

Morin, Lois

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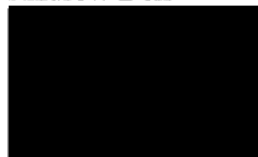
**From:** [REDACTED]  
**Sent:** March-09-20 12:03 PM  
**To:** Morin, Lois  
**Subject:** letter to the Board regarding HPS search warrant application practices  
**Attachments:** Booth and the HPS final.docx

Dear Ms. Morin,

I would be grateful if you would distribute this letter to all members of the Hamilton Police Services Board and Chief Girt and include it in the category of "For the Information of the Board" in the agenda for the next Board meeting.

Thank you for considering my request.

Yours truly,  
Andrew Bell



March 9, 2020

Hamilton Police Services Board  
155 King William Street  
P.O. Box 1060, LCD 1  
Hamilton, Ontario  
L8N 4C1

Re: *R. v. Booth* and the Ability of Members of the Hamilton Police Service to make Applications for Search Warrants

Dear Members of the Board,

I am a retired Assistant Crown Attorney who worked extensively with members of the Hamilton Police Service for more than 20 years. One area in which I developed expertise was search and seizure. I have drafted and have worked with various police forces in drafting applications for a wide range of warrants: search warrants, warrants to take DNA samples, warrants to track vehicles, authorizations to intercept private communications, authorizations to conduct video surveillance and many others.

On February 18, 2020, the Hamilton Spectator published a report of a decision by the Ontario Court of Appeal, the highest court in Ontario, regarding a criminal case which was investigated by the Hamilton Police Service in 2012. The headline was "Court orders acquittal for man after eight years in jail". The decision, *R. v. Adam Booth*, can be found at [www.ontariocourts.ca/decisions/2019/2019ONCA0970.htm](http://www.ontariocourts.ca/decisions/2019/2019ONCA0970.htm).

Mr. Booth was charged with taking part in an horrendous robbery. The identification of him as one of the robbers was the central issue at trial. Descriptions of the robbers and the getaway car were weak. No property stolen in the robbery was found in Mr. Booth's possession. Mr. Booth made no inculpatory admissions. It was a very difficult case to investigate and prosecute.

The Court of Appeal focussed on two search warrants obtained by an officer of the Hamilton Police Service in the hours following the commission of the robbery. Both warrants suffered from fatal flaws. The flaws were the product of the dishonesty and incompetence of the officer seeking the warrants and the culture of the Hamilton Police Service that tolerates that dishonesty and incompetence.

The purpose of this letter is not to ask that the officer be disciplined. The purpose is to cause the Board to require the Hamilton Police Service to review and change its processes so that applications for warrants are made in accordance with the law, to a high technical standard and with a sound appreciation of and respect for the rights of the people affected by the search.

#### Search Warrants Generally

A search warrant is a judicial authorization which allows the police to do what would otherwise amount to trespass, theft and vandalism. A warrant may be issued if the standards set out in the *Criminal Code* and a long series of court decisions are met. Search warrants usually are issued by justices of the peace

rather than judges. Most justices of the peace are not lawyers. The justice of the peace bases his or her decision to issue a search warrant on a document known as an "Information to Obtain". The police officer making the application for a search warrant must swear that what is set out in the Information to Obtain is true.

The police officer seeking the issuance of the warrant is legally obliged to make "full and frank disclosure of material facts" (*Booth, para. 54*) in the Information to Obtain. This means that the officer must not only make the justice of the peace aware of information that supports the issuance of the warrant but also information that detracts from the strength of that information or contradicts it. In other words, the officer has to set out both the good and the bad. (*Booth, paras. 54-6*). That has been the law for more than 20 years.

#### The Flaws in the Search Warrants executed in *R. v. Booth*

One of the warrants in question permitted the search of Mr. Booth's home for items relating to the robbery. The other search warrant related to a video recorder which was seized from Mr. Booth's home when the first warrant was executed.

The Hamilton Police Service officer lied in his application for the warrant to search Mr. Booth's home. The Court of Appeal referred to five instances of dishonesty under oath (*Booth, paras. 67 to 82*).

One example relates to a photo of a watch worn by an associate of Mr. Booth who also was charged with the robbery.

One of the victims was asked whether the watch worn by the associate was one of the watches stolen in the robbery. The victim said to the police: "No not this one (sic)." The police officer stated in the Information to Obtain: "[The victim] could not identify the watch as his." (*Booth, paras. 68 to 71*) The truth is that the victim ruled out that the watch in the photo was one stolen in the robbery, not that the victim couldn't be sure whether the watch was his or not. There is no persuasive justification for the officer's deceit.

While the defects in the search warrant for Mr. Booth's home reflect badly on the officer's character, the defects in the search warrant for the video recorder reflect badly on his competence. The Information to Obtain lacked any grounds on which a warrant could be properly issued. The deficiency shows a complete lack of effective training and supervision by the Hamilton Police Service.

#### What I Learned about the Police while Drafting Applications for Warrants

1. Warrant drafting is an area for specialists.
2. Just because an officer received training does not mean the officer should be given the responsibility to draft applications for warrants. Trained does not mean capable.
3. A police officer who is capable of drafting a search warrant is highly literate, meticulous, scrupulously honest, confident in her or his knowledge of the relevant law, with excellent organizational skills, a strong work ethic, a sense of professionalism and a firmness of mind. Such officers are in the minority.

4. The more warrants a capable officer drafts, the better he or she gets at it.
5. The rarest type of police officer is one who will tell his supervisor and colleagues that there is not enough information to support the issuance of a search warrant.

The problems in *R. v. Booth* would not have occurred if the officer selected to draft the warrants had been experienced and capable as described.

#### The Response of the Hamilton Police Service to *R. v. Booth*

While the deceit and incompetence of the police officer who drafted the warrants in *R. v. Booth* occurred in 2012, the exposure of the incompetence and deceit by the Court of Appeal affects the reputation of the Hamilton Police Service and the confidence of the public, including the judiciary and the defence bar, in the Hamilton Police Service now.

My concern is that there was no response by the Hamilton Police Service to the decision of the Court of Appeal other than indifference. Members of the Board may wish to satisfy themselves about whether my concern is justified. The following questions may be of assistance in evaluating the response of the Service, if any, to the failures in *R. v. Booth*:

1. How many senior police officers have read *R. v. Booth*?
2. How many senior police officers who read *R. v. Booth* were concerned about a Hamilton Police Service member being incompetent and deceitful?
  - a. If so, were they concerned because of:
    - i. the public exposure of incompetence and deceit?
    - ii. the effect on the reputation of the Hamilton Police Service?
    - iii. the effect on morale within the Hamilton Police Service?
  - b. Could any of them provide a persuasive explanation of why these failures happened?
  - c. Do any of them think that taking action now is necessary or advisable?
    - i. If not, why not?
3. Will *R. v. Booth* be made part of Hamilton Police Service in-house training?
  - a. If so:
    - i. when?
    - ii. by whom?
    - iii. in what context?
    - iv. for what purpose?
  - b. If not, why not?
4. Has the Hamilton Police Service done an audit of the quality of Informations to Obtain search warrants?
  - a. If so,
    - i. When did the audit occur?
    - ii. Why was it undertaken?
    - iii. Was a member of the Office of the Crown Attorney involved in the audit?
    - iv. How many Informations to Obtain were reviewed?

- v. How was the quality of drafting assessed?
  - vi. What were the results of the audit?
  - vii. What changes, if any, were instituted as a result of the audit?
- b. If not, why not?
- 5. Do clear criteria in writing exist to determine who on a police investigative team should draft applications for warrants?
  - a. If so, what are they?
  - b. If there are none, why not?
- 6. Is a review of the Information to Obtain by another officer with knowledge of the case mandatory before an application for a warrant is made?
  - a. If not, why not?
- 7. Is a debriefing conducted by the investigative team or supervisor mandatory after an application for a warrant is refused?
  - a. If not, why not?
- 8. Is a debriefing conducted by the investigative team or supervisor mandatory after a search, pursuant to a warrant or otherwise, is determined by a local court to be in breach of the *Charter of Rights and Freedoms*?
  - a. If not, why not?
- 9. Assuming debriefing occurs, is what is learned communicated within the Hamilton Police Service?
- 10. Does the Hamilton Police Service keep track of:
  - a. the number of applications for search warrant which are refused?
    - i. If not, why not?
  - b. the number of local court decisions in which Hamilton Police Service officers are found to have committed a breach of the *Charter*, either by illegal search or otherwise?
    - i. If not, why not?

#### The Hamilton Police Service and Deficiencies in Investigations

In the twenty-three years I worked as an Assistant Crown Attorney in Hamilton, I learned that the standard responses to cases of investigative deficiency were "It's a training issue." and "It's a communication issue." Both responses were coupled with indifference. Neither led to any action by the speaker to identify and deal with the root causes of the deficiency.

Taking action requires pointing out the failures of colleagues and the inability of managers to plan, train and supervise adequately. Only the most senior officers, few of which have extensive experience in the investigation of major crime, are in a position to criticize failure with impunity.

Error is accepted as a normal part of police criminal investigations. (As an aside, the Office of the Crown Attorney in Hamilton has four Case Management Coordinators who review every criminal case brief from the uniform branch in order to identify investigative failures and omissions. If the Hamilton Police Service worked to a higher standard, they would not be necessary.)

### The Culture behind the Problems in *R. v. Booth*

Police officers see the suffering of victims of crime and are moved by it. For the most part, they are highly motivated to bring offenders to justice. That is a noble goal but one that is often difficult to achieve.

There are often significant time constraints on investigators. Evidence can be lost, witnesses can disperse and offenders can flee if the police don't move quickly. Pressure to solve cases by making an arrest can be intense.

Search warrants are an impediment to police investigations. Obtaining a warrant is costly both in terms of time and personnel. Applying for one is viewed too often as a necessary evil. It doesn't matter to most police officers whether the application is done to a high standard or not. Too often, all that matters to the police is whether the justice of the peace issued the warrant. The police know that even if the warrant had been issued improperly, a trial court might admit the evidence obtained by the search, the search may lead to new information that might assist the investigation, and the accused offender might confess or plead guilty.

In *R. v. Booth*, the investigators knew that they had to get a warrant to search Mr. Booth's residence. The officer who applied for the warrant decided to inform the justice of the peace of only what would support the issuance of the warrant and not the whole truth. As Paciocco, J.A. stated in para. 124 of the decision in *R. v. Booth*: "[the officer who applied for the warrant] testified that he was aware of his obligation to make full and frank disclosure, but he was patently inattentive to that obligation. It is not unfair to characterize the ITO [the Information to Obtain] as an exercise in advocacy, rather than disclosure."

This is the culture that has to change. There has to be a recognition and acceptance by the police that complying with *The Canadian Charter of Rights and Freedoms* is detrimental to their ability to protect the public and to investigate crime. Their concept of professionalism has to be broadened to include refusing to act because such an action would involve a breach of the *Charter*. It is the correct stance but it is one for which few will thank them. On the other hand, if the cultural change occurred, a police officer would not feel compelled to lie in order to perform his duty.

I would be glad to discuss this letter with any member of the Hamilton Police Services Board.

Yours truly,

Andrew Bell



cc. Mr. Todd Norman, Crown Attorney  
Mr. Brad Clark, Councillor Ward 9