

FOCUS ON CRIMINAL LAW

COMMENTARY: Telewarrant overuse threatens right to privacy

By Marvin Stern, David Albert and Martina Quail

The sanctity of individuals' privacy in their homes has long been recognized by Canadian courts, and the legal status of domestic privacy was heightened following the proclamation of the *Charter of Rights*. However, the increased use of telewarrants by police has eroded this important protection.

Under the *Charter*, a search of a home that is not authorized by warrant is presumptively unlawful. In order to obtain a search warrant, a police officer must normally appear personally before a justice. The purpose of prior-authorization procedures is to protect citizens against unreasonable searches.

A 1984 *Criminal Code* amendment created the telewarrant, where an officer submits the required information under oath by telephone or other means of telecommunication. The Nova Scotia Supreme Court in *R. v. Hill*, [2006] N.S.J. No. 542, highlighted the importance of in-person appearance versus telewarrants:

"[I]t would not seem to be a long-term solution to have all warrants obtained in this manner [via telewarrant], since it precludes the opportunity for the issuing judge or justice to examine the officer on whose information the warrant is being sought, in person, and to raise whatever questions may be

considered appropriate."

Because of this consideration, a police officer may only apply for a telewarrant where personal appearance is "impracticable". Webster's Dictionary defines "impracticable" as "incapable of being performed or accomplished by the means employed or at command".

However, in recent B.C. decisions, the term has been interpreted to be

synonymous with "impractical," which is less stringently defined as "not wise to put into or keep in practice or effect", and "not pleasing to common sense or prudence". Whereas "impracticable" is about impossibility in the

circumstances, "impractical" is a question of common sense and convenience, a less exacting standard.

Parliament chose "impracticable" to signal a restrictive application: telewarrants were intended for situations where a personal application would border on the impossible. Then-justice minister John Crosby advised Parliament when it might be used when he introduced the amendment that initially created the telewarrant:

"In some circumstances they may be used in order to get a blood sample from a person who was in an accident, is suspected of

impaired driving and is unconscious. They may be used in a situation such as one which might occur in the Yukon or Northwest Territories in which the RCMP member or police might have to travel 40, 50 or a couple hundred miles before he could find a person to whom he could apply to receive a search warrant."

The circumstances he describes are clearly impracticable for an in-person appearance — they make it virtually impossible.

However, the B.C. Court of Appeal has not followed such a strict standard. In *R. v. Erickson*, 2003 BCCA 693, without referring to definitions or precedent, the court defined "impracticable" as follows:

"It is reasonable to conclude that 'impracticable' means something less than impossible and imports a large measure of practicality, what may be termed common sense."

In *Erickson* the accused was charged with marijuana production, evidence of which was found pursuant to a telewarrant issued to search the residence. In a unanimous decision, the court upheld the trial judge's holding that the warrant was validly issued as it was impracticable for the officer to drive 30 kilometres through "rugged unorganized territory" to the nearest justice qualified to issue a warrant.

In *R. v. Nguyen*, 2007 BCSC

335, the B.C. Supreme Court applying *Erickson* upheld a telewarrant where the officer honestly believed there was no justice available in the area of Rossland, even though no evidence was led to establish that supposition.

In *R. v. Phillips*, 2004 BCSC 1797, after concluding that "impracticability is a relatively low threshold to meet", the court upheld a telewarrant where there were no justices available in Surrey and the nearest available justice was in Vancouver, a 45-minute drive away. In *R. v. Cam*, 2007 BCPC 0038, a Surrey provincial court decision, after citing the definition of "impracticability" from *Erickson* and citing *Phillips*, the court held that it was "impracticable" for the officer to make a personal appearance that would involve a 28-kilometre drive, of perhaps a half hour.

The trend in B.C. since *Erickson* has been toward upholding telewarrants as standard procedure, available on the basis of simple expediency. Increasingly, a process of last resort is becoming an instrument of convenience.

However, the courts are not unanimous in their lenient interpretation of impracticability. Several recent provincial court decisions have quashed tele-

warrants where the impracticability requirement was not met. In *R. v. Koprowski*, [2005] B.C.J. No. 2940, it was not impracticable to travel about 30 minutes from Surrey to Burnaby to appear personally. Similarly, in *R. v. Tran*, [2006] B.C.J. No. 193, the court held that it would have been practicable for the officer to appear in



Martina Quail

person for a warrant, since he had on two prior occasions attended personally. In *R. v. Nguyen*, [2006] B.C.J. No. 3040, the court cited the proposition from *Tran* that while inconvenient, it was not impracticable for the officer to drive from Surrey to Burnaby to appear personally.

The courts have also quashed telewarrants in several cases where police officers do not inquire whether a justice is available for an in-person appearance: *R. v. Farewell*, [2006] B.C.J. No. 3344 (BCSC); *R. v. Ong*, [2006] B.C.J. No. 1836, and *R. v. Chung*, [2005] B.C.J. No. 2839.

In light of these recent decisions, we can only hope that the proper balance between police power and personal privacy rights that guided the formulation of s. 487.1 is maintained, so that telewarrants will only be issued where in-person appearance is truly impracticable, and not simply administratively expedient.

Marvin Stern, an associate at Stern & Albert, practises criminal law in B.C.'s Lower Mainland, with an emphasis on impaired driving and drug-related offences. David Albert, an associate at the same firm, began his career prosecuting drug offences and now practises criminal law throughout B.C. Martina Quail is currently an associate with Stern & Albert.



Marvin Stern



David Albert