behind the face of the warrant, that the reviewing court cannot consider "new" evidence. I prefer the approach of Braidwood, J. in **Budai**.

Some of the Canadian cases refer to relevant United States law. For example, in both **Madrid** and **Budai**, reference is made to **United States v. Williams,** 737 F.2d 594 (1984) (C.A. 7th Cir.). In that case the accused challenged a wiretap authorization and, under the applicable law, they were required to show that the affidavit used to obtain the authorization order contained a deliberate or reckless misrepresentation. One of their arguments was that there had been a failure to make complete and total disclosure to the authorizing judge. In deciding that the omission was not so material as to vitiate the warrant, the Court held it was appropriate to consider additional material not before the authorizing judge but known to the affiant at the time the affidavit was made. Eschbach, C.J. said for the Court at p. 604:

> It is further plain that if the challenger is permitted to marshall all exculpatory facts, fairness dictates that the government be allowed to support the affidavit with additional inculpatory information known to the affiant at the time the affidavit was made.

My brief examination of United States law has led me to conclude that there are diverse and conflicting opinions on the issue of amplification. It appears that where the challenge to the warrant is that the supporting affidavit is insufficient in law, no further evidence supporting the issuance may be admitted: see **Aguilar v. State of Texas**, 378 U.S. 108 (1964) at 109, footnote 1. In 79, **Corpus Juris Secondum** (1995), Search and Seizure, Topic 149, the following appears:

> Facts not brought to the issuing magistrate's attention may not be used to justify the issuance of a search warrant, and may not be considered in determining whether the warrant is based on probable cause. A search warrant can be issued only on information obtained prior to its issuance, and its validity must rest on the affidavits made or information presented at that time. Information obtained in the search cannot justify the warrant.

While this rule generally seems to be applied to facially defective warrants: see e.g. **Valdez v. State of Maryland** 476 A. 2d 1162 (1984) (Maryland C.A.); **State of Nebraska v. Parmar** 437 N.W. 2d 503 (1989) (Nebraska S.Ct.), **State of Ohio v. Covey** 544 N.E. 2d 895 (Ohio Supreme Court), there seem to be exceptions: see e.g. **State of Louisiana v. Calderson** 630 So. 2d 305, (1993) (Louisiana C.A.); **People v. Barkley** 571 N.W. 2d 561 (1997) (Mich. C.A.); **People v. Carpenter** 935 P. 2d 708 (Cal. S.C.).

If the warrant and supporting affidavit are valid on their face, the person challenging the warrant is more restricted in terms of the grounds of challenge and bears a heavier onus under United States as compared with Canadian law. There is a helpful summary of the U.S. position in **U.S. v. DeLeon** 979 F. 2d 761 (1992)

(C.A. 9th Circuit):

> In *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L.Ed.2d 667 (1978), the Supreme Court held that a defendant seeking an evidentiary hearing to determine whether a facially valid affidavit contains false statements must make a substantial preliminary showing that: (1) the affidavit contains intentionally or recklessly false statements and (2) the affidavit cannot support a finding of probable cause without the allegedly false information. If a defendant prevails at a *Franks* evidentiary hearing, evidence obtained on the basis of a search warrant issued on an affidavit containing material omissions or misrepresentations must be excluded. In *United States v. Stanert*, 762 F.2d 775 (9th Cir. 1985), *amended reh'g denied*, 769 F. 2d 1410 (9th Cir. 1985), we extended *Franks* to omissions of material facts and concluded that "the Fourth Amendment mandates that a defendant be permitted to challenge a warrant affidavit valid on its face when it contains deliberate or reckless omissions of facts that tend to mislead. Id. at 781.

Once the evidentiary hearing is required, it appears that both the accused and the prosecution may adduce evidence. A leading American text, Wayne R. LaFave, **Search and Seizure** (2nd, 1987), says this:

> ... the defendant must prove both (i) that the challenged statements are in fact false, and (ii) that their inclusion in the affidavit amounted to perjury or reckless disregard for the truth. However, the prosecution may present evidence and this presentation may include facts not included in the affidavit but which support the conclusion that the facts alleged herein are true. (emphasis added) Vol 11, s. 4.4(d), p. 201-2.

It would seem that cases such as **Williams, supra**, are concerned with the scope of evidence on the evidentiary hearing. There is a helpful discussion in **State of Iowa v. Post** 286 N.W. 2d 195 (Iowa S.C.) at 201:

> .....The appellant correctly notes that when a defendant challenges the existence of probable cause for the issuance of a warrant, the State is limited in its support to the evidence actually presented to the magistrate. *State v. Rockhold*, 243 N.W. 2d 846, 848-49 (Iowa 1976). The question of whether rebuttal evidence is permitted when the defendant challenges the truthfulness of the supporting affidavit has apparently never been addressed by this court. However, cases considering the falsity issue presuppose that there would be a factual hearing at which both the defendant and the State would present evidence. The seminal Iowa case on this subject is *State v. Boyd*, 224 N.W. 2d 609 (Iowa 1974). *Boyd* discussed the showing required to be made by a defendant before a hearing will be held on the issue of false

statements. The court

> adopt[ed] a rule *permitting a defendant to inquire into* the truth of the representations upon which a search warrant has been issued only upon a preliminary showing under oath that an agent or representative of the state has: (1) intentionally made false or untrue statements or otherwise practiced fraud upon the magistrate; or (2) that a material statement made by such agent or representative is false, whether intentional or not.
>
> If defendant proves either of the above by a preponderance of the evidence, the search warrant shall be invalidated and the evidence seized thereunder shall be inadmissible.

Ibid. at 616 (emphasis added). This indicates that a prima facie showing merely entitles a defendant to a hearing on the issue. Such a hearing necessarily involves a presentation of evidence by both defendant and the State. This was the procedure employed in *Iowa District Court in and for Johnson County*. See 247 N.S. 2d at 245. We hold that the trial court did not err in allowing the State to present rebuttal testimony. When all the evidence presented at the hearing is considered, we conclude that the defendant has failed to meet his burden under the *Boyd* criteria.

These cases support the view that once the challenge to the warrant or the supporting affidavit goes behind the face of these documents, and an evidentiary hearing is required on review, both parties may adduce evidence relating to the issue of whether the supporting affidavit contains intentionally or recklessly false statements. If such a finding is made, however, it appears that U.S. law requires that such statements be deleted from further consideration. Although **Williams** was a wiretap case, the passages concerning the admissibility of evidence relate to the evidentiary hearing at which, as in the case of search warrants, the accused has the burden of proving that the supporting affidavit contained misrepresentations intentionally or recklessly made. These cases do not seem to me to assist very much with the question of amplification of erroneous, but not intentionally false or misleading, information which arises in the present case.

Somewhat more helpful is the treatment in U.S. law of material omissions. The accused bears the burden of showing that facts were omitted with the intent to make, or in reckless disregard of whether they make, the affidavit misleading. In federal law, at least, once that burden is discharged, the affidavit is then reviewed as if the omitted material were present and the adequacy of the information so supplemented is assessed: **U.S. v. Clapp** 46 F. 3d 795 (1995) (C.A. 8th Circuit).

Given the more restricted grounds for challenge behind the face of the warrant and the more onerous burden on the challenger in U.S. law, these cases are of only limited assistance in considering the issues in this case. However, they are helpful to the extent that they permit evidence both <u>pro</u> and <u>con</u> the issue of whether the affidavit is intentionally or recklessly misleading and, in the case of omissions, require the affidavit to be judged as if the omitted material were contained therein.

The issue of amplification, at the level of principle, is concerned with the balance between the two requirements for a warrant: the reasonable grounds of belief requirement and the prior authorization requirement. As discussed earlier, the Supreme Court of Canada has held that the primary focus is on whether the reasonable grounds of belief requirement was met <u>when the warrant issued</u>. The Court's treatment of amplification is consistent with this. Allowing evidence after the fact showing that reasonable and probable cause existed at the time the warrant was obtained is an indication that the existence <u>in fact</u> of such grounds is an

important consideration on review.

This is not to say that failure to provide complete and accurate information during the prior authorization process will be ignored; far from it. It is open to a court to invalidate the warrant where that process has been fundamentally subverted. In addition, the court is required to exclude from consideration material that was obtained in breach of the **Charter**. Also to be excluded is material that was deliberately and purposefully false or misleading in the sense that it was known to be false or materially misleading and was placed before the justice for the purpose of making the grounds appear more substantial than they were.

I conclude that in a s. 8 *voir dire* challenging a warrant issued pursuant to an Information to obtain which is valid and adequate on its face, evidence is admissible to explain non-deliberate errors or omissions on the review provided that the information was known to the police officers involved in obtaining the warrant at the time it was obtained and subject, of course, to the requirement that unconstitutionally obtained evidence cannot be considered. Although it is not, strictly speaking, necessary for me to do so for the purposes of this case, I am inclined to accept the Crown's position that deliberately false and misleading material placed before the authorizing justice is not subject to amplification.

It may be helpful to summarize the principles I have adopted to the review in a s. 8 *voir dire* at trial of a warrant supported by an Information to obtain which is

valid on its face:

1. The trial judge is to determine whether the justice of the peace could have validly issued the warrant;
2. In conducting that review, the trial judge may hear and consider evidence relevant to the accuracy of and motivation for the material included in the Information to obtain a search warrant;
3. Fraudulent or deliberately misleading material in the Information does not automatically invalidate the warrant. However, it may have this effect if the reviewing judge concludes, having regard to the totality of the circumstances, that the police approach to the prior authorization process was so subversive of it that the warrant should be invalidated. In addition, fraudulent and deliberately misleading material should be excised from consideration;
4. In assessing the validity of the warrant, the trial judge, generally, is entitled to consider all evidence bearing on the existence in fact of reasonable and probable cause shown to be in the knowledge of the police at the time the warrant was sought. However, such evidence cannot be used if it was obtained by unconstitutional means or (I am inclined to think) to amplify fraudulent or intentionally misleading material in the Information to obtain.

f. Application of these Principles to the Facts

The errors relied on by the appellant in the Information are first, that

Corporal MacPhee was advised by Constable Hewitt, not Constable Babstock; and second, that the police informant did not identify the accused by his middle name or surname. These errors did not result from a deliberate attempt to mislead the Justice of the Peace. The evidence before the trial judge showed that, at the time the warrant was issued, Constable Babstock had, in fact, reviewed and confirmed the contents of the fax sent by Constable Hewitt to Corporal MacPhee. It also showed that there was ample investigative evidence to link the source's information to the accused. It was proper for the judge to consider this evidence. I conclude, therefore, that the material in the Information to obtain, as corrected and amplified by the evidence on review, meets the test set by the Supreme Court of Canada. There was sufficient material to allow the justice of the peace to grant the warrant.

As mentioned earlier, I further conclude that the errors made by the police in applying for the warrant were not so fundamentally subversive of the prior authorization process as to require the warrant to be invalidated. I would hold, therefore, that the trial judge was right to conclude that the appellant's s . 8 rights had not been breached in this case.

Having reached that conclusion, it is not necessary to address the s. 24(2) issue.

D. Disposition:

For these reasons, I would dismiss the appeal.

Cromwell, J.A.

Concurred in:

Pugsley, J.A.

Flinn, J.A.

C.A.C. No.144218

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

WAYNE ROGER MORRIS	)	
Appellant	)	
- and -	)	REASONS FOR JUDGMENT BY:
HER MAJESTY THE QUEEN	)	CROMWELL, J.A.
Respondent	)	