The *Garofoli* Hearing: Procedural Considerations

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Search Warrants

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1. INTRODUCTION[1]

In the Canadian legal system, the State's power to search and seize is regulated by a system of judicial pre-authorization. Search warrants are sought by law enforcement on an *ex parte* basis and, as a general rule, judicial authorizations are presumed to be valid unless an accused establishes otherwise.[2] An accused may do this by bringing an application before the court for judicial review and demonstrating that a warrant is defective on its face and must be quashed or by showing that it never should have issued. A judicial review into the latter is commonly referred to as a *Garofoli* hearing.[3]

The purpose of a *Garofoli* hearing is to give an accused the opportunity to make arguments and/or call evidence so that the reviewing court can assess whether or not the warrant should have issued. While there is a need to balance the interests of efficiency and deference to the initial authorizing judicial officer, the *Garofoli* process is crucial to the integrity of the prior judicial authorization process. In criminal law, a search warrant gives the State the power to invade an individual's privacy. Without prior judicial authorization, a search conducted where one has a reasonable expectation of privacy is *prima facie* unreasonable and breaches an individual's section 8 *Charter* rights. As the individual is not present or represented at the warrant application, the review hearing will be the first (and likely only) opportunity to challenge the lawfulness of the police conduct in this area of law. As such, the right to a procedurally fair review *must* be available to keep police power in check.

This paper will explain the *Garofoli* hearing in detail and discuss how the courts have approached its various procedural aspects.

2. STANDARD OF REVIEW

When reviewing a judicial authorization, the relevant question is not whether the reviewing Court *would* have granted the order. The question on review is whether or not the order *could* have issued. The test in this regard was set out by Sopinka J. in *R v Garofoli,* as follows:

> 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

1 With special thanks to Heather Ferg, Kelsey L. Sitar and Kim Arial for their assistance and contributions in preparing this paper.

2 This paper will refer to "search warrants" but the procedural principles described apply generally to wiretap orders, production orders, general warrants and all other orders permitting the state to obtain for an order enabling them to breach a citizen's reasonable expectation of privacy.

3 *R v Wilson*, 2011 BCCA 252 [*Wilson*] at para 63; and *R v Campbell*, 2010 ONCA 588 at para 45, aff'd 2011 SCC 32.

> 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.[4]

In *R v Morelli,* Fish J. restated the standard of review, as follows:

> 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" (R. v. Araujo, 2000 SCC 65, [2000] 2 S.C.R. 992 (S.C.C.), at para. 54 (emphasis in original)). 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]

3. THE STARTING POINT: LEGISLATIVE PRECONDITIONS

Whether or not a warrant or order properly issued will necessarily entail consideration of the particular search mechanism employed by the police. The prerequisites will vary depending on the legislative preconditions and therefore careful analysis of the authorizing statute is the starting point for any application for review. Most legislative enactments require evidence on oath that meets the "reasonable grounds" standard; however, some searches can be authorized on the lower "reasonable suspicion" standard (i.e. where the expectation of privacy at issue is reduced). For example, the police can obtain a Dial Number Recorder (DNR) to obtain a list of phone numbers in communication with a particular phone number based on "reasonable grounds to suspect."[6] Where the expectation of privacy is higher, such as in the context of intercepting private communications, the police are required to establish reasonable grounds as well as the "investigative necessity" of the order sought. Careful analysis of the legislative prerequisites will be the starting point of the analysis because the parameters of the review will be established by these preconditions for issuance.

4. TYPES OF REVIEW

The review of an order may take the form of either a challenge to the warrant's "facial validity" and/or a challenge to its "sub-facial validity."

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4 *R v Garofoli,* [1990] 2 SCR 1421 [*Garofoli*] at para 56.

5 *R v Morelli*, 2010 SCC 8 [*Morelli*] at para 40, citing *R v Araujo*, 2000 SCC 65 [*Araujo*] at para 54.

6 *Criminal Code*, RSC 1985, c C-46, s 487.015.