Citation: *R. v. 16142 Yukon Inc.,* 2023 YKTC 13

Date: 20230623
Docket: 21-10406
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Phelps

REX

v.

16142 YUKON INC. o/a NORTHERN ENVIRO SERVICES and KERRY PETERS

Appearances:
Ludovic Gouaillier — Counsel for the Crown
Sarah Hansen — Counsel for the Defence

RULING ON *CHARTER* APPLICATION

[1] PHELPS T.C.J. (Oral): The matter before me involves alleged violations of the *Environment Act,* RSY 2002, c. 76, and of the *Special Waste Regulations*, O.I.C. 1995/047. The defendants are 16142 Yukon Inc., which carries on business using the name Northern Environmental Services ("NES"), and Kerry Peters.

[2] The parties filed an Agreed Statement of Facts, which provides that Mr. Peters is the sole director of NES and owns the following properties that are relevant to the application before the Court:

1. Lot 12, Block 14, Adela Trail, Watson Lake, Yukon (the "Adela Property");

2. Lot 3, Block 46, Watson Lake, Yukon (the "10th Street Property"); and

3. Lot 4, Block 46, Watson Lake, Yukon (the "Centennial Property").

***Charter* Challenges**

[3] NES and Mr. Peters seek the exclusion of certain evidence pursuant to s. 24(2) of the *Charter of Rights and Freedoms* (the "*Charter*") for alleged violations contrary to s. 8 of the *Charter*. There are two searches being challenged:

1. A search on or about October 16, 2020, of the Centennial Property conducted without a warrant; and

2. A search of the Centennial Property and of the 10th Street Property on December 9, 2020, pursuant to a search warrant issued under s. 154(1) of the *Environment Act*.

[4] At the outset of trial, a *voir dire* was declared to address the October 16, 2020 warrantless search of the Centennial Property. My decision on the first *voir dire* is cited as *R. v. 16142 Yukon Inc*., 2023 YKTC 4, wherein I concluded that the October 16, 2020 warrantless search of the Centennial Property was unreasonable and violated s. 8 of the *Charter*.

[5] The warrant authorizing the December 9, 2020 search of the Centennial Property, and of the 10th Street Property, was granted on December 4, 2020 (the "Warrant").

[6] In response to my ruling on the *voir dire* for the October 16, 2020 search, the Crown applied the doctrine of automatic excision, as set out in in *R. v. Love*, 2022 ABCA 269, to the original Information to Obtain relied on for the Warrant, and filed the new vetted version with the Court (the "ITO").

[7] The *voir dire* for the December 9, 2020 search proceeded with a *Garofoli* application challenging the Warrant, as described by the Supreme Court of Canada in *World Bank Group v. Wallace*, 2016 SCC 15, at paras. 120 to 122:

> 120 As a general rule, there are two ways to challenge a wiretap authorization: first, that the record before the authorizing judge was insufficient to make out the statutory preconditions; second, that the record did not accurately reflect what the affiant knew or ought to have known, and that if it had, the authorization could not have issued . . . The challenge here is brought on the second basis, sometimes referred to as a subfacial challenge.
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> 121 In view of the fact that a subfacial challenge hinges on what the affiant knew or ought to have known at the time the affidavit was sworn, the accuracy of the affidavit is tested against the affiant's reasonable belief at that time. In discussing a subfacial challenge to an information to obtain a search warrant, Smart J. of the British Columbia Supreme Court put the matter succinctly as follows:
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> > During this review, if the applicant establishes that the affiant knew or should have known that evidence was false, inaccurate or misleading, that evidence should be excised from the [information to obtain] when determining whether the warrant was lawfully issued. Similarly, if the defence establishes that there was additional evidence the affiant knew or should have known and included in the [information

> to obtain] in order to make full, fair and frank disclosure, that evidence may be added when determining whether the warrant was lawfully issued. (*R. v. Sipes*, 2009 BCSC 612, at para. 41)
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> 122 Smart J.'s comments apply equally to a *Garofoli* application . . . They accord with this Court's observation in [*R. v. Pires*, 2005 SCC 66] that an error or omission is not relevant on a *Garofoli* application if the affiant could not reasonably have known of it (para. 41). Testing the affidavit against the ultimate truth rather than the affiant's reasonable belief would turn a *Garofoli* hearing into a trial of every allegation in the affidavit, something this Court has long sought to prevent (*Pires*, at para. 30).

[8] The Warrant was issued under the authority of s. 154 of the *Environment Act*:

> 154 Search warrants
>
> (1) If, on ex parte application, a justice is satisfied by information on oath that there are reasonable grounds to believe that there is in a place
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> (a) a thing by or in relation to which a provision of this *Act* or the regulations has been contravened; or
>
> (b) a thing that there are reasonable grounds to believe will afford evidence with respect to the commission of an offence under this *Act*,
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> the justice may issue a warrant authorizing an environmental protection officer, or authorizing any other person named in the warrant, to enter and search the place and to seize any thing referred to in paragraph (a) or (b) subject to any conditions specified in the warrant.

[9] The application before the Court requires a consideration of the preconditions to the issuance of a warrant under this section. A justice must be satisfied on review of the information to obtain that there is:

1. a place; and

2. There are reasonable grounds to believe that in the place, there is:

    a. a thing by or in relation to which a provision of the *Environment Act* or the regulations has been contravened; or

    b. a thing that there are reasonable grounds to believe will afford evidence with respect to the commission of an offence under the *Environment Act*.

[10] The Warrant was sought in relation to the 10th Street Property and the Centennial Property. Each of the properties would be the "place" whereon the affiant had reasonable grounds to believe that there is "a thing" as set out in ss. 154(1)(a) or 154(1)(b).

[11] The ITO as vetted by the Crown removes information that should not have been included in the document in light of the *voir dire* ruling on the October 16, 2020 search. This resulted in the excision of significant portions of the original information to obtain. The original 21 paragraph information to obtain, which was itself limited in investigative detail, was reduced to 15 paragraphs.

[12] I am mindful in my review of the ITO of the test to be applied as articulated by the Supreme Court of Canada in *R. v. Araujo*, [2000] SCC 65, at para. 51:

> 51 The reviewing judge does not stand in the same place and function as the authorizing judge. He or she does not conduct a rehearing of the application [page1017] for the wiretap. This is the starting place for any reviewing judge, as our Court stated in *Garofoli*, supra, at p. 1452:
>
> > The reviewing judge does not substitute his or her view for that of the authorizing judge. If, based on the record which was before the authorizing judge as amplified on the review, the reviewing judge concludes that the authorizing judge could have granted the authorization, then he or she should

> not interfere. In this process, the existence of fraud, non-disclosure, misleading evidence and new evidence are all relevant, but, rather than being a prerequisite to review, their sole impact is to determine whether there continues to be any basis for the decision of the authorizing judge.
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> As I noted as a judge at the Quebec Court of Appeal in *Hiscock*, supra, at p. 326 C.C.C., even a basis that is schematic in nature may suffice. However, as our Court has recognized, it must be a basis founded on reliable information. In *R. v. Bisson*, [1994] 3 S.C.R. 1097, at p. 1098, the requirement was described as "sufficient reliable information to support an authorization" (emphasis added). The Court concluded that this requirement had still been met despite the excision of retracted testimony. In looking for reliable information on which the authorizing judge could have granted the authorization, the question is simply whether there was at least some evidence that might reasonably be believed on the basis of which the authorization could have issued.

Facial Validity of the ITO

[13] As noted, the ITO before the Court has been significantly redacted and does not represent the ITO that was before the issuing judge. It remains necessary to review the ITO in its current form to determine facial validity. The second step, if necessary, is to address the sub-facial validity based on the evidence presented at the *Garofoli* application.

[14] In para. 3 of the ITO, the 10th Street Property and the Centennial Property are defined together as the “Properties”.

[15] The information regarding the preconditions required for the issuance of a warrant for the Properties under the authority of s. 154 of the *Environment Act* is contained in para. 9 of the ITO, which states:

> In April 2020, CO DONOVAN could smell a strong odor of motor oil in the Department of Environment yard which he believed was coming from the

> Property. This is when CO DONOVAN first observed the containers of what appear to be special waste stored at 1006 Centennial Avenue, which is adjacent to this property. These containers are 1000L semi transparent totes and in these totes he observed, what appeared to be a very dark substance consistent in appearance with used oil. CO DONOVAN could also could smell a strong odour consistent with used oil from the containers indicating the potential for special waste inside.

[16] The physical location of the Centennial Property, in relation to the 10th Street Property, is not set out in the ITO. "Property" is not defined in the ITO, which is where the first sentence suggests that the smell of a strong odor of motor oil was coming from.

[17] The second sentence refers to 1006 Centennial Avenue being "adjacent to this property". Plain reading of this sentence along with the first sentence results in the smell of motor oil coming from a property adjacent to the Centennial Property. There is no other information in the ITO regarding a property adjacent to the Centennial Property. I note that the only information before the Court in the proceedings to date regarding the 10th Street Property is the legal description of the property and the civic address.

[18] Paragraph 18 of the ITO provides the following information in relation to the 10th Street Property:

> On November 5, 2020 Daman WERRUN and Kerry PETERS both applied to the Department of Environment for Special Waste Permits under their separate companies, 536346 Yukon Inc. and KPI, respectively, to generate, store and transport special waste and to dispose of special waste on the 113 Tenth Street property and the 1006 Centennial Ave property.

[19] There is no evidence contained in para. 18 that relates to the preconditions to obtain a warrant under ss. 154 (1)(a) or (b) of the *Environment Act*. The application for

permits is in no way linked in the ITO to being relevant to the observations contained in para. 9.

[20] Paragraph 19 of the ITO provides the following statement in relation to the Properties:

> I believe that special waste is being stored, handled and disposed of on the Properties and is still present because CO DONOVAN can still see the containers from his office adjacent to the properties. I wish to collect samples from any containers on these properties to be used as evidence of offences under the *Environment Act* and *Special Waste Regulations*.

[21] There is no evidence contained in the ITO that there were any containers on the 10th Street Property or that the 10th Street Property is adjacent to CO Donovan's office.

[22] With no evidence regarding the preconditions for a warrant under the authority of s. 154 of the *Environment Act* for the 10th Street Property contained in the ITO, I find there is no evidence, that might be reasonably believed, on the basis of which the authorization could have been issued to search the 10th Street Property. The ITO was not facially valid in relation to the 10th Street Property.

[23] I find that the evidence regarding the preconditions for a warrant under the authority of s. 154 of the *Environment Act* for the Centennial Property contained in para. 9 does set out some evidence, that might be reasonably believed, on the basis of which the authorization could have issued. The ITO was facially valid in relation to the Centennial Property.

Sub-facially Validity of the ITO

[24] The Court in *Araujo* expanded on the approach to a sub-facial challenge of an information to obtain at paras. 53-54:

> 53 Other appellate court jurisprudence confirms this understanding. In the context of reviewing a search warrant, appellate courts have looked to whether the authorization could have issued . . . For example, in *R. v. Monroe* (1997), 8 C.R. (5th) 324 (B.C.C.A.), at p. 333, Esson J.A. stated that, after looking for whether there was sufficient grounds on which the judge could have authorized a warrant, "The judge was then required to assess the evidence placed before the justice, in the light of the evidence brought out at trial, in order to determine whether, after expunging any misleading or erroneous information, sufficient reliable information remained to support the warrant".
>
> 54 The authorities stress the importance of a contextual analysis. The Nova Scotia Court of Appeal, while reviewing the cases from our Court cited above, explains this in a judgment dealing with problems arising out of errors committed in good faith by the police in the material submitted to the authorizing justice of the peace:
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> > These cases stress that errors, even fraudulent errors, do not automatically invalidate the warrant.
> >
> > This does not mean that errors, particularly deliberate ones, are irrelevant in the review process.
> >
> > While not leading to automatic vitiation of the warrant, there remains the need to protect the prior authorization process. The cases just referred to do not foreclose a reviewing judge, in appropriate circumstances, from concluding on the totality of the circumstances that the conduct of the police in seeking prior authorization was so subversive of that process that the resulting warrant must be set aside to protect the process and the preventive function it serves. (*R. v. Morris* (1998), 134 C.C.C. (3d) 539, at p. 553)
>
> An approach based on looking for sufficient reliable information in the totality of the circumstances appropriately balances the need for judicial finality and the need to protect prior authorization systems. Again, the test is whether there was reliable evidence that might reasonably be believed on the basis of which the authorization could have issued, not whether in the opinion of the reviewing judge, the application should have been granted at all by the authorizing judge.

[25] By consent, both Conservation Officer ("CO") Aaron Koss-Young, the affiant of the ITO, and Conservation Officer ("CO") Logan Donovan, the sub-affiant of the ITO, were cross examined. Both officers testified at the October 16, 2020 warrantless search *voir dire* and the cross examination in the subsequent *Garofolli* application *voir dire* was limited to the ITO. I will address the evidence of the officers as each impacted paragraph is reviewed in numerical order.

[26] The majority of the paragraphs of the ITO provide background information regarding: the purpose of the application; the properties subject to the application; the relationship between NES and Mr. Peters; and that NES at the time of the application held a Special Waste Permit 42-105, which authorized certain activities at the Adela Property. I will address the paragraphs that provide some evidence of the preconditions for the Warrant.

Paragraph 5 of the ITO

[27] Paragraph 5 of the ITO states:

> The Properties are currently occupied by NES. Kerry PETERS is the sole director of NES. Attached as Exhibit C is a corporate profile showing Kerry PETERS as director.

[28] CO Koss-Young's evidence in relation to para. 5 included:

1. His notes from October 16, 2020, confirm that he was advised by Mr. Werrun that the Centennial Property was owned by Mr. Peters and leased to a third party.

2. He tried to interview Mr. Peters but Mr. Peters declined.

3. Without interviewing Mr. Peters, he was unable to determine who was leasing the Centennial Property. No further investigative techniques were engaged to determine who was leasing the property.

4. There were several vehicles with NES markings on them on the property. There were also several vehicles on the property that did not have NES markings on them.

[29] It is clear from the examination of CO Koss-Young that he did not have evidence to conclude that the Properties were "currently occupied by NES". If he held that belief at the time, the reasons for the belief are not set out in the ITO. Instead, the first sentence of the paragraph states an erroneous fact.

[30] It is misleading to include that Mr. Peters is the owner of the Centennial Property, as set out in para. 3 of the ITO, without including the evidence that the property was leased to a 3rd party. It is also problematic as the ITO does not address whether there was a special waste permit issued to a 3rd party for the Centennial Property.

[31] I find that para. 5 should read:

> The Centennial Property is currently owned by Kerry Peters and leased to an unknown 3rd party that occupies the property. Kerry PETERS is the sole director of NES. Attached as Exhibit C is a corporate profile showing Kerry PETERS as director.

Paragraph 9 of the ITO

[32] CO Donovan was cross examined on his observations from April 2020, as set out in para. 9 of the ITO, confirming that:

1. His observations were in relation to the Centennial Property which is adjacent to the Department of Environment property where he is employed.
2. He cannot distinguish between the smell of clean motor oil and the smell of used motor oil.
3. He does not recall telling CO Koss-Young that he smelled used motor oil.
4. He believed that the smell of motor oil was coming from the Centennial Property but does not have any training in locating the source of smell. He did not provide any detail as to why he believed it came from the Centennial Property, such as wind direction.
5. There were several commercial and government properties in the immediate vicinity of the Department of Environment property that could have been the source of the smell, including the Department of Highway and Public Works property immediately adjacent to the Centennial Property, on the opposite side from the Department of Environment property, where government employees perform oil changes on heavy equipment and government fleet vehicles, and where oil based asphalt is prepared for road maintenance.
6. He conceded that the smell of motor oil could have come from a different location than the Centennial Property.
7. There is no offence for the storage of clean motor oil under the *Environment Act* or the *Special Waste Regulations.*

[33] Based on the testimony of CO Donovan, I accept that he cannot distinguish between the smell of clean motor oil and the smell of used motor oil. The reference in the paragraph to “used” motor oil is erroneous. I find that CO Donovan made assumptions regarding the source of the smell of motor oil and that he lacked certainty regarding the source of that smell, making the statement that CO Donovan “could smell

a strong odour consistent with used oil from the containers indicating the potential for special waste inside" seriously misleading.

[34] The activities on the Department of Highway and Public Works property, immediately adjacent to the Centennial Property, on the opposite side of the Department of Environment property, and the activities on the several commercial and government properties in the immediate vicinity of the Department of Environment property are not set out in the ITO. There is no information in the ITO that addresses the smell or the containers in the remaining paragraphs, and no explanation for why CO Donovan believed the smell to be coming from the Centennial Property.

[35] CO Koss-Young did not include in the ITO any observations or investigative steps regarding the Centennial Property, the containers on the property or the smell of motor oil in the months between CO Donovan's initial observations and the date of the Warrant. While it appears that the investigative effort was minimal, there was an occasion, as set out in my decision on the *voir dire* for the October 16, 2020 warrantless search, where in the fall of 2020, CO Koss-Young, CO Donovan, and CO Donovan's supervisor in Watson Lake, District Conservation Officer Mark Brodhagen, together, made observations of the Centennial Property. The ITO does not address that the observations were made, or what the officers observed.

[36] It is also important to point out that the ITO is otherwise silent on the smell of motor oil referenced from April of 2020. It is relevant and important information for the issuing Judge to be advised of CO Koss-Young's personal observations in the fall of 2020, including in relation to smell. Given the proximity of the Centennial Property to the

Department of Environment property, CO Donovan's ongoing observations would also be relevant and important to include. The lack of detail regarding ongoing observations in the ITO raises significant concerns that para. 9 contains incomplete, erroneous and misleading information.

[37] I find that after I expunge the misleading or erroneous information from para. 9 the following remains:

> In April 2020, CO DONOVAN could smell a strong odor of motor oil in the Department of Environment yard which is adjacent to 1006 Centennial Avenue. This is when CO DONOVAN first observed containers stored at 1006 Centennial Avenue. These containers are 1000L semi transparent totes and in these totes he observed, what appeared to be a very dark substance consistent in appearance with used oil.

Conclusions on the ITO Subfascial Validity

[38] The requirement under s. 154 of the Environment Act is for the affiant to have "reasonable grounds to believe" that the preconditions for a warrant exist. In *Ontario (Environment and Climate Change) v. Geil*, 2018 ONCA 1030, the Ontario Court of Appeal addressed "reasonable grounds to believe" in the regulatory context at paras. 60 and 61:

> 60 In *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, [2005] 2 S.C.R. 100, the Supreme Court considered the meaning of "reasonable grounds to believe" in a regulatory context. Section 19(1)(j) of the *Immigration Act*, R.S.C. 1985, c. I-2, provided that "[n]o person shall be granted admission who is a member of any of the following classes: ... persons who there are reasonable grounds to believe have committed an act or omission outside Canada that constituted a war crime or a crime against humanity".
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> 61 The Supreme Court affirmed Federal Court of Appeal jurisprudence holding that "reasonable grounds to believe" requires something more

> than "mere suspicion", but less than proof on the balance of probabilities. It requires "an objective basis for the belief which is based on compelling and credible information": *Mugesera*, at para. 114.

[39] Given the problems with para. 5 of the ITO, there is no information in the ITO regarding who occupied the Centennial Property. Similarly, there is no information regarding whether there was a special waste permit issued to a third party that permitted the storage of special waste on the Centennial Property.

[40] The redacted para. 9 leaves CO Donovan smelling motor oil, which is not in itself evidence of an offence unless the motor oil is used, in the Department of Environment yard which is adjacent to the Centennial Property. The smell could have come from a variety of locations, and this observation is not linked specifically to the Centennial Property.

[41] The remaining information contained in para. 9 is the observation of 1000L semi transparent totes observed to contain what appeared to be a “very dark substance consistent in appearance with used oil”. Even without redaction, it is unclear in para. 9 if the reference to “motor oil” and the reference to “used oil” are two separate things. Plain reading of the paragraph suggests that they reference separate things.

[42] Paragraph 19 includes that “CO DONOVAN can still see the containers from his office”, referring to the containers on the Centennial Property. CO Koss-Young does not recall when this observation was made by CO Donovan and did not take any notes in relation to the receipt of this information. The lack of recording of the information significantly impacts the reliability of the statement, but I am satisfied that the reference is from a date close in time to the Warrant and not misleading.

[43] What is left in the ITO, after redaction, is the observation of totes in April of 2020, that were observed again in or around December of 2020, containing a “very dark substance consistent in appearance with used oil”. This observation, read with the remaining paragraphs of the ITO, does not constitute “compelling and credible information” of the existence of the preconditions for a warrant under the authority of ss. 154(1)(a) or (b) of the *Environment Act.*

[44] I find that the ITO is not sub-facially valid and that the Warrant should not have been issued. With this finding, the December 9, 2020 search, conducted under the authority of s. 154 of the *Environment Act*, breached the s. 8 *Charter* rights of the applicants.

[45] Counsel agreed to await this decision before making their s. 24(2) *Charter* submissions. Dates will be set to file written submission.

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PHELPS T.C.J.