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TAB 10

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THE SIX-MINUTE Criminal Court Judge 2016

"Step Six" Applications

Pursuant to *R. v. Garofoli*

The Honourable Kenneth Campbell
Superior Court of Justice

January 23, 2016

cpd Continuing Professional Development

"Step Six" Applications

Pursuant to *R. v. Garofoli*, [1990] 2 S.C.R. 1421

K.L. Campbell J.
Ontario Superior Court of Justice
Toronto Region

Some Preliminary Issues

- The Crown *proposes* what editing of the ITO is needed to preserve confidential informant privilege, but it is the trial judge who must make the "*final determination*" as to what redactions are necessary to preserve the privilege.
- The Crown bears the legal burden of justifying any proposed editing of the ITO, that is necessary to protect the privilege.
- The Crown may be required to provide the reviewing judge with a sealed written explanation and/or justification for each of the proposed redactions to the ITO (judicially summarized for the accused).
- The Crown may be required to prove that the claimed privilege exists by establishing that the individual who provided information to the police was a confidential informant.

  R. v. McKenzie, 2015 ONSC 6289.

Disclosure Issues Generally

- The accused is entitled to disclosure of all materials that were put before the issuing justice (i.e. the ITO and any appendices), and anything else in the "investigative file" in relation to the accused.
- For disclosure purposes, the "investigative file" encompasses all materials accumulated by the police agency in its investigation and relied upon in the search warrant materials targeting the accused. Typically, this includes the information received by the affiant about what the confidential informant said regarding the involvement of the suspect in the alleged offence, but does not include background personal information about any confidential informant or the details of his or her previous activities in confidentially providing information to the police about the criminal activities of others.

  R. v. McKenzie, 2016 ONSC 242, at paras. 15-16, 30-32.

Disclosure of Information From Confidential Informant

> "... in cases where the affiant has communicated directly with the confidential informant, the affiant's notes of those communications (redacted to protect privilege) should be disclosed to the accused. Similarly, in cases where the affiant has been provided with information from another police officer about the confidential informant's allegations about the involvement of the suspect in the alleged offence, any documentation passed along to the affiant and/or any notes about what information was passed along to the affiant (redacted to protect privilege) should be disclosed to the accused."
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> *R. v. McKenzie*, 2016 ONSC 242, at para. 33.

Information About Informant Not Subject to Disclosure

> "... the investigative file will typically *not* include: (1) any background information or personal details about any confidential informant; (2) any police intelligence files about any confidential informant (sometimes described as a confidential informant file); and/or (3) any reports to or from any police agency regarding the previous involvement of the confidential informant in other cases – even if redacted so as to protect the identity of the confidential informant. Accordingly, the handwritten notes or briefing notes of police handlers (not provided to affiants) are usually held to be outside the "investigative file" for disclosure purposes. ..... Such materials are typically just background information about the confidential informant and the details of his past activities as a confidential informant, and are part of an intelligence-gathering function focused on the confidential informant, rather than on the target of the current police investigation."
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> *R. v. McKenzie*, 2016 ONSC 242, at para. 38.

Step Six – *R. v. Garofoli*

> "6. If, however, the editing [of the ITO] renders the authorization insupportable, then the Crown may apply to have the trial judge consider so much of the excised material as is necessary to support the authorization. The trial judge should accede to such a request only if satisfied that the accused is sufficiently aware of the nature of the excised material to challenge it in argument or by evidence. In this regard, a judicial summary of the excised material should be provided if it will fulfill that function. It goes without saying

that if the Crown is dissatisfied with the extent of disclosure and is of the view that the public interest will be prejudiced, it can withdraw tender of the wiretap evidence."

R. v. Garofoli, [1990] 2 S.C.R. 1421, per Sopinka J., at p. 1461.

"The Nature of the Excised Material"

"... the threshold legal standard outlined in *Garofoli*, does not require the judicial summary to disclose the specific details of the redacted materials. Of course, it is usually not possible to disclose the details of the factual narrative provided by a confidential informant without also effectively disclosing the identity of the confidential informant. That is why the "step six" procedure in *Garofoli* "clearly contemplated that an accused would not be privy to all the information contained in the ITO, despite the fact that it would be reviewed and relied on by the reviewing judge," and by its "very nature" involves a "disparity in the information available" to the accused and the reviewing judge.
.....

... it is not the specific details of the excised materials that must be included in the judicial summary, but rather only a description of the "nature" of the excised materials."

R. v. McKenzie, 2016 ONSC 245, at para. 63.
R. v. Crevier, 2015 ONCA 619, at paras. 72, 84, 97.

Judicial Summary - "Types of Information" Redacted

- Source of CI's Information – Relationship With Accused;
- Previous history of reliability of the CI in providing information;
- Whether CI has a criminal record (e.g. any offences of dishonesty);
- CI's motivation in speaking to the police (e.g. consideration);
- Whether CI advised of penalties for providing false information;
- Whether physical descriptions of CI match accused/location;
- Degree of detail provided by CI – Timing of the information.
- Any discrepancies between one CI and another CI.
- Whether CI's information contradicted by police investigation.
- Any errors of inaccuracies in the ITO.

R. v. Crevier, 2015 ONCA 619, at para. 84.

"To Challenge it in Argument or by Evidence"

> "The other [caveat worth highlighting] is that the accused's awareness, gained through the judicial summary and other available information, must be sufficient to allow the accused to mount a challenge of the redacted details both in argument *and by evidence*. In my view, this means an accused's attack on an ITO and the validity of a search warrant can be made on either a facial or sub-facial basis, or both. In other words, the accused must, through the judicial summary, cross-examination of the affiant, or the leading of evidence, be in a position to mount both a facial and sub-facial attack on the warrant, including a challenge to those parts of the ITO that are redacted but relied on by the trial judge."
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> *R. v. Crevier*, 2015 ONCA 619, at para. 72.

Indirectly Challenging Redacted Material

- This standard contemplates that an accused may be able to challenge the redacted portions of an ITO by argument and with evidence notwithstanding that the accused is only entitled to be informed, by means of the judicial summary, of the "*nature* of the redacted details" and "*not the details themselves*."

- The argument that the accused cannot launch a sub-facial attack on the truth or accuracy of redacted materials without personally knowing the details of the information redacted, and can thereby personally test, verify and/or challenge the accuracy of those details incorrectly assumes that procedural fairness requires that the accused/counsel must be personally privy to the specific details of the redacted materials in order to directly test, verify or challenge their accuracy.

  R. v. McKenzie, 2016 ONSC 245, at paras. 64-70.

Judge Can Review and Verify Redactions

> "... the decision in *Khela* appears to stand for the general proposition that even in cases where the liberty interests of an individual are at stake, and the state seeks to rely upon secret, undisclosed information in reaching a decision that directly impacts adversely upon those liberty interests, the necessary procedural fairness, which requires "measures to verify the evidence being relied upon," can be provided indirectly by a judge who can

independently examine "sealed" materials and assess the reliability of the confidential, undisclosed information."

R. v. McKenzie, 2016 ONSC 245, at para. 67.
Mission Institute v. Khela, 2014 SCC 24, at paras. 87-88.

Indirect Challenges to Redactions Affect Weight

"Once the reviewing judge has determined that the accused is sufficiently aware of the nature of some or all of the redacted information, he or she can then assess the adequacy of the ITO with the help of that information. This assessment must be made in context. This context includes the fact that the accused could not directly challenge those portions of the ITO that were redacted and that support the warrant's issuance. The judge will consider the extent to which the accused's inability to directly challenge the redacted portions should affect the weight to be given to those portions. .....

Similarly, the reviewing judge should consider the nature of the information assessing the weight to be given to the redacted information, the extent to which the judicial summary allowed the accused to challenge it, and whether its nature is such that it was susceptible to being challenged by cross-examination or otherwise."

R. v. Crevier, 2015 ONCA 619, at para. 88.