



**Law Society**  
of Ontario

**Barreau**  
de l'Ontario

## **TAB 5**

# **The Six-Minute Criminal Court Judge 2020**

Preparing to Litigate Search Warrants in 6 Minutes

**The Honourable Michal Fairburn**  
*Court of Appeal for Ontario*

January 25, 2020





# Preparing to Litigate Search Warrants in 6 Minutes

**JUSTICE MICHAL FAIRBURN**

COURT OF APPEAL FOR ONTARIO

# Step One: The Search Warrant

Does the warrant refer to the correct provision?

Is the warrant signed?

If it refers to appendices, are they attached?

## Step Two: Does the provision permit what was done?

487.014(1) ...

117.04(1)

487

487.092(1)

199(1)

487.01(1)

487.05(1)

462.32(1)

487.012 ...

## Know the provision:

- ▶ Who has jurisdiction to authorize?
- ▶ Does the provision allow for what was authorized?
- ▶ Is it a warrant of last resort?
- ▶ Was there something else available?

## Step Three: Facial Validity

[37] A facial validity challenge requires the reviewing judge to examine the ITO and to determine whether, on the face of the information disclosed there, the justice could have issued the warrant .... The record examined on a facial review is fixed: it is the ITO, not an amplified or enlarged record ....

*R. v. Sadikov*, 2014 ONCA 72, at para. 37

# Facial Validity

IS EACH STATUTORY PREREQUISITE ADDRESSED AND, IF SO, DO THE CONTENTS OF THE ITO MEET THOSE PREREQUISITES?

REASONABLE GROUNDS TO BELIEVE

REASONABLE GROUNDS TO SUSPECT

Consider against  
the *Garofoli* test  
for review – can  
you possibly  
meet that  
threshold?

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. IN THIS PROCESS, THE EXISTENCE OF FRAUD, NON-DISCLOSURE, MISLEADING EVIDENCE AND NEW EVIDENCE ARE ALL RELEVANT, BUT, RATHER THAN BEING A PREREQUISITE TO REVIEW, THEIR SOLE IMPACT IS TO DETERMINE WHETHER THERE CONTINUES TO BE ANY BASIS FOR THE DECISION OF THE AUTHORIZING JUDGE.

**R. V. GAROFOLI**, [1990] 2 S.C.R. 1421



## STEP FOUR: SUB-FACIAL VALIDITY

- ▶ ***R. v. Araujo***, 2000 SCC 65, at para. 50


Sub-facial challenges to an affidavit go behind the form of the affidavit to attack the reliability of its content.

Make disclosure requests early.

Make appropriate inquiries about the the basis for redactions.

# Sub-facial Attack

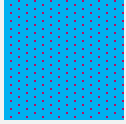
- ▶ On a sub-facial challenge, material may be placed before the reviewing judge to show that parts of the ITO should be excised because they are misleading or inaccurate.
- ▶ Has the affiant deliberately or recklessly misled the issuing judge leaving “the entire ITO unreliable as a basis upon which to issue a warrant”?
  - ▶ *R. v. Shivrattan*, 2017 ONCA 23, at para 26
- ▶ The reviewing judge should carefully consider whether sufficient reliable information remains in the amplified record, in other words, information that might reasonably be believed, on the basis of which the enabling warrant could have issued: *Araujo*, at para. 52.
  - ▶ *Sadikov*, at para. 38



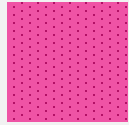
Step 4(a): Consider whether a cross-examination of the affiant is in order? If so, get application prepared.

- ▶ In some cases, the proposed cross-examination may be directed at the credibility or reliability of an informant. However, cross-examination that can do no more than show that some of the information relied upon by the affiant is false is not likely to be useful unless it can also support the inference that the affiant knew or ought to have known that it was false.

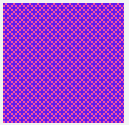
▶ *R .v. Lising*, 2005 SCC 66, at para. 41



Was the timing of execution complied with?

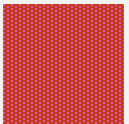


Did the police search where they were supposed to search and for what they were supposed to search for?



Did the police knock before entering or make a hard entry?

*R. v. Cornell*, 2010 SCC 31



Did the police have a copy of the warrant?

*Criminal Code*, s. 29

## STEP FIVE: Execution of the Warrant

STEP SIX:  
WERE THE  
RETURN  
PROVISIONS  
COMPLIED  
WITH?



Did the police comply with the return provisions?

*R. v. Garcia-Machado*, 2015 ONCA 569