
CANADA / JUDGMENT

R. v. Robertson

2016 BCSC 2075

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2016 BCSC 2075 R. v. Robertson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Robertson,

2016 BCSC 2075

Date: 20161109

Docket: 97803-3C

Registry: Kamloops

Regina

v.

Jason Robertson and Sarah Robertson

Before: The Honourable Madam Justice Watchuk

Disclosure Application Ruling

Counsel for the Crown:

Iain A. Currie

Evan C. Goulet

Counsel for Jason Robertson:

Jeremy Jensen

Counsel for Sarah Robertson:

Julian van der Walle

Place and Date of Hearing:

Kamloops, B.C.

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Written Submissions:

October 11, 14, 25, 2016

Place and Date of Judgment:

Kamloops, B.C.

November 9, 2016

I. Introduction

- [1] Jason and Sarah Robertson ("the applicants") are charged on Indictment 97803-3 with 10 counts relating to weapons, drug and property offences. The charges arose on May 8, 2014 after a search warrant was executed at their residence in Kamloops, B.C.
- [2] At the trial an application was made to cross examine the affiant, Cst. Gammie, with regard to paragraph 97 of the Information to Obtain (the "ITO") which was filed in support of the application for the search warrant. The issue raised in that application was the police's loss of visual continuity of a vehicle which left the residence on May 7, 2014. The application was granted. Cross-examination has not yet taken place.
- [3] In the ITO, reference is made to and reliance is placed upon information from five confidential informants ("CI"s) who are known as sources A, B, C, D, and E. Cst. Gammie was the handler of sources C and E.
- [4] Prior to the commencement of the trial on January 25, 2016, the parties entered into the type of disclosure order which was often referred to as a "McKay Order". Pursuant to that order, the communications between the police handlers and the five sources or confidential informants in the form of handler notes ("SHNs") and debriefing reports ("SDRs") were disclosed in a redacted form. No issue is raised regarding the nature and extent of the redactions.

II. The Application

- [5] At the trial the applicants filed a further application for disclosure regarding the CI information, titled "Notice of Application for In Camera Hearing and Disclosure". It seeks the following orders and procedures:
 - (a) An order that the Court and the Crown enter into an in camera hearing with the unredacted Source Handler Notes ("SHN") and Source Debriefing Reports ("SDR");

- (b) That the court review the unredacted materials (SHN and SDR) with a view to determining if paragraph 21 of the ITO was a true and accurate statement;
 - (c) That the court disclose to the applicants if paragraph 21 is accurate and that all the source information truly was fairly characterized as first-hand information, as opposed to 3rd hand rumour or gossip;
 - (d) That, in the alternative, if it becomes clear from reviewing the unredacted materials that some of the tips were not gleaned from the source's "personal knowledge", that the court disclose to the applicants specifically which of the tips were misleadingly characterized as "personal knowledge" tips in the ITO.
- [6] In support, the applicants stated:

The Factual Basis for this Application

1. The applicants are charged with a numerous firearms offences as well as other offences. A warrant was executed at the applicant's residence on May 8, 2014. The allegations arise as a result of what was found by police during the search on May 8, 2014. The warrant was issued on the basis of an Information to Obtain ("ITO") that contained a significant amount of information alleged to have been given to the police by five informants, referred to as Sources A, B, C, D, and E in the ITO. The affiant appears to have been the "primary handler" of two of the sources. Cpl. Bannerholt appears to have been the primary handler of one of the sources. Cst. Johnson and Cst. Gray appear to be the primary handlers of the other two sources.

2. At paragraph 21 of the ITO, the affiant asserts the following:

The information provided by informants comes from his/her own personal knowledge of the event described. In order to protect his/her identity, some information has been generalized. By personal knowledge, I mean one of the three criteria have been met:

- (a) The informant personally witness the event described;
 - (b) The information was disclosed to the informant by the individual(s) being referred to;
 - (c) The informant overheard the information disclosed by the individuals being referred to.
3. The affiant is essentially saying that every single tip referred to in the ITO is first-hand information that the informant obtained by actually seeing the events described, or hearing the person being referred to in the tip assert out of their own mouth the content of the tip. The tips are contained in paragraphs 35 to 57 of the ITO, with each paragraph seemingly representing one tip received by police from informant A, B, C, D, or E.
 4. While much of the ITO is vetted, paragraph 21 is not and has been openly disclosed to the applicants from the beginning of the litigation. The affiant has expressly asserted that all the source information in the ITO is essentially first hand. The applicants do not seek any

specific information regarding additional details about the tip in terms of its content or the circumstances surrounding the passing of the tip to the RCMP because that information could tend to reveal the identity of the informant. What the applicants seek is for the court to review the unredacted materials to confirm if paragraph 21 is an accurate and fair characterization of all the tips; if all the tips were truly first-hand information being passed to the police as the affiant claims.

The Legal Basis for this Application

1. The applicants are entitled to disclosure of all material in possession of the Crown and police that could possibly be relevant to their defense: see *R. v. Edwardsen*, 2015 BCSC 705 (CanLII).
2. What the applicants are seeking does not engage informant privilege in this case because the police and the Crown have openly said that the all the informant tips set out in the ITO were from "personalized knowledge." If the Crown or police thought that it would potentially jeopardize the secret identity of any of the informants for the applicants to know whether or not the informant tips were first hand, surely they would not have proclaimed that the tips were from the sources "personal knowledge" so openly in the ITO. They clearly chose not to claim privilege over paragraph 21.
3. The courts disclosure to the applicants by way of either a confirmation that the tips all appear to be from the "personal knowledge" of the sources as defined by the affiant, or disclosing to the applicants that certain of the tips were not in fact first-hand information will not reveal to the applicants any additional information that could tend to reveal the identities of the informants. It might have been a compelling argument for the Crown to say that it would endanger the identity of the informants to reveal if the information was first hand because this could seriously reduce the amount of people that the informants could be. This argument cannot be made in this case because the Crown and the police chose not to claim privilege over the description of the tips as first hand. Thus, it cannot logically be said that disclosing if each tip was first hand or alternatively something more akin to third hand gossip would give the applicants any more information in addition to what they already know that is capable of somehow revealing who the informants are.
4. The applicants can use these disclosures in two ways. Firstly, if a significant portion of the tips turn out to have been misleadingly characterized as being all from the sources' personal knowledge", the applicant can argue that the offending tips be excised from the ITO on the basis that the characterization was erroneous or misleading: see *R. v. Morelli*, 2010 SCC 8 at paragraph 41. The argument could then be made that what remains in the ITO is insufficient to support the warrant. Secondly, even if what remained in the ITO sans the misleading informant tips could support the warrant, if the applicants are able to establish a violation of the duty to make full and frank disclosure or that the affiant demonstrated a careless and cavalier approach to ITO drafting, this would be relevant to a s. 24(2) analysis and could properly be seen as a serious aggravating factor favouring exclusion of the evidence: see *R.*

v. Ling, 2009 BCCA 70. In other words, if the applicants are able to establish, for example, that the police breached of their section 8 rights by violating the knock and announce rule, the applicants can point to the misleading characterization of the informant tips as a factor that aggravates the seriousness of the breaches under s. 24(2).

5. Trial judge's reviewing unredacted confidential informant related materials has been approved of by the Supreme Court of Canada since at least 1990: see R. v. Garofoli, [1990] 2 SCR 1421. Privilege does not attach to what the applicant is seeking for the reasons stated above. The applicants are entitled to disclosure of all material that could possibly be relevant to their defence. The true character of the tips as either first hand or something less than that is relevant information that the applicants can use to advance their Charter application. Because it is relevant and because it is not privileged, it should be disclosed.

The Relief Sought is:

1. An order for an in camera hearing to take place and the disclosures sought be made.
- [7] The application to cross-examine Cst. Gammie states that more expansive cross examination may be sought depending on the result of this application for further disclosure.
- [8] When submissions on the application for further disclosure were completed, the decision was reserved as it was understood that R. v. McKay was soon to be heard by the British Columbia Court of Appeal. Counsel then advised that they were not available for the continuation of the trial until November, 2016. After the decision in that case was released on September 30, 2016, reported as 2016 BCCA 391 [McKay], counsel provided further written submissions.

III. Submissions of the Parties Following McKay

- [9] Due to the unique nature of the application, much of the defence submission and the first Crown submission are set out in full below.

A. The Defence

The defence submits that the McKay case supports the application for an in camera hearing into whether or not paragraph 21 of the ITO was a true and accurate statement. The Applicants state the following:

The McKay case stands for the proposition that because the focus of a Garofoli hearing is a narrow one (limited to determining if the statutory prerequisites to the authorization such as reasonable grounds have been met) the right of the defence to disclosure is more limited than the rights of the defence to disclosure of the evidence the Crown plans to present in the trial proper.

In the McKay case, the Crown did disclose to the defence the one SDR that had been relied upon by the affiant in that case.[1] However the trial judge also ordered disclosure of all the SDR and SHN, even the ones not referred to by the affiant, on the basis that they fell under the Stinchcombe first party disclosure regime because they were potentially relevant to the defence in a broad sense, not merely on the search warrant challenge.[2]

The Court of Appeal went on to hold that this was an error because the trial judge defined relevancy too broadly in relation to the narrow issue being raised by the defence which of course was the validity of the search warrant.[3] The Court also seemed to suggest that the defence is required to "meet a minimal relevance threshold before requiring the disclosure of background material that usually only goes to an allegation of abuse of process, fraud, or misrepresentation by omission or otherwise on the part of the investigating authorities." [4]

In McKay, the court held that the affiant's notes used to prepare the ITO, and the SDR reports the affiant read and relied upon were properly disclosed to the defence.[5] What did not need to be disclosed was the SDR and SHN that the affiant did not rely on and that were incapable of supporting an inference that the affiant knew or ought to have known that some of his statements in the ITO were inaccurate or misleading in some way. The Court of Appeal did not foreclose the possibility that in unique circumstances, informant material not relied on explicitly to obtain the authorization may be required to be disclosed on a "case- specific" basis.[6]

Excision seems to turn on what the affiant knew or ought to have known at the time of swearing the ITO. If the defence establishes that there are inaccurate statements in an ITO, that is not enough to get them excised. The defence must also show that the affiant knew or ought to have known that the statements were inaccurate at the time of swearing the ITO.[7] It is for that reason that much of the background material not relied on and not seen by an affiant at the time of swearing an ITO becomes irrelevant. However, if the affiant made a statement in an ITO that he knew was inaccurate or that he ought to have known was inaccurate, then the documents that could possibly help the defence unmask this police impropriety must be disclosed, subject to privilege of course.

In the case at bar the affiant said at paragraph 21, in a broad statement designed to enhance the evidentiary value of the numerous tips given about Jason Robertson, that all the tips were essentially first hand by the tipster either observing the event themselves or hearing the subject of the tip (usually Jason Robertson) say it out of his own mouth either to the tipster or to another person while the tipster was present. These tips were all relied on explicitly in the ITO to support grounds for obtaining the warrant.

The affiant in the case at bar was the handler of two of the sources himself. This means that if his source handler notes that he himself created as result of handling these sources show that the tips he received were not first-hand tips as defined in paragraph 21, obviously the affiant knew that paragraph 21 was false and misleading at the time of swearing the ITO. Clearly, an in camera review of the affiant's SHN in relation to these two sources and the tips they gave that were explicitly relied on in the ITO meets the relevance threshold on this Garofoli application.

Turning then to the tips alleged to be first hand that were obtained by other handler's before being passed on to the affiant. The defence says that an affiant, before making a broad statement to the effect that ALL the tips relied on in his ITO are first hand, has at least a minimal duty of verification to inquire with the various handler's and confirm that the handler's understanding of the nature of the tip is that it was first hand before the affiant starts claiming that the tip was first hand in the ITO. The reason for this is obvious. The police cannot be incentivized to keep their affiant's in blissful ignorance of the true nature of the information the police have before they can go about making such sweeping statements in an ITO. To hold otherwise would encourage affiants to recklessly claim that all the tips in an ITO are first hand without them knowing or even caring if that is true or not. If that were the case, the Crown could always argue that no matter how inaccurate an ITO turns out to be, nothing should be excised from it because the affiant simply did not know for sure that his statements were false.

A responsible affiant knows that many times the police will obtain tips that are not first hand in nature and that have essentially come to the police "through the grapevine" of source information. It is incumbent on an affiant, before he swears that a tip is first hand, to take at least some steps to ensure that the tips are in fact first hand. This does not mean that the affiant must speak to the source themselves to make this determination. Instead, the affiant is at least required to inquire with the handler about the handler's understanding of the nature of the tip. If the handler tells the affiant the tip is first hand, that is likely all that is necessary for the affiant to say in an ITO that the tip is first hand.

If however the affiant does not take these steps to verify the nature of the tip, it can fairly be said that the affiant ought to have known that his claim that the tip was first hand was inaccurate because he took no steps to ascertain if it was or was not prior to swearing the ITO. In this way the source handler notes of the other handlers are relevant in this case as they will show if the tips were indeed first hand. If the court, on an in camera hearing, confirms that many of the tips from sources "handled" by other officers were not first hand, then the defence can cross examine the affiant on what steps he took to inquire about the nature of these tips before he swore to the sweeping statement he made in paragraph 21. If the defence is able to show that the affiant did not take meaningful steps to verify the nature of these tips, the defence will be well on its way to having those tips excised from the ITO on the basis that the affiant ought to have known his characterization of them as first hand was misleading.

One point not addressed expressly by McKay and World Bank is if allegations of fraud, misrepresentation or non-disclosure regarding the way an affiant drafted an affidavit can also be relevant to other issues in a voir dire beyond merely the validity of the associated authorization. It is well established in the case law that violations of the duty to make full and frank disclosure is a serious aggravating factor on a s. 24(2) analysis and augers strongly in favour of exclusion.[8] This is so even if the failure to make full disclosure was unintentional.[9]

It is possible that violations of the duty to make full and frank disclosure will not result in the warrant being set aside. This can happen because the court is required to review the amplified information in light of material non disclosures and misleading information and decide if what

remains could still support the issuance of the warrant. If it does, notwithstanding the failures to make and full and frank disclosure, the warrant must stand. However, in this circumstance, would the police's violations of the duty to make full and frank disclosure be irrelevant to section 24(2)? It must be remembered that the only issue in McKay was the validity of the warrant on a sub-facial review.[10] That is not so in the case at bar as in this case the accused have, in addition to challenging the warrant, alleged numerous Charter violations relating to the manner the search was conducted and other breaches alleged to have occurred during the execution of the warrant. If the accused are successful in establishing these breaches, but unsuccessful on the challenge to the warrant, the court will still be required to evaluate the breaches in relation to the three well known Grant factors. Surely violations to make full and frank disclosure that were incapable of getting the warrant set aside could still be considered by the court on section 24(2) and could auger in favour of exclusion depending on how bad the violation was. This is because section 24(2) requires the court to consider "all the circumstances" to make the admissibility determination.[11]

The law is clear that the Crown is permitted to call evidence aimed at mitigating the seriousness of Charter breaches in the context of section 24(2).[12] In other words, the Crown is permitted to call evidence to "build their case" for inclusion under s. 24(2). There is no reason in principle that an accused should not be permitted to do the same thing. If the in camera hearing exposes that there were violations of the duty to make full and frank disclosure, the defence will seek to rely on this even if the challenge to the warrant is unsuccessful to build its case for exclusion. Therefore, the relevancy of the disclosure sought in this case is not limited to the challenge to the warrant. In the circumstances of this case, it is also relevant to section 24(2).

To summarize, on the issue of relevancy, the defence says that the general information sought by the defence - the true nature of the tips being first hand as defined in paragraph 21 or third hand gossip or rumour - is relevant to the Garofoli application in this case. The defence is not asking for specific details about the tips or the tipsters but is instead asking the court to review the unredacted SHN and SDR on an in camera basis so the defence will have a chance to potentially expose that the affiant misled the judicial officer when he characterized all the tips as first hand. The SHN the affiant himself created in respect of the two sources he handled will show if those particular tips were in fact first hand. If they were not, the defence will have been successful in showing that paragraph 21 was misleading and that the affiant failed in his duty of candour on an ex parte application. The SHN and SDR in respect of the sources not handled by the affiant are also relevant because if the court, after an in camera hearing, confirms that many of those tips were also not first hand, the defence can cross examine the affiant on what steps he took to verify they were first hand prior to swearing that they were in the ITO. This will give the defence the opportunity to further undermine the basis for the warrant because it will provide the basis for the defence to argue that those tips should also be excised on the basis that the affiant ought to have known that characterizing them as first hand without doing anything to confirm they were was misleading and inaccurate. The disclosure sought is also relevant to section 24(2) for the reasons explained above.

Dealing finally with privilege. In McKay the Court of Appeal held that the trial judge took an overly narrow view of informer privilege in ruling that editing of the source documents could be done to ensure that informant privilege was respected. The court said this:

- [155] Known informers or their police handlers may assist in determining what information will identify them, but, as Sharpe J.A. pointed out in Omar, there may be only a small pool of individuals who could have provided the tip. A seemingly innocuous detail could be all that someone familiar with the matter needs to identify the informer. SHNs are intended to record multiple debriefings and along with SDRs may relate to multiple offences and individuals. Hence, there is some risk posed by a mosaic effect of disclosure. These concerns call for heightened caution when it comes to editing so as not to "unwittingly deprive informers of the privilege which the law accords to them": Leipert at para. 16.
- [156] What is said in Leipert with respect to an anonymous tip is generally true of the SHNs and SDRs sought by the respondent in this case. They were prepared and kept with a view toward protecting the identity of the informer. The risk posed by editing is great. The SHNs were not disclosed to the investigators or to the Crown or broadly within the police service.
- [157] In my view, where the Crown can establish that a document has been created to record information provided by a confidential informer that could tend to reveal the informer's identity, as it appears to have done to the satisfaction of the judge in this case, and the document is not disclosed or relied upon to obtain an order, there is no prima facie right to obtain an edited version of the document. The Crown should not be required to demonstrate that unedited portions are "clearly irrelevant". It is not the norm to so limit privilege and it seems strange to me to seek to routinely edit documents in this context, where the risk of inadequate editing is so great.
- [158] For that reason, even if I had concluded the material sought was relevant to the challenge to the warrant, I would not have ordered the disclosure of edited versions of the SHNs or SDRs that were not relied upon by the affiant or otherwise before the authorizing judge, without examining the documents to address the claim to blanket privilege.
- [159] On a Garofoli application there is no presumption of disclosure of background information other than material referred to in an ITO or affidavit in support of a wiretap authorization. Background material may be producible on a case-specific basis if the defence establishes likely relevance to an issue on the application. Even where the relevance threshold is met, production of SHNs and SDRs may not be consistent with informer privilege.

(Emphasis Added)

Prior to this, when discussing the seminal case of Leipert, the court had said:

- [64] The defence application in Leipert was therefore dismissed both because the Court could not determine what editing might be necessary to protect an anonymous informer, and, because the defence was seeking disclosure of "background" information, rather than "the very document upon which the Crown relied to sustain the warrant or authorization". In my

view, Leipert suggests (at para. 32) that once a background document is considered to be privileged, editing should not be resorted to unless the judge "can be certain that what remains of an informant document after editing will not reveal the informer's identity" or innocence is at stake. The Court did not address the views of Southin and Cumming JJ.A., that the background material the defence sought was clearly irrelevant.

(Emphasis Added)

In the case at bar the defence is not seeking to have the SHN and SDR reviewed by the court to determine if more specific information in those documents can be disclosed to the defence. The defence agrees that this would be a dangerous exercise and even one additional innocuous detail may be enough to inadvertently identify a source.

What the defence is asking for in this case could not possibly serve to directly identify or indirectly identify the source by reducing the potential people the informant could be. The affiant has already said in the ITO that all the tips are first hand. By reviewing the documents in camera to determine if this is true or not, the court would merely confirm the truthfulness of what the police and Crown have already seen fit to disclose. This information will not reveal to the applicants any additional information that could tend to reveal the identities of the informants. It might have been a compelling argument for the Crown to say that it would endanger the identity of the informants to reveal if the information was first hand because this could seriously reduce the amount of people that the informants could be. This argument cannot be made in this case because the Crown and the police chose not to claim privilege over the description of the tips as first hand.

Revealing that the tips were not in fact first hand would not serve to reduce the pool of people the informants could be, in fact it would drastically increase the potential people the informants could be. The logic of this argument is compelling. Presumably, only a small group of people would be privy to this information first hand because alleged criminals do not tend to talk about serious criminality in front of large groups of people that have no connection to their operation. However once the person who got the information first hand begins to pass on that information to others it becomes third hand. There is no limit to the amount of people that could get this information passed on to them "through the grapevine" before the source heard it and decided to relay it to police.

Simply put, if the court revealed to the defence after an in camera hearing that the tips were not first hand, at that point the source could be virtually anybody. The pool of people that the source would be exponentially increased, as opposed to decreased. In this way, the court can be certain that revealing that some, none, or all the tips were not first-hand would not pose any danger to revealing who the informants are.

One argument the Crown made was that simply confirming that the tips were first hand could have the effect of revealing who the informant is. There are serious problems with this submission. A judicial officer is entitled to assume that the information provided by an affiant is the truth. The duty to make full and fair disclosure requires that the police tell the truth on an ex

parte application. Absent cross examination that undermines the truthfulness of statements in an ITO, the statements are essentially presumed true. Therefore, the court and the defence must operate on the assumption that paragraph 21 is true unless the defence is successful in attacking in the truthfulness of that statement. That is exactly what the defence is trying to do here. In this way, confirming that the tips were first hand would not provide any additional information to the defence that has not already been disclosed.

This case comes down to a very important issue for the future. Can the police claim that tips are first hand without the defence having any ability to question or challenge that characterization? It is well established in the case law that tips that are first hand are given substantially more evidentiary value than third hand tips.[13] If the police are permitted to hide behind informant privilege in the way advocated by the Crown in this case, the police can claim all tips are first hand in all their ITO's in the future without the defence having any ability to undermine that. There will be no oversight of the police in this regard and unscrupulous affiants will be immune from exposure when they recklessly and/or falsely assert that tips are first hand. This would be very dangerous and would seriously undermine any citizen's ability to effectively challenge authorizations going forward.

To summarize, on the issue of privilege, the court can be certain that confirming that the tips are first hand or revealing that they were not will not violate informant privilege. The test for privilege is whether or not then information provided could tend to indirectly identify the informant by reducing the pool of people the informant could be. That is not possible in this case because at this point, assuming the affiant was truthful, the defence already knows that the tips came from people who had first hand access to Mr. Robertson and were around when he was talking about criminal topics. Confirmation would not give the defence any more information that it does not already know. Revealing that the tips were not first-hand would in fact drastically increase the amount of people the informants could be. As such, the unique application being made in this case does not endanger informant privilege.

B. Submissions of the Crown

2. The decision in McKay addresses two related issues: 1) the scope of disclosure in the context of a Garofoli application, and 2) the disclosure of documents protected by informant privilege.

The scope of disclosure

3. The notes and reports with respect to the five confidential informants in this case have been disclosed in a redacted form further to a consent Order based on the jurisprudence that was considered and, at least in part, overturned in R. v. McKay. It is clear that the same Order would no longer be supportable.

4. This observation is pertinent because the defence is asking this Court to take a further step towards disclosing more of the contents of the notes and reports, without offering proof sufficient to meet the onus described in McKay for even the initial disclosure it has already been provided:

The question that ought to have been asked is: what material should be disclosed so as to permit the accused to make full answer and defence to the charge, including, to the extent he may challenge it, the validity of the warrant and the legality of the seizure. It is entirely appropriate to require the accused, in the circumstances, to meet a minimal relevance threshold before requiring disclosure of background material that usually only goes to an allegation of abuse of process, fraud or misrepresentation by omission or otherwise on the part of the investigating authorities. [paragraph 143]

5. The Crown points to the phrase "to the extent he may challenge it", and notes that the defence has not challenged paragraph 21 on a voir dire, applied to cross-examine the affiant about its veracity, or pointed to any evidence that would call the statements in that paragraph into question. Instead the defence has simply expressed a wish to have the Court confirm (or not), that paragraph.
6. Obviously, the disclosure of the redacted material in this case is a bell that cannot be unrung. We are not attempting to litigate the earlier consent Order. We are asserting that McKay refutes the premise of the defence application: that an accused is entitled, on demand, as a matter of first-party, Stinchcombe disclosure to source handler notes and source debriefing reports in order to challenge a warrant. Essentially, the defence argument here was that the Court should examine the material which they said (before McKay) that they were entitled to see but for informant privilege, and provide the defence with further information about that material. After McKay, it is clear that the defence are not entitled to see SHNs and SDRs without meeting the threshold described above.
7. Put more succinctly, the defence argument was explicitly built on the foundation of the decision in R. v. Edwardson, 2015 BCSC 705 which was cited for the proposition that the defence is entitled to disclosure of all material that "could be possibly relevant" [Defence Application, p.3, paragraph 1 under the heading "The Legal Basis for this Application"]. Edwardson has now been overruled (see R. v. McKay at paragraphs 101 -104, and, for example, paragraph 133).

Informant Privilege

8. In the second part of McKay, the Court of Appeal discusses informant privilege, and this part too provides reasons for rejecting the defence argument.

9. First of all, in its oral argument, the defence sought to downplay the jurisprudence that states that judicial editing of informant information was to be avoided, in part by distinguishing *R. v. Leipert* on the basis that it dealt with an anonymous informant. This same argument had found favour in the trial court in *McKay*, but was explicitly rejected by the Court of Appeal at paragraph 154: "the application of *Leipert* is not limited to cases involving anonymous informers."
10. Indeed, *McKay* supports the Crown's original argument pointing out the dangers of judicial editing of confidential informant information (see paragraphs 149 to 156).
11. Secondly, *McKay* does not support the defence argument that because the police make a statement about a confidential informant (i.e. "they provided first hand information"), that privilege does not attach to documents which touch on that statement (i.e. the SHNs and SDRs). The trial judge in that case had accepted a similar argument, "...he noted that some editing had resulted in the partial disclosure that was made in the ITO. He therefore concluded the documents could be safely edited..." [paragraph 147], but this approach was rejected on appeal [see paragraph 157].
12. Finally, the defence application in this case goes one step further than the Order for disclosure that was overturned in *McKay*. Since the SHNs and SDRs were appropriately withheld from the defence because of informant privilege in *McKay*, there is no basis for this Court to look further into the question of what facts from the SHNs and SDRs ought to be disclosed.

IV. Discussion

- [10] This application for additional disclosure is brought in the context of a *Garofoli* application. The search warrant of the applicants' residence is being challenged. The procedure mandated in *R. v. Garofoli*, [1990] 2 S.C.R. 1421 is described in *McKay* at para. 42:
- [42] The first leg upon which a disclosure order in these circumstances stands is *Garofoli*, the Supreme Court's seminal consideration of the procedures available for challenging a wiretap authorization to ensure conformity with the minimum constitutional requirements demanded by s. 8 of the Charter. At 1451-1452, Sopinka J., writing for the majority, describes the permissible scope of a challenge to an order authorizing a search warrant or a wiretap authorization, so as to give substance to s. 8 Charter rights. Where the admissibility of evidence is challenged at trial on the basis that it was obtained pursuant to an order that ought not to have been made, the reviewing judge should determine whether the relevant statutory pre-conditions for the authorization have been met. The reviewing judge does not conduct a hearing *de novo*; the reviewing judge can only interfere if there was no basis for the issuing judge to be satisfied that the pre-conditions for granting the authorization existed.

- [11] Specifically, the applicants ask that the Court review in camera with the Crown the unredacted SHNs and SDRs to confirm whether paragraph 21 of the ITO is an accurate and fair characterization of the tips from the five sources. The applicants question whether all the tips were truly first-hand information being passed to the police, as the affiant claims.
- [12] If granted this disclosure, the applicants will seek to have some of the CI information, set out in paragraphs 35 to 57, excised from the ITO. Thereafter, if the ITO remains sufficient to support the search, the applicants will argue that the evidence obtained in the search ought to be excluded pursuant to s. 24(2) of the Charter.
- [13] The premise of the application is that the applicants are entitled to "all material in possession of the Crown and police that could possibly be relevant to their defence". They submit that, given their entitlement to the information in the source handler notes and source debriefing reports, and taking a restrictive view of the reach of informant privilege, this Court should review those unredacted documents in camera and provide further information about them.
- [14] Since that argument was made, *R. v. McKay* has substantially changed the law in this area. *R. v. Edwardsen*, 2015 BCSC 705 [Edwardsen], relied upon by the defence as the basis of the application, has been over-ruled. I will therefore discuss the application in the context of the law as it now stands post-McKay.
- [15] In *McKay*, Mr. Justice Willcock thoroughly discussed and set out the recent case law dealing with disclosure of informant-related materials in the context of both *Garofoli* and *Stinchcombe* applications. In particular, in resolving the issues on appeal, he discussed the relevance of and the privilege over the materials sought by the defence in that case.
- [16] The applicants bring a unique request to this court. Although they have been provided redacted copies of the SHNs and SDRs pursuant to a consent order made prior to the *McKay* decision, they ask that the Court review with the Crown the unredacted materials to determine if the statement in para. 21 of the ITO regarding the source of the materials, being stated as "first-hand", is accurate. The immediate disclosure sought is the Court's opinion regarding the accuracy of that statement in para. 21. Various procedures are suggested depending on the result of the Court's review.
- [17] At the hearing of the application, practical and legal difficulties with the suggested procedures were set out by the Crown. It was also the submission of the Crown that the defence's requested course of action would unnecessarily bring the Court into the circle of privilege.
- [18] However, before turning to the privilege issue, it must first be determined if the disclosure sought is disclosure to which the applicants are entitled. Is the information which they seek the Court to glean from the materials relevant on their *Garofoli* application?

V. Relevance

- [19] The source-related materials sought to be reviewed by the Court are the SHNs and SDRs. The nature of those documents is described in detail at paras. 8-9 of McKay; in brief, they are the notes taken by the handler of each CI, grouped by source, and the reports compiled by the handler from the notes in a form intended to be generic. Neither is related to a specific investigation or targeted individual.
- [20] In the ITO sworn by Cst. Gammie there is no mention of SHNs or SDRs. It is apparent that they were not materials put before the issuing justice. They were not part of the evidentiary basis for the issuance of the warrant and their disclosure is therefore not mandated. (R. v. Pires and Lising, 2005 SCC 66 at paras. 25-26)
- [21] Cst. Gammie was the handler for Sources C and E. As such, was the author of the SHNs and SDRs for those sources. There is no basis to conclude that he had knowledge or ought to have had knowledge of the corresponding notes and reports for Sources A, B and D.
- [22] The issues differ for these two categories of materials: those of which the affiant had personal knowledge, and those about which he did not know or ought to have known. The first issue to be determined is whether either or both categories of materials are relevant on a Garofoli application.
- [23] The discussion of relevance in McKay is extensive. R. v. Barzal (1993), 84 C.C.C. (3d) 289 (B.C.C.A.) is relied upon in McKay (at paras. 52-57) for its restrictive analysis of what material is relevant in relation to a Garofoli challenge:
- [44] In this case the accused wanted access to the debriefing notes in order to test the reliability of the informers. A detailed inquiry into police files is not required for that purpose. Sufficient reliability is established, or is not established, by reference to the material filed in support of an application for an authorization. The right to make full answer and defence in this context is a right to the disclosure of material which had been before the authorizing judge. It is not a right to embark on a fishing expedition of all the material in the possession of the police. Such an enquiry could be endless, including access to police files, cross examination of police officers, cross examination of informants (which is not permitted; Garofoli at p. 1465), and consideration of the details of each case in which the informer had been involved.
- [24] Since the SHNs and SDRs authored by officers other than the affiant are not prima facie documents pertaining to the police investigation of the accused (but rather information from a specific source), they are not part of the fruits of the investigation into the accused or contents of the investigative file associated with the accused (see McKay at paras. 130-140).

- [25] If a disclosure request goes beyond what was before the authorizing judge or part of the investigative file disclosed pursuant to the Crown's Stinchcombe obligations, the accused must show some basis for believing that there is a reasonable possibility such material would be useful on the Garofoli application (McKay at para. 82).
- [26] The information regarding Sources A, B and D was not part of the investigative file, and was not before the issuing judge. The disclosure sought here goes beyond those parameters. Have the applicants shown some basis for believing there is a reasonable possibility such material would be useful on their Garofoli application? As stated at para. 143 of McKay: "it is entirely appropriate to require the accused to meet a minimal relevance threshold before requiring disclosure of background material that usually only goes to an allegation of abuse of process, fraud or misrepresentation by omission or otherwise on the part of the investigating authorities."
- [27] With regard to the SHNs and SDRs of other officers, the applicants submit that the affiant has a duty to do more than accept his fellow officers' statements about the tips received, presumably requiring the affiant to have reviewed all the SHNs and SDRs before swearing to the information from informants. However, this proposition is not supported in McKay:
- [142] Documents not seen by or provided to the affiant, such as the SHNs here, speak only to whether the informer was truthful or whether the information was accurately described to the affiant. Because such documents do not speak to the affiant's reasonable belief, they are not capable of supporting the challenge to the affidavit.
- [28] The applicants also submit that McKay does not discuss fraud, misrepresentation or non-disclosure on the part of the affiant which can be relevant to other issues. In McKay, the Court was addressing a disclosure issue in advance of any cross-examination of the affiant or any allegation of misfeasance being levelled in the context of a defence-onus Charter application. That is similar to this application. Despite having received disclosure of the redacted materials for all five sources, the applicants make only bare allegations of fraud, misrepresentation or non-disclosure with respect to the informant information in the ITO. The applicants do not point to any specific basis upon which such an allegation could be made.
- [29] The minimal relevance threshold for the materials not authored by or known by the affiant has not been met.
- [30] With regard to the SHNs and SDRs for sources C and E, Cst. Gammie as the handler of those sources knew the contents of the documents regarding those two sources when he swore the ITO. Those documents are therefore prima facie relevant to the narrow issues on a Garofoli application. The applicants have been provided redacted copies of those materials. They seek more information. In my view, the relevance threshold must also be met for the additional disclosure sought. Post-McKay they are not producible without more. Edwardsen no longer applies. It is now necessary for the applicants to meet the relevance threshold for these documents.

[31] The applicants submit that relevance is shown:

if [the affiant's] source handler notes that he himself created as result of handling these sources show that the tips he received were not first-hand tips as defined in paragraph 21, obviously the affiant knew that paragraph 21 was false and misleading at the time of swearing the ITO. Clearly, an in camera review of the affiant's SHN in relation to these two sources and the tips they gave that were explicitly relied on in the ITO meets the relevance threshold on this Garofoli application.

[32] The relevance threshold in Garofoli requires more than a statement that if the affiant lied or misled the issuing justice then he intentionally lied. It requires the applicants to identify a basis for asserting that the affiant lied or misled or negligently misstated. In McKay, the Court of Appeal said that if the defence can demonstrate a basis for the allegation that an affiant made a knowingly or negligently inaccurate statement, then disclosure would follow (para. 143), subject to privilege (paras. 158-159).

[33] As with the materials authored by other officers, the redacted SHNs and SDRs of the affiant have been disclosed to the Applicants. No basis for the allegation of inaccuracies in the ITO is found in the submissions of the applicants.

[34] The allegations are speculation. Seeking disclosure on the basis of speculative allegations constitutes a "fishing expedition". In World Bank Group v. Wallace, 2016 SCC 15, the Supreme Court of Canada stated:

[134] As in the case of applications to cross-examine the affiant, the accused will already have access to the documents that were before the authorizing judge, including the affidavit in support of the authorization (Criminal Code, s. 187(1.4)); Pires, at paras. 25-26). These documents are clearly relevant and the accused is presumptively entitled to them (Criminal Code, s. 187(1.4); Pires, at paras. 25-26; Ahmed, at para. 30). The accused also has a right to access the rest of the investigative file under Stinchcombe disclosure, subject of course to the exceptions identified in Stinchcombe and McNeil. This disclosure should be sufficient to enable the accused to show a basis for third party production requests, if such a basis exists. While an accused has a right to production of relevant documents, there is no right to embark on a fishing expedition. The right does not extend to every document relating to the case, regardless of who holds it or where it is. This is especially so when production is sought in aid of a Garofoli application.

[35] It is not of assistance to the applicants to state that information regarding inaccuracies in the ITO, if found by the reviewing judge, would be supportive of their Garofoli application. Relevance is not met by asserting that if a fishing expedition bears fruit, the potential use of that fruit, being the confirmation of the alleged misfeasance, supports the fishing expedition.

[36] The relevance threshold for the information sought by the applicants regarding all SDRs and SHNs is not met. That finding is sufficient to dispose of the application.

VI. Privilege

- [37] Although in the circumstances it is not necessary to deal with the issue of privilege as the application does not meet the relevance threshold, it is important to note that the application would also have failed due to its impact on informant privilege.
- [38] The issue here is whether there should be further disclosure, by way of providing unredacted material to the Court and the Court subsequently providing information to the applicants, of documents protected by informant privilege. That the redacted information in the documents is subject to informant privilege is not in dispute.
- [39] The applicants submit that a judicial review of the tips could not possibly reveal information that would identify the informants. They say that this is because confirmation that the tips were first-hand will only confirm what the Court and the defence are already required to assume, and revealing that the tips were not first-hand will inevitably expand the pool of potential informants.
- [40] I cannot agree with this proposition. The principal risk of revealing privileged information about an informant is not that defence counsel or the Court will be able to make assumptions or discover the informers' identities, but that the accused - or anyone to whom they choose to provide the disclosed information - will do so. There is no information upon which the Court can decide one way or another what the accused themselves think or believe about the tips. It is possible to imagine a situation where an accused person might be greatly assisted to have the Court confirm that a certain piece of information was not first-hand. An example is if he or she had assumed wrongly that the police were lying.
- [41] It is incorrect to say that "[r]evealing that the tips were not in fact first hand would not serve to reduce the pool of people the informants could be". Although it may seem logical that most often the number of people knowing something first-hand would be fewer than those who could hear second-or-more-hand, that is not always the case. It may be that the accused knows that the information provided by the informant is false and knows who else knew it to be false.
- [42] The additional information sought is analogous to requesting a court to edit privileged documents. The perils of a court editing documents other than an ITO are addressed in McKay at paragraph 151:
- [151] In addressing the request for disclosure of an anonymous tip (that, unlike the ITO, was not before the authorizing judge) the Court in Leipert appears to have accepted the Crown's argument that judges should not try to turn privileged documents into unprivileged documents by editing them. It recognized that editing may improperly be used in an attempt to balance the right to make full answer and defence against informer privilege. It rejected any such balancing, holding (at para. 28), that once privilege is established, it cannot be "diminished by or 'balanced off against' other concerns relating to the administration of justice". For that reason, it concluded the documents sought should not be

edited with a view towards making partial disclosure. At para. 30, the Court distinguished the cases where editing is appropriate on two grounds:

- a) "the informants in those cases were not anonymous, enabling the court to make judgments on what details might or might not reveal the identity of the informers"; and
- b) "the defence was seeking to review the affidavit or "Information to Obtain" filed in support of the application for the authorization, as distinguished from background documents and information".

[43] I conclude that additional disclosure regarding the information provided by the five sources would be contrary to the principles of informant privilege.

[44] I would add in response to the question posed by the applicants in their submissions that the answer has been clear since Garofoli was decided in 1990. Can the police claim that tips are first-hand without the defence having any ability to question or challenge that characterization? The answer is no. The defence have an ability to question the affiant and challenge his claim that he believed the tips were first-hand if the defence, subject to a question of privilege, can meet the low threshold of demonstrating a basis for the view that cross-examination will elicit testimony tending to discredit the existence of one of the preconditions to the warrant. In this case they have not done so.

[45] The application is therefore dismissed.

"The Honourable Madam Justice Watchuk"

[1] McKay at para. 11

[2] McKay at para. 32

[3] McKay at para. 143

[4] McKay at para. 143

[5] McKay at para. 142

[6] McKay at para. 159

[7] McKay at para. 141

[8] R. v. Hall, 2016 ONCA 13 at para. 65

[9] R. v. Morelli, 2010 SCC 8 at para. 59 and 102-103

[10] McKay at para. 136

[11] R. v. Grant, 2009 SCC 32 at para. 59 and 64-65

[12] R. v. Bains, 2014 BCCA 43 at para. 43-47

[13] See for example: R. v. Liu et al, 2011 BCSC 1266 at para. 71, R. v. Cheng 2013 BCSC 1979 at para. 63 and 64, and R. v. Hemmings 2013 MBQB 273 at paras. 16-18

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