Citation: *R. v. Aden,* 2024 YKTC 20

Date: 20240625
Docket: 23-00146
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Phelps

REX

v.

SALAH ALI ADEN and
HAMZA OMAR YASSIN

Appearances:
Neil Thomson — Counsel for the Crown
Tony C. Paisana — Counsel for Hamza Omar Yassin
Kim Arial — Counsel for Salah Ali Aden

RULING ON APPLICATION

[1] Salah Ali Aden and Hamza Omar Yassin ("Aden & Yassin") are before the Court as co-accused on a three-count Information. The first two counts are allegations contrary to s. 5(1) and s. 5(2) of the *Controlled Drugs and Substances Act,* S.C. 1996, c. 19 ("*CDSA*"). The third count is for an offence contrary to s. 354(1)(a) of the *Criminal Code*. All three offences are alleged to have occurred on or about May 27, 2023.

[2] The allegations against Aden & Yassin arise from an investigation that commenced in 2022 with an original focus on Mr. Yassin. The RCMP had received Crime Stoppers tips at the time about Mr. Yassin trafficking cocaine in Whitehorse. The

investigation stalled for a period of time, then continued in 2023 as a result of information provided to the RCMP from a confidential informant ("CI") about an individual named "Frankie" who was dealing drugs in Whitehorse. The RCMP suspected that Frankie was Mr. Yassin and the RCMP member that dealt with the CI throughout this investigation (the "CI Handler") showed the CI photographs of Mr. Yassin and a suspected associate, Mr. Aden. The RCMP claim that the CI positively identified both Aden & Yassin from the photographs shown, confirming that Mr. Yassin was the individual known by the CI as Frankie.

[3] Cst. Meagan Brown affirmed an Information to Obtain ("ITO") before a Territorial Court Judge on May 26, 2023, that relied heavily on information from the CI about the activities of Frankie. The ITO was in support of search warrants for a residence and a vehicle linked to Mr. Yassin, granted on the same date, that were executed on May 27, 2023. Aden & Yassin were located by the RCMP in the residence at the time of the search, giving rise to the charges before the Court.

[4] Mr. Yassin has asserted that his s. 8 *Charter* rights were violated by the RCMP, which include:

1. That the ITO lacked reasonable grounds to believe that evidence of the alleged offences would be discovered in the residence; and

2. That the identification of Frankie as Mr. Yassin was the product of a flawed and unfair identification procedure. Absent this identification, the ITO did not disclose reasonable grounds to believe that Mr. Yassin was engaged in unlawful activity. That is, there would be no

> reasonable grounds to believe an offence had been committed or that evidence of any such offence would be discovered at the residence or within the vehicle.

[5] These challenges are supported by Mr. Aden and will proceed by way of a *Garofoli* application. In anticipation of the *Garofoli* application, Aden & Yassin filed a Notice of Application seeking disclosure from the Crown for:

1. The CI Handler's notes and reports relating to meetings with the CI where any identification relating to the suspects or persons of interest in this case was provided; and

2. The lifting of the redactions on the various photographs shown to the CI, the identities of the person depicted in those photographs and any identification the CI provided in relation to those photographs.

Viva Voce Evidence on the Application

[6] There was one witness called by the Crown on this application, Cpl. Mitchell Hutton. Cpl. Hutton supervises the Yukon RCMP Crime Reduction Unit ("CRU"), which has a primary focus on drug offence investigations. He is an experienced CI Handler and supervises CI Handlers within the CRU.

[7] Cpl. Hutton testified to the covert techniques used by the RCMP to meet with a CI, the process of taking careful notes in relation to those meetings, and how the notes and reports prepared by a CI Handler are stored and safeguarded within the unit. These techniques are necessary to protect the identity of a CI.

[8] In addition to this general overview regarding the handling of a CI, Cpl. Hutton testified to:

1. The standard approach within the CRU used when showing photographs to a CI to confirm the identification of a suspect. Cpl. Hutton confirmed that the standard practice when showing photographs to a CI does not follow the RCMP Operational Manual, 25.4 Sequential Photograph Packs. This section of the Operation Manual sets out the procedure for conducting a photograph lineup for the purpose of confirming identification by and eyewitness.

   The practice for CI Handlers in the CRU is to show one or more photographs and ask if the CI recognizes the individual in the photograph. What is said to the CI when showing the picture, as well as the CI's response, is written on the back of the photograph or in the CI Handler notes. It is important to be careful with the language used when showing the photograph to the CI, and to record the exchange accurately. In his experience, the photographs are then secured within the CI Handler notebook.

2. Cpl. Hutton explained that the reason for not following the Sequential Photograph Packs procedure has to do with the logistics in relation to the handling of the CI, and not involving additional RCMP members in CI interactions. He further explained that the purpose of the CI

identifying the photograph is to make sure that RCMP are “on the right track” and “investigating the right person”.

3. CI Handlers follow the RCMP Operations Manual provisions by writing notes in a manner to avoid, as much as possible, identifying the CI. Despite the effort, there is generally information in the notes, and in reports, that could be used to identify a CI.

4. He reviewed the photographs disclosed as having been shown to the CI to identify Aden & Yassin by the CI Handler and confirmed the source of the photographs for two of the three photographs disclosed. He could not confirm how the RCMP came into possession of one of the two photographs shown to the CI depicting Mr. Yassin, being an identification card from Quebec with a false name. Cpl. Hutton confirmed that the Quebec identification card in question, or an exact replica thereof, was seized from the residence during the search that was conducted after the Judge reviewed the ITO and authorized the search.

5. Cpl. Hutton confirmed the CI Handler practice within the CRU regarding the oral briefing of affiants seeking judicial authorizations in order to avoid the requirement to disclose CI Handler notes and reports. The process is addressed in the following exchange during cross examination:

Q: Stepping back again to your concern for protecting a CI's identity, there are occasions source handlers have to disclose CI information to an affiant in drafting an ITO, correct?

A: Yes.

Q: Does your unit make a practice of only orally reporting information to affiants?

A: I feel like that's the way we've done it for a while, so yes.

Q: And why is it that you do it that way?

A: I don't feel like a dissemination of reports is required within the unit. Those are generally for outside unit and the source handler is verifying information after its written down into the ITO so we feel like that's a good practice.

Q: You and your fellow colleagues in your unit are aware that if you show an affiant your notes or reports, that must be part of the disclosure later on in the case, right?

A: Yes.

Q: And that by only orally reporting the information to an affiant you circumvent that requirement for disclosure, correct?

A: Yes, that's not the word I would use, but yes.

Q: And that's one of the reasons you do it only orally, right?

A: That's one of the multiple reasons, yes.

Q: But its consistently one of the reasons you do this way?

A: yes.

Q: You make a conscious effort not to show the affiant your notes and reports, right?

A: For multiple reasons, yes.

Q: Including among them, so that they don't get disclosed, right?

A: Yeah, I generally don't think of it that way, but yes.

> Q: When a source handler is relaying to an affiant details of multiple meetings with an informant over many months you would agree that for them to do so reliably they would have to consult their own notes and reports to do so, right?
>
> A: Yes.
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> Q: It would be bad practice to orally report CI meetings over several months all at once without the benefit of your notes and reports while doing so?
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> A: I wouldn't necessarily call it bad practice. It depends on the content, how detailed it is, that sort of thing.
>
> Q: You would expect your officers if, for example, they are relaying the content of three different CI meetings all at once, in order to keep those meetings separate and straight in your mind, to consult their own notes while doing so?
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> A: Some people would, yes.

Concern About the CI Handler Notes

[9] The defence submits that the CI Handler briefed Cst. Brown at one meeting on April 18, 2023, regarding three meetings with the CI from late 2022 to March 2023, and that in order to provide the details necessary for the briefing, the CI Handler must have relied on her notes or reports. It is submitted that the disclosure should not be denied in the face of a deliberate process by the RCMP to rely on the notes and reports for the ITO, but doing so in a manner that permits them to deny disclosure.

[10] Cst. Brown's notes were disclosed and filed as part of this application. Her notes relating to the three meetings between the CI Handler and the CI are very brief, while the information that is contained in the ITO in relation to the meetings has more detail.

Of specific concern to the defence is the statement at para. 18 of the ITO that "Frankie is Hamza Yassin" followed by:

> Specifically, Informant A saw a photo of Hamza Yassin and identified them as Frankie. Aden Salah was also identified by Informant A by a photo as a male that works for Hamza Yassin.

[11] The disclosed notes from Cst. Brown simply state "Frankie is Hamza Yassin". There is no reference in the notes about the identification of Mr. Aden.

[12] The disclosure provided to defence with respect to the photographs shown to the CI at the meeting where Aden & Yassin were identified by the CI included one photograph of Mr. Aden, and two photographs of Mr. Yassin. This potentially conflicts with the information in para. 18 of the ITO which indicates that "a photo" was identified by the CI. It either conflicts with the number of photographs shown to the CI, or goes to the certainty of the identification if the CI could only recognize one of the two photographs.

[13] The disclosed photographs include a Quebec identification that has a picture depicting Mr. Yassin with a different name, constituting fake identification. As testified to by Cpl. Hutton, the RCMP have no record regarding how this particular piece of identification was obtained by the RCMP, if at all, in advance of the meeting between the CI Handler and the CI when Mr. Yassin was identified. This identification, or at least an exact replica of this identification, was located by the RCMP during the execution of the warrant at the residence, well after the meeting between the CI Handler and the CI.

Law

[14] A casebook with 12 cases was filed by the defence and relied on by both the defence and the Crown. In addition, the Crown filed one additional case: *R. v. Plowman*, 2015 ABQB 667.

[15] The Justice in *Plowman* addressed the content of CI Handler materials, referenced in the decision as Source Handler Notes ("SHN"), and the safeguards in place to protect them, which is consistent with the testimony of Cpl. Hutton, although more expansive, at paras. 17 and 18:

> 17 SHN are detailed notes taken by the Source Handler from the information provided by the Informant. They often contain the exact terminology used by the informant. They are detailed as to time and location of the meeting, any safety considerations, the information provided by the informant and who else might know that information. They may also indicate the compensation paid to the informant and how the informant acquired the information. The information in the SHN is extremely sensitive, often very specific and may identify the informant.
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> 18 There is very limited access to the SHN, even within the police service, as the consequences to an informant if discovered could be serious. Not only is severe bodily harm or death to the informant possible, but similar consequences to family and friends are also possible.

[16] The decision in *Plowman* continues at para. 22 to address the challenges with redacting the notes to protect a CI:

> 22 According to Sgt. Anderson, even the disclosure of edited or redacted notes may disclose the informant. The volume of information remaining after redaction, or even the volume of material redacted, might identify the informant. Further, an accused may have access to a piece of information contained in the notes which, on its face, would not apparently disclose the identity of the informant. However, the accused may know that a particular individual is the only individual with a particular piece of information. Indeed, criminals often plant certain information with

> suspected informants so as to trap the informant. Ultimately, if EPS acts on that information, the criminal will know who disclosed it.

[17] I find these passages to be helpful in the case before me to highlight the significance of the request before me and why caution must be used when considering the disclosure of material that could identify a CI. These materials are protected and are not generally considered as first party disclosure.

[18] The Court in *Plowman* provides a helpful review of the applicable law as it relates to the disclosure relating to materials that could identify a CI and refers to the legal test necessary to address such applications at paras. 46 & 47:

> 46 Burrows J. also referred to ***R v Ahmed***, 2012 ONSC 4893, [2012] O.J. No 6643. In that case, MacDonnell J. held that once a disclosure request reaches beyond that which was before the authorizing judge and the investigative file, any presumption of relevance is significantly attenuated, and the accused must establish some basis for believing that there is a reasonable possibility that disclosure will be of assistance on the application.
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> 47 MacDonnell J. held at para. 32 that placing a relatively modest onus on the defence acknowledges the practical realities of the process by which grounds for judicially authorized searches are developed. Affiants are often required to distill information gathered by other police officers. They do not necessarily go behind those reports to check them against the underlying notes for accuracy and completeness. MacDonnell J. held that in the absence of some basis for suspecting a problem, it is reasonable for the affiant not to demand that the authors of the reports provide their notebooks. It is reasonable to require the applicants to point to something justifying an order that the notebooks be produced for the purpose of the application. Otherwise, the door would be open to wide ranging, time consuming, and resource draining fishing expeditions. In the absence of a reason for believing that discrepancies between the notes and the report might be unearthed by looking at the notes, or for suspecting that the authors of the reports misstated the facts contained in the reports, there is no basis to order that the notes be produced.

[19] The Court in *Plowman* summarized the approach to disclosure at paras. 59 and 60:

> 59 In determining the disclosure obligations of the Crown, the Court must consider the principles of disclosure mandated by the Supreme Court of Canada in ***Stinchcombe*** and ***McNeil***, while balancing the necessity of protecting the privilege afforded to confidential informants. While the disclosure mandated by ***Stinchcombe*** must be recognized, so too must the privilege afforded to confidential informants be respected. Although the right to disclosure and cross-examination is central to the right to make full answer and defence, a ***Garofoli*** hearing is an admissibility hearing and there are other important but competing interests at play, including that of maintaining informer privilege: ***R v Crevier***, 2015 ONCA 619, [2015] OJ No 5109 at para 57.
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> 60 To achieve this often difficult reconciliation between competing principles, the Court must consider the nature of the challenge to the search warrant itself. There must be a recognition of the difference between disclosure that is relevant in terms of the right to make full answer and defence at trial, and the disclosure which is relevant to a ***Garofoli*** application. Consequently, it is relevance and materiality that guide the inquiry into disclosure for the purpose of potentially undermining the basis for the warrant, and not arbitrary descriptions of the scope of disclosure.

[20] The British Columbia Court of Appeal thoroughly reviewed the caselaw in this area in *R. v. McKay*, 2016 BCCA 391, and stated the following conclusions at paras. 133 and 134:

> 133 *Stinchcombe* does not, in the first instance, require the police to produce for the Crown or the Crown to obtain all of the police's operational files or background information unrelated to a specific investigation. It does not require the Crown to assess relevance upon the assumption that the *bona fides* of the police or prosecution will be in issue. To define the Crown's general disclosure obligations by asking what issues might arise in relation to a bare allegation of non-disclosure or misrepresentation in relation to the application for the warrant expands the scope of disclosure far beyond the investigative file or the fruits of the investigation. In my view, that definition clearly exceeds what was contemplated or demanded by *Stinchcombe*.

> 134 Evidence, with respect to the manner in which the investigation was conducted, only becomes relevant if the Crown is aware of the basis for some concern with respect to disclosure or police conduct in relation to the obtaining of the warrant (where, as in *McNeil*, there is an expectation that will be disclosed) or where the requesting party can meet the low threshold of establishing a reasonable likelihood that the records sought will be of probative value to the issues on the application. In this regard, I adopt the following passage from the judgment of Campbell J. in *McKenzie*:
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> > [44] ... I agree with the sentiments expressed by Goldstein J. in *R. v. Grant*, 2013 ONSC 7323, [2013] O.J. No. 5508, at paras, 17, 31-32, where, in refusing to review a confidential informant file to determine its potential relevance to the accused's challenge to a search warrant, he refused to undertake the proposed exercise of "random virtue testing of the police by the judiciary" by engaging in such "inquisitorial procedures" that could quickly turn into an "endless series of collateral inquiries that have nothing to do with the main function of the court on a *Garofoli* application."

[21] The Court in *McKay* goes on to addresses the Supreme Court of Canada decision of *World Bank Group v. Wallace*, 2016 SCC 15, at para. 141:

> 141 *World Bank Group* re-emphasized that the relatively narrow focus of a *Garofoli* application is on what the affiant knew or ought to have known at the time he or she swore the affidavit in support of the authorization or warrant: para. 119. The Court's comments with respect to the relevance of documents in the hands of third parties in that case are also applicable here:
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> > [124] ... [W]here an accused asserts that third party documents are relevant to a *Garofoli* application, he or she must show a reasonable likelihood that the records sought will be of probative value to the issues on the application. The fact that the documents may show errors or omissions in the affidavit will not be sufficient to undermine the authorization. They must also support an inference that the affiant knew or ought to have known of the errors or omissions. If the documents sought for production are incapable of supporting such an inference, they will be irrelevant on a *Garofoli* application (*Pires*, at para. 41).

First Party Disclosure of CI Handler Notes

[22] The Crown submits that the notes and reports of the CI Handler are not first party disclosure because they were not reviewed by Cst. Brown. Cst. Brown was briefed orally by the CI Handler, took notes of the briefing, and prepared the ITO based on those notes.

[23] I conclude from the evidence of Cpl. Hutton, and the exchange during cross examination set out in this decision, that it is the practice of the RCMP to have CI Handlers orally brief an affiant of an ITO to avoid the necessity of disclosing notes and reports. I also conclude that in some cases, the CI Handler will have their notes and reports with them when providing the oral report to the affiant or will have recently reviewed them. Although not specifically stated, one of the "multiple reasons" for this approach would be to protect the identification of the CI by not disclosing CI Handler notes and reports on a regular basis. Doing so avoids inadvertently disclosing material that could identify the CI.

[24] The approach of intentionally providing oral briefings by CI Handlers to affiants seeking judicial authorizations to avoid disclosure of notes and reports is the subject of a *Charter* challenge in this matter by Aden & Yassin.

[25] While the practice of oral briefings, and the legitimacy of the underlying purpose, may give rise to an arguable *Charter* argument, which I remain undecided on, the statement of Cpl. Hutton that the practice within his unit is to then have the CI Handler "verifying information after its written down into the ITO" is of interest to the application before the Court. One possible conclusion to be drawn from this statement is that the CI

Handler participates in the drafting of the ITO, specifically for the purpose of confirming that the contents of the ITO are consistent with the CI Handler's recollection, notes, and reports. However, I am not able to come to a conclusion about the actual involvement of the CI Handler in this case or the implications that would arise.

[26] Cst. Brown did not personally review the CI Handler notes or reports that are the subject of concern in this application and I find that those notes and reports do not constitute first party disclosure.

Garofoli Disclosure of CI Handler Notes

[27] At the outset, I note that the application for disclosure of the CI Handler notes relating to the identification of Aden & Yassin is not set out in a manner that could be considered a "fishing expedition". The focus of the application is on the meeting with the CI and the outcome of that meeting as it relates to the conclusions in para. 18 of the ITO. The argument put forward is that the identification of Aden & Yassin by the CI is a critical component of the ITO, and that there are significant concerns about the process of identifying them, along with the disclosure of the identification used, and the police conduct, including:

1. The CI Handler did not follow the procedure for administering photo lineups as set out in the RCMP Operational Manual, Sequential Photograph Packs. The decision not to follow the process and the safeguards contained therein call into question the legitimacy of the identification of Aden & Yassin by the CI. The process used, and the

statements made during the process by the CI Handler and the CI are relevant to the assessment of the identification.

2. The RCMP included in the disclosure material a picture of Mr. Yassin used by the CI Handler at the meeting with the CI that does not appear to have been in the possession of the RCMP at the time and was not discovered until the search warrant was executed.
   Cpl. Hutton testified to the practice and procedure followed by CI Handlers when meeting with a CI to identify individuals in pictures, and the CI Handler notes and reports could provide relevant and material evidence on the issue in question.

3. There is inconsistency between what is set out in the ITO regarding the number of photographs of Mr. Yassin shown to the CI and the disclosure by CRU of the photographs. Alternatively, the CI could only identify Mr. Yassin in one of the two photographs, going to his level of certainty, which is not set out in the ITO.

4. Significant detail about the identification of Aden & Yassin in the ITO is absent in the affiant's notes. The failure by the affiant to record this important information in her notes calls into question how the detail was included in the ITO.

[28] Aden & Yassin have satisfied me that the focussed disclosure request for the CI Handler notes is relevant and material. The statement in the ITO relating to the identification of Aden & Yassin should have alerted Cst. Brown to the need to clarify the

process used. There are clear concerns regarding the purported identification of Aden & Yassin attested to in the ITO, the manner of disclosure related to the identification, and concerns surrounding police conduct in relation thereto.

Disclosure of redacted photographs and CI Handler notes of meetings regarding the identification of other suspects or persons of interest

[29] The disclosure of the photographs used to identify Aden & Yassin includes portions that are redacted and marked “Irrelevant”. Aden & Yassin seek the disclosure of these vetted portions of the disclosure if they relate to other persons of interest in the investigation. They also seek disclosure of CI Handler notes or reports of the identification of other persons of interest in this investigation by the CI.

[30] The argument for disclosure is that it may assist in addressing the identification issues in relation to Aden & Yassin, as well as assist the defense against the s. 5(1) *CDSA* trafficking allegation. When the application by Aden & Yassin was originally filed, they faced a fourth allegation under s. 462.31(1)(a) of the *Criminal Code* and the identity of other persons of interest was considered by Aden & Yassin to be critical to mounting a defence to the charge. However, at the outset of this application, that charge was withdrawn by the Crown.

[31] The Crown is opposed to the disclosure and considers it to be protected by informer privilege, as it may result in the inadvertent identification of the CI through the process of elimination. That is, by disclosing interactions attempting to identify other persons of interest, and not the CI, there could be conclusions drawn about the CI’s identity.

[32] With respect to the CI Handler notes and reports, they were not reviewed by the ITO affiant and are not first party disclosure. I am not satisfied on the information before me that they would be relevant and material to the *Garofoli* application. The request for the notes as they relate to other persons of interest creates an unnecessary risk to exposing the identification of the CI on a basis that, as set out in the authorities, it presents as a "fishing expedition".

[33] The application for the disclosure of the CI Handler notes relating to meetings with the CI at which the CI was asked to identify other persons of interest in this investigation is denied.

[34] With respect to the photographs, the vetting was marked by the RCMP as "irrelevant". The defence asked to know if the photographs that were vetted were unrelated to this investigation, in which case they would abandon the application. Similarly, if the vetted photographs were foils, being of individuals unrelated to the investigation but similar in appearance to Aden & Yassin, used to bolster the identification, this would impact their position. The Crown reported to counsel and the Court that the photographs are not foils, and that "some of the photographs were of individuals associated to Messrs. Aden and Yassin and that the informant was asked to identify these individuals".

[35] In light of this clarification from the Crown, the redacted portions are clearly not irrelevant and the decision of the RCMP to mark them in this fashion is concerning. The protection of CI identity is of critical importance in the disclosure process, and the RCMP neglected to apply the necessary care and attention to detail here. This mistake

on the part of the RCMP is not determinative of the issue. The Crown confirmed the content of the photographs and their argument regarding the disclosure remains unchanged.

[36] The disclosure of these photographs presents a significant risk to the identification of the CI, and I am not satisfied that they are relevant or material to the *Garofoli* application. The foundation for the application and disclosure of the CI notes relating to the identification of Aden & Yassin, specifically the challenge to para. 18 of the ITO, does not benefit from disclosing the redacted photographs. This application is also, on the arguments before me, tantamount to a fishing expedition and is denied.

Conclusion on Application

[37] I direct the disclosure, once vetted and reviewed by the Court, to Aden & Yassin of the following:

> The CI Handler notes and reports relating to meetings with the CI where Aden & Yassin were identified, either at the meeting referenced in para. 18 of the ITO or a separate meeting that was relied on for the statement in para. 18 of the ITO, including the photographs of Aden & Yassin shown to the CI contained in the notes or reports, what was said to the CI by the CI Handler when showing the photographs to the CI, the specific response of the CI to each photograph of Aden & Yassin shown, and any other notes taken in relation to the identification process undertaken at the meeting.

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PHELPS T.C.J.