PROVINCIAL COURT OF NOVA SCOTIA

Application for the taking of bodily substances for the purpose of forensic DNA analysis (Re), 2024 NSPC 7

Date: 20240130
Registry: Kentville

In the matter of an *ex parte* application pursuant to s. 487.05 of the *Criminal Code*

DECISION REGARDING ISSUANCE OF DNA ORDER

Judge:	The Honourable Judge Ronda van der Hoek
Reviewed:	January 26, 2024, in Kentville, Nova Scotia
Relevant section of *Criminal Code*:	Section 487.05 of the *Criminal Code of Canada*

By the Court:

[1] An investigator applied to the Court seeking an application for the taking of bodily substances for the purpose of forensic DNA analysis under ss. 487.05 and 487.1 of the *Criminal Code.*

[2] I decline to issue the order.

[3] Following my review of the *Information to Obtain* (ITO) sworn on December 18, 2023, and provided to me on January 24, 2024, I determined by happenstance that the application had been, twice before, submitted to Provincial Court Judges who in turn denied the applications. The first sworn ITO dated December 1, 2023, was not granted, nor was the subsequent one sworn on December 8, 2023. I say by happenstance, because nowhere in the ITO before me does the affiant set out the two previous refusals, nor does s/he explain whether subsequent versions of the document were drafted in aid of addressing any concerns expressed by the other two judges.

[4] Applications for warrants are made *ex parte* and require full disclosure and factual accuracy. I find a failure to disclose two previous judicial refusals, represents a material non-disclosure. (*R v Araujo*, 2000 SCC 65 at ¶ 46)

[5] As Judge Atwood explained in *Application for production order (Re),* 2020 NSPC 35 at ¶ 15, “it appears that the officer labours under the misapprehension—shared by a number of policing services in this part of the Province—that the role of the court in the warrant-issuance process is an automatic

one, merely to rubber-stamp applications by investigative agencies. Not so. This is because the decision whether to issue an order or warrant involves the exercise of judicial discretion".

[6] The exercise of judicial discretion requires the affiant to disclose that another judge refused to grant the application, the basis for the decision, if provided, and what, if anything, the affiant did to address any stated concerns. A judge must be able to trust the affiant. Incidentally, I determined Judge Manning, in refusing to grant a first warrant, offered the affiant a precise and insightful written summary setting out his grounds.

[7] There are any number of reasons why such information about previous denials must be included in subsequent ITOs. One, it recognizes the possibility charges will eventually be laid, and acknowledges the Crown's requirement to disclose previous denials. Two, it serves to bring to the attention of a reviewing judge that a colleague has signalled a deficiency. Three, it allows a subsequent judge to determine whether deficiencies were addressed. Four, it discourages judge shopping during investigations. That is because investigators should never take ITOs to judge after judge in the hope one will eventually grant the application unaware it was denied on previous occasions.

[8] Similar concerns were addressed in Ontario in *R. v. Campbell*, [2014] O.J. No. 6541 at ¶ 56, where McMahone J. offered advice aimed at avoiding allegations of abuse of process:

> **56** To avoid the allegation of abuse of process, the police, in concert with the Crown Attorney's Office, may wish to develop a procedure for submitting an application for a second hearing based entirely on the same ITO, such procedure may consider the following steps:
>
> - 1.Upon refusal the officer should consult with senior colleagues to determine if additional information could be obtained to strengthen the application.
> - 2.Before resubmitting the exact same ITO, they should consult with the Crown about whether such action would be appropriate. Such consultation should take place, unless there are exigents circumstances requiring immediate action.
> - 3.In submitting the materials the officer should ensure the ITO includes the particulars of the earlier refusal, including the time, name of the judicial officer, and the reasons of refusal.
> - 4.A copy of any reason or endorsement provided by the judicial officer who refused the warrant should be an appendix to the ITO.
> - 5.Ensure the second judicial officer is the judicial officer who is on call and that no specific officer should be selecting individually any reviewing judge. The officer should not select a particular judicial officer, but follow the procedure for contacting whoever is next on call.
> - 6.If the second judicial officer refuses the application the officer should not resubmit the same ITO. The officer should only submit a new application if there is additional information in the new ITO.
>
> …
>
> **58** I do not accept the argument that allowing successive search warrant applications on the same materials would amount to judge-shopping and would be a reason not to allow for such procedure. For the reasons as I have articulated I conclude the following:
>
> - 1.Pursuant to s. 487, a Justice of the Peace or Justice has the jurisdiction to entertain a search warrant on the same material that another justice has refused to grant a search warrant.
> - 2.The second Justice must be advised of the prior refusal and a summary of the reasons of such refusal; and,
> - 3.A second application, I find, is a hearing ***de novo*** and is not a review or appeal of the Justice's decision.

[9] I have consciously chosen not to include the name of the particular affiant in my decision because I can accept the possibility s/he was unaware of the requirement to disclose previous refusals. For the reason that this is not the first time I have been presented with such a situation, it is in the public interest that the

Court signal its disapprobation for material nondisclosure in an ITO and encourage police agencies to undertake proper training procedures aimed at ensuring this situation does not come to represent the norm.

[10] The application is denied. The affiant may, of course, wish to resubmit in accordance with the concerns expressed herein.

van der Hoek, JPC