The *Garofoli* Hearing:
Cross-examination, Amplification and other Procedural Considerations

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I. Introduction

In ***R. v. Pires and Lising***[1], the Supreme Court of Canada considered the constitutionality of the *Garofoli* leave requirement, the threshold test for cross-examination of an affiant on an application to challenge a wiretap authorization pursuant to section 8 of the *Charter.* The Court ultimately found the leave requirement to be consistent with *Charter* principles and not an infringement of the accused's right to full answer and defence but in doing so touched on the wider implications of the need to balance the rights of the accused, with the public interest in the fair but efficient use of judicial resources. While the focus of the appeal was on the leave requirement, it is the overarching principles of trial fairness, efficiency and need for the court to control its own process that have carried forward and continue to be a warning to future proceedings.

With that warning in mind and in looking forward from the Supreme Court's decision in ***Pires and Lising***, this paper will discuss how the courts have since approached the procedural aspects of the *Garolfoli* hearing. In particular, it will the threshold test for leave to cross-examine the affiant, and if leave is granted, the scope of cross-examination, the scope of re-examination, the ongoing debate over the proper process and the use of amplification evidence.

II. Standard of Review

The standard of review for a challenge to the authorization was set out by Sopinka J. in ***R. v. Garofoli*** and has been consistently applied thereafter:

> The reviewing judge does not substitute his or her view for that of the authorizing judge. If, based on the record which was before the authorizing judge as amplified on review, the reviewing judge concludes that the authorizing judge could have granted the authorization, then he or she should not interfere. In this process, the existence of fraud, non-disclosure, misleading evidence and

[1] ***R. v. Pires; R. v. Lising***, 2005 SCC 66; [2005] S.C.R. 343 (S.C.C.) [*Pires and Lising*].

> new evidence are all relevant, but, rather than being a prerequisite to review, their sole impact is to determine whether there continues to be any basis for the decision of the authorizing judge.[2]

That standard was recently reiterated by Fish J., in ***R. v. Morelli***:

> In reviewing the sufficiency of a warrant application, however, "the test is whether there was reliable evidence that might reasonably be believed on the basis of which the authorization could have issued" (*R. v. Araujo*, 2000 SCC 65, [2000] 2 S.C.R. 992 (S.C.C.), at para. 54 (emphasis in original)). The question is not whether the reviewing court would itself have issued the warrant, but whether there was sufficient credible and reliable evidence to permit a justice of the peace to find reasonable and probable grounds to believe that an offence had been committed and that evidence of that offence would be found at the specified time and place.[3]
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> [41] The reviewing court does not undertake its review solely on the basis of the ITO as it was presented to the justice of the peace. Rather, "the reviewing court must exclude erroneous information" included in the original ITO (*Araujo*, at para. 58). Furthermore, the reviewing court may have reference to "amplification" evidence — that is, additional evidence presented at the *voir dire* to correct minor errors in the ITO — so long as this additional evidence corrects good faith errors of the police in preparing the ITO, rather than deliberate attempts to mislead the authorizing justice.

III. <u>Leave to Cross-examine the Affiant</u>

Where the defence seeks to challenge the admissibility of intercepted communications by way of cross-examination of the affiant, leave to do so must first be obtained. The threshold test for the leave requirement was set out in ***Garofoli***:

> Leave must be obtained to cross-examine. The granting of leave must be left to the exercise of the discretion of the trial judge. Leave should be granted when the trial judge is satisfied that cross-examination is necessary to enable the accused to make full answer and defence. A basis must be shown by the accused for the view that the cross-examination will elicit testimony by tending to

[2] ***R. v. Garofoli***, [1990] 2 S.C.R. 1421 (S.C.C.) at para. 56 [*Garofoli*]; ***R. v. Araujo***, 2000 SCC 65, [2000] 2 S.C.R. 992 (S.C.C.), at paras. 54 and 59 [*Araujo*]; ***Lising and Pires***, *supra,* at paras. 8 and 30; ***R. v. Morelli***, 2010 SCC 8, [2010] 1 S.C.R. 253 (S.C.C.), at paras. 40-42 [*Morelli*].

[3] ***Morelli,*** supra at para. 40.

> discredit the existence of one of the pre-conditions to the authorization, as for example the existence of reasonable and probable grounds.[4]

The Supreme Court of Canada in ***Pires and Lising*** upheld the constitutionality of the *Garofoli* leave requirement, finding that it does not infringe the right to full answer and defence:

> There is no question that the right to cross-examine is of fundamental significance to the criminal trial process. However, it is neither unlimited nor absolute. The extent to which it becomes a necessary adjunct to the right to make full answer and defence depends on the context. The *Garofoli* threshold test requires that the defence show a reasonable likelihood that cross-examination of the affiant will elicit testimony of probative value to the issue for consideration by the reviewing judge. It is grounded in two basic principles of evidence: relevance and materiality. It is also born out of concerns about the prolixity of proceedings and, in many cases, the need to protect the identity of informants. The rule does not infringe the right to make full answer and defence. There is no constitutional right to adduce irrelevant or immaterial evidence. Further, the leave requirement strikes an appropriate balance between the entitlement to cross-examination as an aspect of the right to make full answer and defence, and the public interest in the fair, but efficient, use of judicial resources and the timely determination of criminal proceedings.[5]

That said, the threshold test for leave to cross-examine the affiant is not an onerous one to meet. All that must be shown is a *reasonable likelihood* that it will assist the court to determine a material issue.[6] The purpose of the leave requirement is to "weed out" unnecessary proceedings that are unlikely to assist in the determination of the relevant issues. The focus is on the ultimate question to be determined on a *Garofoli* review -whether there is a basis upon which the authorization *could* have issued. There is a narrow basis upon which an authorization can be set aside, that calls for a narrow window for cross-examination. Therefore:

> If the proposed cross-examination is not likely to assist in the determination of this question, it should not be permitted. However, if the proposed cross-examination falls within the narrow confines of this review, it is not necessary for the defence to go further and demonstrate that cross-examination will be successful in discrediting one or more of the statutory preconditions for the authorization.[7]

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[4] ***Garofoli***, *supra* note 2 at para. 88.
[5] ***Pires and Lising***, *supra* note 1 at para. 3.
[6] ***Pires and Lising***, *supra* note 1 at para. 40.
[7] ***Pires and Lising***, *supra* note 1 at para. 40.

Scope of Cross-examination

If the accused meets the *Garofoli* threshold test and cross-examination is permitted, it is neither unlimited nor absolute.[8] The scope of cross-examination was explained by Sopinka J. in ***Garofoli***:

> When permitted, the cross-examination should be limited by the trial judge to questions that are directed to establish that there was no basis upon which the authorization could have been granted. The discretion of the trial judge should not be interfered with on appeal except in cases in which it has not been judicially exercised. While leave to cross-examine is not the general rule, it is justified in these circumstances in order to prevent an abuse of what is essentially a ruling on the admissibility of evidence.[9]

In some cases, cross-examination of the affiant alone may not be sufficient to establish the extent of the record that was before the authorizing judge. This is particularly true in larger cases, involving more than one authorization whereby there is a central affiant whose job it is to compile the affidavit from information from other officers without having first-hand knowledge him or herself. In those cases, leave to cross-examine the sub-affiants may be granted if the defence can establish that the affiant's role was limited to that of a "straw person" and that the sub-affiants would be in a better position for cross-examination. That said, the test for leave to cross-examine a sub-affiant is more stringent than the standard leave requirement for the affiant. As stated by the Ontario Court of Appeal in ***R. v. Durette***:

> The trial judge must be given some latitude in determining what evidence he will permit to be called on these preliminary issues. This was not the trial of the accused on the merits, but merely the process of establishing certain pre-conditions to the admissibility of evidence. To permit defence counsel to challenge the veracity of these authorizations by conceding, as a matter of law, a right to compel the attendance of other police officers without any assurance as to the utility of their evidence, would lead to interminable and unproductive delay.[10]

[8] ***Pires and Lising***, *supra* note 1 at para. 3.
[9] ***Garofoli***, *supra* note 2 at para. 89; ***Pires and Lising***, *supra* note 1 at para. 45.
[10] ***R. v. Durette*** (1992), 72 C.C.C. (3d) 421 (Ont. C.A.) at para. 103; reversed on other grounds: [1994] 1 S.C.R. 469 (S.C.C.) [*Durette*].

Scope of Re-examination

Just as the scope of cross-examination of the affiant by the accused is limited so too is the scope of re-examination by the Crown. The B.C. Court of Appeal in ***R. v. Wilson***[11] recently discussed the proper procedure to be followed in a *Garofoli* hearing, including the parameters to be placed on re-examination. Writing for the Court, Frankel J.A. explained that re-examination can only occur after leave is granted to the accused, and only on those areas raised in cross-examination. Crown cannot elicit evidence by way of direct-examination or areas not first covered by defence. In particular, Frankel J.A. stated the following as a reminder of the proper scope of re-examination:

> The granting of leave to cross-examine allows an accused to challenge the basis on which a search warrant was granted. The warrant having been obtained on the basis of an ITO, that document stands as the informant's evidence in-chief. Although an accused is entitled to challenge the correctness of the statements in an ITO, and to bring out other facts that undermine the efficacy and reliability of those statements, the Crown is not entitled, in the first instance, to seek to bolster an ITO or to correct errors in it.
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> In my view, the Crown is limited to re-examining the informant on matters arising in cross-examination. The Crown is not entitled to supplement, qualify, or otherwise explore areas not raised in cross-examination: Bryant, Lederman and Fuerst, *The Law of Evidence in Canada*, 3rd ed. (Markham: LexisNexis, 2009) at §§ 16.183, 16.184. For example, if an ITO contains information from an anonymous source, then it is for the accused to decide wither to cross-examine with respect to that information**.** If the accused elects to cross-examine then, depending on the nature of that examination, re-examination may be appropriate. However, the Crown cannot, as it did here, call evidence in chief-to show that the investigative facts are different from those set out in the ITO.[12]

IV. Amplification

As part of the review process, the reviewing judge is entitled to consider the record before the authorizing judge *as amplified on review*. The phrase "as amplified on review" refers to the process of "amplification" whereby external or "new" evidence is adduced through cross-examination (or re-examination) of the affiant, to "amplify" or enhance the record for the purpose of correcting technical errors and oversights in the supporting ITO. As a matter of principle, errors and misstatements must be excised from an affidavit. If, after excision the

[11] ***R. v. Wilson***, 2011 BCCA 252 [*Wilson*].
[12] ***Wilson****, supra* at paras. 66-67.

authorization can be sustained, there is no need to resort to amplification. If, on the other hand, excision renders the authorization unsustainable, good faith omissions or errors may be amplified on review.[13]

The Supreme Court of Canada in ***R. v. Araujo***, confirmed that amplification may be resorted to as a necessary part of the review process but cautioned on its limitations and the potential dangers associated it:

> The danger inherent in amplification is that it might become a means of circumventing a prior authorization requirement. Since a prior authorization is fundamental to the protection of everyone's privacy interests (*Hunter v. Southam Inc., supra* at p. 160), amplification cannot go so far as to remove the requirement that the police make their case to the issuing judge, thereby turning the authorizing procedure into a sham. On the other hand, to refuse amplification entirely would put form above substance in situations where the police had the requisite reasonable and probable grounds and had demonstrated investigative necessity but had, in good faith, made some minor, technical error in the drafting of their affidavit material. Courts must recognize (along with investigative necessity) the two principles of prior authorization and probable grounds, the verification of which may require a close examination of the information available to the police at the time of the application for wiretap, in considering the jurisprudence on amplification.[14]

More recently, the Supreme Court of Canada in ***Morelli*** restated the principles outlined in ***Araujo***, emphasizing the limited scope of amplification evidence:

> It is important to reiterate the limited scope of amplification evidence, a point well articulated by Justice LeBel in *Araujo*. Amplification evidence is not a means for the police to adduce additional information so as to retroactively authorize a search that was not initially supported by reasonable and probable grounds. The use of amplification evidence cannot in this way be used as "a means of circumventing a prior authorization requirement" (*Araujo*, at para. 59).
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> Rather, reviewing courts should resort to amplification evidence of the record before the issuing justice only to correct "some minor, technical error in the drafting of their affidavit material" so as not to "put form above substance in situations where the police had the requisite reasonable and probable grounds and had demonstrated investigative necessity but had, in good faith made" such errors (para 59). In all cases, the focus is on "the information available to the

[13] ***R. v. Morelli***, *supra* note 2; ***R. v. Araujo***, *supra* note 2; ***R. v. Garofoli***, *supra* note 2.
[14] ***Araujo***, *supra* note 2 at para. 59.

> police at the time of the application" rather than information that the police acquired after the original application was made (para. 59).[15]

In ***Morelli***, a warrant was issued to seize and search the accused's computer which resulted in pornographic pictures involving children being found on the computer; the accused was convicted of possession of child pornography. Upon review of the ITO affidavit in support of the search warrant, the Supreme Court of Canada held that the warrant contained a variety of inaccurate, incomplete or misleading statements. The erroneous information was excised and the Court reviewed the balance of the remaining grounds taking into account information gleaned through amplification:

> The facts originally omitted must be considered on a review of the sufficiency of the warrant application. In *Araujo*, the Court held that where the police make good faith errors in the drafting of an ITO, the warrant authorization should be reviewed in light of amplification evidence adduced at the *voir dire* to correct those mistakes. Likewise, where, as in this case, the police fail to discharge their duty to fully and frankly disclose material facts, evidence adduced at the *voir dire* should be used to fill the gaps in the original ITO.[16]

As a result of amplification a number of omitted facts known to police at the time of the application came to light. It was determined that the amplified record painted a far "less objective and villainous" picture than before; sufficient grounds no longer existed. Having failed to provide the details at the outset of the application, the Court held the affiant failed to respect his duty to make full and frank disclosure and the warrant could not be saved.

Is amplification only available to correct minor, technical errors?

Since the Supreme Court of Canada's decision in ***Araujo***, there has been some debate as to what exactly is the proper scope of amplification and whether or not it is *only* available to correct minor, technical errors in drafting.

In the summary of the applicable legal principles as set out in the above paragraphs from ***Morelli*****,** Fish J., (writing for the majority), states that amplification should be resorted to ONLY to correct "some minor, technical error in the drafting of their affidavit". For the most part, Fish J. is merely reiterating the principles from ***Araujo*** but it has been argued that he goes further than the Supreme Court before him in adding the word "only" where it did not exist before.

[15] ***Morelli***, *supra* note 2 at paras. 42-43.
[16] ***Morelli***, *supra* note 2 at para. 60.

The Supreme Court of B.C. in ***R. v. Radjenovic***[17], supported the limited scope and use of amplification evidence. Referencing the "divergent perspectives" on the issue that emerged post-***Araujo*** but pre-***Morelli***, Ker J., found that the debate on the scope of amplification had been laid to rest by ***Morelli***:

> In *Morelli* at para. 42, however, Fish J., made it clear that amplification should not serve as a means of circumventing the prior authorization process by permitting the police to "adduce additional evidence so as to retroactively authorize a search that was not initially supported by reasonable grounds." Thus, minor technical errors made in good faith can be rectified on amplification but substantive deficiencies cannot be rectified through the amplification process.
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> The narrower view of the permissible scope of use of amplification evidence appears to have found support in *Morelli*. Therefore, amplification evidence may include additional evidence presented at the *voir dire* to correct minor errors in the affidavit, so long as it corrects good faith errors of the police in preparing the affidavit, and not deliberate attempts to mislead the authorizing justice.[18]

In light of the limited scope as set out in ***Morelli***, Ker J. found that many of the areas sought to be amplified by the Crown, namely cross-reference corroboration within the parameters of the affidavit, how the affiant's personal knowledge of aspects of other investigations assisted in accepting what the Agent was saying and his belief of what the Agent was telling the officers - were "largely unnecessary"[19]. Despite limiting the use of amplification evidence, Ker J. found the authorization to be valid upon review.

Most recently the B.C. Court of Appeal affirmed the limited scope of amplification in ***Wilson***, *supra*, where Frankel J.A., writing for the Court reiterated the following:

> As discussed by Mr. Justice LeBel in *Araujo*, amplification cannot be used to circumvent the need for the informant to satisfy a justice of the peace that the requirements for the issuance of a search warrant have been met. However if the evidence on the *voir dire* reveals that the informant, "in good faith, made some minor, technical error in drafting", then, on the review, those errors can be taken as corrected".[20]

On the other hand, there is a line of cases that take the position that the Supreme Court in ***Araujo*** did not actually limit amplification to *only* minor, technical matters. Those cases argue that the Court was not identifying an *exclusive* category of errors for which amplification can seek to reconcile, but rather was giving an example, in the circumstances of that case.

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[17] ***R. v. Radjenovic***, 2010 BCSC 1750. [*Radjenovic*].
[18] ***Radjenovic***, *supra* at paras. 93-94.
[19] ***Radjenovic***, *supra* at para. 95.
[20] ***Wilson***, *supra* note 11 at para. 68.

This argument was accepted by the Court in ***R. v. Pilarinos***[21], where Bennett J., as she then was, found the following:

> The defence submits that this paragraph limits the extent to which amplification may be considered. **The defence submits that only minor technical errors in drafting made in good faith may be amplified. I do not draw this conclusion. It appears to me that LeBel J.** [in *Araujo*] **is identifying a spectrum**. It would be wrong to permit a defective authorization to be totally rehabilitated by amplification during the review process. As the learned justice said, this would make a sham out of the authorization process. On the other hand, when one considers cases such as *Plant* and *Morris*, the concerns on the affidavit that were found to be properly amplified went beyond minor technical errors in drafting. [emphasis added].[22]

The "spectrum" argument was addressed more recently in the post-*Morelli* case of ***R. v. Bouchard***[23], where the court weighed in on the amplification debate. Aitken J., pointed out that in both ***Plant*** and ***Morris***, amplification went beyond the correction of minor technical errors. Aitken J., further pointed out that both cases predated ***Araujo*** but were not disapproved of by the Supreme Court of Canada. On that issue, Aitken J., cited Bennett J., as she then was, in ***Pilarinos***, *supra*, for the proposition that while it would be wrong to permit a defective authorization to be totally rehabilitated by amplification, amplification was not limited to minor technical errors in drafting made in good faith.[24]

In ***Bouchard***, Aitken J. went on to allow amplification to correct a drafting error wherein the Affiant left out a reference to the undercover officer, making it seem like another person arranged to buy drugs. The error was admitted under cross examination and it was found there was no intention to mislead the issuing justice; the words were simply left out.

In ***R. v. Fougere***[25], a warrant was issued after informant information was received about a grow-op at the accused's residence. The accused took issue with the fact there was no information of *when* the informant made observations about the residence and evidence was elicited from the officer that the observations had been made "within a month" of the tip to police. The accused argued the evidence was not proper "amplification evidence" per ***Morelli***. In allowing the timeframe to be considered as proper amplification evidence, Edwards J. explained that what he took from the limitation in *Morelli* was that amplification evidence cannot be used to fill in gaps in the information which existed at the time of the application, but

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[21] ***R. v. Pilarinos***, 2001 BCSC 1844 [*Pilarinos*].
[22] ***Pilarinos***, *supra* at para. 27.
[23] ***R. v. Bouchard***, 2011 ONSC 5052 [*Bouchard*].
[24] ***Bouchard***, *supra* at paras. 15-16.
[25] ***R. v. Fougere,*** 2010 NSSC 169 [*Fougere*].

in that case, the evidence gave nothing new that was not available at the time of the application and it rebuts the notion that the police were acting on stale information[26].

Finally, in his paper, "**Excision and Amplification**", Croft Michaelson questions whether amplification is restricted to *only* "technical drafting errors". In doing so, he refers to the French version of the judgment in *Araujo* whereby it states at paragraph 59:

> [R]efuser toute amplification ferait passer la forme avant le fond, lorsque la police a des motifs raisonnables et probables suffisants..., mais qu'une erreur sans grande importance ou technique s'est glissée par inadvertance dans l'affidavit.[27]

Translated into English, the passage reads: "amplification is appropriate to correct inadvertent errors that are not of great importance, or are technical in nature". Michaelson took that to mean that "minor" errors are not restricted to those matters of no consequence - the error must still have *some* bearing on the sufficiency of the grounds in the affidavit or there would be no point in amplifying it.[28]

At the end of the day, it would seem that the courts have differing opinions as to whether the Supreme Court in ***Morelli*** went beyond the example given in ***Aurajo***, thereby limiting the scope of amplification even further. That said, where the authorities do agree, is while amplification cannot be used to circumvent the application process, care should also be taken not to put form over substance in those cases where errors were made in good faith.

Amplification can be probative for and against ALL parties

Another issue that has been the focus of debate is the extent to which amplification evidence can be used by both the defence and the Crown. While it has been argued that amplification evidence can only be used for the sole purpose of identifying errors, omissions and fraudulent misstatements in the ITO, the authorities seem to support the position that amplification, where appropriate, can be probative for and against *all* parties. Rather than focusing on Crown or defence, the review process is focused on the *record as whole* and whether if, based on the record before the authorizing judge as amplified on the review, the authorization could have issued.

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[26] ***Fougere***, *supra* at para. 17.
[27] Michaelson, Croft, "**Excision and Amplification**" as part of "*The Complete Guide to Wiretaps*" (CPD - Law Society of Upper Canada: March 5, 2011) [*Michaelson*].
[28] ***Michaelson***, *supra* at pg. 4-7.

In ***R. v. Madrid (Troncoso)***[29], the BC Court of Appeal warned that where the applicant chooses to amplify the record through cross-examination he or she must live with the consequences, even if that means otherwise sparse evidence is enhanced. Defence counsel had argued that amplification could only be taken to benefit the accused, not the Crown. In support of that argument, counsel made reference to paragraph 68 of ***Garofoli***, where it is stated that in the review process, "the existence of fraud, non-disclosure, misleading evidence and new evidence are all relevant..." It would appear that the defence in that case based their position on the fact that the words "*new evidence*" follows a negative list of errors, potentially detrimental to the authorization and the exposure of which is the goal of the defence; therefore, cross-examination can *only* be used to elicit evidence favourable to the defence, and not the Crown. McEachern C.J., in ***Madrid***, disagreed stating:

> Counsel for the Appellants argue that the above passage means that cross-examination can only weaken the force of the affidavit evidence, but it cannot strengthen it. With respect, I doubt the correctness of that view. First, Sopinka J. referred to the record "as amplified on the review," making no distinction between "amplifying" evidence that helps the defence case and that which hurts it. Second, if Appellants' counsel have stated the correct view, there would be no down-side to cross-examination and counsel may fish, at least until the patience of the trial judge is exhausted, without risk of an unfortunate answer or unfavourable evidence. This would be contrary to all the principles of a balanced, adversarial trial process...[30]

At paragraph 67 of ***Madrid***, McEachern C.J. summarized:

> I take the above-quoted passage from *Garofoli* to mean that fraud and non-disclosure, etc., are not prerequisites to review as previously thought. Although Sopinka J. said the cross-examination would be limited, counsel are now exploring such questions by thorough and far-reaching and exhaustive inquiries. As a result, trials such as this one consume enormous amounts of court time in the pursuit of fraud, mistake or non-disclosure. These ingredients, if established on cross-examination or otherwise, may destroy the basis for the decision of the issuing judge. But it does not follow, in my view, that the ordinary principles of advocacy do not apply. **Evidence given on an issue in a *Garofoli* cross-examination can be probative both for and against all parties subject to all just exceptions, just as in the trial proper**... [emphasis added].[31]

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[29] ***R. v. Madrid*** (1994), 48 B.C.A.C. 271 (B.C.C.A.) [*Madrid*].
[30] ***Madrid***, *supra* at para. 60.
[31] ***Madrid***, *supra* note 29 at para. 67.

McEachern C.J.'s reasoning on the scope of amplification in ***Madrid*** was adopted by Cullen J., as he then was, in ***R. v. Lee***.[32] In ***Lee***, the accused was granted leave to cross-examine the affiant in connection with his subjective belief as to the utility of the interceptions sought and the objective grounds for that belief among other areas. The accused argued that only *portions* of the information obtained in cross-examination of the affiant were applicable on amplification, and that the information could NOT be used to augment the objective reasonableness of the grounds to obtain the authorization. In other words, the information obtained in cross-examination could only go to amplify the record for the defence, and not the Crown. In rejecting the defence argument, Cullen J., confirmed that the weight of authority favours the consideration of new evidence to supplement the affiant's grounds for belief through amplification.

Cullen J., reiterated that in cases where "manifestly erroneous" information is excised from the affidavit as was the case in ***Araujo***, ***Plant,*** and ***Morris,*** care should be taken that the limits proscribed by ***Aurajo*** (and later ***Morelli***): that amplification only go to correct minor, technical errors in drafting be adhered to so that amplification does not become a means of circumventing the prior authorization process. That said, absent any risk of subversion of the process, the fact that the *new information* also happens to augment the reasonable grounds for issuing the warrant does not make it an improper use of amplification.[33]

Further, in "**Wiretapping and Other Electronic Surveillance**" by Hubbard, Brauti, and Fenton, the authors state:

> The process of amplification is meant to be a flexible process. Amplification is a two way street. Sometimes, amplification will assist the defence in excluding key information supporting the issuance of the authorization from consideration. Other times, amplification will assist the Crown in placing otherwise erroneous information in its proper perspective and in augmenting the totality of circumstances justifying the issuance of the order.[34]

Although ***Madrid*** pre-dates the Supreme Court's decision in ***Araujo***, it has not been been overruled by that case or even the recent Supreme Court decision in ***Morelli***. There has been no express statement by the Supreme Court that amplification cannot be probative for defence and Crown alike. In both cases, the Court refers to the *record* (as a whole) "as amplified on review". In fact, LaBel J., in describing the scope of amplification at paragraph 59 ***Araujo*** (and

[32] ***R. v. Lee***, 2002 BCSC 15 [*Lee*].
[33] ***Lee***, *supra* at paras. 33-39.
[34] Hubbard, Brauti and Fenton, "**Wiretapping and Other Electronic Surveillance**", Canada Law Book, at page. 8-34.12.

adopted by Fish J., in ***Morelli***), warned against putting "form above substance" in situations where the reasonable grounds existed at the time but good faith errors were made. In other words, amplification should be resorted to, for the benefit of the Crown, to save the authorization in such circumstances.

The Crown cannot amplify as of right

In ***Wilson****, supra*, Frankel J.A. criticized the procedure followed at trial whereby the Crown was permitted *carte blanche* to question the affiant in an attempt to bolster the record that was before the issuing justice. While the *voir dire* procedure was not an issue raised on the appeal, Frankel J.A. thought it appropriate to clarify the process.

Frankel J.A. explained that the Crown is not permitted to amplify the record as of right. Amplification can occur only if leave to cross-examine is first granted to the defence and the Crown may only re-examine on areas raised in cross-examination - Crown cannot elicit evidence by way of direct-examination or areas not first covered by defence. In particular, Frankel J.A. explained:

> However, the fact that an accused is granted leave to cross-examine does not give the Crown the ability to examine the informant in-chief with respect to the contents of the ITO. More specifically, it does not provide the Crown with an opportunity to do what occurred here, namely to attempt to "amplify" the ITO. Indeed, I am not aware of another case in which the voir dire has proceeded in this way.
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> The granting of leave to cross-examine allows an accused to challenge the basis on which a search warrant was granted. The warrant having been obtained on the basis of an ITO, that document stands as the informant's evidence in-chief. Although an accused is entitled to challenge the correctness of the statements in an ITO, and to bring out other facts that undermine the efficacy and reliability of those statements, the Crown is not entitled, in the first instance, to seek to bolster an ITO or to correct errors in it.
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> In my view, the Crown is limited to re-examining the informant on matters arising in cross-examination. The Crown is not entitled to supplement, qualify, or otherwise explore areas not raised in cross-examination: Bryant, Lederman and Fuerst, *The Law of Evidence in Canada*, 3rd ed. (Markham: LexisNexis, 2009) at §§ 16.183, 16.184. For example, if an ITO contains information from an anonymous source, then it is for the accused to decide wither to cross-examine with respect to that information. If the accused elects to cross-examine then, depending on the nature of that examination, re-examination may be appropriate. However,

> the Crown cannot, as it did here, call evidence in-chief to show that the investigative facts are different from those set out in the ITO.[35]

As clarified in ***Wilson***, although the Crown cannot seek to amplify the record as of right, re-examination and elicitation of information in support of the authorization is allowed on those areas raised by the defence in cross-examination. It follows that once the defence "opens the door", Crown can re-examine on the issue.

It should be noted that in his review of the proper procedure to be followed on the *voir dire*, no mention was made of *new evidence* elicited on cross-examination being to the sole benefit of the defence and not the Crown. Where the proper procedure is followed, amplification evidence *may* be considered on the *record as a whole*.

V. Conclusion

In ***Pires and Lising***, Charron J., expressed concern over the prolixity of proceedings and the need for trial courts to exercise discretion to control their own process and reign in unnecessary applications:

> The concern over the constructive use of judicial resources is as equally, if not more applicable today as it was 15 years ago when *Garofoli* was decided. For our justice system to operate, trial judges must have some ability to control the course of proceedings before them. One such mechanism is the power to decide to embark upon an evidentiary hearing at the request of one of the parties when that party is unable to show a reasonable likelihood that the hearing can assist in determining the issues before the court.[36]

That was in 2005. In 2012, with the increasing amount of mega-trials, complex evidentiary motions and the overarching "procedural morass"[37] that has long-since plagued the criminal justice system, this concern still holds true and has been echoed by higher courts across Canada. It is with that warning in mind that an adherence to the procedural requirements of the *Garofoli* review including the threshold test, fair limits on cross-examination of the affiants

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[35] ***Wilson***, *supra* note 11 at paras. 65-67.

[36] ***Pires and Lising***, *supra* note 1 at para. 35.

[37] ***Durette***, *supra* note 10 at para. 46 - full quote from Finlayson, J.A.: "Unless we, as courts, can find some method of rescuing our criminal trial process from the almost Dickensian procedural morass that it is now bogged down in, the public will lose patience with our traditional adversarial system of justice. As Jonathan Swift might have said, we are presently sacrificing justice on the shrine of process".

(and sub-affiants as the case may be) and the proper use of amplification evidence will lead to a streamlined hearing with the focus on relevance and the material issue at hand.