SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Chaisson*, 2021 NSSC 123

Date: 20210414
Docket: SAT No. 503668
Registry: Pictou

Between:

Her Majesty the Queen

v.

Gabriel George Chaisson

DECISION ON SEARCH WARRANT

Judge:	The Honourable Justice Scott C. Norton
Heard:	April 12, 2021, in Pictou, Nova Scotia
Decision:	April 14, 2021
Counsel:	Wayne J. MacMillan, for the Crown T.J. McKeough, for the Accused

By the Court:

Introduction

[1] Mr. Chaisson brings this application to challenge whether there were reasonable grounds to issue a search warrant and, if not, exclude the evidence obtained pursuant to s. 24(2) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 ("*Charter*").

Facts

[2] Mr. Chaisson is charged with one count of possession of Cocaine for the purpose of trafficking contrary to s. 5(2) of the *Controlled Drugs and Substances Act*, SC 1996, c.19 ("CDSA") on October 9, 2020 at or near Goshen Nova Scotia and four counts of breach of a condition of a release order contrary to s. 145(5)(a) of the *Criminal Code*.

[3] Cst. John Donaldson of the Royal Canadian Mounted Police, Antigonish Detachment, prepared an Information to Obtain in Form 1 pursuant to s. 487.1 of the *Criminal Code* ("ITO") on October 6, 2020 on the basis that he had reasonable grounds to believe and did believe there would be a hand gun, ammunition, firearm or other prohibited device at Mr. Chaisson's residence at […], Goshen, NS.

[4] Cst. Donaldson sent the ITO and supporting documents by fax to the Justice of the Peace Centre for review on October 8, 2020. The ITO and Search Warrant signed by Justice of the Peace Judith Gass were received by Cst. Donaldson within a short period of time.

[5] The search warrant was executed at Mr. Chaisson's home shortly after 9:42 a.m. on October 9, 2020. Mr. Chaisson was present and was arrested and read his *Charter* rights with respect to the breach of order and possession of firearms. Mr. Chaisson was unable to speak to his personal lawyer but left a message with him and later made contact with a lawyer from legal aid.

[6] While members of the RCMP were searching the residence they found items that suggested that Mr. Chaisson was conducting business in trafficking a controlled substance.

[7] At about 11:50 a.m. Cst. Donaldson left Mr. Chaisson's residence and returned to the Antigonish Detachment to prepare an Information to Obtain pursuant to s. 11 of the *CDSA* ("CDSA ITO"). This was sent to the JP Centre and Justice of the Peace Judith Gass returned signed ITO and CDSA Warrant at approximately 2:11 p.m. Cst. Donaldson took Mr. Chaisson out of the cells at the Detachment and gave him a copy of both the s. 487 and CDSA Search Warrants,

advised there were new charges stemming from the CDSA search and read him his *Charter* rights again. Mr. Chaisson was again unable to reach his lawyer of choice but was able to speak with a legal aid lawyer.

Issues

1. Were there grounds as set forth in the ITO and CDSA ITO sufficient to grant the search warrants?
2. Should the evidence obtained as a result of the searches be excluded under s. 24(2) of the *Charter*?

Law

[8] The standard of review to be applied by a Judge when reviewing an issuing justice's decision to issue a search warrant was discussed by the Nova Scotia Court of Appeal in *R. v. Durling*, 2006 NSCA 124. There, Chief Justice MacDonald instructed as follows, at paras. 15-18:

> [15] What then was the judge's role when reviewing the JP's decision to issue a search warrant? **Simply put, he was to consider not whether he would have issued the warrant but instead whether the warrant *could* have been issued based on the relevant information provided**.
>
> [16] This test can be traced back to the Supreme Court of Canada decision in *R. v. Garofoli*, [1990] 2 S.C.R. 1421, where in the analogous context of a wiretap authorization, Sopinka, J concluded:

> ¶ 56 The reviewing judge does not substitute his or her view for that of the authorizing judge. 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**.

[17] In what circumstances could a warrant be justified? The prescribed test is an objective one. The issuing JP would have to have reasonable and probable grounds that an offence had been committed and that the search would uncover material evidence. In other words, a *credibly-based probability* must replace suspicion. Thus, in *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 at pp. 167-168, the Supreme Court concluded:

> Anglo-Canadian legal and political traditions point to a higher standard. The common law required evidence on oath which gave "strong reason to believe" that stolen goods were concealed in the place to be searched before a warrant would issue. Section 443 [now s. 487] of the Criminal Code authorizes a warrant only where there has been information upon oath that there is "reasonable ground to believe" that there is evidence of an offence in the place to be searched. The American *Bill of Rights* provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation ...." The phrasing is slightly different but the standard in each of these formulations is identical. ***The state's interest in detecting and preventing crime begins to prevail over the individual's interest in being left alone at the point where credibly-based probability replaces suspicion.*** History has confirmed the appropriateness of this requirement as the threshold for subordinating the expectation of privacy to the needs of law enforcement. Where in the state's interest is not simply law enforcement as, for instance, where state security is involved, or where the individual's interest is not simply his expectation of privacy as, for instance, when the search threatens his bodily integrity, the relevant standard might well be a different one. That is not the situation in the present case. *In cases like the present, reasonable and probable grounds, established upon oath, to believe that an offence has been committed and that there is evidence to be found at the place of the search, constitutes the minimum standard, consistent with s. 8 of the Charter, for authorizing search and seizure.* In so far as subss. 10(1) and 10(3) of the Combines Investigation Act do not embody such a requirement, I would hold them to be further inconsistent with s. 8.

[Emphasis added.]

> [18] These same principles would apply to this case where the search warrant was sought under s. 11 of the Controlled Drugs and Substances Act (1996, c. 19).
>
> [Bold emphasis added]

[9] Where an ITO relies on information from a criminal informant, the issuing justice must assess the reliability of the criminal informant's information before granting the search warrant. In *R. v Garofoli*, *supra*, Justice Sopinka explained the totality of the circumstances to be considered at p. 1457:

> (ii) … 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; and,
>
> (c) the indicia of the informer's reliability such as past performance or confirmation from other investigative sources.

Position of the Parties

Defence

[10] The Defence argument focuses on the ITO obtained under s. 487.1. Mr. Chaisson argues that there were 3 confidential sources upon which the ITO was based. He submits that para 14 of the ITO makes clear that the information provided by Sources A and B were not corroborated by an earlier search of Mr. Chaisson's residence on February 28, 2020 in that no firearms were found. Para 14 states:

> On February 28, 2020, a search warrant was executed on Gabe Chaisson's residence and a bolt action rifle and imitation firearm were seized along with a large quantity of controlled substances and cash. The quantity and description of firearms described by the confidential informants in this document were not located. This leads me to believe Gabe Chaisson hides his firearms or has since acquired more firearms for his protection.

[11] Mr. Chaisson argues that Source A and B should therefore be ignored and that if the information of Sources A and B is ignored as unreliable, the ITO is left supported only by the information from Source C. This was a new source and, discounting the corroboration of A and B, with nothing to corroborate its reliability. This does not amount to sufficient grounds for the Justice of the Peace to issue the warrant.

[12] Alternatively, Mr. Chaisson says that if Source A and B are considered, each Source gave a description of a different type of firearm.

[13] Of greater concern to Mr. Chaisson, he says, is the fact that Cst. Donaldson acknowledged in cross-examination that it would have been difficult to obtain a warrant to search for drugs because there was no recency to the information about the presence of drugs at the residence. He testified that public safety related to the possible presence of firearms is a more serious concern. Because Sources A, B and C are the same for both warrants, Mr. Chaisson asks the Court to conclude that Cst. Donaldson tailored the warrant as seeking firearms when the real intent was to

allow the police to search for drugs. He points to the fact that no reference that Mr. Chaisson was suspected of trafficking drugs was included in the ITO.

Crown

The Crown says that Mr. Chaisson has the burden to establish, on a balance of probability, that the search warrant was not lawfully issued and if so that the exclusion of the evidence obtained is the appropriate remedy. The Crown argues that the test for this Court on review is whether the ITO "could" have given the issuing justice reasonable and probable grounds to believe that illegal firearms and other prohibited devices were present. The Crown says that the information provided to the Justice of the Peace was sufficient such that when examined objectively by this Court it will conclude that a Justice of the Peace "could" issue the warrant.

Analysis

[14] The argument advanced by Mr. Chaisson is based largely on the submission that para 14 of the ITO establishes that Source A and Source B were proven wrong by the fact that the earlier search in February did not turn up the firearms they provided the police with information about. This in turn is based on a

presumption, not evidenced, that Sources A and B were sources for that earlier search warrant. With respect, I do not see that conclusion in para 14.

[15] Cst. Donaldson was cross-examined by Defence counsel at the hearing of this motion. He testified that he was not aware that Sources A and B were used as sources for the earlier search warrant. He believed that their confidential information provided to him was new information that, together with the information provided by Source C, provided reasonable and probable grounds for a warrant. It was Mr. Chaisson's burden to prove that they were sources on the earlier search warrant and therefore their information was wrong and should be ignored. He failed to do so.

[16] As to the argument that the police sought the ITO for the purposes of circumventing their inability to obtain an ITO to search for evidence of trafficking, this is no more than a theory. Had there been no evidence of the possession of unregistered firearms by Mr. Chaisson that theory may have been developed into a better argument. However, on the evidence before the Court, I find that the ITO presented to the Justice of the Peace provided reasonable and probable grounds, established upon oath, to believe that an offence has been committed and that there is evidence to be found at the place of the search.

[17] Mr. Chaisson made no argument that the *CDSA* search warrant was not properly issued. Rather, his argument was that if the s. 487 search warrant was improperly issued, all of the evidence obtained subsequent to it should be excluded. In light of my findings, there is no merit to this argument.

[18] In conclusion, for the reasons stated, the application by Mr. Chaisson to challenge the search warrants is dismissed.

Norton, J.