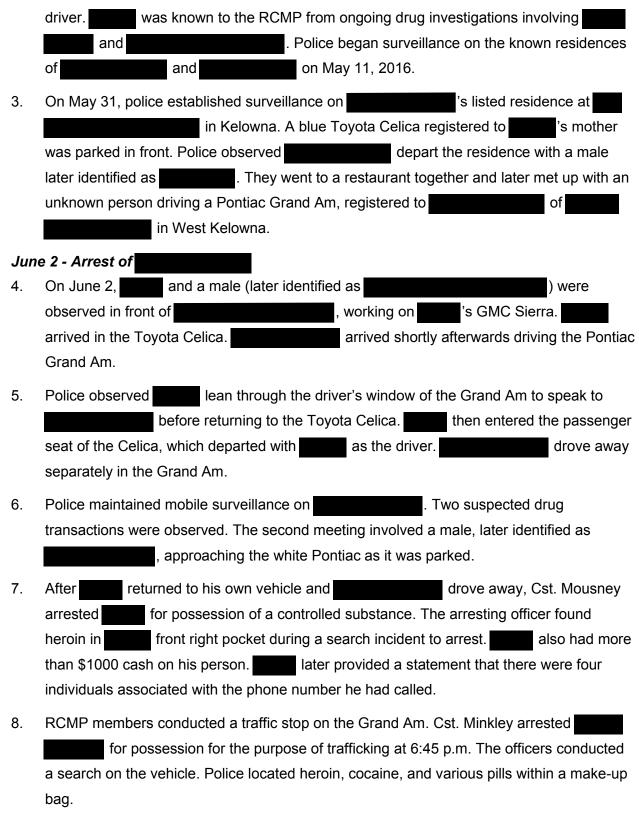
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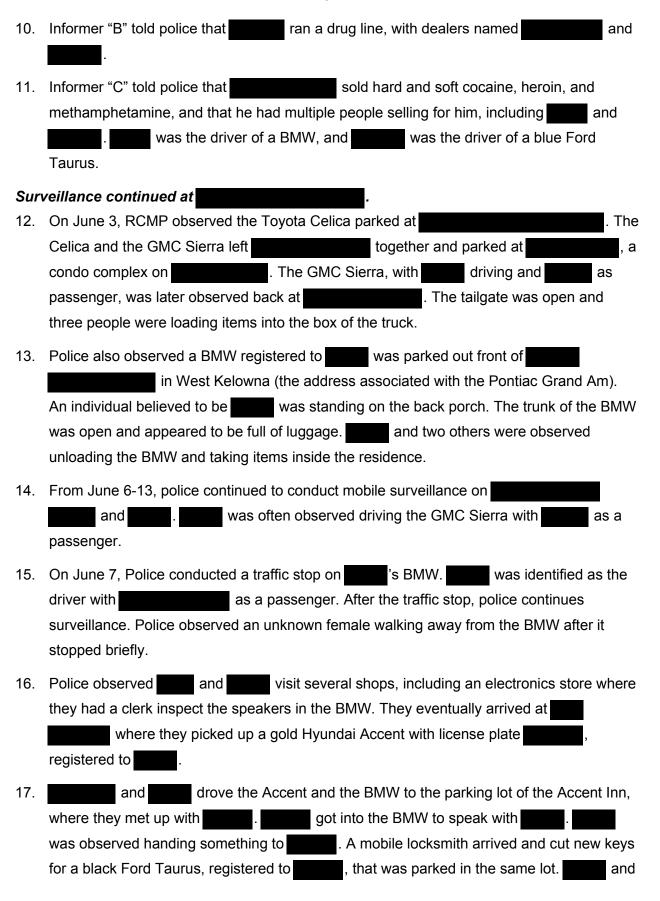
# IN THE SUPREME COURT OF BRITISH COLUMBIA IN THE JUDICIAL DISTRICT OF KELOWNA

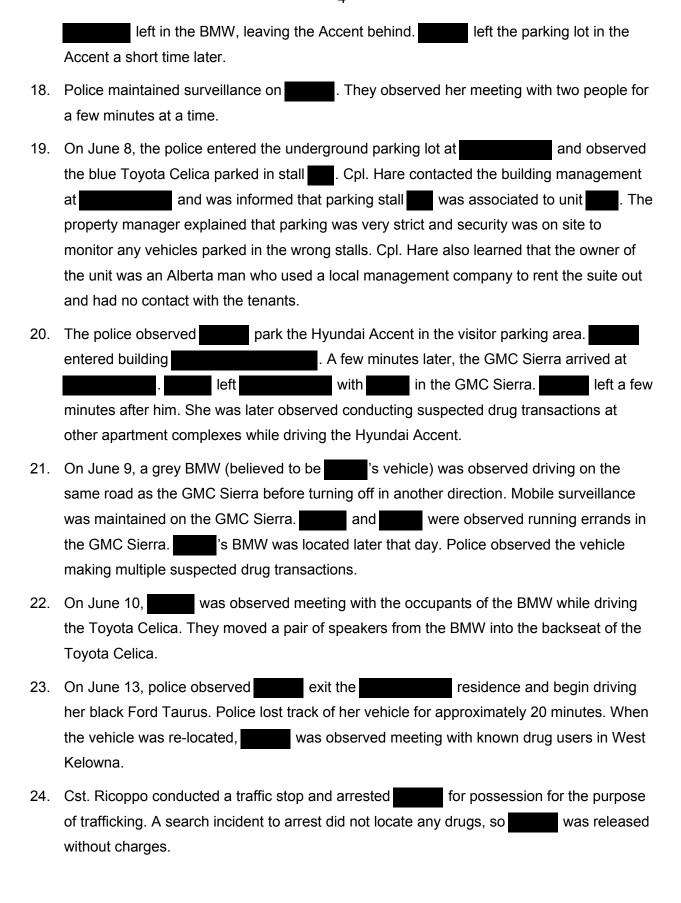
Bet	ween:  HER MAJESTY THE QUEEN  Responden
	-and-
	Applicant/Acc sec
	NOTICE OF APPLICATION
cou	TAKE NOTICE that an application will be made by Counsel on behalf of the licant at the trial of this matter in the British Columbia Supreme Court in Kelowna, on at 10:00 AM or so soon thereafter as the application may be heard, at the rthouse located at 1355 Water St, Kelowna, British Columbia, V1Y 9R3, for an order of this exclusion of evidence under s. 24(2) of the <i>Charter</i> .
follo	AND FURTHER TAKE NOTICE that the application will be made pursuant to the wing Sections 8, 10(b), and 24(2) of the Canadian Charter of Rights and Freedoms.
<u>GR</u>	OUNDS FOR MAKING THIS APPLICATION:
1.	On April 22, 2016, the Kelowna RCMP began investigating a tip from a confidential informant. Informer "A" had provided information that was the licence plate on a vehicle being used to traffic drugs in Kelowna. Informer "A" was an individual who had provided reliable information to the RCMP in the past.
2.	The licence plate was associated with a brown Hyundai Accent. The RCMP queried the license plate and learned that it was registered to was the subject of a traffic stop on April 19, 2016. was identified as the

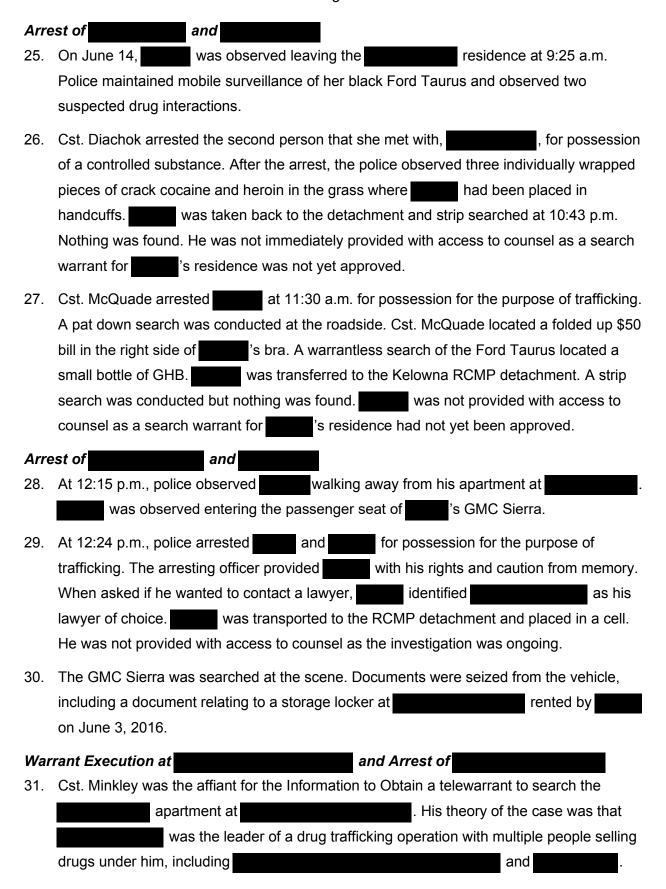


#### Further confidential informant information

9. Police obtained further confidential informant information in June. Informers "B" and "C" had not provided information to police in the past.

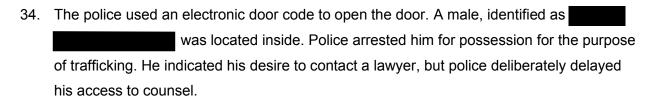


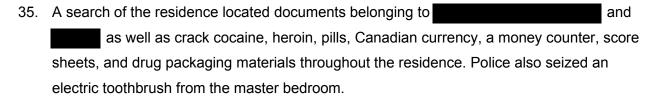




32.	The warrant was requested to search for cocaine and heroin for the purpose of trafficking
	as well as Canadian Currency, drug trafficking paraphernalia including scales, score
	sheets, drug packaging materials, and documents identifying the residents.

33	The warrant	was granted	and executed	at 2:45 n m
JJ.	THE Wallant	was granted	and cacculcu	at 2.70 p.111

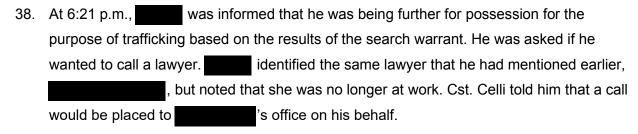


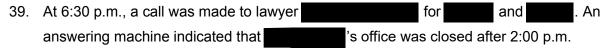


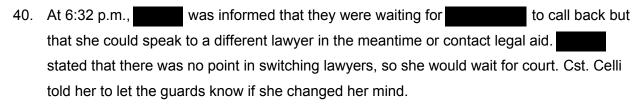
### Police Efforts to Contact Counsel

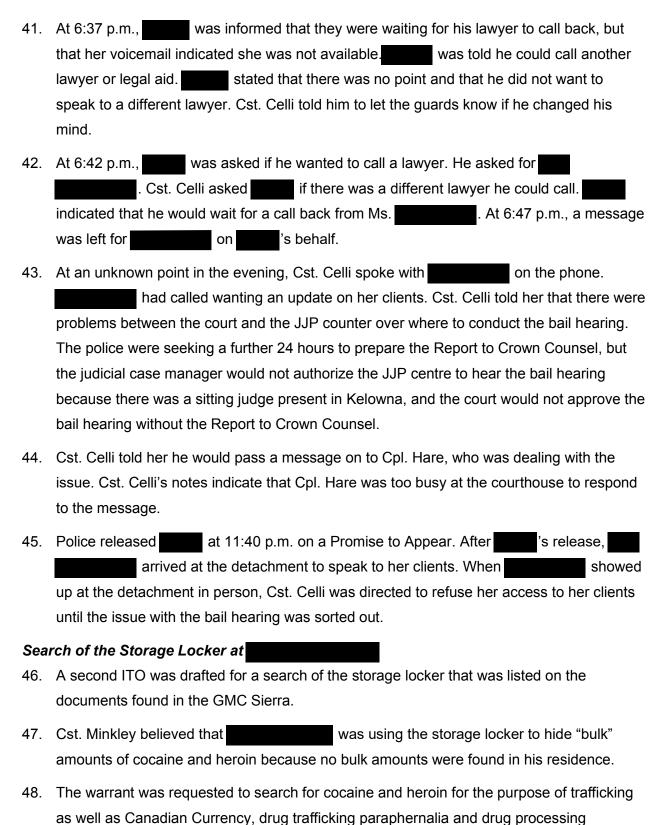
36.	At 6:15 p.m.,	was informed that she was being further	charged for possession	of
	trafficking on the bas	is of the findings from the search at the	condo. Cst.	
	Celli told her that a c	all would be placed to her lawyer's office	on her behalf.	

37.	At 6:20 p.m., police informed	that they were n	ot charging him with an offence	
	but asked him to provide a witness stater	ment.	told police that he was staying	
	with police because he was homeless an	cause he was homeless and had no place to stay. He had just gotter		
	jail and was sleeping on the couch. He ha	ad known	for a long time, and	
	was helping him get clean.	denied any knowle	edge about the drug trafficking	
	operation.			









49. The warrant was granted and executed at 10:18 p.m. The police located some suspected score sheets inside of a laundry basket.

materials such as a pill press.

### **Statutory and Common Law Requirements for Search Warrants**

- 50. A search is reasonable within the meaning of s. 8 of the *Charter* if it is authorized by law and is conducted reasonably. A search will be reasonable within the meaning of s. 8 of the *Charter* where (1) it is authorized by law; (2) the law itself is reasonable; and (3) the search is conducted in a reasonable manner.
- 51. A warrantless search is *prima facie* unreasonable.
- 52. The law authorizing the police to apply for the warrants to search the apartment located at and the storage locker located at is found in s. 11 of the Controlled Drugs and Substances Act and s. 487.1 of the Criminal Code.
- 53. A telewarrant may be issued pursuant to s.11 of the CDSA and section 487.1(2) of the *Criminal Code* if a judicial justice is satisfied there are reasonable grounds to believe that there can be found in a particular place a controlled substance or precursor in respect of which the CDSA has been contravened; or, anything which a controlled substance or precursor is contained or concealed; or, offence-related property; or, anything that will afford evidence in respect of an offence under the CDSA or an offence, in whole or in part in relation to an offence under the CDSA, under s. 354 or 462.31 of the *Criminal Code*.
- 54. The issuing justice must also be satisfied that it would be impracticable for the peace officer to appear personally before a justice to make the application. Section 487.1(4) of the *Criminal Code* stipulates that an information submitted by telecommunication must include, among other requirements, a statement of the circumstances that make it impracticable for the peace officer to appear personally before a justice.
- 55. Accordingly, an Information to Obtain (ITO) in support of a lawful telewarrant under s. 11 of the CDSA must (1) describe an offence that has already been committed; (2) indicate with specificity which items are to be seized; (3) designate with specificity which premises are to be searched; (4) provide objectively reasonable and probable grounds for believing that all of the above requirements are met; and (5) meet the statutory requirements for an information to obtain a warrant by telecommunication.
- 56. The ability of the authorizing justice to assess the reliability of the information is paramount. The affiants and sub-affiants informing an ITO are obligated to provide full, fair, and frank disclosure in the ITO of all material information.

### Deficiencies in the ITO for

### Reason for Seeking a Telewarrant

- 57. The warrant was faxed to the JJP Centre shortly after 1:00 p.m. on Tuesday, June 14, 2016. At paragraph 63, the affiant writes that the reason for seeking a telewarrant was that he had called the Kelowna courthouse and had been advised that there were no Judicial Justices available to review the ITO.
- 58. There are no notes of this conversation and no explanation is provided as to why a JJP was unavailable to hear the application. It is unclear if the affiant inquired as to when a JJP would be available.
- 59. The Practice Directive of the Chief Judge regarding daytime search warrant applications indicates that "JPs are considered to be available to hear applications in person when court is not sitting during scheduled court sitting hours, but *not* during scheduled breaks or lunch adjournments, when presiding in court, or outside sitting hours."
- 60. The telewarrant procedure was designed to allow law enforcement officers to apply for search warrants at all hours of the day and night. The impracticability-requirement ensures that telewarrants are only sought when it is not practicable to make an in-person application. Although urgency is not a factor, section 487.1(4)(a) is a statutory precondition which requires an affiant to disclose reasonable grounds for not making the application in person.
- 61. The Applicant submits that the affiant failed to comply with the requirements of s. 487.1(4) because he failed to provide sufficient information as to why a JJP was unavailable to hear the application when he called and why it would have been impractical to wait until a JJP became available.
- 62. Given that the warrant was being sought during the lunch hour on a Tuesday, something more was required. If a JJP would have been available after the lunch break, the affiant would only have to wait for one hour to appear in person. In that case, resorting to a telewarrant may not have been reasonable. Alternatively, if a JJP would not have been available until the next day, then seeking a telewarrant may have been reasonable. However, by not providing any explanation whatsoever, the affiant failed to establish whether the decision to apply for a telewarrant rather than to wait for a JJP was reasonable. Therefore, the statutory requirement was not met, and on this ground alone, the warrant could not have issued.

### **Confidential Informants**

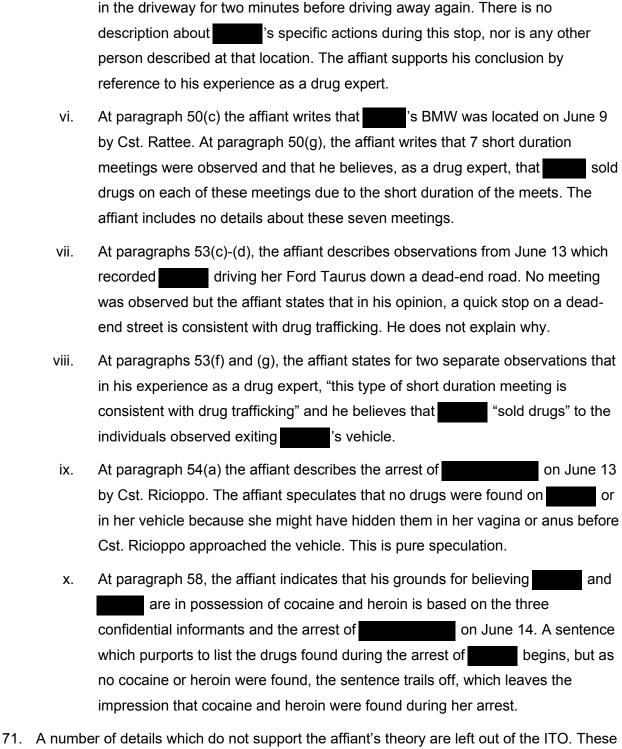
- 63. Where an ITO relies upon the information of a confidential informant, that information should be corroborated and/or the underlying circumstances for the confidential informant's conclusions must be set out to enable the authorizing justice to satisfy themselves that there are indeed reasonable grounds for believing what is alleged.
- 64. Hearsay statements from an informant can provide reasonable and probable grounds to justify a search. However, evidence of a tip from an informer, by itself, is insufficient to establish reasonable and probable grounds. The reliability of the tip is to be assessed by recourse to "the totality of the circumstances". The results of the search cannot, *ex post facto*, provide evidence of reliability of the information.
- 65. In this case, the affiant did not disclose whether the information provided by the confidential informants was first-hand knowledge or hearsay from third parties. In addition, the pedigree information for confidential informers "B" and "C" are completely lacking.

  Taking into account the circumstances laid out in the ITO, the reliability of the confidential informers' information cannot properly be assessed, and together with the rest of the ITO, there were no reasonable and probable grounds that evidence of drug-trafficking would be found at

### The "Expertise" of the Affiant, Conclusory or Misleading Statements, and Material Omissions

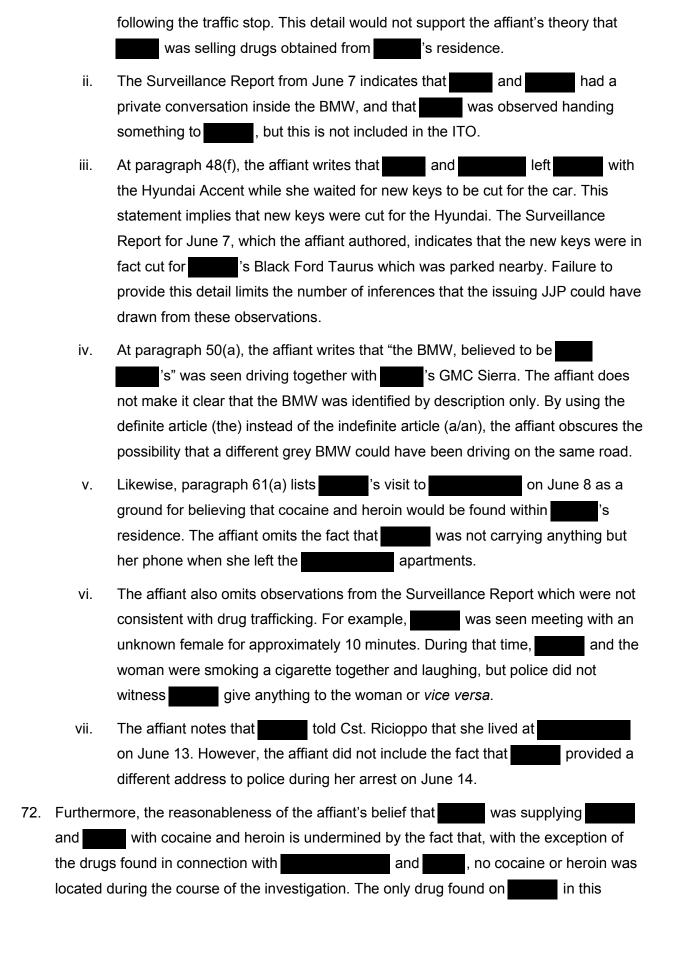
- 66. The Applicant submits that, upon a *Garofoli* review, the telewarrant to search could not have issued.
- 67. This was an *ex parte* application. The affiant has a duty to provide full, fair and frank disclosure to the issuing justice. Throughout the ITO the affiant presented inferences that only assisted his application and did not provide the issuing justice the conclusions that the Applicant might have presented had he been present during the application. The affiant offers opinions that amount to conclusory or misleading statements for the sole purposes of assisting his application.
- 68. Furthermore, at paragraph 7, the affiant identifies himself as "an expert in the matter of possession of cocaine and heroin and methamphetamine for the purpose of trafficking." He notes that he has prepared seven expert opinion reports but has never been qualified as an expert in court. His experience includes 11 years as a Peace Officer and four years with the Drug Section of the Kelowna RCMP, during which time he had been involved in 80

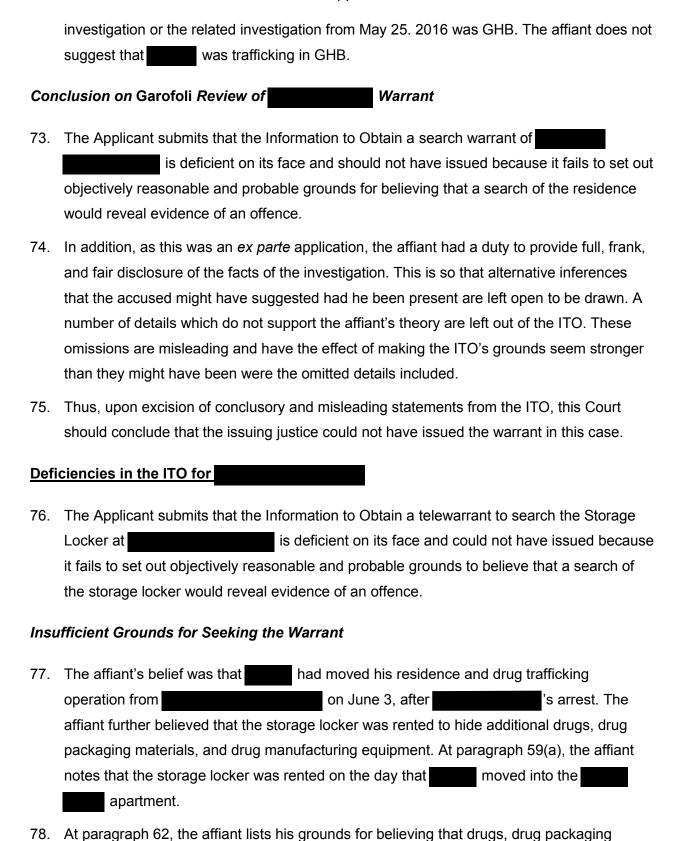
- search warrant investigations. In addition, the affiant had attended a three-week Drug Investigative Techniques course in 2009, and an Expert Opinion Workshop in 2015.
- 69. Throughout the ITO, the affiant supports conclusory statements on the basis of his experience "as an expert", without further explanation.
- 70. The Applicant submits that the affiant holding himself out as an expert at the time is misleading because it provides illusory support for many of the conclusions in the ITO. Therefore, all references to the affiant as an "expert" and the following conclusory and misleading statements should be excised from the ITO:
  - i. At paragraph 43(a), the affiant comments that, in his experience as a drug expert, the interaction observed between and an unknown female is consistent with drug trafficking because of the short duration of the meet. Therefore, he believes that sold drugs to the unknown female. Observing a single brief meeting, without more, is insufficient grounds for such a conclusion.
  - ii. At paragraph 44(a), the affiant writes that the driver of a Mercedes SUV was seen approaching seem as 's vehicle. The affiant states that he believed the driver was meeting with to purchase drugs, but he provides no further description of the encounter or explanation for this belief.
  - iii. At paragraphs 48(j), (l), (m), and (o), the affiant writes that unknown persons were observed exiting the Hyundai Accent while was driving, although they were not seen getting inside. A comment on each paragraph cites the affiant's experience as a drug expert in support of his belief that, due to the short duration of the encounters,
  - iν. At paragraph 49(b) the affiant writes that Cst. Hoult observed entering on June 8 at 12:09 p.m. and leaving again at building 12:20 p.m. At paragraph 49(g), the affiant describes 's next stop, a housing complex on , as consistent with drug trafficking. The affiant concludes that visited the apartment to "reload" with a quantity of drugs. The affiant provides no analysis for his conclusion that the visit at was to reload, but the visit to was to sell.
  - v. At paragraphs 49(j)-(k)(i), the affiant writes that he believes sold drugs to an occupant of a residence on because she was observed stopping



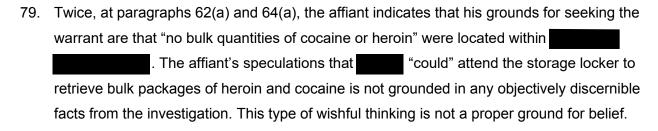
71. A number of details which do not support the affiant's theory are left out of the ITO. These omissions are misleading and have the effect of making the ITO's grounds seem stronger than they might have been were the omitted details included.

i. At paragraphs 48(a)-(e), the affiant describes the observations from surveillance on and and on June 7. The affiant does not include in the observations the fact that police observed a possible drug encounter immediately





materials, and drug manufacturing equipment would be found inside the storage locker.



- 80. At paragraph 64(c), the affiant writes that drug manufacturing equipment would be found in storage locker an industrial pill press was found in the December 2015 investigation. The ITO for did not suggest that was keeping this type of manufacturing equipment within his residence. At no point in the previous ITO or investigation did the affiant disclose any basis to believe that was trafficking in pills.
- 81. None of the observations made over the course of the investigation suggested that there was any drug activity happening in relation to the Storage Locker. Therefore, nothing in the ITO could support a reasonable belief that drugs would be found inside the locker.
- 82. The Applicant submits that reasonable and probable grounds for this search were entirely absent and as such the warrant could not have issued. The search was therefore warrantless and conducted in breach of and seizure pursuant to section 8 of the *Charter*.

## <u>SECTION 10(b)</u>: Everyone has the right on arrest or detention to retain and counsel without delay and to be informed of that right.

- 83. In addition to the deficiencies of the ITOs, the Applicant submits that his right to counsel was deliberately violated without any reasonable basis.
- 84. Once a person is detained, police must inform the detainee of their right to counsel without delay. At a minimum, individuals who are detained for investigative purposes must be advised, in clear and simple language, of the reasons for the detention. The purpose of this informational duty is to enable detained individuals to understand the extent of their jeopardy such that they may make a meaningful decision with respect to submitting to the detention and exercising their s. 10(b) rights.
- 85. Detainees who choose to exercise their s. 10(b) right by contacting a lawyer trigger the implementational duties of the police. The police must facilitate a reasonable opportunity for the detainee to contact counsel. Only a brief interlude between the commencement of an investigative detention and the advising of the detained person's right to counsel under section 10(b) may be warranted.

- 86. Police must refrain from questioning the detainee until that reasonable opportunity is provided. The provision of a reasonable opportunity to consult with counsel is a fundamental guarantee aimed at mitigating a detainee's legal vulnerability while under state control. Section 10(b) includes not only the right to retain counsel but the right to retain the counsel of the accused's choice. The right of the accused to be represented by the counsel of their choice was recognized at common law as a fundamental right.
- 87. If the chosen lawyer is not immediately available, detainees have the right to refuse to speak with other counsel and wait a reasonable amount of time for their lawyer of choice to respond. The right is limited by a corresponding obligation to exercise reasonable diligence in attempting to contact counsel. An accused, when they are unable to reach the lawyer of their choice on the first call, is expected to try an alternate number or find an alternate lawyer if their counsel of choice cannot be reached within a reasonable time.
- 88. When the police undertake to stand in the shoes of the accused to facilitate the call to counsel, they have a duty to take the naturally expected steps that the accused would take. This includes making sufficient efforts to contact the accused's chosen lawyer. Just as there is an obligation on the part of accused to act diligently to contact counsel of choice, diligence is equally required of the police when they choose to stand in the shoes of the accused.
- 89. When was arrested on June 14, at 12:24 p.m., his right to counsel was deliberately delayed for over six hours. The Kelowna RCMP deliberately denied access to counsel for all detainees. Due to the deliberate police delay, their lawyer of choice was no longer in the office and they were offered Legal Aid instead.
- 90. Cst. Celli placed exactly one phone call and left one message on the lawyer's voicemail for knowing that her office was closed. When the lawyer did not call back immediately, Cst. Celli offered to call Legal Aid. refused, so Cst. Celli told him to let the guards know if he changed his mind.
- 91. The Applicant submits this is a grossly inadequate effort on the part of the RCMP to facilitate the right to counsel, especially in light of the fact that his lawyer would have been available for nearly two hours following his arrest. The RCMP waited until long after her office was closed to even ask him who he wanted them to call.
- 92. There are no notes indicating when access was finally facilitated so the total delay is unknown. More troubling is the notebook of Cst. Celli, which indicate that appeared at the detachment in person close to midnight but was deliberately denied

- access to her clients. The disclosure does not indicate whether the police finally granted access to counsel of choice before conscripting a statement from the Applicant.
- 93. The Applicant submits that the Kelowna RCMP deliberately denied him access to counsel without cause, in violation of section 10(b) of the *Charter*.

### **MATERIAL RELIED ON:**

- 94. The Applicant will be relying on the following authorities:
  - 1) **R v Debot**, [1986], 30 CCC (3d) 207, aff'd [1989] 2 SCR 1140
  - 2) R v Garofoli, [1990] 2 SCR 1421
  - 3) R v Pires; R v Lising, 2005 SCC 66
  - 4) R v Clark, 2015 BCCA 488
  - 5) R v Villaroman, 2018 ABCA 220
  - 6) R v Golden, 2001 SCC 83
  - 7) **R v Hall**, 2019 BCPC 152
  - 8) **R v Stillman**, [1997] 1 SCR 607
  - 9) R v Willier, 2010 SCC 37
  - 10) *R v McCallen*, [1999] OJ No 202 (Ont CA)
  - 11) *R v Bloom*, 2006 BCSC 1823
  - 12) *R v Bartle*, [1994] 3 SCR. 173
  - 13) *R v Caslake*, [1998] 1 SCR 5
  - 14) *R v Suberu*, [2009] 2 SCR 460
  - 15) R v Rover, 2018 ONCA 745
  - 16) *R v Mian*, [2014] 2 SCR 689
  - 17) *R v Mann*, [2004] 3 SCR 59
  - 18) R v Grant, 2009 SCC 32
  - 19) Such further and other authorities as the Applicant may cite and this Court may permit.

**DATED** at the City of Vancouver, in the Province of British Columbia, this 8<sup>th</sup> day of January, A.D. 2020 AND DELIVERED BY PRINGLE CHIVERS SPARKS TESKEY,

Solicitors for the Applicant herein whose address for

service is in care of the said Solicitors.

PRINGLE CHIVERS SPARKS TESKEY

PER:

DANIEL J. SONG

COUNSEL FOR THE APPLICANT

TO: CLERK OF THE COURT

AND TO: PUBLIC PROSECUTION SERVICE OF CANADA

Court File No.:

## IN THE SUPREME COURT OF BRITISH COLUMBIA

### JUDICIAL DISTRICT OF KELOWNA

BETWEEN:

### **HER MAJESTY THE QUEEN**

Respondent

- and -

Applicant/Accused

### **NOTICE OF APPLICATION**

PRINGLE CHIVERS SPARKS TESKEY

DANIEL J. SONG