Court of Queen's Bench of Alberta

Citation: R. v. Synergy Group of Canada Inc., 2004 ABQB 296

Date: 20040416
Docket: 031070824X1
Registry: Calgary

In the Matter of a Warrant To Search Pursuant To Section 487 and 487 Subsection 4887(2.1) of the *Criminal Code of Canada* Issued on July 14th A.D. 2003, At Calgary, In the Province of Alberta.

Between:

Her Majesty the Queen

Respondent
(Informant)

- and -

The Synergy Group of Canada Inc., Truehope Nutritional Support Ltd., David Lawrence Hardy And Anthony Frederick Stephan

Applicants

Reasons for Judgment
of the
Honourable Mr. Justice C.S. Brooker

INTRODUCTION

[1] The Applicants seek an order in the nature of *certiorari* to quash a search warrant that was issued by Judge DeLong on July 14, 2003, allowing the Respondent to search the Applicants' premises.

[2] The Applicants state that there were several material omissions in the sworn Information which precluded Judge De Long from acting judicially and that, as a result, a jurisdictional error occurred.

[3] The Respondent submits that although there was information excluded from the Information to Obtain sworn in support of the search warrant, it was not omitted in bad faith and was not relevant and necessary for the issuing judge to properly exercise his jurisdiction.

FACTS

[4] The events surrounding the application may be briefly summarized:

1. The Applicants are involved with the production and sale of a product called Empowerplus. The Applicants take the position that Empowerplus is not a "drug" as that term is defined under the *Food and Drugs Act*[1]

2. The Respondent is of the view that Empowerplus is a drug under the *Food and Drugs Act* and, as such, compliance with the *Act* is required. This disagreement lead to a series of meetings and communications regarding the Applicants' compliance with the statute and the regulations. The Applicants had their legal counsel write to the Respondent in the course of those negotiations. The negotiations continued from October 2000 until April 2003.

3. During that period the Government announced proposed changes to the manner of regulating natural health products and the Applicants took the position that, because of those proposed changes, it was unclear how Empowerplus should be regulated. However, at no material time did the regulatory framework change so as to effect the compliance or non-compliance of Empowerplus with the *Food and Drugs Act*.

4. In April and May of 2003, the Respondent seized shipments of Empowerplus from the Applicants, causing them to make an application in the Federal Court for judicial review of the seizures and the decision of Health Canada to treat Empowerplus as a drug under the *Act*. In that application the Applicants specifically named Kim Seeling and Mandip Deol as the inspectors who were responsible for the seizure. Although these two individuals were not named as parties, the Notice of Application in the Federal Court was specifically directed to each of them as well as the Respondent.

[5] On July 14th, the Applicants obtained a search warrant on the basis of an Information To Obtain consisting of 96 paragraphs totalling 30 pages. Despite its detail, that Information

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[1] R.S.C. 1985, c.F-27

omitted, *inter alia*, the following information:

1. that there was a Federal Court application pending between the parties in relation to the seizures of Empowerplus, wherein the Applicants sought, among other things: a permanent injunction restraining future seizures of Emerpowerplus by the Respondent; an order quashing the Respondent's decision that Empowerplus is a drug under the *Act*; an order quashing any decision by the Respondent that there may have been a violation of s.9(1) and 9(2) of the *Act*; an order quashing any assessment by the Respondent that there may have been a violation of A.01.040 and C.01.014 of the Regulations; and a declaration that the importation of Empowerplus into Canada is lawful and that no DIN or establishment licence is required in the circumstances;

2. that there had been ongoing communications between the two parties for 2 ½ years concerning the regulation of Empowerplus;

3. that changes had been proposed by the Minister of Health regarding the regulations concerning the treatment of natural health products; and

4. that two officers, Seeling and Deol, named as officers to whom the search warrant was to be directed, were the same persons named in the Federal Court application that was then extant.

POSITIONS OF THE PARTIES

[6] In determining if there has been a jurisdictional error in cases where a charge has not been laid, the Applicants submit that the function of a reviewing court is to decide whether the information provided to the issuing judge was sufficient to allow him or her to act judicially in exercising his or her discretion to issue the search warrant[2]. The Applicants state that it was not up to the Respondent to disclose only that information that it determined was relevant to the issuing judge. Rather, they submit that all of the information concerning the parties dealings should have been disclosed so that the judge could determine if it was relevant and, if so, how much weight it ought to be afforded in deciding whether or how he would exercise his discretion to issue the requested search warrant. Without having provided all of the information to the issuing judge the Applicants argue that he was precluded from acting judicially.

[7] The Respondent takes the position that the appropriate test to be applied by the reviewing judge in these circumstances is whether the issuing judge could have satisfied himself, had he been given the omitted information, as to:

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[2]Ewaschuk, E.G., *Criminal Pleadings and Practice in Canada,* 2nd ed. (Aurora: Canada Law Book, 1987)

- whether there were reasonable and probable grounds to believe that offences were committed in violation of the *Food and Drugs Act*; and

- whether there were reasonable and probable grounds upon which to believe evidence of those offenses existed at the premises described in the search warrant.

LAW

[8] Applications for search warrants are made *ex parte.* As Crown counsel fairly points out in his brief filed in this application:

> It is beyond question that given the *ex parte* nature of a search warrant application, there is a duty of full and frank disclosure on the investigator seeking it. All relevant circumstances, both favouring and detracting from the granting of the warrant, must be revealed to allow the issuing justice to exercise his or her discretion judicially. Failure to do so may result in the search warrant being quashed.

[9] The review of search warrants is limited to jurisdictional error[3].

[10] The British Columbia Court of Appeal in ***R. v. Sismey***[4] held that, where a search warrant applicant deliberately misleads the issuing judge, the warrant cannot stand. However, the Nova Scotia Court of Appeal in ***R. v. Morris***[5] held that even fraudulent errors do not lead to an automatic vitiation of the warrant. Nevertheless, the Court added that in the appropriate circumstances the reviewing judge may conclude that the conduct of the police in obtaining the warrant was so subversive that the warrant must be set aside to protect the process. This case was cited with approval by the Supreme Court of Canada in ***R. v. Araujo***[6], wherein the Court concluded at page 1019 that the correct approach is to look for "sufficient reliable information in the totality of the circumstances".

[11] Where information is omitted but it was not in an effort to deliberately mislead the judge,

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[3] ***Re Church of Scientology and The Queen (No. 6)*** (1987), 31 C.C.C. (3d) 449 (Ont.C.A.), leave to appeal to S.C.C. refused 23 O.A.C. 320n

[4] (1990), 55 C.C.C. (3d) 281

[5] (1998), 134 C.C.C. (3d) 539

[6] [2000] 2 S.C.R. 992

a jurisdictional error may still occur where the issuing judge is misled and cannot determine, on the information provided, whether grounds for the issue of the warrant are satisfied. Specifically, the information provided must be sufficient to demonstrate that there are reasonable and probable grounds to believe that an offence has occurred and that there is evidence thereof at the premises designated in the warrant. Where the information is misleading with respect to those grounds, the judge cannot be said to have been acting judicially in issuing the warrant.[7]

[12] The test for quashing a search warrant on an application for *certiorari* is set out in ***Church of Scientology*** at pages 528 - 529:

> ... the appropriate test on a *certiorari* application is whether there was evidence upon which the justice acting judicially could have determined that a search warrant should be issued. In those circumstances, therefore, the function of the reviewing judge is to determine whether there is any evidence remaining, after disregarding the allegations found to be false, taking into consideration the facts found to have been omitted by the informant, upon which the justice could be satisfied that a search warrant should issue. We recognize that in such event it is not known whether the justice would have been satisfied but keeping in mind that the proceedings are not a trial involving the guilt or innocence of the accused, it is sufficient that he or she could have been satisfied. If, however, the reviewing judge finds in these circumstances that there is no evidence upon which the justice acting judicially could be satisfied, then the only logical conclusion would be that there is an absence of jurisdiction in the court and the warrant would have to be quashed even though there has not been a fraud upon the court or reckless disregard for the truth.

ANALYSIS

[13] On the evidence before me I do not find that Sandra Jarvis, the individual who swore the Information to Obtain, deliberately intended to mislead the issuing judge. She has explained that the reason she did not include the additional facts is because she did not view them as being relevant to her application[8]. I agree with the Applicants' submission that it is for the judge to decide whether these facts are relevant to his decision; not the informant.

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[7] ***Re Fleet Aerospace Corp. and The Queen*** (1985), 19 C.C.C. (3d) 385 (Ont.H.C.J.)

[8] In fact, Ms Jarvis deposes in paragraph 8 of her affidavit filed in opposition to this application: "While preparing the Information to Obtain, I was aware of the civil action in the Federal Court ... I did not include this information in the Information to Obtain as the decision to obtain a search warrant was made prior to the date the civil action was commenced. As such, it is my belief that the civil action had no influence on Health Canada's enforcement action."

[14] It would appear that there is a certain inconsistency or tension between, on the one hand, the obligation for full, fair and frank disclosure when one is applying *ex parte* for a search warrant; and, on the other hand, the test for quashing a search warrant as set out in ***Church of Scientology***. This case offers a good illustration of that. This was not a case of urgency. This was not a case of an abbreviated Information. The Crown took a number of months to prepare its application. Ms Jarvis took time and went into extensive detail producing 96 paragraphs over 30 pages in support of her application. Yet, she never mentioned the 2 ½ years of discussions between the Applicants and the Respondent, nor the fact that the Applicants were challenging the Respondent's position and the application of the legislation in Federal Court. These facts (as well as those earlier set out at paragraph 5 herein) should have been placed before the issuing judge by the Respondent. They provide balance and context to the circumstances in which the application for the search warrant was being made. The Respondent's failure to do so offends the requirement for full, fair and frank disclosure on an *ex parte* application. Were that the test for quashing the warrant, I would have no hesitation in doing so. However, as noted above, that is not the test. The test is clearly set out in ***Church of Scientology***, the result of which appears to be that, here, at least, the requirement for full, fair and frank disclosure rings rather hollow.

[15] Applying, as I must, the test as set out in ***Church of Scientology,*** the issue is whether the facts disclosed in the Information to Obtain left an incorrect impression with the issuing judge[9] such that, had he been apprised of all the facts, he could not have been satisfied that the warrant should be issued.[10]

[16] In this case the Information to Obtain set out the grounds upon which the Respondent based its allegations that the Applicants were acting in violation of the *Food and Drugs Act* and why it was reasonable to believe that evidence of those offences could be found at the designated premises. Specifically, the Respondent swore that the Applicants were, through various web-sites and telephone call centres, importing and promoting the sale of Empowerplus in Canada prior to obtaining the required approval of Heath Canada and that evidence thereof could be obtained at the premises set out in the warrant.

[17] Does the failure to disclose the civil suit being pursued in Federal Court or the ongoing course of correspondence and discussions between the parties relating to the applicability of, or compliance with, the *Act*, preclude the judge, acting judicially, from determining whether the warrant should issue? I cannot say that it does. If all these additional facts had been placed before the issuing judge, he could still have issued the search warrant in the form that he did.

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[9]See ***Sismey***

[10]See ***Church of Scientology***; ***R. v. Bisson,*** (1994), 87 C.C.C. (3d) 440 (Que. C.A.), aff'd [1994] 3 S.C.R. 1097, and ***R. v. Doliente*** (1996), 108 C.C.C. (3d) 137 (Alta. C. A.), rev'd on other grounds, [1997] 2 S.C.R. 11

[18] Accordingly, I find the application to quash the search warrant must fail. The application is dismissed.

Heard on the 21st day of October, 2003.

Dated at the City of Calgary, Alberta this 16th day of April, 2004.

C.S. Brooker
J.C.Q.B.A.

Appearances:

Scott Couper, Department of Justice, Canada
for the Respondent (Informant)

Hersch Wolch, Q.C., Wolch, Ogle, Wilson, Hursh & Dewitt
for the Applicants