

CANADA / JUDGMENT

R. v. Dubensky

2023 BCSC 487

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Supreme Court of British Columbia

DECIDED

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2023 BCSC 487 R. v. Dubensky

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Dubensky,

2023 BCSC 487

Date: 20230208

Docket: 87669-2

Registry: Nanaimo

Rex

v.

Michael John Dubensky

Before: The Honourable Madam Justice Young

Oral Ruling on Vukelich Application

Counsel for the Crown:

J. Rutherford

Counsel for the Accused:

J.D.A. Watt

Place and Date of Trial/Hearing:

Nanaimo, B.C.

January 30 - February 3, 2023

February 6 - 8, 2023

Place and Date of Judgment:

Nanaimo, B.C.

February 8, 2023

- [1] THE COURT: I am ready to give my reasons on the Vukelich hearing. The accused, Michael Dubensky, is charged with trafficking of a controlled substance, contrary to s. 5(1), and possession for the purpose of trafficking, contrary to s. 5(2) of the CDSA.
- [2] Mr. Dubensky filed a notice of application challenging the facial validity of an information to obtain, "ITO", filed in support of the search warrant to search the premises at Unit 17 - 31 Prideaux Street, Nanaimo, British Columbia, which is Mr. Dubensky's alleged residence. A further search warrant was executed on cellphones seized from the alleged residence.
- [3] Mr. Dubensky argues that when the evidence obtained through Charter violations is excised from the ITO, the balance of the evidence in the ITO would not support the issuance of the warrant.
- [4] Mr. Dubensky alleges that there was an insufficient basis for the issuance of the search warrant, specifically the ITO lacks reasonable grounds for believing that the offence had been committed and the things to be searched for would be located within a residence located at 17 - 31 Prideaux Street, Nanaimo, B.C.
- [5] Mr. Dubensky argues that the numerous statements within the ITO are irrelevant, opinion, conclusory, prejudicial, and insufficiently sourced, thereby justifying excision.
- [6] Further, Mr. Dubensky argues that the affiant did not provide full and frank disclosure to the authorizing justice. Mr. Dubensky seeks to cross-examine the affiant in order to amplify the record upon review.
- [7] The Crown takes the position that Mr. Dubensky's application for a voir dire should be summarily dismissed because it has no realistic prospect of success at the threshold stage, relying on *R. v. Vukelich* (1996), 108 CCC (3d) 193 (leave to appeal refused: 1996 SCCA No.461) (*Vukelich*).

The Vukelich Threshold

- [8] A Vukelich hearing serves an "important trial management" goal, as it filters out "proposed pre-trial applications where the circumstances, as disclosed by the submissions of counsel and references to supporting materials, are such that the remedy sought could not reasonably be granted" (*R. v. McDonald*, 2013 BCSC 314 (*McDonald*) at para. 17). The discretion to deny a voir dire is an important trial management tool that allows a trial judge to control the course of proceedings and to not embark on inquiries that will not assist the real issues in the case (*Trans Mountain Pipeline ULC v. Mivasair*, 2020 BCCA 255 at para. 50).

and *R. v. Johnson and Haevischer*, 2021 BCCA 34 at para. 372 (leave to appeal granted: 2021 CanLII 122896 on the issue of a summary dismissal of a stay of proceedings application).

- [9] In *R. v. Cody*, the Supreme Court of Canada emphasized that trial judges have a positive duty to use their case management powers to minimize delay, including by asking defence counsel to summarize the evidence it anticipates eliciting in the voir dire and, where that summary reveals no basis upon which the application could succeed, dismissing the application summarily (para. 38).
- [10] Although the Vukelich threshold has been expressed in different ways at different times, the fundamental question is whether the applicant can demonstrate a reasonable basis upon which their application could succeed or a reasonable likelihood that it can provide assistance to the court (*Cody* at para. 38 and *R. v. Frederickson*, 2018 BCCA 2 at para. 26).
- [11] As Justice Dewitt-Van Oosten explained in *R. v. Orr*, 2021 BCCA 42 at para. 46, applicants are not automatically entitled to evidentiary voir dres whenever a Charter claim is raised; and as a result, where there is no reasonable likelihood that a voir dire can assist in determining the issues before the court, or no reasonable prospect of success in proving an infringement or obtaining the sought-after relief, a trial judge has clear jurisdiction to decline an evidentiary voir dire and to summarily consider and dismiss the application.
- [12] In *Orr* at para. 59, the court said that counsel advanced its "full position" on the Vukelich hearing, that is counsel at trial, and counsel did not point to any additional submissions he would have made or evidence he would have called if there had been a voir dire. On appeal, the appellant complained that he had been deprived of his opportunity to cross-examine the affiant. However, at trial the accused took the position that its review had been limited to a facial challenge.
- [13] At para. 61, Justice Dewitt-Van Oosten says that the judge had access to the entirety of the affidavit prepared in support of the search warrant. Appellant's counsel worked through the ITO, highlighting the parts he said were misleading, irrelevant, incomplete, unduly prejudicial, and reflected conclusory statements about the appellant's alleged drug trafficking that were speculative, failed to account for alternative and innocent explanations, and were of no assistance to assessing the existence of reasonable grounds. He highlighted weaknesses in the ITO including what he described as "quasi-opinion evidence" on behaviours consistent with drug trafficking, without expert qualification.
- [14] At para. 66, Justice Dewitt-Van Oosten found that the trial judge properly instructed himself that a warrant's facial validity is assessed with reference to the totality of the material before the authorizing justice. He focused on the right question and asked himself "whether the facts set out in the ITO, after excising misstatements and adding omissions as suggested by the defence submissions, disclosed a reasonable basis on which the warrant could have been challenged" (*Frederickson* at para. 39). Ultimately, the judge (at trial) found there was no reasonable prospect of success on the s. 8 claim. This procedure was upheld by the Court of Appeal.

[15] In *Frederickson*, unlike in *Orr*, the accused had sought a voir dire for the purpose of making a sub-facial challenge to the search warrant and the right to cross-examine the affiant. The trial judge conducted a Vukelich hearing, after which he concluded that the accused had not met the threshold required for a voir dire. Assessing the application for cross-examination, the trial judge, however, made an error by considering the factual basis referred to in evidence given in a previous voir dire.

[16] The court said, at para. 29, that to obtain leave, it must be shown that the proposed cross-examination will elicit testimony that could discredit the existence of a pre-condition to the issuance of the warrant, such as reasonable and probable grounds (*R. v. Garofoli*, [1990] 2 S.C.R. 1421 at p.1465; *R. v. Pires*; *R. v. Lising*, 2005 SCC 66 at para. 10; and *World Bank Group v. Wallace*, 2016 SCC 207 at 1190. The court goes on to say at para. 29 that:

Cross-examination that can show only that some of the information relied on by the affiant is false will not likely be useful unless an inference can be made that the affiant knew or ought to have known that the information was false. A sub-facial challenge can still be made if leave to cross-examine is not granted (*Pires* at para. 32; *R. v. Sadikov*, 2014 ONCA 72 at paras. 39-41,44).

[17] At para. 32 in *Frederickson*, the court said that:

While the defence does not have to meet the Garofoli test in a Vukelich hearing, a trial judge must consider it in order to determine whether the defence has shown a reasonable basis on which the search warrant can be challenged and the court could find a breach of s. 8 of the Charter.

And, at para. 33, as was done here:

... the defence must state, with reasonable particularity, the grounds upon which the application is made.

[18] Justice Fisher, in *Frederickson*, directed that the court should evaluate the best case for the defence based on expunging every impugned paragraph in the ITO and adding what the accused contended ought to be included. Justice Fisher went through that exercise, redacting impugned paragraphs and adding passages that the defence submitted were missing. She concluded that the ITO with redactions and additions, based on defence submission, was sufficient on its face and on the facts such that an issuing justice could have issued a warrant. The court concluded that the appellant's proposed attack on the issuance of the search warrant had no reasonable prospect of success. Thus, there was no reasonable likelihood that an evidentiary hearing could assist in determining whether the appellant's s. 8 Charter rights were breached. The court saw no purpose at the Vukelich stage for an evidentiary hearing or for cross-examination of the affiant. The refusal to hold a s. 8 voir dire was upheld.

[19] In this case, the accused relies on *R. v. Belanic*, 2019 BCSC 1411, where Justice Riley was engaged in a Garofoli hearing to determine the validity of a search warrant. Justice Riley set out applicable legal principles for assessing the facial validity of an ITO. He said at para. 12 that the rule against narrative underlies the requirement to properly source information set

out in an ITO. The issuing justice must be furnished with information necessary to properly assess the credibility and reliability of the facts presented in the ITO. At para. 14, Justice Riley explains the rule against conclusory statements and says that it is trite law that an affiant cannot simply recite conclusory statements without setting out any factual underpinning.

[20] The accused also relies on *R. v. Abo Zead*, 2020 BCSC 1970 which is an oral ruling of Justice Sharma on the facial validity of a warrant for cellphones. In that case the Vukelich threshold had been met and a six-day voir dire was set. The sole issue in the ruling was whether the ITO facially contained information sufficient to provide reasonable grounds required to grant the two search warrants. Justice Sharma summarizes principles for review of the ITO starting with the rule against conclusory statements. She also said, at para. 44, that a judge is entitled to draw inference from facts set out in the ITO, but those inferences must be reasonable and must be based on facts contained within the ITO.

[21] The accused also cites *R. v. Pires*; *R. v. Lising*, 2005 SCC 66 where the Supreme Court of Canada approved the Garofoli threshold requiring the defence to show a reasonable likelihood that cross-examination of an affiant will elicit testimony of probative value for consideration by the reviewing judge. It is grounded in two basic principles of evidence: reliance and materiality. The court held that the rule does not infringe the right to make full answer and defence. There is no constitutional right to adduce irrelevant or immaterial evidence. The leave requirement strikes an appropriate balance between the entitlement to cross-examine as an aspect of the right to make full answer and defence and the public interest in a fair, efficient use of judicial resources. At para. 40, the Court said that:

... in determining whether cross-examination should be permitted, counsel and the reviewing judge must remain strictly focussed on the question ... determined on a Garofoli review -- whether there is a basis upon which the authorizing judge could grant the order. If the proposed cross-examination is not likely to assist in the determination of this question, it should not be permitted.

[22] The Crown's position is that even if all of the accused's challenges, both facial and sub-facial, to the ITO were successful, there is still sufficient grounds on which the search warrant could be granted. The Crown has illustrated this by, for the purpose of argument only, creating a revised ITO, redacting the portions of the ITO which the accused objects to and adding words to the ITO that were arguably admitted. I am going to refer to this as the "Vukelich ITO". The Crown submits that what is left is an ITO that could still support the granting of the search warrant.

[23] Although this is a Vukelich hearing, counsel for the accused has made his whole argument both on the facial and sub-facial validity of the ITO. I will therefore review the ITO and his argument in full, as was done in *Frederickson* in the Court of Appeal. I will evaluate the best case for the defence based on expunging every impugned paragraph in the ITO and adding what the accused contended ought to be included and determine whether with those

redactions and additions the issuing justice could have issued the warrant. If I find that it could, then I must conclude that the accused's attack on the issuance of the search warrant has no reasonable prospect of success.

Review of the ITO

- [24] The ITO is a 24-page affidavit sworn by Constable Mike Fudge, the affiant, who describes himself, at para. 2, as a peace officer employed by the RCMP for 11 and a half years, and is currently posted to the Nanaimo RCMP detachment Projects Unit, which primarily investigates drug offences. Similarly, the affiant describes the other peace officers who have provided him with information. The ITO says, at paras. 5 and 7, that Constable Ilioi and Corporal Nguyen are court-qualified drug experts. The accused submits that these descriptions of experience and expertise are insufficient to support the many conclusions that the affiant makes within the ITO.
- [25] The Crown objects to this submission, saying that the accused is asking the court to weigh the evidence and comment on its reliability. That is not the role of the reviewing judge, I agree. My role is to determine whether the issuing justice could have issued the warrant and not to determine how much weight should be placed on an opinion.
- [26] Under the heading "Summary of Investigation" at para. 16, the ITO makes reference to the RCMP attending at a residence where three people were found deceased, suspected of having overdosed on drugs. The accused submits that this incident is not relevant to the current investigation and should be excised. I agree that on a facial validity challenge this section would be excised and is not relevant. The accused seeks leave to cross-examine the affiant on his reasons for including this irrelevant information. I have considered whether anything would be gained by asking if the inclusion of this evidence was intentional to bolster the seriousness of the investigation. If the affiant were to say yes, I believe the remedy would be excision, not quashing the warrant. The irrelevant facts may be inflammatory but they are true.
- [27] At para. 17 the ITO refers to another investigation where a male was located deceased on June 14, 2020, and whose toxicology results tested positive for Carfentanyl. As will be seen below, this investigation and the death have some relationship to the current investigation because the individual's cellphone was searched and on it was a telephone number subsequently linked to the accused.
- [28] In the Vukelich ITO, at para. 17, the Crown has redacted the words "an additional" and "another", and at para. 18 on the same topic the words "from both sudden death scenes" were redacted.

- [29] At para. 20 of the ITO there is a reference to the search incidental to arrest and the police locating \$325 Canadian currency in Dubensky's pants pocket. The accused submits that the search incidental to arrest locating \$325 in Canadian currency in his pants pocket should be excised because of the s. 10(b) breach I found in a previous ruling. I will deal with that submission separately under a s. 24 ruling in voir dire number 1.
- [30] At para. 29, under the heading "Initiation of Investigation (Drug Overdose x 4)", the accused objects to the reference to drug overdose times four and to the June 11 RCMP attendance at the first death scene where overdoses were suspected. I agree that that attendance at the death scene of those three overdose deaths was unrelated to this investigation. On a facial validity challenge, because of irrelevance and possible inflammatory nature, it is likely, in my view, that the following would be excised:
- (a) the portion of the heading that says "drug overdose x 4";
 - (b) all of paragraph 30(a) through (e);
 - (c) the reference in paragraph 32 to the names of the three deceased individuals;
 - (d) the reference at paragraph 33 to five cellular telephones that were seized from inside Unit 101 - 407 Selby Street, as they relate to the death of the three individuals which is irrelevant to this investigation.
- [31] The accused submits that not only are the deaths of these three individuals not related to this search, but also appear to be an irrelevant attempt to bolster the seriousness of this investigation. The accused submits that the reference to those deaths of those three individuals is intertwined and hard to separate from the ITO.
- [32] I agree with the submission that the reference to the deaths of these three individuals is irrelevant and may bolster or inflame the seriousness of the investigation, but these references can be easily extracted, as demonstrated in the Crown's Vukelich ITO.
- [33] On p. 4, para. 18 of the ITO, the affiant describes a text message on the deceased individual's, Mr. Mountain's, phone. The ITO says that the message was sent from Mr. Mountain's phone. The affiant omitted the fact that the text shows the red words "failed" underneath it, which indicates to me that the text was drafted but failed to send. This is an error that could be amplified on review if a sub-facial challenge were allowed.
- [34] In the Vukelich ITO, the Crown has inserted the word "failed" before the word "sent" and has replaced the word "arranging" with the words "attempted to arrange". This change was also made at p. 9, para. 34(b)(i). The words "sent from" were changed to "composed on". This correction is also made at para. 1 on p. 9.
- [35] Also at p. 9 of the ITO, the affiant states two opinions [as read in]:

I believe that this text message was sent by Mountain to his drug dealer arranging to meet to purchase drugs. My belief is strengthened in that this was the last text message sent on Mountain's phone prior to his remains being located. Additionally, the Money Maxx pawn shop is located a very short distance, approximately a two-minute walk, from where Mountain's remains were located.

[36] The accused argues that these conclusions are not supported by the evidence. There is no reference to which pawn shop Mr. Mountain was referring, and the message was never sent.

[37] In the Vukelich ITO, this entire opinion has been redacted, as has the next paragraph that starts with the words "I believe that Mountain purchased drugs" and ends with the word "overdose".

[38] The accused submits that the affiant and Constable Fowler examined surveillance video from the music store attached to the pawn shop and saw no footage of Mr. Mountain or the accused on the date in question. The accused submits that he should be able to cross-examine the affiant on the omission from the ITO. He failed to reference the fact that the text message failed to send, and he failed to include the information of lack of surveillance video observed at the scene. He also wished to cross-examine the affiant on the fact that there are numerous other pawn shops that exist in Nanaimo. If the affiant were cross-examined on all these points, I believe the remedy to the accused would be to excise these references. The Crown has excised these references in the Vukelich ITO.

[39] At p. 12 of the ITO, the affiant says [as read in]:

Based on the phone number [xxx-xxxx] being confirmed associated to Dubensky approximately 10 days after Mountain texted that same phone number advising he was at the pawn shop, I believe that Mountain was texting Dubensky advising him that he was at the pawn shop, and additionally I am aware that 31 Prideaux Street is approximately 150 feet from the Money Maxx pawn shop, the pawn shop I believe Mountain was referring to in this text message.

[40] The accused submits that there is no foundation for this statement of belief and this opinion should be excised. In the Vukelich ITO, the entire opinion has been excised.

[41] At para. 39 the ITO references the surveillance of the accused at the New Hope Centre meeting with another man. It describes observations made by Constable Ilioi, who advised other police over the radio that this meet was consistent with a drug transaction. It also provides information that Constable Ilioi is a court-qualified drug expert. After that statement, the affiant gives an opinion based on his experience as a police officer and drug investigator. He agrees with Constable Ilioi's interpretation of the meet. His opinion, however, goes beyond that of Constable Ilioi. Constable Ilioi says it is consistent with a drug transaction. The affiant says he believes the male wearing the maroon shirt purchased drugs from Dubensky.

[42] The accused seeks to redact this opinion from the ITO. There was no hand-to-hand exchange viewed, there was no drugs found or money viewed. I believe the last sentence of this interpretation would be redacted on a facial review of the ITO. The entire opinion under para. 39(3)(a) at p. 14 has been redacted in the Vukelich ITO.

[43] The second opinion is stated at p. 14 where the affiant references a fact that the area is well known for drug users to frequent Nanaimo. The accused submits that the following sentence should be redacted on a facial review, and it says [as read in]:

In fact, this address is immediately next door to where the triple drug overdose occurred on June 11, 2020, with this investigation.

I agree, for reasons stated above, that the reference to the three overdoses would likely be redacted on a facial review. The entire opinion is redacted in the Vukelich ITO.

[44] Below that is an indented item number (1) where the affiant says [as read in]:

Corporal Nguyen observed a clear hand-to-hand transaction between Dubensky and the older male, which lasted less than 10 seconds.

The accused says that Corporal Nguyen's statement on the surveillance report, which he would use if permitted to cross-examine the affiant, is that it was less than a minute. I do not believe anything turns on the difference between "less than a minute" and "10 seconds". Nonetheless, in the Vukelich ITO the words "which lasted less than 10 seconds" has been redacted.

[45] The next reference at p. 15, para. 39(2)(f), is to a surveillance observation at 1913 hours where Dubensky was observed walking out of the driveway of 31 Prideaux Street and walking south on Prideaux Street. At para. (f)(i) the affiant says [as read in]:

Constable Ilioi observed Dubensky walk directly to the passenger side of a red Ford Focus.

The accused submits that if he were permitted to cross-examine the affiant on this evidence using the surveillance report, it would show that this statement is inaccurate. Constable Ilioi's statement is that Dubensky approached the Ford Focus and not that he walked directly to the passenger side of the Ford Focus. In the Vukelich ITO, the words "walked directly to" have been replaced with the word "approached".

[46] The affiant then provided his opinion at the bottom of p. 15, stating, based on his experience as a police officer and drug investigator, he agrees with Constable Ilioi's interpretation of the meet. He believes that the meet was consistent with a drug transaction. He then goes further, however, and opines that the occupant of the red Ford Focus purchased drugs from Dubensky. The accused objects to the affiant going further with his opinion than did the officer who observed the interaction. It is likely that the last sentence would be redacted on a facial challenge. In the Vukelich ITO the entire opinion has been redacted.

- [47] The affiant connects the red Ford Focus with the May 27, 2020 drug complaint regarding the same vehicle, where the complainant complained that the occupants were using drugs and the female had a needle still in her arm. The complainant recalled the licence plate of the vehicle and the fact that there was a Rottweiler inside the vehicle. The accused complains that the affiant jumped to a conclusion that the occupants of the vehicle were the same occupants as were in the vehicle on May 27, 2020, because of the Rottweiler. The accused submits that this is an unreasonable connection for the conclusion drawn. In the Vukelich ITO the entire opinion has been redacted.
- [48] The accused also objects to the opinion at the bottom of p. 16 of the ITO where the affiant gives opinions about Herb Mountain texting Dubensky and referring to the Money Maxx pawn shop. In the Vukelich ITO that entire opinion has been redacted.
- [49] At para. 40, the affiant deposes that Constable Fowler emailed Nanaimo Probation Officer Jenna Beck and asked her if probation had an updated address for Michael Dubensky. The affiant includes information about a current recognizance which the accused says is prejudicial and irrelevant. In the Vukelich ITO the three words after "recognizance" are redacted.
- [50] At para. 40(c), the affiant refers to members attending 17 - 31 Prideaux Street and Constable Fowler learning from the initial call-taker remarks that Unit 17 is in the basement of 31 Prideaux Street. This call had nothing to do with Mr. Dubensky, who was not living there at the time, but it is relevant because it indicates where Unit 17 is located in the building. I note that Unit 17 does not show up on the floorplan, and so it is relevant for the police to identify the location of Unit 17. It was some time later that the probation officer advised them that they had an address for Mr. Dubensky at Unit 17 - 31 Prideaux Street.
- [51] The accused seeks to cross-examine the affiant on the details of the June 26th surveillance because it only discloses the one incident that was consistent with a drug transaction and all of the other comings and goings Mr. Dubensky had on that day. Even if these other comings and goings were included in the ITO, I do not believe they are relevant or that the added information would undermine the validity of the search warrant.
- [52] The accused notes that there is no observation of him walking in or out of Unit 17 - 31 Prideaux Street. He is, however, seen walking to and from 31 Prideaux Street, he is seen emerging from the stairs around the area where Unit 17 is located, and the probation officer says they have an address for him at 17 - 31 Prideaux Street. I believe there is a sufficient connection to the accused and Unit 17.

- [53] The accused seeks to cross-examine the affiant on his description of Constable Devoe's observation on June 26, 2020, immediately before the arrest of the accused and Mr. Mickey. The accused submits that there are certain details left out of the report. Constable Devoe's notes will show, if he is permitted to cross-examine the affiant, that Mr. Mickey had his back to her. Cross-examination of the affiant would not likely assist in the argument, given that this information came from a sub-affiant.
- [54] The accused seeks to cross-examine the affiant on the fact that he omitted a reference to Mr. Mickey's statement from the ITO. Apparently after arrest Mr. Mickey provided a statement, that was sent to Officer Fowler, that he did not purchase the drugs that were in his pocket from Mr. Dubensky. The Crown submits this statement had not been obtained by the time the ITO was sworn. She also submits that it is not unusual for an arrested person to deny they purchased drugs or from whom they had purchased the drugs. This statement was not significant enough to withdraw the ITO. For the sake of this review, I have considered adding a statement that Mr. Mickey denied purchasing the drugs from Mr. Dubensky. I agree with the Crown's submission that even with the statement the justice could still issue the warrant. It is not my role to weigh the statement.
- [55] In the Vukelich ITO, the Crown has also redacted the following:
- (a) from paragraph 42(b), the words "and frequenting areas known for drug use within the City of Nanaimo";
 - (b) the opinion after paragraph 42 about where Herbert Mountain arranged to meet Dubensky to purchase drugs;
 - (c) from paragraph 44(ii), the reference to the container containing rolled currency totalling \$325, which I have not ruled yet on;
 - (d) the opinion of the affiant at paragraph 44 where Constable Devoe has seen Dubensky place something he received from Mickey in his pocket;
 - (e) the opinion of the affiant that Dubensky placed something in the hoodie pocket of Mr. Mickey; and
 - (f) the opinion related to drug quantities and terms;
 - (g) at paragraph 46(i)(1), another reference to the \$325;
 - (h) two opinions of the affiant at paragraph 47(i) and (ii) related to the common drug trafficker practice.
- [56] The Crown has produced the Vukelich ITO making all the redactions and additions listed above, and submits that even if all those excisions were successful on the facial or sub-facial challenge to the ITO, it would not undermine the validity of the ITO, this warrant could have still been issued.

- [57] I have confirmed with counsel for the accused that the Vukelich draft ITO does incorporate all of the changes they wish to raise and that they have made their full argument before me and have not held back the argument for our Garofoli hearing.
- [58] I have reviewed the Vukelich ITO which excises all the misstatements and adds omissions as suggested by the accused's counsel. For my analysis, I have included a statement from Mr. Mickey. I conclude that the issuing justice could find that there was a reasonable ground to believe a drug offence had been committed, namely trafficking, and that the drugs and other evidence of that offence would be located at Unit 17 - 31 Prideaux Street in Nanaimo.
- [59] The accused has made numerous meritorious arguments about the flaws in the ITO. However, even if I were to accept every argument made by the accused, I find there is no reasonable prospect of success on this s. 8 claim.
- [60] The accused says the application to cross-examine should not be determined at this Vukelich threshold hearing. I disagree. In this hearing the accused has made his full argument on the facial and sub-facial validity of the ITO and on his goals in seeking cross-examination of the affiant. I have found that the threshold has not been met, and so there will be no evidentiary hearing or voir dire in which he seeks leave to cross-examine.
- [61] In doing so, however, I considered the seven areas on which the accused wishes to seek leave to cross-examine, and I am going to list them here:
- (1) the motivation for including irrelevant and inflammatory evidence about the three prior overdose cases;
 - (2) admissions of evidence that the text on Mountain's cellphone failed, that the surveillance from the music store did not show either Mountain or Dubensky on the day of Mountain's death or the fact that there are numerous pawn shops in Nanaimo;
 - (3) the discrepancy in Corporal Nguyen's observation of a meet of less than one minute and the affiant's evidence that it was 10 seconds;
 - (4) the misstatement of Constable Ilioi's observation that Dubensky walked directly to the passenger side of the vehicle rather than approached the vehicle;
 - (5) the surveillance on June 26th that shows Mr. Dubensky coming and going and running errands and not just making suspicious deliveries;
 - (6) the discrepancy between the affiant's statement and Constable Devoe's notes of her observations on June 26; and
 - (7) the fact that Mr. Mickey's statement was missing.

I have concluded that items (1), (2), (4) and (6), if successful, would result in a redaction of evidence, and that items (3), (5) and (7) would not likely make a difference in the analysis.

[62] Although this is the first step at the Vukelich hearing, I see no purpose in entering into a Garofoli hearing, given that I have already considered all the arguments and ruled that the Vukelich ITO would still disclose a reasonable basis on which a warrant could have been granted.

[63] The accused's s. 8 challenge to the search warrant is therefore dismissed.

"B. M. Young, J."

The Honourable Madam Justice Young

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