

CANADA / JUDGMENT

R. v. Gallant

2023 BCSC 1696

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Supreme Court of British Columbia

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2023 BCSC 1696 R. v. Gallant

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Gallant,

2023 BCSC 1696

Date: 20230922

Docket: NA87685

Registry: Nanaimo

Rex

v.

Michael William Gallant, and Melissa Anne Edwards

Before: The Honourable Justice Marzari

Oral Ruling on Voir Dire #1

Re: Information to Obtain

Counsel for the Crown:

J. Rutherford

Counsel for the Accused Michael William Gallant:

K. L. Waugh

K. Kerr-Donohue

Counsel for the Accused Melissa Anne Edwards:

K. D. Bradshaw

Place and Date of Trial/Hearing:

Nanaimo, B.C.

September 11-15, 18-22, 2023

Place and Date of Judgment:

Nanaimo, B.C.

September 22, 2023

Note: Third party names have been initialized for the purpose of publication.

INTRODUCTION

- [1] Mr. Gallant and Ms. Edwards were charged with possession for the purpose of trafficking in controlled substances under s. 5(2) of the Controlled Drugs and Substances Act, S.C. 1996, c. 19 [CDSA] following a search of the upper unit of 770 Brechin Road, Nanaimo, BC conducted pursuant to a search warrant issued on July 30, 2020 (the "Warrant"). Ms. Edwards and Mr. Gallant argue that the search was a violation of their rights under section 8 of the Canadian Charter of Rights and Freedoms (the "Charter") on the basis, in part, that the Warrant was insufficient to support the search, and therefore invalid. They seek exclusion of the items found as a result of that search pursuant to s. 24(2) of the Charter.
- [2] This constitutional challenge to exclude the evidence obtained through use of the search warrant was the subject of a voir dire, and these are my reasons on that voir dire.

THE CHALLENGE TO THE WARRANT

- [3] I start by noting that because a search warrant is presumed to have been properly issued, the accused bears the burden of proving otherwise: *R. v. Wilson*, 2011 BCCA 252 at para. 63.
- [4] In this respect, the two accused argue that the statutory preconditions for issuing a search warrant pursuant to section 11 of the CDSA and s. 487.1 of the Criminal Code, R.S.C. 1985, c. C-46 [Code] were not met.
- [5] These statutory preconditions under the Code are essentially that there are reasonable grounds to believe that an offence has been committed; and that there are reasonable grounds to believe that evidence in relation to that offence will be found in the location to be searched.
- [6] To issue a warrant under s. 11 of the CDSA, the requirements are augmented and essentially require reasonable grounds to believe that a drug offence has been committed, that the things to be searched for are either drugs or drug-related items as set out in s. 11, and those things are in the place or places to be searched.

[7] Regardless of which provision is relied upon, the requirement is that the issuing justice must be satisfied, on sworn information, there are reasonable grounds to believe that:

- a) an offence has been committed; and,
- b) that evidence in relation to that offence will be found in the location to be searched.

[8] In this case, the offence alleged to be committed (the "Named Offence") as stated in the Information to Obtain ("ITO"), is as follows:

Michael GALLANT, on or about the 30th day of July at or near Nanaimo in the province of British Columbia, did unlawfully possess a controlled substance, to wit: Suspected Fentanyl for the purpose of trafficking contrary to section 5(2) of the Controlled Drugs and Substances Act.

[9] The location sought to be searched is "the upper unit of 770 Brechin Road". Ms. Edwards and Mr. Gallant focus their challenge primarily on whether the ITO set out sufficient evidence to support the reasonable grounds to believe that evidence in relation to the Named Offence would be found in this location.

[10] Furthermore, Ms. Edwards and Mr. Gallant challenge the search warrant facially and sub-facially as follows:

- (a) That the ITO is facially invalid, such that the issuing justice could not have concluded that there were reasonable grounds to justify issuing the search warrant; and,
- (b) That the ITO is sub-facially invalid, in that the ITO failed to make proper disclosure, and contained material errors, and as a result, there was insufficient information to permit the issuing justice to conclude that there were reasonable grounds to justify issuing the search warrant when that info is taken into account.

[11] In terms of facial validity, the accused point to more than 50 statements in the ITO that they say should be excised, or should be given little to no weight on this review. They argue that what is left is insufficient to support the issuance of the warrant on its face.

[12] In terms of the sub-facial challenge, Ms. Edwards and Mr. Gallant submit that the ITO did not provide full, fair and frank disclosure of material facts, and contained inaccurate, misleading and false statements. Once appropriate excisions and additional evidence, revealed through the cross-examination, are taken into account, they argue that the requisite grounds did not exist for the issuance of the warrant.

[13] On these bases they seek a declaration that the search warrant was invalid, and that the search violated their rights under section 8 of the Charter.

LEGAL PRINCIPLES

- [14] It is uncontroversial that that the judicial justice who issued the Warrant was required to consider whether the ITO set out reasonable grounds to believe both that the Named Offence had been committed, and that the stated evidence of that offence would be found in the location stated. On its face, the warrant issued by the Judicial Justice indicates that she found these reasonable grounds to exist.
- [15] It is not controversial that reasonable grounds contemplate a "credibly-based probability" or "reasonable probability". It requires more than suspicion, but less than the civil standard of a balance of probabilities: *Stoughton v. Canada (Attorney General)*, 2022 BCCA 212 at para. 28; and *R. v. Le*, 2014 BCCA 166 at para. 36.
- [16] In *R. v. Belanic*, 2019 BCSC 1411, Justice Riley of this court summarized many of the key legal principles applicable to the application of this test in the context of the facial challenge to the ITO as follows:
- [7] In applying this test, I am obliged to consider the totality of the circumstances set out in the ITO. The ITO must contain facts that could satisfy the issuing justice that the statutory preconditions for granting the warrant were met. The two statutory preconditions for obtaining a search warrant under s. 487 of the Criminal Code are the requirement to show reasonable grounds to believe that an offence has been committed, and the requirement to show reasonable grounds to believe that evidence of that offence will be located at the place to be searched: see *R. v. Morelli* at paragraph 39. In the case at bar, I am dealing with a warrant issued under s. 11 of the Controlled Drugs And Substances Act, S.C. 1996, c. 19 [the CDSA]. In this context, I would restate the key statutory requirements as follows: (i) the requirement to show reasonable grounds to believe that there has been a contravention of the CDSA, in other words that a drug offence has been committed; and (ii) the requirement to show reasonable grounds to believe that a controlled substance and/or evidence of a controlled substance will be located in the place to be searched.
- [8] The reasonable grounds standard does not require proof of a prima facie case, much less proof beyond a reasonable doubt. Rather, the reasonable grounds standard contemplates a credibly-based probability or reasonable probability. It has been described at the point at which suspicion gives way to credibly-based probability: *R. v. Vu*, 2011 BCCA 536 at para. 39, affirmed on this point, *R. v. Vu*, 2013 SCC 60 at para. 9 to 18; see also *R. v. Liu*, 2014 BCCA 166 at para. 37.
- [9] The requirement to consider the totality of the circumstances means that I cannot simply examine each aspect of the grounds in isolation. I must consider whether, in light of all the grounds taken together or viewed cumulatively, the issuing justice could have granted the warrant: *R. v. Whitaker*, 2008 BCCA 174 at para. 41. As explained in *R. v. Lam*, 2002 BCCA 99 at para. 10, "[i]t is important that the Information be examined as a whole and not one piece of evidence at a time, because each piece of evidence colours other pieces of evidence and a fuller picture emerges by considering all the evidence together."

- [10] The reviewing judge must also take into account that an authorizing justice may "draw reasonable inferences from the evidence in the ITO". In keeping with the deferential standard that governs the review, the question is not whether the reviewing judge would draw a particular inference, but whether the issuing justice could reasonably have drawn the suggested inference, based on the contents of the ITO: *R. v. Vu*, 2013 SCC 60 at para. 16 to 17.
- [11] With regard to quality of drafting, I am guided by *R. v. Sanchez* (1994), 93 C.C.C. (3d) 357 (Ont. S.C.), wherein Hill J. stated that: "[t]he specificity and legal precision of drafting expected of pleadings at the trial stage is not the measure of quality required in a search warrant information". To the same effect are the remarks of Gibbs J.A. in *R. v. Melenchuk* (1993), 24 B.C.A.C. 97 at para. 15, explaining that it would be "impractical to expect of an officer swearing an information in these circumstances the precise prose of an Oxford grammarian, the detailed disclosures of a confessional and the legal knowledge of a Rhodes scholar." To paraphrase the remarks of Campbell J. in *R. v. Boussoulas*, 2014 ONSC 5542 at para. 12, while "reasonable latitude" should be accorded to the drafter of an ITO, considering the precision of the language, such latitude can never be extended so far as to relieve the affiant of his or her duty to act with "integrity and reasonable diligence", mindful of the duty to make full and frank disclosure in an ex parte proceeding.
- [12] There is another important concept to be borne in mind when assessing the facial sufficiency of the grounds in an ITO. That concept is the rule against narrative, which underlies the requirement to properly source information set out in an ITO. It is aptly stated in *Re: Criminal Code*, [1997] O.J. No. 4393 (O.N.S.C.) at paragraph 8:

Firstly, and most importantly, any factual assertion by the applicant within the four corners of the affidavit must be sourced to some investigative resource. Otherwise, the applicant breaches what is sometimes referred to as the rule against narrative. It is insufficient for an applicant to simply state conclusions, opinions and facts without providing the court the source or origin for [those] conclusions, opinions or facts. The credibility and reliability of the assertions are inextricably linked to the investigative resources themselves.

- [13] As this passage suggests, the issuing justice must be furnished with information necessary to properly assess the credibility and reliability of the facts presented in the ITO. Although an affiant is permitted to rely on hearsay, he or she is expected to set out the source of any such hearsay averments so that the reader is able to properly evaluate the credibility and reliability of that source. For example, where the affiant states that he or she obtained information from the review of a police file without being more specific as to the originating source, this will often be problematic because it will not be possible to determine whether the particular factual assertion originated with a police observation, a witness statement, an informer tip, a citizen complaint, or some other source of information. Without knowing the source of the information, the reader cannot make any assessment of the credibility and reliability of the source, making it difficult or sometimes impossible to determine whether the information is capable of supporting a reasonable belief.

- [14] Another important concept is the rule against conclusory statements. As stated in *R. v. Sunner*, 2017 BCSC 2445 at para. 31, "[i]t is trite law that an affiant cannot simply recite conclusory statements that are material to the application without setting out any factual underpinning allowing the issuing justice to evaluate the factual basis for the conclusion", citing *Restaurant Le Clémenceau Inc. v. Drouin*, [1987] 1 S.C.R. 706.
- [17] Justice Riley concludes at para. 15 by noting that the use of the term "informant" for the officer who prepares the application can sometimes cause confusion. Instead he uses the term "affiant", and I will do the same.
- [18] As recent as the *Belanic* decision is, there have at least three decisions of our Court of Appeal since that decision (*R. v. Slemko*, 2020 BCCA 207; *R. v. Le*, 2021 BCCA 52 [Le 2021]; and *R. v. Bridgen*, 2022 BCCA 429) as well as two decisions of the Court of Appeal for Ontario on relevant points in this hearing (*R. v. Ilia*, 2023 ONCA 75; and *R. v. James*, 2019 ONCA 288). The *James* case went as far as the Supreme Court of Canada, where it was decided by the majority essentially for the reasons stated by Justice Nordheimer in the Court of Appeal for Ontario on the s. 8 issue: *R. v. James*, 2019 SCC 52 [James SCC].
- [19] From these more recent decisions, I discern a theme, warning reviewing justices, such as myself, from weighing individual pieces of evidence in the ITO at an early stage, beyond the threshold question of excision of that information, or the requirement to amplify to address a lack of full, frank or fair disclosure on a sub-facial review. This is perhaps most clear in the decision of the Supreme Court of Canada adopting the decision of Nordheimer JA in *James*:
- [52] In my view, the trial judge committed three errors of law in reaching his conclusion. First, and contrary to what he recited in his reasons as the basic principles applicable to his task, it is clear that the trial judge did not in fact employ the proper test for reviewing a judicial authorization. Rather than deciding whether or not the issuing justice of the peace could have granted the search warrant, the trial judge proceeded to review and weigh the evidence in the ITO afresh and then decided that he would not have issued the search warrant. That is not the proper test:
- [Citations omitted. Emphasis added.]
- [20] Although this caution is not a new one, and is reflected in the principles summarized above in *Belanic*, and rooted in our Court of Appeal's decisions in *R. v. Lam*, 2002 BCCA 99; *R. v. Whitaker*, 2008 BCCA 174 and others, the theme is present also in *Le* 2021; *Slemko*; and *Bridgen*.
- [21] In *Slemko*, at paragraph 53, our Court of Appeal quoted and adopted a large portion of *R. v. Sadikov*, 2014 ONCA 72 as written by Justice Watt, wherein the Justice, having canvassed the history of the relevant jurisprudence, concluded the following regarding the role of the reviewing Court:

- [84] The scope of warrant review is narrow. The review is not a de novo hearing of the ex parte application. The reviewing judge does not substitute his or her view for that of the issuing judge [citations omitted]. The standard is whether there is sufficient credible and reliable evidence to permit a justice to find reasonable and probable grounds to believe that an offence has been committed and that evidence of that offence would be found at the specified time and place of search: Morelli, at para. 40. Said in another way, the test is whether there was reliable evidence that might reasonably be believed on the basis of which the warrant could - not would - have issued: Morelli, at para. 40; Araujo, at para. 54; and Garofoli, at p. 1452.
- [88] It is no part of the reviewing judge's mandate to determine whether she would issue the warrant on the basis of the amplified record. Nor is it the reviewing judge's role to draw inferences, or to prefer one inference over another. The inquiry begins and ends with an assessment of whether the amplified record contains reliable evidence that might reasonably be believed on the basis of which the warrant could have issued: Morelli, at para. 40

[Emphasis added.]

- [22] These cases warn against a close parsing and weighing of individual aspects of the ITO, beyond the threshold question of their relevance and reliability. The weighing and assessment of sufficiency is done at the end, in light of all the information that remains.
- [23] Ultimately, the cases are in accord that the reviewing judge must consider the ITO on a practical, non-technical, and common-sense basis, and determine whether, on the totality of the evidence set out in the ITO (excising any unreliable, unsupported or misleading information on the facial review, and adding additional information required for full, fair and frank disclosure on the sub-facial review), provides sufficient information upon which the issuing judicial justice could have issued the warrant.

REVIEW OF THIS ITO

- [24] In this case, during the course of argument leading up to cross-examination of the affiant, and after cross-examination of the affiant, the Crown agreed with counsel for the accused to certain excisions from the ITO on the basis that they lacked factual foundation set out in the ITO or were otherwise undeserving of any weight.
- [25] During the voir dire I reviewed these proposed excisions at various times, and agreed that they were appropriate. While some of these concessions were made before cross-examination, others were made after cross-examination. Nevertheless, these excisions were made on a basis which, in my view, affects the facial review as well as the sub-facial review.
- [26] In addition, both leading up to the cross-examination of the affiant, and after cross-examination, it was agreed that some modification to the ITO would be appropriate for the sub-facial review, if required. Counsel helpfully conferred and proposed specific wording

addressing a number of specific modifications (which the Crown calls "amplifications" and the defence calls "additions") to address information that was available to the affiant at the time, but not included in the ITO. I have also reviewed these and find that the proposed changes are appropriate for the sub-facial review.

- [27] The ITO with the agreed upon changes was marked as Exhibit 8 in this voir dire. It addresses many, but not all, matters that the accused argue should be excised, disregarded or filled-in on the facial or sub-facial review of the ITO.
- [28] I will therefore proceed by reviewing the ITO on its face, with a view first as to whether it contains any additional information that is not reliable or relevant upon which the Judicial Justice might have concluded that it disclosed reasonable and probable grounds to issue the Warrant. In addition to those aspects of the ITO that have been excised with the consent of the Crown (as shown on Exhibit 8), I will also consider whether there is additional information challenged by the defence that ought to be excised or disregarded for the purposes of the facial review.
- [29] I will then review the information I am left with as a whole, to consider whether the ITO disclosed sufficient information on its face to support the issuance of the Warrant by the Judicial Justice.
- [30] If I conclude that there is sufficient evidence on the face of the ITO to support the issuance of the warrant, I will turn to the question of whether the ITO ought to be excised or amplified (or otherwise modified) based on cross-examination of the affiant (or by consent of the Crown) to reflect an accurate picture of the information known to the affiant at the time of the ITO being sworn and the affiant's duty of full, fair and frank disclosure.

The FACIAL REVIEW

- [31] Mr. Gallant and Ms. Edwards challenge the facial validity of the ITO on a number of grounds, as well as attacking the weight that could be given to most of the individual paragraphs of information it contains. These broad grounds include the following main themes that I discern from their argument:
- a) The information provided by the confidential informant should be given no weight, being made up primarily of bald assertions with little to no detail, probative corroboration or source information;
 - b) The affiant makes conclusory statements unsupported by the evidence, including his beliefs about whether activities are "consistent" with drug trafficking activity, and these statements should generally be disregarded;
 - c) The surveillance evidence does not provide reliable evidence of drug-trafficking activity associated with 770 Brechin Road;

- d) Some of the alleged past criminal activity of some of the persons seen to be coming and going from the area of 770 Brechin Road is dated or irrelevant and should be excised or disregarded; and
- e) To the extent that the ITO describes and relies upon comings and goings to 770 Brechin Road, it does not provide any or adequate information that these comings and goings are related to the upper unit (that was the subject of the warrant), especially in light of the information, disclosed on the face of the ITO itself, that there is also a lower unit at that address.

[32] I address these issues in order.

Confidential Informer Evidence

- [33] The accused challenge the reliability of information provided by a confidential informer and included in the ITO. They argue that the information contains bald assertions whose reliability or source cannot be assessed, that are lacking in detail, and to the extent that aspects of these statements are corroborated, they do not indicate special knowledge that renders the other information more reliable.
- [34] Some aspects of the informant's information are conceded by the Crown to be without foundation or not corroborated (and these statements have been excised by consent on Exhibit 8).
- [35] However, the Crown argues that the informant's information provided in January and April 2020 that Mr. Gallant is selling drugs, and that in July 2020 he was "still going strong," "lives by Brooks Landing," and selling "side, pants and hard" and "multi-ounces per day," and is "working with [TG]" is detailed, corroborated and reliable.
- [36] R. v. Debot, [1989] 2 S.C.R. 1140 sets out that three factors must be considered in assessing information provided by a confidential informant:
 - a) whether the information is compelling,
 - b) whether the source is credible,
 - c) and whether the investigation has corroborated elements of the information.
- [37] The assessment involves considering all three factors. Weaknesses in one factor can, to some extent, be compensated for by strength in others. In Slemko the Court of Appeal overturned a decision of this court finding that the ITO was insufficient in part on the basis that the reviewing judge failed to "address the informant's evidence in light of the other evidence": at para. 62. Even more recently, in Bridgen, the Court of Appeal for British Columbia reminds us that information provided by confidential informants need not "be probative by themselves of reasonable grounds". Instead, "the reviewing judge must look at the totality of the evidence as amplified, and determine whether the ITO assessed as a whole could have supported the issuance of the warrant": at para. 35. "The cumulative effect of the

evidence is taken into account" and the evidence is not assessed on a piecemeal basis: *R. v. Luong*, 2010 BCCA 158 at para. 17.

[38] Where, as here, the ITO relies on information from a confidential informer, the issuing justice must be able to assess the informer's reliability, including motive and whether the information from the informant was compelling, credible, and corroborated, although weaknesses in one area may be compensated for by strengths in others: at p. 1168. Relevant considerations include:

- a) the degree of detail in the informant's information,
- b) the informant's source of knowledge, and
- c) any indicia of the informant's reliability such as past performance or confirmation of their information from other investigative sources

R. v. Garofoli, [1990] 2 S.C.R. 1421 at p. 1457.

[39] Here, the informant provides some detail about the types of drugs Mr. Gallant is said to be dealing (explained in the ITO to refer to methamphetamine, heroin or fentanyl, and crack cocaine). The informant also provides general information of where Mr. Gallant lives that is consistent with the landlord's information that Mr. Gallant is living at 770 Brechin Road, and which the affiant explains is within 900 meters of Brooks Landing Mall. There is evidence that [TG] entered the house at 770 Brechin Road on July 11, 2020.

[40] Finally, there is evidence that Mr. Gallant is involved in the drug trade, including an observed interaction on July 24, 2020 in downtown Nanaimo where a man was observed to get into and then out of Mr. Gallant's vehicle in less than a minute, and which was believed by the affiant to be consistent with a drug transaction. The ITO also sets out that Mr. Gallant was arrested on an endorsed warrant for drug trafficking on July 8, 2020, and that Mr. Gallant was searched incidental to that arrest and was found to have over \$5,000 in cash in his pockets. Finally, the ITO sets out various surveillance observations with respect to Mr. Gallant's address, including that [DS] was arrested after a 4-minute stop at 770 Brechin Road with .86 grams of suspected fentanyl on July 30, 2020. All of this is believed by the affiant to be consistent with Mr. Gallant's involvement in the selling of drugs.

[41] The ITO also sets out various information that the affiant "came to know" about the confidential informant as indicia of reliability, including that that informant was not paid for the information or received any special benefits or promises in return for the information. Further the confidential informer "has not provided any information to the police that was found to be false, misleading or incorrect" (although not all of the information provided by the informer has been corroborated).

[42] Looking at the three primary considerations all together and without isolating any one point that may be more generally known are weaker than the others, and in the context of the ITO as a whole, I find that the non-excised information stated in the ITO from the confidential

informer is sufficiently compelling, credible, and corroborated to form part of the grounds to support a warrant considered by the issuing justice. The question of whether the informer information, taken together with everything else in the ITO, could have satisfied the issuing justice that there was a basis for issuing the warrant is the ultimate issue which will be addressed at the conclusion of the analysis.

- [43] Having said that, the confidential informant's information is primarily relevant only to the first aspect of the test for a search warrant: whether there were reasonable and probable grounds to believe Mr. Gallant was in possession of fentanyl for the purposes of trafficking (I note that the Named Offence relates only to Gallant in the ITO and not to his co-accused Ms. Edwards). Furthermore, in my view, even without the confidential informant's information, the ITO sets out grounds on its face upon which the Judicial Justice could have formed reasonable grounds to believe that Mr. Gallant had committed the Named Offence.
- [44] The more difficult question on this voir dire is whether there are reasonable grounds upon which the Judicial Justice could have reasonably believed that evidence in relation to that offence would be found in the location to be searched. Main focus of the defence.

Beliefs of the Affiant/Conclusory statements

- [45] In the ITO, Constable Fowler, the affiant, states that he has been a member of the RCMP since February 2014, and a constable with the unit that specifically investigates drug related offences in the City of Nanaimo since May 2019. This means that he had just over 6 years of experience as a peace officer when he swore the ITO on July 2020, of which just over a year was experience in drug related offences in Nanaimo specifically.
- [46] Based on that experience, he has added comments throughout the ITO stating his beliefs with respect to various aspects of the factual investigative information he lays out. Many of these comments are to the effect that certain observed behaviours of Mr. Gallant, or others seen in the area of 770 Brechin Road, were "consistent with" drug related activity. These comments are italicized and placed in square brackets generally below the factual information they relate to.
- [47] The two accused take issue with almost all of these italicized comments. They argue they are conclusory, that they are not supported by the investigative evidence, and they exceed Constable Fowler's stated experience. They argue these comments should therefore be disregarded.
- [48] Defence counsel also object to statements made in the "Investigational Summary" near the beginning, and in the "Search Warrant Justification" towards the end of the ITO, as including conclusory or narrative statements unsupported in those paragraphs by any sourced factual information from the investigation.

- [49] The Crown has agreed that certain statements of belief by the affiant are without support in the investigational facts provided, and has agreed to excise them. Those excisions are noted on Exhibit 8.
- [50] With respect to the Investigational Summary, the Crown argues that this portion of the ITO is for context, and that the conclusory statements made in this section are summaries of information supported by the "Details of the Investigation" that follows. To the extent there is no evidence to support the information in the Summary in the Details section, the Crown has agreed to excise it.
- [51] With respect to the vast majority of the italicized comments that remain, and the Search Warrant Justification, the Crown argues that the affiant was required to attest to his beliefs, and he has done so. Further, the affiant's opinions are not false or intentionally misleading, and excision is therefore not merited. Regardless, the Crown argues that it is the opinion of the issuing Justice that matters, not the opinion of the affiant, and it was for the issuing Judicial Justice to determine how much weight to give the beliefs of a six-year member of the RCMP, with a year on a dedicated drug team in Nanaimo where the offences took place. Further, the Crown argues that many of these italicized beliefs do not rely on special experience, but are common sense.
- [52] Generally, it is established that conclusory statements in an ITO, that contain no factual underpinning, should also be disregarded on review since the absence of a factual underpinning prevents the issuing justice from evaluating the factual basis or the conclusion: Belanic, para. 14.
- [53] To the extent that the introductory section of the ITO contains information that might be relied upon in the ITO, it is apparent that it is the affiant's summary of other information in the ITO. These statements can only be given weight if they are supported by the investigative evidence found elsewhere in the ITO. I consider this point to be obvious on the face of the ITO and misleading to the Judicial Justice.
- [54] With respect to the italicized statements of the affiant's belief in the ITO, the authorities indicate that it is appropriate for the affiant to state the beliefs he relies upon based on the investigative information also included in the ITO.
- [55] While I appreciate the defence submission that when police officers suspect drug transactions they are more likely to see short duration interactions between individuals as drug transactions. This is all the more the case when the individuals interacting have a known or documented suspicion of drug sales or purchases. In this case, the affiant characterized many (though not all) of the persons coming and going from 770 Brechin Road and their interactions as "consistent" with a drug transaction, based on his experience.

- [56] Defence counsel could not point me to any case where an officer was found to be unqualified to state the types of beliefs stated by Constable Fowler. In my view, these italicized statements are not analogous to the statements rejected in *R. v. Morelli*, 2010 SCC 8 about the presumed behaviours of a pedophile. In my view, the statements that over-reach the mark and lack any support in the investigative facts portion of the ITO have been properly agreed to be excised by the Crown on Exhibit 8.
- [57] While Constable Fowler's experience may be less lengthy than affiants in other cases, on its face I have no reason to doubt that his years of experience were sufficient to allow him to be trained in the investigation of drug transactions.
- [58] In this regard, I would adopt the words of Justice Devlin stated in *R. v. Harmes*, 2022 BCSC 262:
- [26] . . . While I agree with the applicants that the affiant does not provide an extensive account of his specific training, nor roles he has held in other investigations, the lack of detail does not equate with no detail. It was open to the issuing justice to conclude that based on his eight years with the RCMP - including his more recent experience targeting street level drug dealing with the SEU for approximately three years - the affiant had the requisite knowledge and experience to draw inferences and make deductions from what the surveillance had revealed.
- [59] I find this observation to be true of inferences respecting Constable Fowler's experience in this case as well.
- [60] I also note that Constable Fowler has set out the evidence in the ITO to explain his own subjective views and beliefs. There is more support stated for some italicized passages than there is for others, but I would not excise any of the remaining italicized statements as being conclusory. Rather, these beliefs and opinions are to be evaluated on the evidence he refers to, and as a whole in ITO together with Constable Fowler's stated experience.
- [61] Furthermore, I agree with the Crown that to some extent, multiple short duration interactions have been recognized as consistent with drug transactions in some cases. In *R. v. Charlton*, [1992] B.C.J. No. 1405, 1992 CanLII 367 (C.A.), the Court of Appeal accepted that visits of a "fleeting sort" are to be expected when drug trafficking is occurring.
- [62] Likewise, in *Harmes*, Justice Devlin accepted the officer's statements based on his experience that short-duration visits are consistent with drug trafficking, and found the occurrence of many such visits, as set out in the ITO in that case, were supportive of the search warrant.

[63] I accept it was open to the issuing justice to accept Constable Fowler's evidence, based on his experience, that short-duration visits and hand to hand transactions observed during the surveillance of Mr. Gallant and 770 Brechin Rd. were "consistent with" (though not conclusive of) drug trafficking activity. This evidence might also be consistent with many other things, which is why it is necessary to consider the evidence in its totality.

[64] I turn then to the surveillance evidence itself.

The Surveillance Evidence

[65] Putting aside the issue of whether the persons coming and going from the House at 770 Brechin Road were attending at the upper unit or the lower unit, the Defence argues that the surveillance evidence on its face is insufficient to allow an inference that drug transactions were occurring during this period.

[66] The Crown disagrees, and says that the surveillance evidence is some evidence that supports the issuance of the Warrant.

[67] On my review of the ITO, there are three days in particular July 11, 24 and 30 2022, where people were observed approaching, entering, and leaving 770 Brechin Road after a relatively short duration, which the affiant believed were consistent with drug transactions.

[68] On July 11, 2022 observations were made of several comings and goings to and from 770 Brechin Road between approximately 5-11 pm, at which point Mr. Gallant was seen leaving. Of the persons attending at 770 Brechin Road, four were believed to be connected with the drug trade, or acted in a manner believed to be consistent with a drug transaction. These included:

- a) A gentleman who had been arrested in May 2020 with cell phones, weapons and cash in his car that the affiant considered consistent with him being a drug trafficker;
- b) An encounter between Mr. Gallant and a person riding a bicycle and wearing a full-face helmet. Mr. Gallant was observed to wave to this man, who rode to the front entrance of 770 Brechin Road where Mr. Gallant was, and ride away 8 minutes later;
- c) A woman seen leaving 770 Brechin Road and getting into a vehicle with a male driver. The vehicle was registered to a man who had been arrested for possession for the purposes of trafficking the previous month, during which arrest, substantial amounts of controlled substances and cash had been seized;
- d) A 17-minute duration stop by a person in a vehicle who then went directly on to make an 11-minute stop behind a general store in Parksville, and then was observed to perform a hand to hand transaction in the general store parking lot (discussed above);
- e) An 11-minute stop by [TG], while his driver remained in the vehicle.

- [69] On July 24, 2022 a white van went into the driveway of 770 Brechin Road and a man exited the van and was seen to go toward "the residence" and coming out 6 minutes later, and drive away.
- [70] On July 30, 2022 between 2:00 pm and 4:15 pm, three short duration visits of 4-6 minutes were observed at 770 Brechin Road, the last one being [DS], who was then followed and arrested for possession, and was found with 0.86 g of suspected fentanyl in his pocket. A statement was obtained from [DS] which states that he is an addict, and that he "goes downtown to see people he knows and purchase drugs" but "he's got no names for the people" and he "didn't know that he was linked to Mike Gallant." He said that the stuff seized from him cost him \$100.
- [71] While one or two short duration visits in a few hours to a house with a couple of suites may not be very compelling, they might still be some relevant evidence. What I consider makes this evidence more compelling is the connection that a number of the persons attending the property for durations of less than 15 minutes had criminal drug related activity.
- [72] None of these observations is conclusive that drug transactions were occurring during any or all of stops at 770 Brechin Road. However, taken together and with the other evidence in the ITO, I find that they are some evidence that could give rise to a reasonable inference in that regard.
- [73] The accused challenge the relevance and reliability of some of this drug related history, in part on the basis that it is stale dated. I turn now to those concerns.

Dated or Irrelevant Past Criminal Histories

- [74] The ITO sets out suspected past criminal activity of a number of persons, including Mr. Gallant himself, and a number of persons seen during the surveillance on various days in July 2020 coming or going from the area of 770 Brechin Road.
- [75] The accused objects to the inclusion of much of the stated drug-related history as dated and irrelevant.
- [76] While I am somewhat sympathetic to this objection, the appellate authority on this point, in my view, supports the inclusion of past criminal activity well short of a conviction and well short of it being recent. In *Le* 2021, our Court of Appeal at paragraph 81 notes that "reference to prior suspected criminal activity is appropriately included in an ITO, as long as the prior activity was of a type that is relevant to the investigation, and as long as the prior suspected activity did not result in charges that were dismissed." The Court also stated:
- [83] In terms of the weight to be given to the evidence of suspected criminal activity, it is important to recognize that the judicial justice of the peace was obliged to consider all of the information in the ITO together, not to reach separate conclusions as to the cogency of each piece of relevant evidence.

- [77] The Supreme Court of Canada's decision in *James* SCC essentially adopting the dissent of Justice Nordheimer including at paras. 59-60 of *James*, also tends to support the relevance of a dated criminal record as it relates to the subject of the investigation, and may even open the door to charges that were stayed rather than dismissed (though I need not and would not decide that here).
- [78] The Court of Appeal for Ontario in *Ilia*, referencing *James* at paragraph 16 and reviewing an allegedly dated investigation referenced in the ITO states: "Nor is it a problem in an ITO that the 2015 investigation raised character evidence issues arising from conduct several years before, which may have been an impediment in a trial" and went on to "reject the submission that information from the 2015 investigation did not support the trial judge's reasoning."
- [79] I take from these cases that criminal activity related information may have some relevance, despite being a few years old, and despite that evidence falling short of a record or conviction of criminal activity. In my view, the known or suspected drug-related activity of persons attending at the address that is the subject of the warrant sought, would also meet this threshold for consideration by the Judicial Justice.
- [80] I would therefore not disregard or excise the information contained in the ITO setting out the suspected or documented drug-related history of persons observed attending or leaving 770 Brechin Road in July 2020 on the basis that this information is not reliable, is irrelevant or too dated.
- [81] The one exception to this is the inclusion of information with respect to [LB]. The ITO provides that on July 11, 2020 a green jeep parked in the driveway of 770 Brechin Road while that area was under surveillance. The driver was not identified; however, the registered owner of the jeep was determined to be [LB], and the ITO records that he had a conviction for the possession of a scheduled substance in 1999.
- [82] In my view, a criminal record more than 20 years old exceeds what could be considered possibly relevant in this case. Any potential relevance is further diminished by the fact that [LB] was not seen to be driving the Jeep, but was only determined to be its registered owner. I would therefore excise paragraph 23(g)(i)(1) from the ITO on this basis.
- [83] However, I would not excise the information that follows at paragraphs 23(g)(ii-v) (noted above at paragraph 68(d)) setting out the further observations made with respect to the driver of this Jeep, who exited the house at 770 Brechin Road 17 minutes after arriving, made an 11-minute stop at a trailer behind a general store, and then was observed to make a "hand-to-hand transaction" with the occupant of another vehicle in the parking lot of the general store. Nor would I excise the evidence that the affiant believed that this was "consistent with a drug deal" and the evidence of a second officer that observed the transaction who "believed it was a drug deal."

- [84] As a result, the remaining observations with respect to the Jeep and its unknown occupant were available to the Judicial Justice for their consideration.
- [85] I turn then to what I consider to be the strongest challenge on the validity of the ITO-- whether the ITO provides sufficient evidence that these short duration visits to 770 Brechin Road are sufficient to support an inference that evidence of possession for the purpose of trafficking would be found in the upper unit of that address where Mr. Gallant lived.

The Residence

- [86] The ITO provides clear grounds to believe that Mr. Gallant (the subject of the Named Offence) and Ms. Edwards, resided together in the upper unit of a house at 770 Brechin Road, the location of the search approved in the Warrant. The support for this information includes a complaint from the landlord of 770 Brechin Road to this effect. That complaint also stated that the lower unit tenants were complaining to the landlord of "noise and traffic at all hours."
- [87] On its face, the ITO describes both a lower unit and an upper unit at 770 Brechin Road. At paragraph 4(a) the ITO states that the search warrant is for "the residence located at the upper unit of 770 Brechin Road, Nanaimo, British Columbia" and goes on to state the items expected to afford evidence of the Named Offence, and that "there are reasonable grounds for believing that the said items are in the residence located at the upper unit of 770 Brechin Road."
- [88] The ITO goes on to frequently refer to the "residence" but does not specifically define the upper unit as such. Instead, throughout the ITO various terms are used to describe the area where surveillance was conducted and observations were made including: "the residence;" "the residence of 770 Brechin Road;" "house at 770 Brechin Road;" "770 Brechin Road", "the driveway in front of the upper unit at 770 Brechin Road", "the driveway", "the front entrance of 770 Brechin Road", "the front area of the residence;" "the target residence driveway", and "the front door area of 770 Brechin Road;" etc.
- [89] I find that there is an inference readily available from the ITO that both Melissa Edwards and Mr. Gallant had access to the front entrance and front area of the residence, as each of them are described in this area during the period of surveillance.
- [90] However, the defence points out that no information is provided in the ITO as to how the front entrance or area of 770 Brechin Road is connected to the upper unit or the lower unit. On its face, it is possible that there is a common door to both the upper and lower units, and that the persons observed coming to and from the house (perhaps other than Mr. Gallant and Ms. Edwards themselves) were not going to the upper unit. On this basis, the defence says the surveillance is evidence of nothing, and adds nothing to the inferences the Judicial Justice might draw with respect to the comings and goings from 770 Brechin Road.

- [91] While conceding that the ITO could have been drafted in a manner that more clearly defined what the affiant meant by "the residence", the Crown argues that perfection is not required of the officers that draft ITOs, and that, even as drafted, an inference was nevertheless available to the Judicial Justice that the persons coming and going for short durations, believed to be consistent with drug transactions by the affiant, were related to the upper unit occupied by Mr. Gallant. In support of the availability of this inference, the Crown relies on:
- a) The complaint made by the lower unit tenants that traffic at all hours was occurring in the upper unit of the house;
 - b) Mr. Gallant and Ms. Edwards were seen in the front areas of the House, cars registered to Mr. Gallant were observed in the front driveway, and much of the surveillance evidence describes comings and goings at the front of the house;
 - c) Mr. Gallant's observed presence in the house, or the presence of vehicles registered to him in the driveway of the house, during the time of many of these short duration visits, are some evidence that the visits were directed to him; and
 - d) The evidence that supports reasonable grounds to believe Mr. Gallant was dealing in drugs, is also some evidence that transactions consistent with drug transactions at the house where Mr. Gallant lives were related to Mr. Gallant's unit, and not the lower unit.
- [92] Although the surveillance does not (and perhaps could not) describe which unit was being accessed, the Crown argues that this type of proof is not required in an ITO, and would be impossible to attain. The police can't see through walls to determine where these visitors actually ended up, but this should not be required.
- [93] Based on the landlord and lower tenant complaints about traffic at all hours, the observations made at the front of the house, and Mr. Gallant's drug related activity, the Crown argues that the overwhelming inference from the surveillance is that the persons observed attending at the House at 770 Brechin Road were going into the upper unit.
- [94] The Crown also points to *R. v. Bridgen*, 2022 BCCA 429, where a warrant to search Ms. Bridgen's residence was upheld on the basis of surveillance evidence regarding Ms. Bridgen's comings and goings from her residence for various purposes, including shopping. Many of the trips consisted of Ms. Bridgen driving to particular locations and engaging in brief meetings in her car or outside her car, which the affiant believed to be drug transactions. On a few occasions, Ms. Bridgen met a man "well known for property crime offences and drug trafficking" in the area. Although no suspected drug activity was observed or alleged within Ms. Bridgen's residence, the fact that the apparent criminal activity took place after Ms. Bridgen left her residence, or that she returned to her residence thereafter, coupled with the affiant's knowledge regarding the drug trade as set out in the ITO, was the primary basis that the reviewing judge (and the Court of Appeal) upheld the issuance of the warrant to search Ms. Bridgen's residence.

- [95] In Bridgen, there were also two units in the house, which was suspected but not known with certainty by the officers conducting the surveillance and preparing the ITO. The warrant only permitted a search of Ms. Bridgen's residence, and the officers entered the door that she was seen using. The Court of Appeal at paragraph 43 found that the absence of information relating to a possible second unit to be a "distraction" rather than a material omission (however I note that the ITO did not rely on suspected drug transactions at the residence, only Ms. Bridgen coming and going from her residence between suspected transactions).
- [96] The Crown says that this is a lesser evidentiary basis than is present here, where the affiant sets out numerous short duration visits to the location which is the subject of the warrant.

Determination on location

- [97] There are only a few precedents, that I was pointed to, that assist me with this question.
- [98] First, I agree with the Crown that in terms of information that the police would find the evidence sought in the location sought, there is more direct information in this ITO than there was in Bridgen in relation to the location to be searched.
- [99] Even where it is known that there are two units in the house in this case, and it was only suspected in Bridgen, the ITO before me provides more information about potential drug related activity at a specific location than was apparently available in Bridgen. This includes evidence of Mr. Gallant waving down a person with a full-face bicycle helmet and meeting with him for a short duration in the front entrance of the house. No similar link to the location to be searched was present in Bridgen.
- [100] In Belanic, although Justice Riley found that the information contained in the ITO was only sufficient to support the warrant in relation to one of three locations or units, in a rooming house, he refused to excise a portion of the ITO wherein the surveilling officers expressed that they could not tell which of 7 units in a rooming house foot traffic entering the rooming house was going to, but they nevertheless believed that the traffic was associated with the person and unit under investigation. At para. 50(d) Justice Riley considers this to be an aspect of full and frank disclosure as to the limits of the surveillance evidence, but also states:

As I read it, Constable Brassard was merely stating that although the police could not see which unit the foot traffic was going into, they believed that it was going to Unit 6, because they had informer information that Ms. Cross was a drug trafficker and they had confirmed that she resided in Unit 6.

- [101] This information was not excised.
- [102] I also consider the ITO in this case somewhat analogous to the facts in Ilia decided by the Court of Appeal for Ontario earlier this year. In Ilia, the Court of Appeal upheld the issuance of a warrant to search for child pornography at two locations based on an IP

address, on grounds additional to those of the reviewing justice. The reviewing justice had found there to be a "gap" in the ITO, once the ITO was amplified to include information that "if the internet account designated by the IP address was not password protected (which was unknown), the network would be "open" and therefore accessible to others in the immediate vicinity of the Danforth address." The reviewing judge accepted that in the face of this amplified record, "without more, there is no reasonable and logical inference that the subscriber for an IP address is the user who downloaded the child pornography." I consider this to be somewhat similar to the question of whether the suspected drug related activity at 770 Brechin Road was associated with the upper unit rather than the lower unit, based on the surveillance information alone.

- [103] In *Ilia*, the reviewing judge nevertheless upheld the warrant on the basis of an earlier 2015 investigation. The Ontario Court of Appeal upheld the warrant on both the 2015 grounds, and that the information that the IP address was associated with the accused and/or his mother even if many others might also have had access to or use of this virtual address. In this regard, the Court of Appeal stated:
- [17] Even leaving aside the points just made, Mr. *Ilia's* appeal based on the allegedly improper use of the 2015 investigation would have to be dismissed on the simple basis that there was no "gap" in the evidence that required closing in order to establish reasonable and probable grounds. As the Crown argues, reasonable grounds can co-exist with exculpatory possibilities: *R. v. Ha*, 2018 ABCA 233, [2018] A.J. No. 801, at para. 34 and at paras. 82, 85 and 89, per Slatter J.A. (concurring); *R. v. MacCannell*, 2014 BCCA 254, [2014] B.C.J. No. 2069, at paras. 45-46; and see *Bush*, at para. 58. To hold otherwise would effectively be to insist on the standard of proof of beyond a reasonable doubt to obtain a search warrant, when "reasonable and probable grounds" is a threshold investigative standard. This standard requires only a "reasonable" or "credibly-based" probability, a standard even below the balance of probabilities: *R. v. Baron*, 1993 CanLII 154 (SCC), [1993] 1 S.C.R. 416, 78 C.C.C. (3d) 510, at 531-532, per Sopinka J.; *Mugesera v. Canada (Minister of Citizenship & Immigration)*, 2005 SCC 40, [2005] 2 S.C.R. 100, at para. 114; and *Ha*, at para. 89, per Slatter J.A. (concurring).
- [18] There can no doubt come a point when alternative innocent possibilities are so likely that they may undermine a finding of reasonable probability relating to the relevant incriminating inference. However, in this case, the possibility of a third-party use of the internet signal was predicated on the theory that if the Danforth network was not password protected, someone else could have intercepted the signal, and there was no evidentiary basis to suggest either of these conditions. The prospect of third-party access in this case was not the kind of weighty alternative possibility that could undermine the credibly-based probability that the IP address was used by someone at the Danforth address.

- [104] Ilia is a very recent decision, and not yet considered by our Court of Appeal. However, I note that it relies, in part, on an earlier decision of the Court of Appeal for British Columbia in *R. v. MacCannell*, 2014 BCCA 254, at paras. 45-46. I also consider it consistent with other recent rulings from our Court of Appeal, including the following from Slemko:
- [63] In my view, there are two problems with the judge's consideration of the observations made by the police in the course of surveillance. First, his observation that the items collected by the appellant may have lawful as well as unlawful uses suggests he was not considering whether this evidence should have been given some weight by the judicial justice in determining whether there were reasonable and probable grounds to believe that an offence has been committed but, rather, that he was weighing the evidence to determine whether the commission of the offence could be established. It is apparent from the treatment of this evidence that the reviewing judge was not asking the appropriate question: what inferences could the justice have reasonably drawn from the evidence of the purchase of large amounts of caustic soda and kitty litter?
- [105] At paragraph 64 of Slemko, the Court cautions that it would also be an error to consider whether this surveillance evidence, standing alone, would justify the issuance of the warrant.
- [106] I have already found above that the surveillance evidence of 770 Brechin Road, together with the available information regarding the vehicles or persons identified there, is capable of supporting an inference on the reasonable grounds standard with respect to drug-related activity at 770 Brechin Road generally.
- [107] I have also found that the warrant disclosed reasonable grounds to believe that Mr. Gallant was living in the Upper Unit of 770 Brechin Road.
- [108] In addition, I have found that is sufficient evidence to support the Judicial Justice's finding of reasonable grounds to believe that Mr. Gallant was involved in the Named Offence.
- [109] The Court of Appeal for British Columbia in *R. v. Liu*, 2014 BCCA 166 was clear that grounds to believe a person is trafficking drugs is not sufficient on its own to search their home. There must be something further, capable of supporting a reasonable belief that drugs or drug trafficking paraphernalia would be found in their home.
- [110] The presence of two units at 770 Brechin Road adds to the available inferences from the evidence in the ITO. The presence of the lower unit raises the possibility that the persons attending at 770 Brechin Road, particularly for short durations or with drug-related histories noted in the ITO, were not meeting with Mr. Gallant or attending the Upper Unit.
- [111] Ultimately, however, I am guided by the ruling in *Ilia*, and the cases it relies upon, including those of the Court of Appeal for British Columbia, "that reasonable grounds can co-exist with exculpatory possibilities:" (*Ilia*, at para. 17; *MacCannell*, at paras. 45-46; and *Slemko*, at para. 63). In *R. v. Manlove*, 2018 BCCA 37, the Court of Appeal for British Columbia granted an appeal and upheld a warrant on the basis of evidence of identity that was uncertain and

equivocal. It is not necessary for the ITO to negative other possible inferences to be drawn from the facts.

- [112] I am therefore satisfied that the available facts are still "some evidence" from which the Judicial Justice would have been entitled to draw the inference that there were reasonable grounds to believe there would be evidence of the Named Offence in the upper unit of 770 Brechin Road where Mr. Gallant lived.
- [113] As a result, I accept the Crown submission that drug transactions taking place in the Upper Unit of the house need not be the only available inference, to be an inference open to the Judicial Justice on this ITO.
- [114] Furthermore, it is not a purely speculative inference. The short duration interaction between Mr. Gallant and the man in the full-face bicycle helmet at the front of the Residence provides a direct link between Mr. Gallant, the Named Offence, and the Location to be searched. The objective possibility that this was a drug transaction is supported by the affiant's belief, and to some extent, by common sense.
- [115] That transaction was observed to occur at the front entrance of the house, where much of the surveillance evidence identified the various comings and goings of persons for short durations and/or persons with drug related histories. This is also the area where Mr. Gallant and Ms. Edwards were observed on the property when they were observed there.
- [116] In the end, I have concluded that, despite the other possibilities left open on the lack of precision in the ITO on this point, the surveillance evidence with respect to 770 Brechin Road is still some evidence of relevance to whether evidence of the Named Offence would be found in the Upper Unit of 770 Brechin Road. It was open to the Judicial Justice to consider all of this evidence and draw an inference with respect to the unit or location where evidence of drug transactions might be found on reasonable and probable grounds. I would not excise or disregard this information for the purposes of this review.

Conclusion on Facial Review

- [117] In the end, the only evidence in the ITO that I have found is not sufficiently relevant or reliable (beyond those portions that the Crown and Defence agreed ought to be excised) is the criminal record from more than 20 years ago of a registered owner of a vehicle seen stopping at 770 Brechin Road.
- [118] What is left is to consider the information in the ITO as a whole and consider whether the Judicial Justice could have made the necessary inferences to conclude that they had reasonable and probable grounds to issue the warrant to search the Upper Unit for evidence of fentanyl or other listed drug trafficking paraphernalia.
- [119] The Court of Appeal for British Columbia has repeatedly reminded this court in the last few years, that the ITO must be considered in its totality, and not one piece of evidence at a time, because each piece colours the others: Lam at para. 10; Whitaker, at para. 10. and

Harmes at para. 21. The approach to be taken is a common sense, practical, and non-technical, approach to determine whether the ITO before the Judicial Justice, with the excisions I have made and that the Crown has consented to, provided reasonable grounds upon which to issue the search warrant for Mr. Gallant's residence.

[120] Ultimately, I need to make a determination of whether there was sufficient evidence on all of the non-excised information before the Judicial Justice, such that the Judicial Justice could find that there were reasonable grounds to believe that evidence of the Named Offence would be found in the stated Location.

[121] In this case, I find that there is more evidence than that Mr. Gallant simply lived at this location and was reasonably believed to be dealing in drugs. Individually, each piece of evidence might not amount to much, but taken as a whole I consider that it was open to the Judicial Justice to make a reasonable inference on all the information that there would be evidence of the Named Offence in the upper unit of Brechin Road.

[122] Having reviewed the ITO in its entirety (with the noted excisions), and not withstanding concerns about the weight that I might have given to some of the individual pieces of the information in the ITO had I been considering it at first instance, I am satisfied that, on the whole of the ITO, the issuing justice had reliable and relevant evidence on the face of the ITO from which she could have formed reasonable grounds to believe each of the required elements to issue the warrant.

[123] I would therefore uphold the warrant on the facial grounds.

SUB-FACIAL REVIEW

[124] I turn now to the sub-facial review of the ITO. This review requires this court to consider not just what the Judicial Justice had before her, but what the Judicial Justice ought to have had in terms of the relevant material facts available to the affiant at the time.

[125] Once again, Justice Riley provides a helpful review of the legal principles applicable to this sub-facial review at Belanic:

64 First, there is the principle that an officer who swears an affidavit or an ITO in support of an ex parte application has a duty of full, frank, and fair disclosure. The officer must set out not only the facts which support the order, but also the facts that tend to weigh against the order sought. The affidavit should set the facts out in a manner that is fair and does not trick or mislead the reader: R. v. Araujo at para. 46 to 47.

65 Second, there is the concept of amplification as it is discussed in the case law, notably Araujo and Morelli. The law instructs that where evidence is elicited in cross-examination of the affiant, that evidence can be used by the defence to challenge the accuracy, credibility, or reliability of the averments in the ITO. The defence is thus permitted to use evidence elicited on the review hearing to undercut or undermine the grounds set out in the ITO. However, the law places strict limits on the circumstances in which the Crown can rely upon evidence adduced at the review

hearing to correct or clarify the grounds in the ITO. The Crown can only rely on the principle of amplification to correct or clarify minor mistakes or good faith drafting errors: Araujo at para. 59; Morelli at para. 41 to 42; R. v. Wilson, 2011 BCCA 252 at para. 68.

66 This leads to the third and final point, which is to discuss the effect of false or misleading information or material non-disclosure. As explained in Garofoli at p. 1452, the existence of fraud, misleading information, and non-disclosure are all relevant in deciding whether there "continues to be a basis" for the decision of the issuing justice. The question to be asked at the end of the day is whether, after considering the evidence elicited on review in the manner that I have discussed above, there continues to be "some reliable basis" on which to support the warrant: R. v. Araujo at para. 51 to 52.

[126] With respect to this third point set out in Belanic, I would further clarify that a misleading or incomplete statement of the information available to the affiant at the time is relevant primarily to the question of whether the ITO ought to be excised or amplified. The remedy on a sub-facial review of incomplete, incorrect or misleading information in an ITO is generally amplification, or excision of faulty information.

[127] It is only the inclusion of intentionally fraudulent information, or other evidence of police misconduct, that may lead to other remedies, including the vacating of the warrant altogether. That allegation and remedy are not before me in this case.

[128] Before me, counsel for the accused argued that there is an important distinction between "amplification" used by the Crown to provide good faith corrections, and the process of reading in additional information garnered through cross-examination (or in this case admissions as well) where there are omissions of material facts that might be relevant to the inference drawn by the issuing justice. This arises from the following paragraph in Morelli:

60 The [material] facts originally omitted must be considered on a review of the sufficiency of the warrant application. In Araujo, the Court held that where the police make good faith errors in the drafting of an ITO, the warrant authorization should be reviewed in light of amplification evidence adduced at the voir dire to correct those mistakes. Likewise, where, as in this case, the police fail to discharge their duty to fully and frankly disclose material facts, evidence adduced at the voir dire should be used to fill the gaps in the original ITO.

[129] The defence draws a distinction between "amplification" evidence used by the Crown to correct mistakes, and other evidence used to "fill in the gaps" where there has been less than full and frank disclosure of material facts. The defence argues that the term "amplification" ought not be used for the latter process.

[130] I agree with the defence that to the extent the term "amplification" might suggest "strengthening" or "expanding" the ITO the term is inapt. Nevertheless, this is the word that this Court and others use, not just for good faith corrections to the ITO at the behest of the Crown, but more commonly for the "filling of gaps" with material facts established through

cross-examination of the affiant to address the requirement for full and frank disclosure in the ITO. This does not mean, however, that this process can be used to bolster the grounds set out in the ITO beyond what was before the issuing justice: Belanic at para. 65; R. v Thiessen, 2020 BCCA 85 at paras. 51-52; and Wilson at para. 66. Rather, the sole inquiry is whether these excisions or amplifications undermine the grounds upon which the warrant was issued.

[131] An excellent summary of the process was described by Justice Smart of this court in R. v. Sipes, 2009 BCSC 612, at para. 41, and referenced most recently by our Court of Appeal in Slemko at para. 54 and by the Supreme Court of Canada in World Bank Group v. Wallace, 2016 SCC 15 at para. 121 where it was noted that they "apply equally to a Garofoli application":

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.

[132] In this case, both before and after cross-examination of the affiant by the defence, Crown and defence agreed to various corrections (including a mis-stated date) and amplifications to address gaps in the evidence, as shown in Exhibit 8 on this voir dire. These include the following:

- a) The addition of the time frame for when the landlord reported that he "previously may have observed a firearm or soldering gun in a holster in a room where GALLANT was" to clarify that this was 9 weeks prior to the submission of the ITO;
- b) The date of the charges for possession of a controlled substance for the purpose of trafficking for which Mr. Gallant was arrested on July 8, 2024. Those charges were dated from September 2, 2019, or approximately 10 months prior to the arrest noted in the ITO;
- c) Addition of the date of August 7, 2019 in relation to the drug investigation involving [AKJ], (ITO, para 22(d)-(e), making it almost a full year prior to the submission of the ITO;
- d) Correcting the date [PW] was arrested by police to 2019 rather than 2020, making [PW] arrest a full year earlier than suggested in the ITO;
- e) Adding words to the effect that both [KP] and [TG] were not immediately identified when they drove up to the 770 Brechin Road on July 11, 2020, but were later identified from their PRIME photos;
- f) Additions to clarify that Richards Street, where Mr. Gallant was observed the evening of July 24, 2020, is approximately 4 km from 770 Brechin Road, and that the observations of Mr. Gallant in this location did not originate from the surveillance of 770 Brechin Road.

- g) Addition of information of license plates and searches on those license plates for two vehicles observed arriving and leaving 770 Brechin Road on July 24 and July 30 respectively, and the acknowledgement that the registered owners of these vehicles had no drug related files.
 - h) Changes to para 25(c) of the ITO to clarify visual contact of a male at 770 Brechin Road at 3:12 pm on July 30, 2020 was lost after he was seen walking to the corner of the front door area of 770 Brechin Road; and
 - i) An addition to the information regarding the statement made by [DS] to clarify that downtown Nanaimo (where is stated that "he goes to see people he knows and purchase drugs") is approximately 4km from 770 Brechin Road.
- [133] After cross-examination, the accused urged upon me that additional aspects of the ITO upon which I granted and heard cross-examination of the affiant, be disregarded, treated as prejudicial, or entitled to less weight. I will briefly review these.
- a) "Firearm or Soldering Gun" para 18(c)
- [134] The accused were granted cross-examination on paragraph 18(c) of the ITO in relation to the description provided by the affiant of the landlord's stated observations of "a firearm or soldering gun" both in relation to whether this was a misleading statement, and whether it improperly omitted relevant and potentially exculpatory or clarifying information.
- [135] I agree with the Crown that the ITO as written already expresses significant uncertainty as to whether what the landlord saw was a firearm or a soldering gun on its face, stating he "may have observed a firearm or a soldering gun in a holster in a room where Gallant was."
- [136] The cross-examination evidence provides additional information available to the affiant that the landlord originally believed he saw a soldering gun in a holster on the floor in a dimly lit room where Mr. Gallant was seen working on computer boards. He later became concerned that it was an actual firearm that he saw because, "they look similar", and this is expressed in the landlord's further audio statement to the police. However, the landlord maintains his expression of concern in this regard in that statement.
- [137] Given the already equivocal statement in this regard in the ITO, and that no inferences were drawn from this information by the affiant in the ITO, in my view the ITO is not misleading in this respect, but it is nevertheless of very limited value or relevance on its face. I have decided to disregard all of paragraph 18(c) in this sub-facial review as a result.
- b) "Changed his Story" para 19(b)(ii)(1)

- [138] At para 19(b)(ii)(1) the ITO states that, upon his arrest on July 8, 2020, Mr. Gallant was searched and was found to have \$5240.60 in cash on his person, which he explained "was from online gambling but then changed his story that it was 'covid money'". The defence objects to the negative connotation of "changed his story" in this description, and says it is prejudicial.
- [139] While I am not concerned that the Judicial Justice would have been misled or "prejudiced" by language such as this, in my sub-facial review of this description of events, I would change the wording to "and then he stated"--a more objective means of expressing what seems to have been reported.
- (c) Brooks Landing: Para's 30(c)(ii), 31(a)(ii)
- [140] The defence argues that the statement ascribed to the confidential informer that Mr. Gallant is "living by Brooks Landing" should be given little to no weight in light of the cross-examination evidence of the affiant that 770 Brechin Road is noted by the affiant to be within 900 meters of Brooks Landing Mall, and the affiant's agreement on cross-examination that there are "a lot of residences" that would be within 1 km of Brooks Landing Mall.
- [141] Overall, the evidence on cross-examination, which includes a map that was put to the affiant showing both Brooks Landing Mall, and Brechin Road (though not 770 Brechin Road specifically) tends to support both that there are a lot of residences within 1 km of Brooks Landing Mall, and that Brechin Road is "by" Brooks Landing. The affiant described 770 Brechin Road as just beyond the church on Brechin Road, and that evidence also supports that Mr. Gallant lives "by" Brooks Landing in my view.
- [142] The informant's information in this paragraph does not suggest that Mr. Gallant is dealing drugs out of this house--it is only information about where he lives. Where Mr. Gallant was living is not a controversial issue on this voir dire, and well supported by other information in the ITO. To the extent that the defence is arguing that corroboration of the informant's information might be weakened by this concession on cross-examination, I do not consider that the cross-examination undermined the informant's information.
- [143] I do not consider that any amplifications or excisions of the ITO are appropriate on this aspect of the cross-examination.
- (d) Paragraph 27, 31(f) relating to the completeness of the summary of the interview of Dustin Servis
- [144] The affiant points to the arrest of [DS] with .86 g of suspected fentanyl in his pocket immediately after a short duration stop at 770 Brechin Road as a key fact in the Introductory summary of the grounds for the warrant, and later in the Justification of the warrant. The affiant expresses the belief that [DS] purchased fentanyl from 770 Brechin Road based on this information.

- [145] The ITO also sets out facts inconsistent with this belief at paragraph 27, including at paragraph 27(b) that, in his interview with police after his arrest, [DS] stated that "he goes downtown to see people he knows to purchase drugs" and that he "didn't know that he was linked to Mike Gallant."
- [146] On cross-examination, the full police statement with respect to [DS]' interview was put to the affiant. The statement includes a notation that an officer confronted [DS] with not buying the drugs from downtown, but from the residence of Michael Gallant, after which it states: "[DS] did not want to talk anymore."
- [147] The defence does not suggest any particular amplification to the ITO to capture this information. The Crown says none is needed.
- [148] In *R. v. Nguyen*, 2011 ONCA 465, the Court of Appeal for Ontario dealt with a defence argument regarding the affiant's failure to include in its ITO mention of a number of things that were not observed as material non-disclosure. The Appeals Court overturned the decision holding the warrant invalid. At paragraph 50, the Court addressed a defence submission that there were a series of "omissions of fact" not addressed in the ITO, or matters that were not observed, that should nonetheless have been put forward and countered in the ITO, as follows:

50 I disagree. Although there may be circumstances in which the duty to provide full and fair disclosure will require an applicant for a search warrant to negative something unseen or not done, I would expect such circumstances to arise infrequently. In most cases, the absence of a reference to something not seen, not heard, or not done, will lead to the sensible inference that whatever it is was not seen, not heard or not done. As Doherty J.A. observed in *R. v. Colbourne* (2001), 149 O.A.C. 132 (C.A.), at para. 43:

Constable Henry described the indicia of impairment that he observed. It was implicit that he did not observe any other indicia of impairment. His failure to specifically enumerate the things he did not see does not constitute non-disclosure.

- [149] In this case, I find that the ITO as it stands does not warrant excision or require further amplification with respect to [DS]' statement. The summary of [DS]' statement on its face does not support the affiant's belief that [DS] purchased the suspected fentanyl from 770 Brechin Road. The affiant states this belief based on other grounds, and properly discloses information from [DS]' statement that does not necessarily support his belief. On the evidence available in the ITO, different inferences were available to the Judicial Justice, but one of these was consistent with the affiant's stated belief.
- [150] I find that no further amplification or excision is warranted with respect to these paragraphs for the purposes of the sub-facial review.

Determination Sub-Facial

- [151] As with the facial challenge, the question on this sub-facial review is not whether I would have issued the warrant, but whether the issuing justice could properly have done so, based on the facts as set out in the ITO, with the excisions made, and with the additional evidence elicited in cross-examination that might be said to undercut or weigh against the grounds in the ITO: *R. v. Araujo*, 2000 SCC 65, para. 51 citing *Garofoli* at p. 1452; and *Morelli* at para. 40.
- [152] Some of the changes made to the ITO for this purpose do tend to weaken the facial strength of the ITO. For example, the fact that [PW] was arrested a full year earlier in 2019, rather than in 2020, makes his connection to the drug trade less immediate in the context of the ITO.
- [153] However, the correction of this date, and the addition of other dates that clarify the dates of suspected drug-related activity of Mr. Gallant and a number of persons seen to be stopping at his House, still put these activities within a year or so of the ITO. In my view, these clarifications do not reduce the relevance or weight to which the Judicial Justice might have given these factors in any significant way.
- [154] Furthermore, the additional information that Richards Street and downtown Nanaimo are 4 km away from 770 Brechin Road does not detract in any material way from an ITO that, to my reading, never implied that they were closer to each other.
- [155] However, I do consider the amplification of paragraph 24 which clarifies that the observation of a suspected drug transaction by Mr. Gallant on Richards street did not originate with surveillance at the House to be a material one. This is because it removes a potential inference, relied upon in *Bridgen*, to support a search of 770 Brechin Road on the basis that Mr. Gallant was present there immediately before a suspected drug transaction.
- [156] Nevertheless, considering all the evidence in the amplified ITO in its totality, including the excisions and amplifications agreed to on this voir dire, and disregarding paragraph 18(c), I find that the sub-facial review of the ITO does not change my view of whether the warrant could have been properly issued by the Judicial Justice on the remaining information.
- [157] I therefore uphold the warrant.

"Marzari J."

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