

CANADA / JUDGMENT

R. v. Chang

2024 BCSC 723

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Chang,

2024 BCSC 723

Date: 20240119

Docket: 89207-2

Registry: Nanaimo

Rex

v.

Kerry Wallace Chang, Wendell Johnson Hirt and

Daniel Harold Moore

Before: The Honourable Mr. Justice Baird

Oral Ruling on Voir Dires #1 & #2

Counsel for the Crown:

C. Gibson

Counsel for the Accused Kerry Chang:

K. Bradshaw

K. Kerr-Donohue

No other appearances.

Place and Dates of Hearing:

Nanaimo, B.C.

December 5-8 & 12, 2023

Place and Date of Judgment:

Nanaimo, B.C.

January 19, 2024

INTRODUCTION

[1] This is a formal ruling on an application made by Kerry Wallace Chang for an order setting aside a Criminal Code s. 492.1(2) warrant issued on October 29, 2020 authorising the RCMP to track his cellphone. The warrant is presumed to be valid. The scope of review is narrow. Mr. Chang bears the onus of satisfying the court, on the whole of the material presented, that there was no basis for the warrant. The inquiry begins and ends with an assessment of whether the review record contains reliable information that might reasonably be believed on the basis of which the warrant could have issued. I dismissed this application on December 12, 2023, with these reasons to follow.

BACKGROUND

- [2] Mr. Chang does not dispute that the cellphone referred to in the warrant belonged to him or that he habitually carried it with him. He concedes that the evidence placed before the justice of the peace was sufficient to sustain a reasonable belief that he was trafficking in narcotics a number of months before the warrant was issued, but he says there was no reasonably credible evidence to support the belief that he was actively engaged in drug trafficking when the warrant was sought, or that tracking his cellphone would assist in the investigation. He alleges that the information to obtain the warrant ("ITO") contained material errors and omissions.
- [3] The ITO was sworn by Cst. Kathleen Devoe, a member of the Nanaimo RCMP "Projects Unit", which devotes much of its time and resources to the investigation of narcotics offences. Crown counsel agreed that Cst. Devoe should be cross-examined to rectify a couple of errors in her ITO, and I permitted Mr. Chang to cross-examine her about certain alleged factual omissions that he submitted ought to have been provided to the issuing justice by way of full, fair and frank disclosure. He argued that these omissions should be corrected by adding them to the record of my review of the matter, this by way of attempting to illustrate that if the additional facts had been included in the ITO, the issuing justice could not have issued the warrant. Thus I have before me what are commonly referred to as "facial" and "subfacial" challenges to the ITO.

THE ITO

- [4] The ITO is in a familiar format beginning with the usual sort of introductory paragraphs about the affiant, the offences in relation to which the warrant is sought, and a brief summary of the investigation so far. This is followed by a more detailed recitation of the fundamentals of the investigation, which was triggered by a report to the Nanaimo RCMP from the manager of intelligence at the Vancouver Island Regional Correctional Centre. The report was to the effect that, from roughly mid-June to mid-August, 2020, an inmate named Christopher Mitchell ("Mitchell") had used the Correctional Centre's phone system to communicate with people, including Mr. Chang, about drug trafficking in the Nanaimo area.
- [5] The ITO sets out that Mr. Chang is a person well-known to the Projects Unit as a person associated with local drug trafficking activities, with a criminal record consisting of 21 convictions between 1998 and 2018, including a 2016 conviction for possession of narcotics for the purpose of trafficking.

PHONE CALLS FROM MITCHELL

- [6] Recordings of the jail calls from Mitchell were seized under a production order and analysed by Cst. Devoe and other members of the Projects Unit. The validity of this production order is not in question here. Mr. Chang does not dispute that his voice was correctly identified in some of the calls. He concedes, as I have said, that these phone calls, looked at cumulatively, gave rise to a reasonable belief that he was trafficking in narcotics over the time period in question, and I would add that they indicate pretty clearly that he was engaged in a mid-level trade to street retailers, principally in fentanyl.
- [7] I would emphasise the following particulars about these calls:
1. On June 14, 2020 Mitchell spoke for about half an hour starting at 1:16 p.m. to someone named Bree, whom the police believed to be Mitchell's girlfriend, about money that he owed Mr. Chang. He directed Bree to go and see Mr. Chang and pay him \$1,400. He also told her to sell the remaining inventory so that she could return to Mr. Chang and get more. He said "Kerry will be happy. Keep doing good for Kerry."
 2. At 7:40 p.m. the same day, Mitchell and Bree spoke again. Bree said that she had arranged a meeting with Mr. Chang, who told her to bring the money and asked if she needed more product. Mitchell told Bree to ask Mr. Chang if he could get some "stronger stuff". Bree said that she had already discussed this with Mr. Chang, and he had said "OK".
 3. At 8:40 p.m. the same day, Mitchell told Bree to pay Mr. Chang in full so that he no longer had any outstanding debts with him. He told her to pay his account and not to buy more fentanyl from him "until you need it". Mitchell complained that he had to dip into his savings to pay off Mr. Chang. He also said that if Mr. Chang had stronger product, she should trade for it with weaker product that she already purchased from Mr. Chang.

4. There was another call to Bree at 8:50 p.m. in which Mitchell told her to stock up on methamphetamine when she meets with Mr. Chang, and also to take a "zip" or one ounce of "good shit" if Mr. Chang had it.
5. The following day, June 15, 2020, at 6:56 a.m. Mitchell spoke to Bree to confirm that she had got together the \$1,400 to pay Mr. Chang. She confirmed that she had it, and apparently on the recording of the conversation the listener can hear the sound of Bree counting money until she had counted out "exactly" \$1,400.
6. At 7:33 a.m. Mitchell called Bree again while she was driving to Mr. Chang's house accompanied by somebody called Andrew Zeabin. Mitchell asked "How far is Kerry's", and she answered, "Not far, on Twelfth Street".
7. Mitchell called back at 8:48 a.m., by which time Bree had arrived at Mr. Chang's place, and Mr. Chang spoke with Mitchell on Bree's phone. Mr. Chang told him that he had loaned Bree some money, and also groused about the rising cost of product and how difficult it was to make money in the prevailing economic conditions. They discussed how it must have something to do with the COVID-19 pandemic, and Mr. Chang lamented that nothing was coming over the border right now. Mr. Chang told Mitchell about a new tunnel that had popped up but he did not know where it was. I infer that Mr. Chang was referring to a tunnel at the border for narcotics smuggling. The salient remaining bits of this conversation were as follows.
 - Chang told Mitchell that he has cut out "smalls" and now deals in "zips", which I take to mean that he was no longer selling to users in small amounts, but to street level dealers in amounts of an ounce. He said that dealing at this level, principally to out-of-town customers, "takes him out of the limelight".
 - They also talked about Kenny Pham, a local drug dealer and known associate of Mr. Chang. Mr. Chang said that Kenny was "busy counting money all the time".
 - Bree took back her phone and left Mr. Chang's house. When she got outside she told Mitchell that she had got a full "zip" (one ounce) of fentanyl and a "ball" (3.5 grams) of methamphetamine from Mr. Chang.
 - Bree told Mitchell that the product was "stronger stuff" and that Mr. Chang had charged her \$1,600 for it.
8. At 2:27 p.m. Mitchell called Bree, who was with somebody called Stevie Pirart. In response to a question from Mitchell, Pirart confirmed that she had tried the new product from Mr. Chang and said that it "wasn't that great". She complained that Mr. Chang's "stuff" was always "stomped on" (diluted) and it was "always the bare minimum" that users expected.

9. The following day, June 16, at 6:58 p.m., Mitchell called Bree and had her arrange a "3 way" call with Mr. Chang. Once they connected, Mitchell asked Mr. Chang if he could get Bree some "stronger oil", which I take to mean more potent fentanyl. Mr. Chang said he could get heavier stuff but it would cost more. He said that he would get a new "jug of oil" tonight. After the call with Mr. Chang ended, Mitchell told Bree that she would be getting "better oil" tomorrow.
10. At 7:29 p.m. Mitchell spoke to Bree and asked her to text Mr. Chang to tell him that "homie", probably Ms. Pirart, had sampled a 2-point "smash" of his fentanyl and said that it had had no effect. He wanted her to thank Mr. Chang for getting "better oil". He said, "I don't care if I have to pay a bit extra, I just want to make money."
11. At 8:34 p.m. Mitchell called Andrew Zeabin, and told him that he and Bree had to go back and see Mr. Chang to return the stuff that Bree had got the previous day. He said that Mr. Chang was going to supply them with different stuff because "everyone was complaining".
12. The following day, June 17, 2020, at 9:29 a.m., Mitchell called Bree, who was with somebody called Sheldon Johanson. Mitchell told Johanson that Bree was going back to Chang's place to swap out her fentanyl for new, stronger product in exchange for a little extra money. He said "it's us three that matter - you, me and Bree, and Kerry's on the team, too."
13. The next day, June 18, 2020, Mitchell talked with Bree who said she was waiting for Mr. Chang, whom she called "the boss man". Later she was with Sheldon again, and he repeated that Bree was going to exchange her drugs for stronger stuff and pay a bit more. It seems that Bree was planning to meet with Mr. Chang in Courtenay to do some "collections". A second call swiftly followed in which Bree told Mitchell that Mr. Chang was bringing the "new stuff" to Courtenay to trade it for the "weaker stuff".
14. There was also a discussion about someone called Corey, who had "fucked over" Mr. Chang. It is to be inferred that this comment relates to non-payment for "fronted product", that is, product provided to a retailer on the understanding that it would be paid for after it was sold down the supply chain. Mr. Mitchell said that it was Mr. Chang's fault because he had warned him against "fronting product to Corey".
15. Later on, there was a call from Mitchell to Bree confirming that she had a "zip" or ounce to trade with "him", by which is to be inferred from previous conversations that she meant Mr. Chang. The following day, June 19, 2020, Mitchell spoke to Andrew Zeabin who told him that Mr. Chang had been upset because Bree was "short by 23 grams". He also said that Bree had no money to give to Mr. Chang, just "stuff".

16. An hour and a half or so later, Mitchell called Zeabin again, who was with Sheldon Johanson. Sheldon came on the line right away and said that Mr. Chang was angry because Bree and Andrew had provided no money for Mr. Chang when they arrived at his house. It is to be inferred from this conversation that a "zip" of product had been supplied to Bree for which Mr. Chang expected to be paid \$1,600 by 9:00 p.m. Mitchell confirmed that he would pay this amount "today".
17. A couple of hours later, Mitchell called Stevie Pirart and said that he would pay off Mr. Chang, then source other suppliers because Mr. Chang's product was "garbage". Pirart responded that she knew Mr. Chang's product was bad because when she had prepared an intravenous shot of it, it hardened up like it was "straight up caff" (caffeine). Later the same day, Mitchell called Sheldon Johanson and told him to let Mr. Chang know that he would be getting his "paper" (money) tonight.
18. The next day, June 20, 2020, Mitchell called Bree, who was with Andrew Zeabin and Stevie Pirart. Mitchell said "I thought we only owe Kerry \$1,400" and Bree told him it was \$1,600. Mitchell told Bree to contact Mr. Chang for a "3-way" conversation. When Mr. Chang was connected, Mitchell told him that Bree and Zeabin were on their way to see him. Mr. Chang said that he did not mind helping Bree with a few bucks, but it did not work for him if he had to chase her down for payment.
19. The next call summarised in the ITO was a month or so later, on July 22, 2020. Mitchell called someone named Trish, whom the affiant believed to be an associate and former girlfriend of Mitchell. Trish established a "3-way" call with Mr. Chang, who offered to loan Mitchell some money. Mr. Chang said that "Corey" was supposed to come and see him a couple of days before but had not shown up, and was now "dodging" him. Later the same day, Mitchell called Trish, who was with Mr. Chang, and Mr. Chang said that Corey was going to get some "shots to the head". In a later call, Mitchell asked Mr. Chang to confirm that his cellphone number was "667-2967", and Mr. Chang corrected him on the last four digits, saying it was "2197".
20. On August 11, 2020, there was a call between Mitchell and Sheldon Johanson in which Johanson said that Mr. Chang had just got out of hospital, and was now at home without money or product. Johanson reported news that he had heard to the effect that "Jan", whom the affiant believed was Janine Vautour, Mr. Chang's common-law spouse, had "jacked" Mr. Chang for \$80,000 in cash and product and left with her sons Derek Vautour and Jordan Vautour, also known as Yaskow.
21. On August 14, 2020, there was yet another call between Mitchell and Johanson. Mitchell said that the stuff he got from Mr. Chang was "not the greatest", and Johanson confirmed this. Mitchell said, "the shitty thing is that Kerry's shit sucks." Johanson said that Jan Vautour now "had the good stuff", and implied that they would have had access to better quality supply if Mr. Chang had not come home from the hospital. With "Kerry" coming home, he said, all they could get was his "shitty shit".

SURVEILLANCE OPERATION

- [8] I would note in passing that there were roughly 600 phone calls from Mitchell that had to be listened to, and isolating and evaluating the ones that had to do with Mr. Chang took some time. Once the job was done, the next step in the investigation was a surveillance operation focussed on Mr. Chang's residence at 91 Twelfth Street in Nanaimo. This involved approximately 60 hours of surveillance on 12 separate days between September 15 and October 19, 2020. It is not disputed that Mr. Chang lived at the address in question, or that the owner of the residence was someone called Wendell Hirt.
- [9] When it comes to evidence that Mr. Chang was actively engaged in dealing drugs from the residence, the ITO summary refers to numerous vehicles coming and going from the house, some of them remaining there for only a few minutes. On a couple of occasions, a well-known local drug user and dealer called Patrick Lussier was seen at the house. On another occasion, a person named Scott Taylor came out of the house and was followed by surveillance members and arrested on an outstanding warrant related to drug trafficking activity. He was found to have what the affiant called a "large quantity of cash" on him, and a "scoresheet", that is, a document that drug dealers typically create to keep track of who owes them money. Defence counsel has raised a point, which I have taken into account, that Cst. Devoe did not specify how much cash constituted this "large" quantity, or produce any record of the "scoresheet".
- [10] Mr. Chang himself was only seen on a couple of occasions during surveillance and did not act in any manner suggestive of drug trafficking. Observations of vehicular traffic near this residence, and a couple of alleged "hand-to-hand" exchanges between people seen leaving the area of the residence and others whom they happened to meet, did not strike me as being particularly persuasive standing alone. It is well-known, however, that I must look at the evidence in its totality. The evidence indicative of drug activity during the surveillance may not have been all that strong, but in my view it did nothing to negate the police theory based on the solid background of Mr. Mitchell's phone calls, that Mr. Chang was drug dealer using his house as a base of operations. The surveillance detail observed at least some activity that supported their grounds for this belief.

AMANDA SCHILLING

- [11] In particular, as counsel for Mr. Chang, Ms. Bradshaw, foreshadowed in her introductory remarks on the present application, a key element of the ITO had to do with a person named Amanda Schilling. On October 2, 2020, the surveillance detail observed an Infiniti motor vehicle registered to Ms. Schilling near Mr. Chang's residence. Mr. Chang was observed speaking to the female driver. The following day, October 3, 2020, Amanda Schilling was identified coming from Mr. Chang's house and leaving the area in the same vehicle. On October 8, 2020, she was seen yet again at the Chang residence.

[12] And here is what I consider to be the important link. On October 12, 2020, as a result of an unrelated assault complaint, Amanda Schilling was arrested in the Infiniti off Highway 19A near Long Lake. I have taken account of the location of this arrest, which was not specified in the ITO, and was approximately 13 kilometres from Mr. Chang's house. The car was searched and trafficable quantities of suspected fentanyl and methamphetamine were seized from it. Mr. Chang submitted that in the ITO Cst. Devoe overstated the quantity of drugs found, but then, even on the evidence that Mr. Chang submits ought to have been recorded in it, it would give rise to a reasonable belief that Ms. Schilling possessed both substances for the purpose of trafficking.

"CONFIDENTIAL INFORMER A"

[13] The evidentiary averments in the ITO finish off with information from someone referred to as "Confidential Informer A", a person who, according to "Handler A", had previously provided reliable information to police leading to the identification of criminal targets, the issuance of search warrants, the seizure of drugs and stolen property. The information suffers from the frailty, properly disclosed in the ITO, that the informer received it second hand from a person or persons of unknown reliability.

[14] This does not mean, however, that the information cannot be accorded weight. The issuing justice was entitled to measure the credibility of "Confidential Informer A's" tip by evaluating the extent to which it was corroborated by other reliable evidence in the ITO. In this connection, Informer A's information included that:

1. Mr. Chang was busy selling fentanyl - on this subject, the evidence of the phone calls from the jail from Mr. Mitchell make it clear that he was doing just that, and in reasonably large quantities, at least as recently as August 2020;
2. Mr. Chang was living at "Wendell's on Twelfth" - there is no dispute that this information was accurate; Mr. Chang was living at 91 Twelfth Street in a residence owned by Wendell Hirt, who had been seen around the place during surveillance;
3. Kerry Chang is dealing drugs out of the house - again, this information is in conformity with what I consider to be the very clear evidence to this effect from Mitchell's phone calls from the jail, which revealed that Bree and Andrew Zeabin, amongst other people, were attending Mr. Chang's residence on multiple occasions to trade or purchase a "zip" of product, and that Mr. Chang was conducting his business in this way to "stay out of the limelight";
4. Amanda Schilling sells for Mr. Chang - the surveillance officers observed Ms. Schilling around the Twelfth Street property, and it was open to the JP to infer that Mr. Chang spoke to her directly while she was parked in the Infiniti outside of his house. Several days after her last attendance at the residence she was arrested in possession of drugs including fentanyl in quantities suitable for trafficking;

5. Mr. Chang's car accident did not stop him for long - there is no dispute that Mr. Chang was in a serious motor vehicle accident on July 29, 2020. This is confirmed by the information in the ITO, which also contains the information that Mr. Chang was discharged from hospital on August 11, 2020. The last two phone calls from Mr. Mitchell set out in the ITO also confirm that Mitchell and his confederates were continuing to do business with Mr. Chang after he left the hospital, albeit with some reluctance because they said his product was "shitty".
6. Mr. Chang's cellphone number is 250-667-2197 - there is no dispute that this information is accurate.

DISCUSSION

- [15] I do not propose to itemize all the various ways in which Mr. Chang alleges that Cst. Devoe's ITO in support of the tracking warrant was deficient on its face. I have just reviewed its core averments taking into account the various corrections urged upon me by defence counsel, and I intend only to say in addition to this that, in my view they amount, cumulatively, to credible evidence upon which the tracking warrant could have issued. As I have said, Mr. Chang does not dispute that the evidence of the Mitchell phone calls gave rise to a reasonable belief that he was dealing in drugs from his house between June and August 2020, and it was open to the issuing justice to infer from the August 11 and 14, 2020 phone calls that Mr. Chang continued to conduct this business after his discharge from hospital.
- [16] I agree with defence counsel that much of the surveillance evidence was not terribly persuasive. I have already said that the averments in the ITO about "hand-to-hand" transactions allegedly observed by the surveillance detail amount to very little. The manner in which I intend, for present purposes, to deal with these averments is to exclude them from consideration entirely. I am also prepared to accept that much of the vehicular traffic around the residence was explained by the fact, not disputed by Crown counsel, that a number of people other than Mr. Chang lived there.
- [17] Nevertheless, there remain elements of the surveillance evidence, specifically the evidence of a number of short-term visits to the property, the attendance there on repeated occasions of Patrick Lussier, the departure from it of Scott Taylor and the circumstances of his arrest, and especially Amanda Schilling's visits to the property, followed by her October 12, 2020 arrest in possession of trafficable amounts of methamphetamine and fentanyl, the latter being the very substance which the evidence suggests is Mr. Chang's principal stock in trade, which added to Cst. Devoe's grounds for seeking the tracking warrant based on the reasonable belief that Mr. Chang continued to deal in narcotics from the house.
- [18] When it comes to sub-facial issues, I will accept Cst. Devoe's concession in cross-examination, whether I actually agree with it or not, that she might have included more information in her ITO about Mr. Chang's July 29, 2020 motor vehicle accident and the extent to which he was incapacitated by injuries sustained in it. I would note, in fairness, that Cst.

Devoe cannot be expected to know all of the details about Mr. Chang's physical deficits. She did, in fact, refer to the accident in the ITO, and the information that Mr. Chang was hospitalised because of it. This was mentioned in the Mitchell phone calls. For the purposes of this review, however, I will consider in addition to these ITO references (see: *R. v. Morelli*, 2010 SCC 8 at para. 20) that Mr. Chang's injuries were serious and substantially debilitating. He needed to use a walker to get around, and the only time the surveillance detail saw him go anywhere, he was in the company of Mr. Hirt, who drove him around Nanaimo doing everyday errands.

- [19] It is conceded, as I have said, that the issuing justice was fully entitled to infer from the Mitchell phone calls that Mr. Chang was actively engaged in the business of mid-level drug trafficking from his home at 91 Twelfth Street as recently as a couple of months before Cst. Devoe sought her tracking warrant. The same evidence suggested that Mr. Chang continued to be engaged in this activity after his motor vehicle accident and release from hospital. It may be said that the surveillance evidence does not amount to much on its own, but it yielded some additional grounds for believing that this commerce was ongoing.
- [20] In my view, it was open to the issuing justice to reason that mid-level fentanyl-trafficking operations generating thousands of dollars in revenue do not typically stop for no reason, and to infer, not only from the investigative evidence produced, but also from Cst. Devoe's averments about Mr. Chang's associations and antecedents, including his prior conviction for possession for the purpose of trafficking, that he was probably well-entrenched in the drug trade. On reviewing the matter, as promised, I have considered the alleged "gap" evidence not included in the ITO about Mr. Chang's motor vehicle accident and the extent of the injuries sustained in it. In my overall assessment, however, this gives rise to no plausible reason for supposing that his acquisition and distribution of "zips" of fentanyl could not continue. Mr. Chang told Mr. Mitchell himself that he was no longer dealing in street level, but keeping "out of the limelight" by dealing in larger quantities, mostly for out-of-town customers. His limited mobility meant very little in the scheme of things and, in my mind, gives rise to no compelling inference that his drug dealing activities must have stopped because of it.
- [21] Mr. Chang also challenged the tracking warrant on the footing that it was not necessary - the ITO evidence showed that Mr. Chang rarely left the house, and it was argued that there was no basis upon which the issuing justice could conclude that tracking his cellphone would assist the investigation for this reason. Why track a device that is never taken anywhere? The Crown's response to this argument was to the effect that it would advance the investigation by measuring the activity around the house against the probability that Mr. Chang was inside it because his cellphone was there. I bear in mind that a tracking warrant is merely an investigative tool and, in my view, it was open to the issuing justice to conclude that tracking Mr. Chang's cellphone would assist the investigation in this limited way.

- [22] I repeat that the tracking warrant is presumed to be valid. Mr. Chang bears the burden of establishing that it should be set aside. My role in reviewing the matter is limited to answering the question whether, on all of the evidence presented, there was credible information upon which the warrant could have issued. I bear in mind that Cst. Devoe was not required to present proof beyond a reasonable doubt that Mr. Chang was trafficking in narcotics, or even proof on the balance of probabilities, but only evidence showing a reasonably based probability that he was doing so instead of mere suspicion.
- [23] In my view, on the material placed before the justice, considered in light of the corrections and additions urged upon me by defence counsel, there was credible evidence upon which the tracking warrant could have issued. Accordingly, the application to set it aside is dismissed.

THE WARRANT TO SEARCH 91 TWELFTH STREET

- [24] I will now address Mr. Chang's second application in this case for an order setting aside a warrant issued to Cst. Devoe on November 14, 2020 under s. 11 of the Controlled Drugs and Substances Act, S.C. 1996, c. 19, to search his house at 91 Twelfth Street for drugs, packaging, scales, scoresheets, cellphones and so on. Once again, the scope of the review is limited: the only question to be addressed is whether there was credible evidence upon which the search warrant could have issued.
- [25] I will begin by saying, and this without wishing to be critical of the police for carrying on with their investigation by other means, that, in my view, the grounds for a warrant to search 91 Twelfth Street probably existed after Amanda Schilling's arrest on October 12, 2020. It could be argued plausibly, in other words, that additional evidence in support of the warrant was likely not necessary. Cst. Devoe's ITO for the house warrant repeated all of the evidence presented in support of the trafficking warrant issued on October 29, 2020, whose merits and salient aspects I have already discussed, and it added details of the reasonably modest investigative steps taken in the couple of weeks thereafter.
- [26] The tracking device, first of all, showed that the cellphone remained throughout in the vicinity of 91 Twelfth Street, and I think I can take that to mean that it remained inside of the residence. There was surveillance conducted on November 18 and 19, 2020, during which Mr. Chang was not seen outside his residence, but on November 18, 2020, Amanda Schilling was seen once again at the house and her Infiniti was parked nearby. She did not do anything suggestive of drug trafficking, but naturally the issuing justice would have considered her past association with the property and her recent arrest for possession for the purpose of trafficking. The following day, on November 19, 2020, Patrick Lussier showed up again and entered the place carrying a backpack. He was arrested when he drove away from the residence on an outstanding warrant for driving while prohibited.

- [27] I do not doubt that the police were hoping that this arrest would yield more decisive evidence than turned out to be the case. If they were hoping that the search of Mr. Lussier and his car would yield a recently acquired "zip" of fentanyl, or fentanyl in any amount that looked packaged for sale, they were disappointed. On the other hand, the arresting officer noted that Mr. Lussier appeared to be under the influence of an opioid, and Mr. Lussier admitted as much himself, saying that he had recently consumed methadone. Cst. Devoe in her ITO introduced another possibility, namely that he had recently consumed fentanyl at Mr. Chang's place, a theory backed up by a baggie seized from Mr. Lussier's trouser pocket containing a testable quantity of fentanyl residue. The search of Mr. Lussier's car also turned up a taser, a machete and three metal hatchets.
- [28] In my view, as I have said, there were sufficient grounds for a warrant to issue to search 91 Twelfth Street back on October 29, 2020 when the tracking warrant was sought instead. The additional ITO averments in support of the residential search warrant put before the justice on November 20, 2020, while perhaps not terribly forceful, nevertheless enhanced Cst. Devoe's grounds for seeking it. Considering all of the evidence in combination, and emphasising, without repeating, the Mitchell phone calls, the September-October surveillance evidence, Amanda Schilling's arrest with fentanyl in amounts suitable for trafficking, Amanda Schilling's ongoing association with the house thereafter, the corroborated information provided by "Confidential Informer A", and the details of Patrick Lussier's arrest on November 19, 2020, I find that there were reasonable grounds for the belief expressed by Cst. Devoe in her ITO that Mr. Chang was distributing drugs from 91 Twelfth Street, and that evidence of such activity would be found in his residence if a warrant were granted to search it. There was credible evidence, in other words, upon which the warrant could have issued, and the application for an order setting it aside is dismissed.

"Baird J."

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