IN THE SUPREME COURT OF ONTARIO

(Toronto Motions Court)

B E T W E E N :	)	S. Casey Hill and Ms. Bonnie J. Wein for the Crown, respondent
HER MAJESTY THE QUEEN	)	
Respondent	)	
	)	Ms. Marlys Edwardh Michael Code and Melvyn Green for the applicant
-and-	)	
THE CHURCH OF SCIENTOLOGY	)	
Applicant	)	Heard: January 14, 16, 17, 18 and 21, 1985.

OSLER J.:

As a discrete portion of the motion to quash the search warrant, to which reference has been made in prior rulings, the applicant requests leave to examine the Informant, Detective Sergeant A. Ciampini, and perhaps other unspecified witnesses, for the purpose of adducing evidence tending to indicate support for the proposition that the search warrants herein should be quashed.

As found upon an earlier ruling in this matter, and not now questioned by counsel, this application is in fact a motion under the criminal rules by way of certiorari.

Ex. III-10-J-1

That fact immediately limits the range of matters that should be considered before ruling on the applicant's request. As certiorari is grounded upon a defect in jurisdiction, which would include a case in which the court's jurisdiction had been invoked by means involving fraud, it is only if the examination would potentially result in evidence tending to show that a fraud had been practised upon the judicial officer concerned, or, what is probably the same thing, that there had been a fraudulent abuse of the court's process, that such an examination should be permitted.

In the present case, some affidavit evidence has been placed upon the record by the applicant, without objection, tending to show that in some respects the Information sworn by Sergeant Ciampini was incomplete and misleading. However, counsel for the applicant submits that however convincingly such affidavits may establish weaknesses of that kind in the Information, the issue of fraud can only be determined when it is known what was within the knowledge of the Informant at the time he swore the Information, and whether any omissions and apparent misleading statements were the result of deficiencies in his own knowledge, or a deliberate decision to deceive the court or to mislead it significantly. Those inferences, it is urged, can only be drawn after the Informant himself has been examined, or

cross-examined, with a view to ascertaining his knowledge and intent.

These proceedings are being conducted under the rules respecting criminal proceedings, and Rule 2 thereof provides for the application of the Rules of Practice and Procedure of the Supreme Court of Ontario with respect to originating notices in civil matters where no other express provision is made. The same Rule 2, however, excludes from its operation certain of the Rules of Practice and Procedure, including Rule 230 which provides for requiring the attendance of a witness by subpoena for the purpose of examining him before any officer having jurisdiction in the county, and leaves only Rule 231, which provides that:

> Witnesses may by leave of the court be examined <u>viva voce</u> before the court on any motion.

By an apparent oversight, passage of the <u>Courts of Justice Act</u>, R.S.O. 1984, c.11, has left the Province with unamended rules respecting criminal proceedings and it may therefore be doubtful whether former Rule 231 is still in effect for these purposes. I have, however, already ruled that, to the extent that any body of civil rules is applicable to these

proceedings, it shall be those in force immediately before the proclamation of the Courts of Justice Act, as provided in section 136(3) thereof. It seems to me that I can only proceed by way of analogy to those rules and I accept the submission that the only way the applicant can place evidence bearing upon the bona fides and the materiality of some of the statements made or omitted by Sergeant Clampint in the Information is by persuading me to exercise my discretion to permit the examination of such witness or witnesses viva voce upon this motion.

Upon what grounds, then, should such discretion be exercised, and, if exercised in favour of examination, what 'limits' placed upon that examination?

There is a paucity of authority directly bearing on a motion by way of certiorari to quash a search warrant.

Some help with regard to the scope of Rule 231 generally is obtained from the judgment of Arnup J.A. for the Court of Appeal in Re Canada Metal Company Limited et al. v. Heap et al. (1975), 7 O.R. (2d) 185, an appeal from a decision of the Divisional Court setting aside subpoenas served under

Rule 230 and under Rule 231. The facts of the case distinguish it readily from the case at bar as the narrow issue addressed was that of the right of the applicants for an order in the nature of prohibition from the Divisional Court to examine witnesses, other than the parties sought to be prohibited, before examining the parties themselves. The application was one for prohibition for bias on the part of members of a local Board of Health, and the applicants sought to examine media representatives who were thought to have heard the statements upon which the suspicion of bias was based.

At p.191, Arnup J.A. articulated some principles bearing on the exercise of discretion under Rule 231 as follows:

> The position under Rule 231 is somewhat different from that under Rule 230, in that the witnesses may only be examined before the court which is hearing a motion, by leave of that court. In considering whether leave will be granted, such a court will always consider whether the evidence sought to be obtained from the proposed examination of witnesses is relevant to the issue raised by the main motion and whether, having regard to the range and number of examinations proposed, a granting of leave would be vexatious to the respondents or an unwarranted imposition upon the proposed witnesses.

That expression of principle is not stated to be exhaustive and indeed, as a preliminary, Arnup J.A. had already stated that there was sufficient in the material to indicate that the main motion for prohibition was not frivolous or vexatious.

With respect to Rule 230, the court found that it was not appropriate to declare that, when a subpoena is attacked, an onus of proving justification arises against the party issuing it. An overall reading of the entire judgment would indicate that the same might be said regarding an application under Rule 231. Similarly, the court states that, if the evidence sought to be elicited is relevant to the issue on the motion, there is a prima facie right to resort to Rule 230, although such right must not be so exercised as to be an abuse of the process of the court.

It may well be that the same considerations govern the exercise of discretion under Rule 231. It is important in the present case, however, to bear in mind that the somewhat narrow grounds upon which certiorari is granted have an important bearing upon the question of relevance.

An analogy which may be of some assistance is found in Wilson v. The Queen, 9 C.C.C. (3d) 97, a decision of the Supreme Court of Canada, concerning the right to impeach an authorization to intercept private communications by allegations of misrepresentation in the affidavit upon which the authorization is issued. Both an authorization pursuant to Part IV.1 of the Criminal Code and a search warrant are orders of the court authorizing invasions of privacy, and there is some similarity between the affidavit required for an interception authorization and the information required for the issue of a search warrant under section 443.

In the Supreme Court of Canada, in Wilson, the matter to be decided was the procedure, if any, to attack an authorization when the attack was based on allegations of misrepresentation in the affidavit.

In his judgment for the majority, McIntyre J., at p.124, lays it down that when review is available, "the reviewing judge must not substitute his discretion for that of the authorizing judge. Only if the facts upon which the authorization was granted are found to be different from the facts proved on the ex parte review should the authorization be disturbed."

In a minority decision, Dickson J. agrees in the result, though his approach is far different. He agrees that section 178.16 has the effect of limiting review to a trial judge, but he prefaces this with a general statement that, "the law recognizes a general right of review of an ex parte order made by the court which made the order and preferably by the judge who made the order."

The problem in Wilson's case was that the trial judge was not of the stature of the judge who had made the authorizing order, and such order could not be collaterally attacked before an inferior court. However, at p.112, Dickson J. discusses the right of cross-examination, assuming jurisdiction in the court:

> These authorizations are made ex parte and in camera. If it is admitted that there is a right of the trial judge to go behind an apparently valid authorization, it must be possible to ask questions on cross-examination to find out if there is any basis upon which to argue invalidity. It is of little avail to defence counsel to have a statement of law that an authorization can be held to be invalid if obtained, for example, by material non-disclosure and then preclude counsel from asking questions tending to show there has in fact been non-disclosure.

The question of confidentiality that troubled the courts in Wilson's case does not here arise because all parties and the public at large have access to the information upon which the search warrant issued. However, while admittedly a minority judgment, the opinion of Dickson J. is useful as an indication of the very firm opinion of the present Chief Justice of Canada, an opinion not directly contradicted by the majority, that the right to cross-examine exists in the case of orders made ex parte when it is necessary to form the evidentiary foundation of a challenge.

While far from directly in point, the same principle is powerfully stated for the Divisional Court in Re Ontario Public Service Employees Union et al. v. The Queen in Right of Ontario, 45 O.R. (2d) 70 at 77. The case involved the alleged failure of a subordinate tribunal to consider evidence that was before it and the applicant sought to file affidavit evidence to indicate what had been before the tribunal. The following statement was made by O'Driscoll J.:

> The applicants-grievors cannot "get their case" of denial of natural justice before the Divisional Court if they are refused the right to file affidavit evidence. If the applicants-grievors are denied the right to file affidavit evidence before the Divisional Court alleging a denial of natural

> justice by the G.S.B. (which keeps no verbatim record) in that it failed to advert to crucial and essential evidence in the process of deciding its award, then, the applicants-grievors are shut out and denied that ground of relief; without affidavits, there is no way to get the matter before the Divisional Court. I find on the facts of this case, both the affidavit and the cross-examination thereon to be properly before this court.

While the facts are, of course, very different, the judgment does underline the case for a rule of necessity. As submitted by counsel for the applicant before me, where fairness demands the adduction of certain evidence, then in fact an applicant should be permitted the right to adduce it.

Coming to cases directly bearing on the power to examine an informant on an application to quash a search warrant, an application to quash search warrants was brought before the Saskatchewan Queen's Bench in Shumiatcher v. Attorney General of Saskatchewan, 129 C.C.C. 267. In the course of his judgment, Hall C.J.S.B. stated that:

> Mr. Matthews, the informant, testified that the file in question contained documents relevant to the charges.

This casual reference is not of much assistance save to establish that it would appear that viva voce evidence was given on the motion.

In Abou-Assal and Pollack v. Bourdon J.S.P. et al., 1 C.R. (3d) 213, the judgment of Greenberg J., in the Quebec Superior Court, indicates that, on a motion to quash a search warrant, evidence was heard from witnesses, including, apparently, the Informant.

A number of unreported decisions have dealt with the topic in greater or lesser detail. In Obie's Meat Inc. v. Rene Drouin et al., unreported decision of the Court of Appeal for Quebec, dated April 11, 1973, the court dismissed an appeal from a judgment of the Queen's Bench on a motion for certiorari to quash. It was alleged that the search warrant was obtained for an ulterior purpose and constituted an abuse of legal process. An application was made before the motions judge to examine a detective sergeant who had applied for and obtained the search warrant. Over objections by the Attorney General to the effect that it would be against the public interest to examine the informant, "the judge permitted the examination of Gélineau but upheld objections to most of the questions put to him." At the end of the hearing, the judge quashed the writ or, as we would say, dismissed the application.

In the Court of Appeal, Montgomery J.A.,

with whom Chief Justice Tremblay agreed, found that the appeal should be dismissed. At p.5 of his unreported judgment is found the following:

> Under the circumstances, I do not deem it necessary to discuss in detail the right of a petitioner for a writ of certiorari to make evidence in support of his petition. I do not question the correctness of the judge's decision restricting the examination of Gelineau.

Lajoie J.A. gave separate reasons, but also agreed with those of Montgomery J. Thus the court at least did not disapprove the hearing of viva voce evidence on such an application.

In Ontario, Krever J. had occasion to consider the problem in The Queen v. 237365 Products Limited, unreported but heard January 5, 1979. On a motion to quash, the validity of an extension order was called into question and it was alleged that the extension was not properly proved before the court. Krever J. stated that, as the informant with the original documents in his possession was actually in court, he was prepared to give leave to have the informant called or to permit an affidavit to be filed as to the extension.

The matter was dealt with more extensively

by Ewaschuk J. in The Queen v. Robert Wilson Rowbotham and others, in the course of an oral ruling, given on June 20, 1984. The motion being heard was one for an order to set aside certain authorizations to intercept private communications, and hence was not on all fours with the matter before me. The parallel is, however, quite close, and it is helpful to note the views of Ewaschuk J. on the conditions under which an application will be granted and the reasons which will justify its grant. He shares the view, frequently expressed in the cases, that "it will be the rare case, in my view, where leave to examine a witness viva voce should be granted." He points out that "like an application to set aside a search warrant, the motion is not one of discovery and must not be permitted to generate into a fishing expedition or "a random attack." He reminds himself of the statement in Wilson's case, supra, that "only if the facts upon which the authorization was granted are found to be different on the facts proved on the ex parte (sic) review should the authorization be disturbed", and he points to the necessity of the applicant establishing "on a preponderance of evidence that the facts permitting that determination [that the conditions precedent for an authorization to intercept have been met] are so different from the real facts as to constitute a fraud on the issuing judge. That fraud must have been accomplished either

by fraudulent misrepresentation or fraudulent material non-disclosure--i.e. intentional non-disclosure--or, in some cases, by negligent material misrepresentation or misleading material non-disclosure."

I agree that the applicant here must meet a similar test. However, the ruling and opinion of Ewaschuk J. are of little assistance in deciding when the threshold in the form of a prima facie case for entitlement to adduce evidence has been crossed.

As there is such a dearth of authority in our Province, and indeed in Canada, directly in point, it is useful to examine what has been done in courts of the United States of America, particularly in view of the enactment of s.8 of the Charter of Rights, similar at least to some extent to the Fourth Amendment to the Constitution of the United States.

The text of the Fourth Amendment is as follows:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated and no warrants shall issue but upon probable cause supported by oath or affirmation and particularly

> describing the place to be searched and the persons or things to be seized.

Section 8 of the Charter of Rights and Freedoms is as follows:

> Everyone has the right to be secure against unreasonable search or seizure.

Section 443 of the Criminal Code provides that a warrant may be issued by "a justice who is satisfied by information upon oath in Form 1 that there is reasonable ground to believe that there is in a building, receptacle or place ...", something of the nature described in the various paragraphs of the section. It will be seen that the law and, in at least a rudimentary sense, the precautions ensuring against its abuse are roughly parallel.

It appears that the definitive decision with respect to evidentiary challenge of a search warrant is found in Franks v. Delaware, 438 U.S. 154, a decision of the Supreme Court of the United States, on June 26, 1978.

On a trial for rape, the accused challenged the truthfulness of certain factual statements made in the police affidavit supporting the warrant to search the accused's apartment, and he sought to call witnesses to prove the misstatements.

The issue arose on a motion to suppress evidence. The trial court sustained the State's objection to the proposed testimony, the seized articles were admitted as evidence, and the petitioner was convicted.

The Delaware Supreme Court, on appeal, affirmed the decision, holding that a defendant may, under no circumstances, challenge the veracity of a sworn statement used by police to procure a search warrant.

The case was accepted by the Supreme Court of the United States and, at p.155, Mr. Justice Blackmun, delivering the majority opinion of the court, asked himself the question whether a defendant in a criminal proceeding ever had the right "subsequent to the ex parte issuance of a search warrant, to challenge the truthfulness of factual statements made in an affidavit supporting the warrant."

Having recited the decision of the Supreme Court of Delaware, Blackmun J. went on as follows:

> ... We reverse, and we hold that, where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard

> for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

As a general proposition, with the exception of the final phrase regarding "the fruits of the search", the statement there made does not seem foreign to our law.

Taken as a test as to when a hearing on the alleged falsity of an affidavit or, in our case, information, may be held, there must be "a substantial preliminary showing" or, as we would say, a prima facie case, that "a false statement knowingly and intentionally, or with reckless disregard for the truth" was made, which is equivalent to a fraud upon the court or the judicial officer issuing the warrant. Furthermore, the allegedly false statement must be one in fact necessary to the finding of probable cause upon which the right to issue a warrant is predicated. This parallels our "reasonable and probable grounds."

The onus is upon the applicant, if a hearing is held, to establish the allegation by a preponderance of evidence, and it must be shown that, without the faulty material, the balance of the content of the affidavit, or information, is insufficient to establish probable cause.

In the words of counsel for the respondent Crown in the matter at bar, the last sentence quoted, with the exception of the matter following the word "voided", "is a sensible threshhold test which ought to be met with respect to whether or not such an individual should be called and indeed thereafter, if called, what the circumstances should be as to how the court resolves the issue."

There are many U.S. cases prior to Franks which address virtually the same question. However, considering the very clear statement in Franks, which is precisely in point, there is little to be gained by adverting to them at this stage.

Blackmun J. reviews at length the objections submitted by the State to the proposed hearing, not the least of which was the argument that hearings would be misused as

sources of discovery and dockets would be hopelessly lengthened if indiscriminate hearings were permitted. Blackmun J. states that none of the considerations advanced were trivial, but he states that, "We conclude that they are insufficient to justify an absolute ban on post-search impeachment of veracity." He goes on to list considerations in favour of the "post-search impeachment of veracity." I am particularly impressed with the first reason given, at p.168 of the report, as follows:

> First, a flat ban on impeachment of veracity could denude the probable-cause requirement of all real meaning. The requirement [in the Fourth Amendment] that a warrant not issue "but upon probable cause, supported by Oath or affirmation," would be reduced to a nullity if a police officer was able to use deliberately falsified allegations to demonstrate probable cause, and, having misled the magistrate, then was able to remain confident that the ploy was worthwhile. It is this specter of intentional falsification that, we think, has evoked such widespread opposition to the flat nonimpeachment rule from the commentators, ... from the federal courts of appeals, and from state courts. ...
>
> [words within brackets mine]

At p.171, after completing his review of authorities and of the arguments submitted, Blackmun J. repeats with some embellishment what was stated at the commencement. That opinion is worth repeating.

> In sum, and to repeat with some embellishment what we stated at the beginning of this opinion: There is, of course, a presumption of validity with respect to the affidavit supporting the search warrant. To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient. The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any nongovernmental informant. Finally, if these requirements are met, and if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required. On the other hand, if the remaining content is insufficient, the defendant is entitled, under the Fourth and Fourteenth Amendments, to his hearing. Whether he will prevail at that hearing is, of course, another issue.

Before leaving the case, it should be stated that Mr. Justice Rehnquist wrote a dissenting opinion in which the Chief Justice of the United States joined.

I state my conclusions upon this, the threshold branch of the motion, as follows. There is a presumption of validity with respect to the search warrant and with respect to the information supporting it. Leave to adduce evidence from an Informant may be given by a judge having jurisdiction to hear a motion by way of certiorari to quash the search warrant, and the form in which such evidence may be obtained, is a matter for the discretion of the judge. Because an Information is frequently and of necessity largely based on information and belief, it may be necessary to extend that leave to the examination of additional persons. The motion for leave must be based upon allegations of deliberate falsehood or omission or reckless disregard for the truth. Such allegations must be made out, as to the facts, to the extent of a prima facie case, which may be established by inspection of the material or by affidavit, unless in most exceptional cases. The deliberate falsity, omission or reckless disregard alleged must be that of the Informant. The impugned material must be such that, if it is set aside, the balance of the information would be insufficient to satisfy a justice that there is reasonable ground for the belief necessary to issue a warrant, although if several grounds are alleged and several reasons are given, as in subsections (a), (b) or (c) of section 44(1), the unsupported portion

of a warrant may be severed and the rest permitted to stand. Thus, the potential quashing of the entire warrant is not a condition precedent to the exercise of discretion in favour of excluding evidence.

There may be cases in which respect for the integrity of the judicial process and the administration of justice would require the quashing of a warrant in all its particulars by virtue of the egregiously improper conduct of an Informant, but these will be rare. In my opinion, in most cases a warrant should not be quashed, or only an affected portion should be severed and quashed, unless the removal of the impugned portion of the Information would have left the justice without reasonable ground for the necessary belief.

I turn now to some examination of the facts alleged in the case before me and the question as to whether this test has been met by the applicant.

Before examining the specific allegations, it is necessary to point out that they are made in the context of an Information containing 158 pages and attaching as an integral

part seven appendices, the whole requiring approximately 1,000 pages. The list of things to be searched for runs to twelve pages, and it swears to reasonable grounds to believe that the things to be searched for will afford evidence in respect to the commission of three broadly described offences. One was defrauding the Ministry of Revenue of the Province of Ontario and the Department of National Revenue of Canada of money and other valuable things of a value exceeding $200 by representing to officials that Scientology was a non-profit organization collecting donations without distribution of profit, while it in fact did distribute moneys and profits raised by the Church of Scientology to the personal use of L. Ronald Hubbard, Mary Sue Hubbard and other members of the Church, such profits arising from the sale of courses and materials, contrary to s.338(1)(a) of the Criminal Code. The second offence was that the public was defrauded and, more specifically, persons to whom Scientology made representations concerning the qualities of and benefits receivable from courses and artifacts which were sold at costly prices unrelated to their real value and which were incapable of providing the benefits represented. The third offence was to the effect that certain persons conspired to effect a lawful purpose, the operation of companies controlled and owned by Scientology, by unlawful means, namely the use of the Guardia

Office of Scientology to commit indictable offences, including theft and break-and-enter, to protect the interests of Scientology, contrary to s.423(2)(b) of the Code.

The potential accused with respect to each offence included the Church of Scientology of Toronto, L. Ron Hubbard, Mary Sue Hubbard and various other individuals.

It is apparent not only from the Information but from material filed and evidence already heard by me on the main motion to quash, of which this is only a part, that the Church of Scientology of Toronto is part of and intimately connected to a world-wide organization, that L. Ron Hubbard is described as its founder and that Sue Hubbard is the wife of L. Ron Hubbard.

In the Information, Sergeant Clampin states that there are reasonable grounds to believe that the two Hubbards are in complete control of a vast network of commercial enterprises or franchises. He states the source for that belief is found in the following paragraphs, 39 to 44, inclusive, of the Information.

In those paragraphs, the Informant refers

to a "stipulation of evidence" agreed to by counsel in a case in the United States, entitled United States of America v. Mary Sue Hubbard et al., in the United States District Court for the District of Columbia, No. 78-401 Criminal, October, 1979. The facts stated in the stipulation of evidence, which is in the record as appendix A, and occupies 298 pages of Volume 2, would seem to indicate that, at all material times, L. Ron Hubbard was the overall supervisor of the Guardian Office, a division of the Church of Scientology concerned with policy, and that his wife, Mary Sue Hubbard, held certain titles, was the second person in the hierarchy of Scientology and had duties which included supervision of the Guardian Office. The informant alleged that the stipulation as agreed to by all defendants, stated that Mary Sue Hubbard was convicted of criminal conspiracy and sentenced to a jail term, and that on appeal the findings of fact, based upon the stipulation, were upheld by the United States Court of Appeals (District of Columbia Circuit).

It was objected by the applicant that these paragraphs presented to the judicial officers who issued the warrants, a picture of incriminating facts admitted by certain of the prospective accused, but that in fact the nature of a stipulation of evidence was something quite other than an admission and, to represent it as an admission, seriously mis-

the judicial officers. The applicant filed, and made part of the supplementary case record as Volume 8A, Division JJ, the affidavit of one Russell F. Canan. Mr. Canan is a qualified lawyer in the United States and a Professor of Law in Washington, D.C., with much experience, and he purports to explain what a stipulation of evidence is and what part it plays in a criminal proceeding. He states in paragraph 6 of his affidavit that:

> It is a vehicle by which the parties can expedite and simplify a trial while preserving a defendant's right to challenge to a court of appeals the propriety of a lower court's pretrial ruling.

On the basis of the stipulation, the trial judge convicted. An appeal was taken and, in paragraph 14 of his affidavit, Mr. Canan states that:

> ...defendants' purpose for so stipulating was to allow for an immediate appeal on important constitutional threshold issues which, if successfully challenged, would have the effect of overturning defendants' convictions.

Little purpose would be served by outlining in detail the analysis of the judicial functions performed in connection with the case mentioned. In the result, on the basis of the stipulation, the convictions were upheld by an appellate court and serious fines and penalties were imposed.

It is still not entirely clear to me the precise way in which a stipulation of evidence operates, save that it appears to create a form of estoppel. Nevertheless, I am in no way persuaded that the reference to the stipulation, and reliance placed upon the facts there stipulated by the Informant, misled the judicial officers who issued the warrant, far less am I persuaded that there is a prima facie case of intentional misleading.

The applicant complains that in paragraphs 77 and following, of the Information, the Informant states his belief that the "Guardian Office World-Wide" of Scientology will initiate programs such as SNOW WHITE which he described as a program directly ordered by L. Ron Hubbard, with a view to uncovering and "expunging" any and all files held by government or the private sector which reflected badly upon Scientology.

The applicant states that the manner in which this portion of the Information was presented to the judicial officers was such as to convey to them the idea that files would be "expunged" by any and all methods, and that the activities involved were illegal. The applicant submits that the source

document for the SNOW WHITE program in fact used the phrase "legally expunge" and that throughout the length of that document, there was no suggestion whatever of illegal activity.

It is submitted that, as the Informant swears in paragraph 69(b) of the Information, one of his sources for belief is described as documents seized by the F.B.I. in the U.S.A. in California in 1977, relevant to Scientology in Ontario, and personally examined by the Informant, that Informant must have or should have known of the source document.

The allegation with respect to the SNOW WHITE program is said by counsel for the applicant to be "the lynch pin with respect to all assertions of criminal conduct on behalf of the Church of Scientology", and therefore the accuracy and fairness or otherwise of the representations made to the judicial officers by the Informant in this respect are critical.

In paragraph 75 of the Information, the Informant states that he has reasonable grounds to believe that the tactics of the Guardian Office are not only inconsistent with the existence of a "religion" but "in some instances themselves

constitute criminal activities in pursuit of the protection of Scientology as a franchise system."

The Guardian Office is then tied in to the SNOW WHITE program and, in paragraph 78, reference is made to the object of that program being to "expunge" adverse records.

Finally, in paragraph 79 of the Information, it was stated that the SNOW WHITE program, as quoted from Guardian Order No. 1206 of 22 June, 1974, "was the highest priority of all Guardian Office activity" and that it was written by the commodore (Mrs. Sue Hubbard) who called it SNOW WHITE.

Those allegations are one of the bases, if not the basis, for the conspiracy offence set out in the Informations and in both search warrants. It relates directly not only to the warrants themselves but to the specific authorization to search for and seize all documents related to the SNOW WHITE program in the Guardian's Office.

It is the submission of the applicant that, by selective quoting, amounting to material non-disclosure, the Informant misrepresented and coloured the true object of the

Guardian's Office, and its policy mandate. As a result, it is said, any justice of the peace acting as a reasonable man reviewing the materials before him would draw the inference that the Guardian's Office's highest priority was the execution of the SNOW WHITE program, including and in fact dictating criminal activity to "expunge ... all files on Mr. Hubbard and on the Church of Scientology."

It is then submitted that the affidavit of Mr. Leonard Rubenstein, found in Volume 8A of the record as tab NN, an affidavit not challenged by the respondent by way of cross-examination, indicates that, among the documents filed in the action already referred to in the United States Court, and later released as a public document, was the actual, earlier order upon which operation SNOW WHITE was based. The order was released on October 25, 1979, and, Mr. Rubenstein swears, there were no proceedings that would have resulted in sealing that and other documents, at least until the time of the affirmation of their conviction by the United States Court of Appeals for the D.C. Circuit, in October, 1981.

It is the submission of the applicant that if, in fact, free access to F.B.I. records was had by the Informant, the foundation document, identified as GO 732 WW Lega..

of April 25, 1973, bearing the title, SNOW WHITE Program, should have and almost certainly would have come to his attention. That document is attached as Exhibit B to the affidavit of Mr. Rubenstein. It is couched in the somewhat peculiar language employed by Scientology, and particularly by the Guardian Office. It generally describes a situation in which various countries are denying entry of the ship "Apollo", at that time the headquarters of Mr. Hubbard, and that, by the accumulation of false reports spread by England and the U.S., cumulative files could be built up in those and other countries "which then tend to act on the file without the presence of the real recue (sic) data which is factually good but which is then ignored." Beside the heading, "Ideal Scene" is found the following sentence:

> All false and secret files of the nations of operating areas brought to view and legally expunged and CTC, "Apollo" and LRH free to frequent all western ports and nations without threat and all required ports open and free.

A lengthy strategic plan of action is then outlined and very specific instructions given with respect to the manner of operating in each of a number of separate specified countries.

The applicant submits that the only docume

appearing on the record in which the word "expunged" appears is the document GC 732 WW, just described, and the word is there coupled with "legally", completely negativing the inference that could be drawn from the assertion in the Informant's paragraph 78 and following.

It should perhaps be further mentioned that the order referred to above, under the heading "Handling" requires that, in various countries, litigation be engaged in with the object of exposing to view the allegedly false reports, and to take the matter finally to the United Nations, "meanwhile uprooting and cancelling all such files and reports wherever found." In the submission of the applicant, such phrases as "uprooting and cancelling all such files" must also be interpreted in the light of the phrase "legally expunge."

Put as simply as possible, the applicant states that the Informant "very likely" had access to the Guardian order just reviewed. An inspection of that order should have indicated to him that its object was to obtain the production and correction of adverse files by all legal means, a perfectly lawful object. Indeed, he points out, the Freedom of Information Act and similar legislation in other countries now specifically makes possible such activities.

In paragraph 18 of the information, the informant advises that he "can state from his personal knowledge from viewing all the documents made available from the Federal Bureau of Investigation raids in the United States of America ..." and the applicant submits that this means he has seen all the documents seized by the F.B.I. which, Mr. Rubenstein swears, included the Guardian order reviewed above. Even if not all the documents from the F.B.I. raids were made available, it is most unlikely that the founding program document would have been withheld, and this document establishes the program, sets out the objects, and includes all the key code words necessary to understand it.

I cannot put the matter at issue better than it was put by Mr. Green, in his submission for the applicant, as follows:

> My concern is the fact that he has had access to this document, that he has withheld this document, that this document is not included in the appendices, that it is not cited as a source, and that he has, in my respectful submission, if not deliberately, then certainly recklessly misrepresented the true purpose of the SNOW WHITE program by deleting the critical word "legally" before the word "expunged".
>
> [Transcript, Jan. 14 p.43, lines 5-12]

The test representing the threshold which must be crossed before a cross-examination will be permitted, contains, as I have indicated, matters of fact and questions of mens rea, although perhaps not so phrased in my earlier paragraphs. I know of no way in which the latter question can be explored other than by cross-examination of the Informant. Such cross-examination and of course re-examination may be conducted viva voce before me as soon as convenient to the parties. The examination will be confined, at least initially, to factual matters arising from the Informant's reference to the SNOW WHITE program and to mental elements stated to have significance in the test laid down.

Before leaving this aspect, it is not without significance that the affidavit of Fletcher Prouty, appearing in Volume 8A of the record at tab KK, makes it appear that he formed the conclusion, as a highly placed official of the Central Intelligence Agency of the United States, that since 1950 there has been a definite campaign of harrassment against this organization (Scientology) for nearly thirty years, primarily by means of the dissemination of false and derogatory information around the world to create a climate in which adverse action would be taken against the Church and its members. Defence

against this type of activity was, of course, the stated objective of the SNOW WHITE program.

The applicant raises a point having to do with what has been described as a blue folder containing lists of materials, and it is said that in the execution of the search warrant certain peace officers relied on this document rather than on the warrant itself.

There is little or no material indicating a direct connection between the information and the blue folder material. So far as it discloses the possibility of "oversearch", it is doubtful whether that is an appropriate matter for certiorari. In any event, the question of oversearch and any other material issues arising from the "blue folder" evidence will be separately addressed by counsel and dealt with in due course.

A further submission was made by the applicant to the effect that, because of the length of the information and the complexity of material it contained, it is unrealistic to assume that either Chief Judge Hayes, in the one case, or Justice of the Peace Kostecka, in the other, was able to read the information and reach a proper judicial conclusion in the time available.

I have already observed in another connection that there must be a presumption of regularity in the issuing of the warrants, and the fact that the absorption of the amount of material presented would obviously be a time-consuming and difficult task, does not warrant the institution of a fishing expedition to determine what knowledge, if any, the Informant has of this process. Apart from the issue of fraud, the only way in which the presence or absence or quantity or quality of evidence can bear upon an application for certiorari to quash, is if there is no evidence upon which the judicial conclusion necessary could be reached. That is not the allegation here and this submission does not warrant leave being given to examine or cross-examine the Informant.

Similarly, the submission that the "arcane" nature of some of the language found in the Information justifies examination of the Informant is not acceptable. Difficulties or ambiguities in the language can go only to the weight of evidence and this, surely, was a matter for Chief Judge Hayes and Justice of the Peace Kostecka, respectively. Nothing here goes to jurisdiction.

The final area in which the applicant submits that misrepresentation and omission occurred is that concerning

convictions of the Church of Scientology, or various of its officials or members in other countries. The allegation is, first, that only a selective listing of cases was given and that there are many cases in which findings favourable to the applicant were made that have not been so listed, and, second, that the stature of the court and the result of the case has been misrepresented in some of these cases.

With regard to the first objection, surely it is not incumbent upon an informant in such a case as this to provide a complete history fo all the litigation affecting a potential defendant. What has to be weighed by the justice in deciding whether or not there is reasonable and probable cause is not the guilt or innocence of the potential defendant, but whether there is reasonable cause to believe that evidence is available.

Again, when the matter of reference to foreign courts is reviewed, it must be kept in mind that the informant, as is usually the case, is a police officer, not a lawyer, though no doubt he is reasonably well informed on legal matters. While I agree that in the result the material presented to the judge and to the Justice of the Peace does not accurately state the

outcome of certain cases in France, and omits certain reversals on appeals, it is not quickly apparent that the respective calendars of the court's concern were readily available to the informant, nor is it at first blush always easy to comprehend precisely the result of some of the judgments.

Nevertheless, a recital of convictions and adverse findings made by superior courts in other jurisdictions would inevitably be given weight by the judge and the justice of the peace. It may be that if this had been the only ground alleged and supported on the record, I would not have given leave. As the informant is to be examined in any event, that examination may be extended so as to deal with the state of the informant's knowledge and the steps taken to inform himself of the results of the French cases referred to in the information.

The cross-examinations will therefore proceed before me as soon as may be and they will be limited to the two matters indicated in these reasons.

Released January 23, 1985.
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