Search warrants don't give police carte blanche powers

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1 More than 80 police officers descended on The Comfort Zone after-hours dance club in downtown Toronto on March 16, 2008. The first wave of officers was made up of the Emergency Task Force (ETF), dressed in paramilitary black gear and carrying assault rifles.

2 All patrons were immediately subjected to a 'pat-down' or 'frisk' search. If any drugs were found on them, they were charged with drug offences.

3 Police were executing a Criminal Code (R.S.C. 1985, c. C-46) search warrant alleging a conspiracy among several unnamed drug dealers and club staff.

4 I represented one of the individuals charge in this raid. According to my client, when the police first encountered him he was on the smoking patio outside the club. My client said he was forced at gunpoint to lie face down in the snow, dirt and melt-water on the patio.

5 He said he was then searched, questioned and handcuffed, and taken inside the club, where he remained handcuffed and detained for another 90 minutes or so. As subsequent searches did not uncover any drugs on his person, he says he was told he would be released from the club shortly. Approximately two hours after the police had first detained him, he was escorted outside the club to the sidewalk on Spadina Avenue.

6 There, my client says he was suddenly informed by an escorting officer that he was now under investigative detention, and would therefore be searched for weapons. A pat-down search revealed the apparent presence of a bulge under one of my client's socks. The officer then inserted his fingers inside the socks and discovered three very small baggies (approximately two centimetres by two centimetres) containing some powder alleged to be cocaine. My client was then arrested and a further search of his underwear located alleged Schedule 3 controlled substances.

7 It was apparent by their behaviour that the police were of the view that the possession of a warrant to search The Comfort Zone entitled them to detain and search anybody they found inside.

8 Ultimately, the Crown stayed all charges against my client shortly after the trial began but not before I had conducted detailed research on the scope of police power to search incident to an investigative detention.

9 In its seminal case on investigative detention, R. v. Mann, the Supreme Court of Canada stated the following: "Absent a law to the contrary, individuals are free to do as they please. By contrast, the police (and more broadly), the state, may act only to the extent that they are empowered to do so by law."[1]

10 Various federal Crown attorneys, and certainly the police, seem to think that the execution of the search warrant gave them the right to detain and search all occupants of the place. This view is erroneous. A search warrant issued under s. 487 of the Criminal Code authorizes only a search of the

premises and not the occupants therein. The Comfort Zone search warrant was a Criminal Code one, and therefore did not authorize the search of anybody inside.

11 A warrant issued under s. 11 of the Controlled Drugs and Substances Act (CDSA), does authorize the search of persons found in a place being searched. However, even in that case, the officer may only search an occupant where he or she "has reasonable grounds to believe that any (such) person ... has on their person any controlled substance ... (etc.)." Even with a CDSA s. 11 search warrant then, the police would not have blanket authority to search everyone found in the club, only those for whom the requisite reasonable grounds existed. The case law suggests that there has to be specific reasonable grounds to believe that the individual has contraband on their person.

12 At The Comfort Zone, the fact that the police were looking for drugs did not give them the authority to take advantage of the CDSA search-of-person provisions. As the Supreme Court of Canada held in R. v. Grant,[2] where the warrant is obtained under s. 487, the police must execute it in accordance with the Criminal Code and cannot resort to the special provisions in the CDSA.

13 Even prior to the decision of the Supreme Court of Canada in Mann, the scope of investigative detention was articulated by the Ontario Court of Appeal in the seminal case of R. v. Simpson[3] and other similar cases decided by various provincial courts of appeal throughout Canada.

14 In 2001, the Manitoba Provincial Court, dealing specifically with the issues of search warrants and investigative detentions, stated the following in the case of R. v. Kirby:[4]

> On the basis of the jurisprudence above, I am not satisfied that the doctrine of investigative detention applies to authorize the detention of individuals found in premises where a search warrant is executed, including individuals such as the accused, who are suspected of a criminal activity. If Mr. Kirby could be detained under such a doctrine, every person suspected could be detained while a search warrant is executed, when grounds for arrest do not exist.[5]

15 Indeed, the court in Kirby noted that in Criminal Pleadings and Practice in Canada, 2nd edition, (Aurora, Ont.: Canada Law Book, 2001) by Mr. Justice E.G. Ewaschuk, the author summarizes the general principle as follows:

> A search warrant authorizes the search of premises or property specified in the warrant. A search warrant does not, however, authorize the search of persons on the specified premises or property so that such persons cannot be searched in the absence of a statutory power to do so or in the absence of a search incidental to an arrest.

16 In Search and Seizure Law in Canada (Toronto: Carswell, 1990) by Scott Hutchison and James Morton, the authors state the following:

> ... generally, peace officers have no special authority over persons found in premises while being searched pursuant to a search warrant. Absent an arrest, persons found on premises being searched are not subject to a search by executing officers. Occupants are entitled, in general, to leave the premises being searched.

17 In the case of Levitz v. Ryan,[6] the Ontario Court of Appeal recognized a limited right of police to keep the owner of a premises being searched under reasonable surveillance to ensure that he or she did not interfere with the search or otherwise secrete or destroy evidence.

18 Provincial Court Judge Smith said the following about the principle enunciated in the Levitz case:

> This does not mean, as the officers in this case seem to believe, that a search warrant ipso facto justifies the detention of any person, including the target of the investigation, and automatic personal searches of individuals... for any weapons or property or anything else that may be of concern to police. On the contrary, there must be reasonable grounds to believe that the person to be searched may be armed or dangerous; the police must have such safety concerns in mind and the search must be limited in scope to a search for weapons. Such a limited right of personal search provides the appropriate balance in this context.

19 In The Comfort Zone case, the only weapons in evidence in the whole club were those being held by police officers. Indeed, the ETF report on The Comfort Zone shows that not a single weapon was located during the raid. Moreover, since most of the patrons were dressed for dancing, it was easily discernable whether they were holding or carrying any contraband on their person.

20 In Levitz itself, the Ontario Court of Appeal clarified the reasonable surveillance rule:

> It is not intended to apply, and I do not intend to apply it, to cases where the detention of occupants of premises under search is in the circumstances unreasonable and incapable of being regarded as a "necessary part of the search authorized."

21 In the 1996 case of R. v. Thompson,[7] Provincial Court Judge MacDonnell (as he then was), considered the admissibility of crack cocaine found in the possession of Thompson on the patio of an apartment that was subject to a Narcotics Control Act (R.S.C. 1970, c. N-1) search warrant. The officer who encountered Thompson on the patio was of the belief that the warrant entitled him to search Thompson even though the officer did have any reasonable grounds to believe that Thompson had committed an offence (indeed, he had no information at all about the accused). In excluding the evidence, Justice MacDonnell stated:

> It is plain that (the searching officer), did not believe that he required reasonable grounds to arrest the accused in the circumstances; he believed that where the police enter a place under the authority of a narcotics search warrant, they are entitled - prior to conducting the search - to arrest everyone found within that place for possession of a narcotic. Further, even if Constable Habuda had believed that he had reasonable grounds to arrest the accused, there is nothing in the record which could have lead a reasonable person to come to that conclusion. Therefore, the arrest was unlawful, and the search of the accused cannot be justified under the common law power to search as an incident to a lawful arrest.[8]

22 The search was ultimately found to be unreasonable under s. 8 of the Charter and the narcotics found were excluded under s. 24(2) of the Charter. It is interesting to note that the former Narcotics Control Act, s. 11, did not contain the same explicit requirement that s. 11 of the CDSA does: that the police must have reasonable grounds before they can search a found-in. Crown counsel in the Thompson case conceded that such a requirement should be read into the section. Under the CDSA, the existence of reasonable grounds to search a found-in during the execution of a search warrant is mandated by statute.

23 In the case of R. v. Gogol,[9] Justice Fairgrieve ruled in relation to a case where the accused, an elderly woman, was detained for some two hours with her hands handcuffed behind her back during the execution of a search warrant on her premises. Once again, police were of the view that they could handcuff Ms. Gogol as a precautionary measure to ensure that she did not interfere with the search of her premises. Although there was no evidence that she had tried to obstruct the police officers in searching the premises, she was nevertheless handcuffed. No explanation was given to her for the hand-cuffing, nor was she advised of her rights to counsel.

24 Justice Fairgrieve ultimately determined:

> In this case, the unreasonable manner of conducting the search encompassed the use of unnecessary force against Ms. Gogol and the unwarranted destruction of her property (police had also engaged in acts of vandalism during the execution of the warrant). Section 8 was accordingly violated. The accused's rights under sections 9 and 10, I am satisfied, were also infringed during the execution of the search warrant.[10]

25 In dealing with the issues of exclusion under s. 24, Justice Fairgrieve stated:

> The seriousness of the Charter infringement has to be assessed. In my view, the violations here are extremely serious. It is outrageous, I think, that police officers would regard a search warrant as sufficient authority to handcuff an elderly woman and detain her for a protracted period either to prevent her from leaving her home or as an unjustified pre-emptive measure to prevent the mere possibility that a "basically co-operative person", as she was described in the evidence, might interfere with the search. It is more than a little alarming that Cst. Lee would testify that handcuffing occupants while premises are searched is a "routine thing" barely worthy of note. Equally shocking, I think, is the notion that in 1992 police officers could think that a person could be detained in this way without any consideration of the need to comply with s. 10 of the Charter. The court should not permit a search warrant to be misconstrued by police officers as a warrant for the arrest of the occupants of the premises, or as authority to disregard the rights that any other person under arrest would have
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> ... A wilful failure to appreciate the limits of their powers and the obligation to treat members of the public with courtesy and fairness cannot be condoned by the court. None of the reprehensible police conduct here occurred in circumstances of urgency or necessity. It can only be described, in my view, as a wilful and flagrant violation of Ms. Gogol's rights.[11]

26 The evidence of marijuana found during the search was excluded.

27 The behaviour of the police in The Comfort Zone case involving the systematic routine handcuffing of patrons, merely because they happened to be in the night club being searched, constituted gross violations of those patrons' Charter rights.

28 The decision of the Supreme Court of Canada in Mann makes it clear that neither the search warrant nor the imminent release of the accused could amount to a legal investigative detention. In Mann, the Supreme Court of Canada noted that "investigative detentions (must) be premised upon reasonable grounds. The detention must be viewed as reasonably necessary on an objective view of the totality of the circumstances, informing the officer's suspicion that there is a clear nexus between the individual to be detained and a recent or ongoing criminal offence."[12]

29 It would be not enough to say that since there were certain people in the club suspected of engaging in drug dealing, that therefore anyone found in the club could lawfully be the subject of an investigative detention. To lawfully detain any individual inside the club, the police had to have reasonable grounds that a particular individual was, in fact, reasonably suspected of involvement in drug dealing. As the Supreme Court of Canada stated in Mann, "police officers may detain an individual for investigative purposes if there are reasonable grounds to suspect in all the circumstances that the individual is connected to a particular crime and that such a detention is necessary."[13]

30 As the Saskatchewan Court of Appeal reiterated the limits of the police power to detain individuals

for investigative purposes in R. v. Nguyen:

> The court in Mann carefully placed strict limits on the use of investigative detention. There must be: (i) 'a recent or ongoing criminal offence'; and (ii) a 'clear nexus' between the detainee and that offence. Having satisfied these two criterion, the decision to detain must be "further assessed" against all of the circumstances to ensure that the detention was reasonably necessary. Investigative detention will not avoid Charter challenge if its purpose is to determine whether a crime has been or is being committed as opposed to determining whether the detainee is linked to a recent or ongoing crime.[14]

31 In other words, if the police already have reasonable grounds to suspect that a particular patron was involved in the alleged conspiracy, that person might be lawfully subject to an investigative detention. If the police simply believed they might find evidence of a crime if they search everyone, they were not lawfully entitled to detain and thereafter search all occupants for evidence.

32 As the Supreme Court of Canada stated in Mann:

> The proximity of an individual in a so-called high crime area is relevant only so far as it reflects his or her proximity to a particular crime. The high crime nature of a neighbourhood is not by itself a basis for detaining individuals.[15]

33 Association, in the form of being in the same dance club as those suspected of being either drug dealers or their assistants, could not lawfully form the basis of an investigative detention for those not specifically alleged to be drug dealers or co-conspirators. Many of the people searched (in fact the majority) in The Comfort Zone were ultimately released without charges as they were not found to either be complicit in any drug dealing or to have any drugs from that. This did not stop them from having been detained for hours.

34 In the case of R. v. Morris, Mr. Justice Green dealt with the situation where the accused Morris was detained at gun-point as he drove his car up to a house which was about to be the subject of a Criminal Code search warrant. As Justice Green stated in the Morris decision: "The police rationale for their take-down of the defendant and the other occupants of his vehicle ... rested on their faith in the validity of the warrant to search Deane's home ..."[16]

35 Justice Green noted that the suspect whom the police believed to be engaged in criminal activity was not the accused Morris, but the individual named Deane, whose house was, in fact, the object of the search warrant:

> (T)o be clear, "the suspect" to whom such reasonable suspicion may have attached is Deane - not the defendant, Morris. While there may have been "articulable cause" as it is put in R. v. Simpson, (1993), 12 O.R. (3d) 182 at 202 (C.A.), for an investigative detention and incidental search, that threshold is only upheld with respect to Deane. As regards the defendant, there was nothing other than his association with Deane to give rise to any scintilla of criminal suspicion.[17]

36 It is still necessary to examine whether or not even a suspect lawfully detained can be searched. The police in The Comfort Zone appeared to believe that once detained, anybody could be lawfully searched for suspected drugs.

37 The only search authorized as incident to an investigative detention is a pat-down search. It does not arise simply because a person is under investigative detention. As the Supreme Court of Canada stated in Mann:

> Such a search power does not exist as a matter of course; the officer must believe on reasonable grounds that his or her own safety, or the safety of others, is at risk. I disagree with the suggestion that the power to detain for investigative searches endorses an incidental search in all circumstances ... The officer's decision to search must also be reasonably necessary in light of the totality of the circumstances. It cannot be justified on the basis of a vague or non-existent concern for safety, nor can the search be premised upon hunches or mere intuition.[18]

38 The Supreme Court then goes on to indicate that searches incident to an investigative detention represent a "narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual..."[19] It would not thereafter be permissible for a police officer to say that he or she was aware that one or two armed and dangerous individuals may have been known to frequent the night club, and, therefore, everybody could be considered armed and dangerous, requiring universal searches for weapons.

39 The Supreme Court clarified "the officer must not be acting solely on a hunch, but rather is required to act on reasonable and specific inferences drawn from the known facts of the situation. The search must also be confined in scope to an intrusion reasonably designed to locate weapons.[20] The search must be grounded in objectively discernible facts to prevent 'fishing expeditions' on the basis of irrelevant or discriminatory factors."[21]

40 It is clear then, that absent, reasonable grounds to think that a particular patron in the night club (or any place to be searched, for that matter), is believed to pose a risk to the safety of the police officer, no search is permissible without engaging a violation of s. 8 of The Charter of Rights and Freedoms. And where such a search is held to be reasonable, the search for weapons must be a simple non-intrusive frisk, and must be brief in nature.

41 Even where a valid search warrant is being executed, there are restrictions on the police use of force. In the case of R. v. Markowska, police executed a search warrant during the course of which they detained Ms. Markowski at gunpoint.[22] In commenting on the use of force and drawn handguns, the court noted that the police:

> ... had no information about the defendant's alleged role or to what extent, if any, the fact that she was charged with these offences represented a potential threat. At that time, Ms. Markowski had no criminal record nor any known history of violence. While such outstanding charges (weapons charges) would warrant some caution, the facts known to the police could not objectively justify their use of force in the execution of this search warrant. Nor does the fact that the premises were known to be a massage parlour justify the entry and use of firearms without some identifiable risk to the safety of the police.[23]

42 The court went on to say that "neither the search warrant nor the circumstances encountered by the officers can sanction or justify their use of this degree of force which was clearly excessive."[24]

43 In relation to s. 24, the decision of the Supreme Court of Canada in Mann indicates that in similar circumstances, exclusion of any evidence found in such an unlawful search should follow.

44 The Supreme Court of Canada said in R. v. Buhay, "good faith cannot be claimed if a Charter violation is committed on the basis of a police officer's unreasonable error or ignorance as to the scope of his or her authority."[25] As the court noted in Mann, searches of an accused person's inner pockets involve a violation of that individual's obvious reasonable expectation of privacy. As the court in Mann stated, "The search here went beyond what was required to mitigate concerns about officer safety and reflects a serious breach of the appellant's protection against unreasonable search and seizure."[26]

45 Even before the Supreme Court of Canada decided the Mann case, courts were employing these same principles to exclude evidence unlawfully obtained from individuals who had the misfortune of being present when a search warrant was being executed. In the Kirby case quoted above, Justice Smith stated:

> The officers apparently believed that they were entitled to detain the accused, and to subject him to an immediate search in the absence of reasonable grounds. The evidence suggests that the officers were animated by an approach that 'things can happen' or 'you can never be too careful.' While courts must appreciate that police officers are often subject to danger, and must be loathe to second guess decisions made in the field, the law simply does not allow individuals not subject to arrest to be subject to such purely precautionary searches 'just in case' ... What also troubles me about the police conduct in this case is the attitude that I detected that as long as the police are acting in the course of their duties, they have the power to subject individuals to such precautionary searches ... This apparent lack of understanding of the limits of their authority is serious. It suggests that this was not an isolated, fact-driven incident but part of a pattern of excess of authority when executing search warrants.[27]

46 Justice Smith went on to note that the handcuffing of the accused during the execution of the search warrant tended to show a continued lack of respect for constitutional rights. He also said:

47 Police searches of the person clearly involve an affront to the dignity and privacy of every individual subjected to them. While it is true that a search of one's pockets is a lesser affront to dignity and privacy than a more invasive search, it is still a significant interference going beyond a pat down.

48 While a pat down and search of pockets will be the minimal norm for most persons lawfully arrested, it is not so for those not subject to arrest. The breach was serious.[28]

49 In the 2003 Alberta Queen's Bench decision of R. v. Phan,[29] police were executing a search warrant at a residence where a confidential informant claimed that he had purchased cocaine. The accused was found in the residence being searched and, indeed 2.5 grams of cocaine were found in his pocket.

50 The search warrant in the Phan case was actually a CDSA warrant, which would have allowed the police to search occupants. However, as noted by Justice Johnstone, subsection 11(5) of the CDSA provides that a police officer may search such persons where he or she has reasonable grounds to believe that the person is actually carrying drugs. The existence of the search warrant is not sufficient.

51 As Justice Johnstone noted, "There is a temptation for authorities to sometimes use such a search as an opportunity to obtain evidence of a crime. This is a temptation that is strongly resisted by the courts... Individuals may be detained for investigative purposes and a cursory search such as a frisk or pat down as an incident to detention can be conducted to ensure officers' safety."[30]

52 In a situation that seems to keep repeating itself in the search warrant cases, Justice Johnstone stated:

> It appears that the officers, although acting in good faith, were operating under a standard belief that anyone found within the searched premises could be searched. The search warrant itself became their reasonable and probable grounds for effecting such searches of the person of the occupants. However, it was insufficient to do so. Therefore, this faulty reasoning resulted in a serious Charter breach given the nature of the search.[31]

53 In discussing exclusion under s. 24(2), Justice Johnstone stated: "The narcotics found were real

evidence, but they could not have been discovered without the violation of accused's rights. This was a serious violation and not an isolated, situation-driven incident. It indicates a fundamental misunderstanding of the law by the officers and perhaps a systemic problem given their reference to 'standard' practice."[32]

54 While the legality of the search of my client in The Comfort Zone was never determined, the matter provides an excellent case study about the power of the police to detain and search people found in a location during execution of a search warrant.

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1 [2004] S.C.J. No. 49, [2004] 3 S.C.R. 59 (SCC), at para. 15.

2 R. v. Grant, [1993] S.C.J. No. 98, [1993] 3 S.C.R. 223, 84 C.C.C. (3d) 173, 24 CR (4th) 1 (S.C.C.).

3 R. v. Simpson, [1993] O.J. No. 308, 12 O.R. (3d) 182 (C.A.).

4 R. v. Kirby, [2001] M.J. No. 593, at para. 71 (P.C.).

5 R. v. Kirby, [2001] M.J. No. 593, at para. 71 (P.C.).

6 Levitz v. Ryan, [1972] O.J. No. 1921, [1972] 3 O.R. 783, 9 C.C.C. (2d) 182 (C.A.).

7 R. v. Thompson, [1996] O.J. No. 1501 (Prov. Div.).

8 R. v. Thompson, [1996] O.J. No. 1501 (Prov. Div.).

9 R. v. Gogol, [1994] O.J. No. 61, 27 C.R. (4th) 357 (Prov. Div.).

10 Supra.

11 Supra.

12 R. v. Mann, [2004] S.C.J. No. 49, [2004] 3 S.C.R. 59 (SCC), para. 44.

13 R. v. Mann, [2004] S.C.J. No. 49, [2004] 3 S.C.R. 59 (SCC), para. 45.

14 R. v. Nguyen, [2008] S.J. No. 799 (C.A.), at para. 13.

15 R. v. Mann 2004 Carsw ellMan 303 (SCC), at para. 47

16 R. v. Mor ris, [2008] O.J. No. 2281 (C.J.).

17 Ibid.

18 R. v. Mann, [2004] S.C.J. No. 49, [2004] 3 S.C.R. 59 (SCC), at para. 40.

19 R. v. Mann, [2004] S.C.J. No. 49, [2004] 3 S.C.R. 59 (SCC), at para. 41.

20 R. v. Mann, [2004] S.C.J. No. 49, [2004] 3 S.C.R. 59 (SCC).

21 R. v. Mann, [2004] S.C.J. No. 49, [2004] 3 S.C.R. 59 (SCC).

22 R. v. Markowska, [2004] O.J. No. 5153 (C.J.).

23 R. v. Markowska, [2004] O.J. No. 5153 (C.J.).

24 R. v. Markowska, [2004] O.J. No. 5153 (C.J.).

25 R. v. Buhay, [2003] S.C.J. No. 30, 2003 SCC 30, [2003] 1 S.C.R. 631.

26 R. v. Mann, [2004] S.C.J. No. 49, [2004] 3 S.C.R. 59 (SCC).

27 R. v. Kirby, [2001] M.J. No. 593 (P.C.).

28 R. v. Kirby, [2001] M.J. No. 593 (P.C.).

29 R. v. Phan, [2003] A.J. No. 607 (Q.B.).

30 R. v. Phan, [2003] A.J. No. 607 (Alta Q.B.).

31 R. v. Phan, [2003] A.J. No. 607 (Alta Q.B.).

32 R. v. Phan, [2003] A.J. No. 607 (Alta Q.B.).

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