PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Patterson*, 2014 NSPC 101

Date: 2014-10-07
Docket: 2662814
Registry: Pictou

Between:

Her Majesty the Queen

v.

Stephen Mitchell Patterson

DECISION ON CONSTITUTIONALITY OF WARRANTED SEARCH

Judge: The Honourable Judge Del W. Atwood

Heard: 7 October 2014, in Pictou, Nova Scotia

Charge: 5(2) of the Controlled Drugs and Substances Act

Counsel: Bronwyn Duffy for the Public Prosecution Service of Canada
George Kalinowski for Stephen Mitchell Patterson

BY THE COURT:

[1] The court has for decision the case of Stephen Mitchell Patterson. Mr. Patterson is charged with possession of a controlled substance for the purpose of trafficking, which carries an indictable process. This is an application brought today by counsel for Mr. Patterson asserting that a search that was carried out by police under the authority of a warrant issued 12 October 2013, which resulted in the seizure of controlled substances, was in contravention of Mr. Patterson's right under section 8 of the *Canadian Charter of Rights and Freedoms*[1] to be free from unreasonable search or seizure.

[2] Going along with that is an application to have any evidence seized as a result of that search, should the court find that a section 8 violation occurred, excluded in accordance with the provisions of sub-section 24(2) of the *Charter*.

[3] The search carried out by police in this case was done under the authority of a warrant issued pursuant to s. 487 of the *Criminal Code*; no challenge was raised regarding the facial validity of the warrant itself. What the accused

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[1] Part I of *The Constitution Act, 1982*, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11.

challenges on this application is the sufficiency of the sworn information that was the basis of the issuing justice's decision granting the warrant.

[4] Section 8 of the *Charter* provides that:

> Everyone has the right to be secure against unreasonable search or seizure.

[5] As this was a warranted search, the action of the state in executing the search is presumptively constitutional.[2] The accused bears the burden of proving a s. 8 violation, and the standard of proof is a balance of probabilities. A constitutionally compliant search will have the following characteristics:

- Typically, it will have been carried out on the authority of a properly grounded, prior judicial authorization , or some other source of valid law in the case of warrantless searches;[3]
- The law on which the authorization will have been based must be found to be reasonable;
- The search must have been carried out in a reasonable fashion.[4]

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[2] *R. v. Campbell*, 2010 ONCA 588, at para. 45; *aff'd*, 2011 SCC 32.
[3] *Canada v. Southam*, [1984] 2 S.C.R. 145 at 160-167.
[4] *R. v. Collins*, [1987] S.C.J. No. 15 at para. 23.

[6] This case turns on the validity of the prior judicial authorization. As a judge of a statutory court, I do not have the jurisdiction to quash the warrant that was relied upon by police to search Mr. Patterson's property.

[7] However, as I am the judge before whom Mr. Patterson is being tried, I do have the authority to make findings whether the search was supported by a lawful authority, and, if not, grant an appropriate remedy.

[8] This application involves necessarily a review of an information to obtain search warrant. Exhibit #1 is a copy of a redacted ITO that was provided to me by counsel for the Public Prosecution Service of Canada; it has been referred extensively by counsel in their written submissions and in their oral argument.

[9] The written submissions of counsel were of great assistance to the court. Ms. Duffy's brief, in particular, is about the clearest analysis I have come across on the law pertaining to reviews of ITOs; it was balanced and fair, and did not seek to gloss over the deficiencies in the ITO. It is exemplary of the duty of the prosecution, not to confine itself to seeking a conviction, but to act as a minister of justice.

[10] The standard of review to be applied by a court to determine the sufficiency of an ITO upon which a search warrant is based was outlined by the Supreme Court of Canada in *R. v. Morelli*:

> In reviewing the sufficiency of a warrant application, however, the test is whether there was reliable evidence that might reasonably be believed on the basis of which the authorization could have issued The question is not whether the reviewing court would itself have issued the warrant, but whether there was sufficient credible and reliable evidence to permit a justice of the peace to find reasonable and probable grounds to believe that an offence had been committed and that evidence of that offence would be found at the specified time and place. [5]

[11] Ultimately, as a reviewing court, I must examine the record that was submitted to the authorizing justice, taking account of any redactions arising from the proper exercise of prosecutorial discretion to edit out informer-privileged material; I must decide whether, on a practical, non-technical and common-sense basis, the totality of the circumstances demonstrates reasonable grounds for the belief that the accused was committing the stated offences so as to support the issuance of a warrant.

[12] I apply the useful guidance offered by the Newfoundland and Labrador Court of Appeal in *R. v. Saunders*, in which the majority stated:

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[5] 2010 SCC 8 at para. 40 per Fish J.

> Unimportant in itself, the foregoing is an example of how the trial judge engaged in a critique of the ITO ... almost as if he were correcting a student's term paper ... and not an assessment of the sufficiency of the information in the "totality of the circumstances". The approach taken by the trial judge was like that of a person who views a painting square centimetre by square centimetre to identify defects ... which has its place ... but then fails to step back and view the painting as a whole.[6]

[13] A properly drafted ITO must contain necessarily certain information and evidence. An ITO must provide an accurate description of the offence that is believed to have been committed. It must contain an accurate description of the evidence that is sought to be seized or collected by police. It must contain an accurate description of the places that are sought to be searched.

[14] The ITO must lay out also evidence supporting the existence of reasonable and probable grounds for belief in a number of factors.

[15] First of all, the evidence contained in the ITO must demonstrate a reasonable and probable grounds for belief that the specified offence has been committed.

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[6] 2003 NLCA 63 at para. 11. See also *R. v. Nguyen*, 2011 ONCA 465, at para. 57, and *R. v. Grant* (1999), 132 C.C.C. (3d) 531 (Ont. C.A.) at 543, *l.r.* [1999] S.C.C.A. No. 168, which urge reviewing courts to avoid an overly technical, paragraph-by-paragraph analysis of ITOs.

[16] The ITO must specify reasonable and probable grounds for belief that the evidence that is sought to be seized actually exists.

[17] The ITO must set out evidence that presents reasonable and probable grounds for belief that the material that is sought to be seized will be found in the place sought to be searched.

[18] The ITO must demonstrate that the material sought to be seized will be relevant to the proof of the charges being investigated.

[19] The ITO must set out reasonable and probable grounds for belief that the place sought to be searched is, indeed, the place that is described in the ITO. This is meant to avoid the unfortunate but not uncommon situations when a search warrant is executed at the wrong premises. This is a key part of an ITO, because everybody has heard about the–how shall I put it–unfortunate raids when the take-

down team with battering ram winds up bashing down the door at the kiddies' birthday party rather than at the meth lab down the street that was the real target.

[20] Evidence in an ITO is a statement of fact that is sourced back to the point of origin. Because an ITO is presented in the forum of an *ex parte* application, it must contain full and frank disclosure, and cannot list just the bad bits. An ITO may, indeed, contain hearsay; however, the officer who swears to the ITO must specify her source of information and the basis upon which that source of information is believed to be credible and accurate. This applies especially to tips received from confidential sources. It is often the case that confidential sources will be relied upon extensively in ITOs, and there is nothing wrong with this. In fact, the use of confidential sources is completely proper in policing operations. That having been said, the author of an ITO must be mindful of the need to satisfy an issuing judicial authority of the accuracy and reliability of the source, given that the source will likely remain confidential and never be subject to cross-examination should a charge be laid and a trial ensue. The ITO needs to flesh this out. Has the source been paid? Does the source have a criminal record? Has the source been used before? If so, what were the results, good or bad. But what is most important is spelling out how the source came into the

knowledge the source offers police. Did the source actually see a crime taking place? If so, when? The "when" part is crucial, as the passage of time may mean that the *status in quo* might have gotten changed. If the source did not see the crime going down, then how does the source know what happened? Did a suspect admit something to the source? If so, when, and what were the circumstances? If the knowledge comes from the source talking to someone other than the suspect, then the reliability of that other person must be canvassed.

[21] Mere declaratory statements by a confidential source do not constitute evidence, and that is the clear frailty of this ITO. That's all I see throughout this ITO–paragraph 10.1: "Mitchell Patterson got a [redacted] quantity of weed"; paragraph 11: "Mitchell Patterson has weed. Mitchell Patterson keeps weed in [redacted]. Mitchell Patterson sells cocaine. Mitchell Patterson picked up weed. Mr. Patterson did [redcated] with the weed. Mitchell Patterson has marihuana." In sum, the issuing justice was presented with an array unsubstantiated declarations, assertions and conclusions. There was nothing in the ITO that informed the issuing justice how the confidential source came to know all this, other than the bald statement of the office who swore to the ITO that the source had "first-hand information".

[22] In contrast, evidence in a properly sourced ITO might have told the justice something along these lines: "the source was present and saw Mitchell Patterson getting weed" or "Mitchell Patterson told the source that he had weed". I can repeat only that the declarations contained in paragraphs 10, 11, 12, 13, 14, 18, 21, 24 and 25 are mere conclusory statements that do not constitute evidence.

[23] And so it will be seen that the ITO in this case contained far less solid evidence than what was contained in the recent decision of our Supreme Court in *R. v. Macdonald*, which, as I mentioned during Mr. Kalinowski's oral argument, resulted ultimately in the exclusion of evidence.

[24] *R. v. MacDonald* was decided Arnold J.[7] In my view, it is the gold standard for doing a judicial review of an ITO; it canvasses the core issues thoroughly. At paragraph 20, Arnold J. quoted extensively from the ITO which he was evaluating; in that case, the source in question–Source "B"– was stated as

[7] 2014 NSSC 218.

having observed what he or she believed to have been drug transactions in a parking lot at the Halifax Airport on two separate occasions. Accordingly, the ITO confidential source in *MacDonald* was described as actually having observed the crimes that were alleged to have gone down.

[25] In contrast, the only information that was presented to the issuing justice in this ITO as to Source "A's" knowledge is a mere conclusory statement in paragraph 9.7 that "Source "A" has firsthand knowledge". That begs a big question: what did the officer who swore to the ITO understand "firsthand knowledge" to be? Paragraph 13 of the ITO provides the court with a pretty clear answer:

> On the [redacted] day of September, 2013, Cpl. Paris spoke with Source "A". I spoke with Cpl. Paris on the 1st day of October, 2013. Based upon that conversation, I learned the following *firsthand* information . . . .
>
> [Emphasis added]

[26] This evinces a profound misunderstanding of what constitutes firsthand information. Firsthand information is original information. It is the knowledge of an individual who witnessed and experienced the event in question. The constable describes him having firsthand information in paragraph 13 of what, indeed, was not firsthand information. It was information that he obtained from

Cpl. Paris, who had obtained it earlier from Source "A". We have nothing in the ITO that describes source "A's" source of information. Was Source "A" present to see, firsthand, criminal activity? Did Source "A" have a conversation with Mr. Patterson in which Mr. Patterson admitted to criminal activity? Or is it something else entirely? I simply do not know from reading this ITO.

[27] Consider the case of *viva voce* amplification evidence being called to shore up a rickety ITO . Would it be admissible for a someone to come to court and say merely that so-and-so sells cocaine? Absolutely not. That would not constitute evidence, but would be a conclusion only. On the other hand, evidence might properly be heard that a witness was present and observed someone selling cocaine or that a suspect told him he was in the business of selling cocaine. In the latter instance, it would be an admission or a statement against interest; in the former case, it would be the evidence of a witness who authentically was possessed of firsthand information.

[28] This ITO informs the court of nothing that would allow it to assess the accuracy and credibility of the tips provided by the confidential source.

[29] In the result, I find that it is necessary that I disregard in its entirety, the content of the ITO dealing with the information provided by Source "A".

[30] Turning briefly to the Crime-Stoppers' tip referred to at paragraph 14 of the ITO, it is so bereft of detail that the court is unable to make any assessment of its reliability. The fact that the tip might have been "corroborated by another source" does not, in my view, provide the court with any meaningful information. Who or what is that other source? Is it Source "A" as in paragraph 11 or is it some other unknown source?

[31] With respect to unincriminating surveillance on the 23 October 2013 referred to in para. 23 of the ITO, there is no evidence that the officer who swore the ITO was one of the officers involved in the surveillance. There is no information contained in paragraph 23 as to how the ITO informant came to know what was observed during the surveillance other than the boiler plate in the preamble of the ITO that the constable had access to policing reports and had spoken with other officers. It would have added only slightly to the volume of the ITO to have provided some meagre additional detail.

[32] Finally, it is not even clear that police had reliable evidence that the place described in the ITO was Mr. Patterson's.

[33] On the whole, the ITO is so lacking in evidence as to leave me with no alternative than to conclude that there was no evidence before the issuing justice upon which a credibly-based, evidence-supported warrant to search might have been obtained. I find support for this in the thorough analysis carried out by Arnold J. in *Macdonald* in relation to single-source ITOs as, in my view, this is, indeed, a single-source ITO. In this case, there is a complete absence of detail that might have informed the issuing justice how Source "A" came into the information he gave police, other than the bald conclusory statement that he had some sort of unspecified "firsthand information." That doesn't cut it.

[34] I find that there has, indeed, been a section 8 *Charter* violation of Mr. Patterson's constitutional right to be free from unreasonable search and seizure, as the search was not authorized by law; I will now move to the second branch of the court's review and that is whether evidence collected as a result of the search ought to be excluded.

[35] To determine whether evidence should be excluded in accordance with sub-section 24(2) of the *Charter*, it is necessary that the court undertake the analysis outlined by the Supreme Court of Canada in *R. v. Grant*. Under section 24(2), a court must assess and balance the effect of admitting the evidence on Society's confidence in the justice system having regard to:

> 1. The seriousness of the *Charter* infringing state conduct;
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> 2. The impact of the breach on the *Charter* protected interests of the accused; and
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> 3. Society's interest in the adjudication of the case on its merits.
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> The Court's role on a section 24(2) application is to balance the assessments under each of these lines of inquiry to determine whether, considering all the circumstances, the admission of the evidence would bring the administration of justice into disrepute.[8]

[36] With respect to the issue of the seriousness of the *Charter*-infringing state conduct, I am dealing with the search of the accused's house and car unsupported by a lawful warrant.

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[8] 2009 SCC 32 at para. 71.

[37] In *R. v. Harrison*, the Supreme Court of Canada was called upon to do a sub-s. 24(2) analysis.[9] Admittedly, the facts in *Harrison* were different entirely to the facts in this case; itinvolved police stopping a rental truck on the trumped-up grounds that there was no front license plate, and doing a warrantless search that uncovered a large quantity of cocaine. While factually distinctive, the legal analysis is instructive.

> Here it is clear that the trial judge considered the *Charter* breaches to be at the serious end of the spectrum. On the facts found by him, this conclusion was a reasonable one. The officer's determination to turn up incriminating evidence, blighted him to constitutional requirements of reasonable grounds. While the violations may not have been deliberate in the sense of setting out to breach the *Charter*, they were reckless and showed an insufficient regard for *Charter* rights. Exacerbating the situation, the departure from *Charter* standards was major in degree since reasonable grounds for the initial stop were entirely nonexistent.[10]

[38] Here, I find that there was a largely insufficient regard for Mr. Patterson's *Charter* rights. Yes, police did seek prior judicial authorization; however, it was sought through an ITO that was substantially inadequate. At paragraph 25, the Court goes on to state:

> As pointed out by the majority of the Court of Appeal, there was no evidence of systemic or institutional abuse. However, while evidence of a systemic problem can properly aggravate the seriousness of the breach and weight in favour of exclusion, the absence of such a problem is hardly a mitigating factor.

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[9] 2009 SCC 34.
[10] *Id*. at para. 24.

[39] I do consider this ITO as emblematic of a systemic problem. I have seen many general-warrant ITOs from the very same investigative unit, worded almost identically to this one: "Source X has firsthand information", followed by a recital of a number of incriminating things Source X told police without any detail whatsoever as to how the source knows it. Ms. Duffy has been extremely diligent in intercepting these ITOs and either having them redrafted, or arranging for the court to hear *Morelli* amplification evidence; this one slipped through, because it was processed outside this judicial centre without her legal counsel to have it drafted correctly.

[40] Having said all this, the police who did the search with the warrant in hand believed that they were acting under a lawful authority, and they were justified in holding that belief. I find that this particular factor overcomes the inadequacy of the ITO and favours—if only narrowly— the admission of the evidence.

[41] I turn now to the second factor in *Grant*: the impact of the violation upon the *Charter* protected interests of Mr. Patterson. I find that the impact was,

indeed, significant. A search warrant was issued based on a wholly inadequate ITO. This resulted in a search of what I understand to be Mr. Patterson's residence in which he has a high level of expectation of privacy. This was underscored by Arnold J at paragraph 79 of his decision in *R. v. MacDonald*.

[42] Police searched Mr. Patterson's vehicle as well. Although the law accords a lesser degree of expectation of privacy in a car, it does respect it. This proposition is implicit in the well known vehicle search case, *R. v. Mellenthin*;[11] it has been recognized repeatedly by the Supreme Court of Canada.[12]

[43] Although the evidence seized by police was real evidence, it would not have been found without the warrant.

[44] I find that this section 8 breach had a significant impact upon the *Charter* protected privacy interests of Mr. Patterson and this factor militates in favour of exclusion.

[45] With respect to the public interest in the proper adjudication of this charge, I note that what was seized was real evidence, which would be highly

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[11] [1992] S.C.J. No. 100.
[12] *Supra*, note 8, at paras. 29-30.

reliable. This factor militates in favour of the admission, as letting it in would promote the interest of the public in having the case adjudicated upon its merits.

[46] In balancing these factors in a way consistent with *Morelli* [13] and *Harrison* [14], I take these factors into account: first, the court's decision must be based on a prospective not a retrospective analysis—that is, I must consider the long-term implications of letting in evidence seized on the basis of a warrant backed on a funadmentally flawed ITO. Second, my decision must not seek to punish police for misfeasance. Nevertheless, the court must not associate the justice system with flagrant breaches of people's *Charter* rights.

[47] In my view, the police conduct in this case was, indeed, serious. I find that the drafting of the ITO in this case left the issuing justice with essentially no evidence upon which the issuing justice might properly have assessed the credibility and reliability of Source "A" ; that is significant, given that this was

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[13] Supra, note 3, at paras. 108-112.
[14] Supra, note 8, at paras. 35-42.

primarily a single-source ITO. Further, this ITO exemplifies a systemic drafting problem.

[48] To appear to condone wilful and flagrant *Charter* breaches that resulted in a significant impingement on Mr. Patterson's *Charter* rights would not enhance the long-term repute of the administration of justice. On the contrary, it would undermine it. In this case, the seriousness of the offence and the reliability of the evidence, while important, do not outweigh the factors pointing to exclusion.

[49] I find that the seizure of evidence from Mr. Patterson under the authority of the warrant backed by the flawed ITO was in breach of his constitutionally protected section 8 *Charter* rights; I find that the appropriate remedy under sub- section 24(2) of the *Charter* is the exclusion of that evidence.

[50] Once again, I am indebted to counsel for their excellent written briefs and advocacy, and particularly to Ms. Duffy for the prosecution's fair-minded approach to this case.

JPC