

CANADA / JUDGMENT

R. v. Gelowitz

2023 BCSC 1170

COURT

Supreme Court of British Columbia

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2023 BCSC 1170 R. v. Gelowitz

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Gelowitz,

2023 BCSC 1170

Date: 20230508

Docket: 74036

Registry: Prince George

Rex

v.

Tyler Aaron James Gelowitz

Before: The Honourable Mr. Justice Kirchner

Oral Ruling on Voir Dire No. 2

Re: Facial Validity of the Search Warrant

Counsel for the Crown:

I. Ferbey

Counsel for the Accused:

T.E. La Liberte, K.C.

K.B. Wilkinson

Place and Date of Hearing:

Prince George, B.C.

May 1-5 and 8, 2023

Place and Date of Judgment:

Prince George, B.C.

May 8, 2023

- [1] THE COURT: These are my reasons for judgment on Voir Dire Number 2, which is the challenge to the ITO and the search warrant.
- [2] The accused, Tyler Gelowitz, is charged with five counts of possessing prohibited substances for the purposes of trafficking, contrary to s. 5(2) of the Controlled Drugs and Substances Act, S.C. 1996, c. 19 ["CDSA"]. The substances include cocaine, MDA, fentanyl, heroin and fentanyl, and MDMA. Mr. Gelowitz is also charged with one count of possession of a prohibited substance, that is Gamma-Hydroxybutyric Acid ("GHB"), contrary to s. 4(1) of the CDSA, and one count of possession of a loaded restricted firearm, contrary to s. 95(1) of the Criminal Code, R.S.C. 1985, c. C-46.
- [3] The prohibited substances were seized, along with what the Crown alleges is drug trafficking paraphernalia, by the RCMP during the execution of a search warrant on August 1, 2019 on a residence located in an apartment building on 1st Avenue in Prince George. At the same time, the RCMP executed search warrants on four other locations, one of which was Mr. Gelowitz's home in Prince George. One Information to Obtain (ITO) was filed in support of the search warrants for all five locations. Subject to the outcome of this voir dire, the Crown intends to tender only evidence seized from the 1st Avenue apartment at trial.
- [4] Mr. Gelowitz challenges the validity of the search warrants and seeks to have the evidence obtained under them excluded under s. 24(2) of the Charter. On this voir dire, he challenges the facial validity of the ITOs used to obtain the search warrant. If I find the warrants were validly issued, then he will challenge the subfacial validity in a subsequent voir dire.
- [5] The Crown concedes that Mr. Gelowitz has a privacy interest in the 1st Avenue residence and in his own residence, and that he has standing to challenge only those two search warrants. Mr. Gelowitz did not pursue a challenge to the other three warrants but since the ITO pertains to all five locations, the evidence in support of the warrants for the 1st Avenue apartment and Mr. Gelowitz's own residence must be considered in its totality, including the evidence relating to the other locations that were searched. The other three warrants are for a residence on Eaglenest Crescent, an apartment unit at 152 McIntyre Crescent, and another apartment unit at 166 McIntyre Crescent, all in Prince George. 152 and 166 McIntyre Crescent are two different but attached buildings in the same apartment building complex.

- [6] The surveillance reports that I will discuss later indicate that Mr. Gelowitz had a key to the 1st Avenue apartment unit and the apartment building and unit at 166 McIntyre. There is no observation of his gaining access on his own to either the Eaglenest Crescent residence or apartment unit at 152 McIntyre. Obviously he has a key and access to his own residence.
- [7] The ITO was prepared and sworn by Constable Braden Chamberlain of the Prince George RCMP and submitted to a Judicial Justice under the "telewarrant" procedure provided for in s. 487.1 of the Criminal Code on August 1, 2019, the same day on which it was executed. In addition to challenging the evidentiary basis for the search warrant, Mr. Gelowitz also challenges the adequacy of the evidence supporting the telewarrant process in this case. I will begin by addressing the telewarrant challenge and then move to the substance of the ITO.

The Telewarrant Process

- [8] Section 487.1 of the Criminal Code permits an applicant to apply for a search warrant using the telewarrant process. At the time the warrant was issued in this case, s. 487.1 provided that the process could be used where "it would be impracticable to appear personally before a justice to make an application." That proviso has since been removed: see An Act to amend the Criminal Code and the Identification of Criminals Act and to make related amendments to other Acts (COVID-19 response and other measures), S.C. 2022, c. 17, s. 22. Obviously, the earlier version of s. 487.1 applies here.
- [9] Mr. Gelowitz argues that the ITO does not adequately explain the impracticality of using the telewarrant process in this case. He relies on *R. v. Gardner and Howard*, 2015 BCSC 801, where Justice McEwan observed that the Criminal Code, as it read at the time, expressed a clear preference for in-person hearings and that technological substitutes almost inevitably erode the protections afforded by in-person hearings. In that case, the officer sought a warrant after the local court registry had closed for the day. The officer deposed in the ITO that he wanted to execute the search warrant in daytime hours because the power in the building that was to be searched had to be shut off during the search for safety.
- [10] Justice McEwan observed that there was no evidence to explain why the officer could not wait one day to obtain the warrant in person and execute it the following day. He also noted that there was an unsatisfactory explanation for the urgency in obtaining the warrant. Mr. Gelowitz argues there is a similar lack of evidence in the ITO in this case.
- [11] Constable Chamberlain states in the ITO that at 10:58 a.m. on August 1, 2019 he contacted the Prince George Courthouse and was advised that there was no local judge available to review the information. Mr. Gelowitz argues there is no evidence that the matter was urgent or could not have waited until the next day when an in-person appearance before a Judicial Justice might have been available.

- [12] Provincial Court Practice Direction CRIM 03 that was in effect on August 1, 2019, directs applicants for a search warrant who are "within a reasonable distance of a location where there is or may be a Judicial Justice presiding" are to telephone the local court registry or the judicial administration assistant to inquire whether a Judicial Justice is available to hear the application in person "prior to commencing the search warrant paperwork".
- [13] This is what Constable Chamberlain did in this case and he was told no Judicial Justice was available that day. Making this inquiry and relying on the advice of the court staff was sufficient to discharge any duty Constable Chamberlain had to satisfy himself that a Judicial Justice was not available before making use of the telewarrant option: see *R. v. Young*, 2008 BCCA 513 at paras. 19 to 24.
- [14] As to the question of urgency and whether Constable Chamberlain ought to have or could have waited until the following day to have an in-person appearance, it is my view that the Court of Appeal's decision in *R. v. Clark*, 2015 BCCA 488, which was released six months after Justice McEwan's decision in *Gardner*, has overtaken that case. There the Court of Appeal held that there is no need for the investigating officers to demonstrate urgency to use the telewarrant process and it is not for the court to require that investigators organize themselves to avoid that option.
- [15] Speaking for the court, Frankel J.A. said an ITO need not satisfy a Judicial Justice that there is an immediate need for the warrant when sought by way of a telewarrant. He said at para. 66:
- [66] The telewarrant procedure was designed to make it possible for law enforcement officers to apply for a search warrant 24 hours a day, seven days a week. Whether the application is made in-person or by fax the reasonable-grounds standard must be met before a warrant can be issued. The impracticability-requirement is concerned with whether it is practicable to make an in-person application at the time the application is brought; it does not require that an immediate need for a warrant be demonstrated . . .
- [16] Justice Frankel went on to quote from Justice Levine's decision in *R. v. Le*, 2009 BCCA 14, where she stated at para. 35:
- [35] The appellant suggests that as there was no urgency to carry out the search, Constable Lane should have waited until the next day when she could have appeared in person to obtain the warrant, or she should have asked another officer, who was working during the day, to obtain the warrant. In my opinion, the telewarrant procedure is available so that police officers who work on shifts or in communities where justices of the peace are not available at all hours may carry out their duties, and it is not for the court to interfere in the management of police investigations by requiring them to organize themselves to avoid using the telewarrant procedures in the Code or risk being found in violation of those provisions.

- [17] I find that Constable Chamberlain's explanation for using the telewarrant process, as stated in the ITO, brief though it was, met the requirements called for in the Code as interpreted by our Court of Appeal. I would not set aside the warrants on this basis.

Challenge to the ITO

Legal Principles

- [18] I turn next to the substantive challenge to the ITO, and I will start with a review of the legal principles.
- [19] The search warrants in this case were issued pursuant to s. 11 of the CDSA. To issue a warrant under that section, a justice must be satisfied by information on oath that there are 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. 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.
- [20] The test to be applied on a review of the warrant is whether the ITO contains sufficient credible and reliable information so that the issuing justice could have granted the warrant: *R. v. Garofoli*, [1990] 2 S.C.R. 1421 at 1452. The issue is not whether the reviewing judge would have issued the warrant on the same information. Rather, the reviewing judge must decide whether on a practical, non-technical, and common-sense basis, the totality of the evidence set out in the ITO demonstrates reasonable grounds for believing that an offence has occurred and evidence of the offence, namely drugs or drug-related items, will be found in the place to be searched.
- [21] There must be an objective basis for that belief founded on compelling and credible information. The issuing justice is permitted to draw reasonable inferences from the facts presented in the ITO, but those inferences must be grounded in compelling and credible facts that link the evidence sought to the offences under investigation: *Stoughton v. Attorney General of Canada*, 2022 BCCA 212 at para. 30. The possibility that evidence could be found in the place to be searched is insufficient. In *R. v. Sanchez*, [1994] O.J. No. 2260, Justice Hill said at para. 20 that "some deference should be paid to the ability of a trained peace officer to draw inferences and make deductions which might well elude an untrained person."
- [22] 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*, para. 28, and *R. v. Le*, 2014 BCCA 166 at para. 51.

- [23] In *R. v. Debot*, [1989] 2 S.C.R. 1140 at p. 1166, Wilson J. said the phrase "reasonable belief" approximates the requisite standard. Elsewhere, the standard has been described as the point at which suspicion gives way to credibly-based probability: *R. v. Ballendine*, 2011 BCCA 221, *R. v. Vu*, 2011 BCCA at para.39 - aff'd on this point 2013 SCC 60 at paras. 9-18, and *Le* at para. 37.
- [24] The ITO must be considered in its totality and not one piece of evidence at a time: *R. v. Lam*, 2002 BCCA 99 at para. 10; *R. v. Whitaker*, 2008 BCCA 174 at para. 10. Information in the ITO must be properly sourced so that the issuing justice can assess the credibility and reliability of the source and the evidence: *R. v. Belanic*, 2019 BCSC 1411 at para. 13; *R. v. Sunner*, 2017 BCSC 2445 at para. 31; and *R. v. Harmes*, 2022 BCSC 262 at para. 21. This is referred to as the rule against narrative. Information that is not properly sourced should be disregarded or excised.
- [25] A related principle is that conclusory statements in an ITO that contain no factual underpinning should also be disregarded since the absence of a factual underpinning prevents the issuing justice from evaluating the factual basis or the conclusion: *Belanic*, para. 14.
- [26] 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: *Debot* at p. 215. Relevant considerations include the degree of detail in the informant's information, the informant's source of knowledge, and any indicia of the informant's reliability such as past performance or confirmation of their information from other investigative sources: *Garofoli* at p. 191.

The Information to Obtain

Introduction

- [27] The ITO begins with Constable Chamberlain setting out his experience. At the time he swore the ITO, he had served over 12 years as a member of the RCMP. He had worked with the RCMP's "Street Crew" since September 2015, and had been involved in over 100 drug investigations where search warrants were executed. He has conducted surveillance during drug investigations and observed transactions taking place at residences and in public. He was qualified in a Provincial Court trial in 2018 to give expert testimony on methods of packaging, concealing, distributing, and consuming drugs, as well as prices and drug jargon relating to cocaine, methamphetamine, and heroin.

- [28] Following further introductory matters, including identifying the offence under investigation, Mr. Gelowitz as the subject of the investigation, and the authorizations sought, the ITO sets out some definitions and abbreviations used in the document. In the concluding paragraph of that section, Constable Chamberlain states that he has added comments throughout the ITO to explain or link information and state his belief. These comments are italicized and placed in square brackets for easy identification.
- [29] Mr. Gelowitz takes issue with almost all of these italicized comments. He argues they are conclusory in that they are not supported by the evidence and they transcend Constable Chamberlain's experience. He argues they should be excised from the ITO or, alternatively, disregarded.
- [30] For example, counsel for Mr. Gelowitz took issue with Constable Chamberlain's stated belief that four of the places for which warrants were sought were safehouses. Constable Chamberlain described safehouses as follows in an italicized portion of the ITO:

Based on my police experience and involvement in drug investigations, I know the term "safehouses" is a term used to describe locations where drug traffickers will commonly store drugs and/or cash or evidence pertaining to drug trafficking. Drug traffickers will commonly use these locations to try and evade any detection by police or other drug dealers. Drug traffickers commonly store the bulk amount of the product at these locations.

- [31] Counsel for Mr. Gelowitz argues that since Constable Chamberlain's stated experience does not include recognizing or dealing with safehouses, the ITO does not disclose a reliable basis for the belief stated in this passage. Even if he had sufficient experience, counsel argues the evidence offered in support of the safehouse theory simply does not support Constable Chamberlain's stated belief, such that any italicized commentary about safehouses should be excised.
- [32] I find there was sufficient evidence in the ITO to permit the issuing justice to infer that Constable Chamberlain's 12 years' experience as an RCMP officer, his four years with the Prince George Street Crew, and his participation in over 100 drug investigations equipped him with sufficient knowledge about safehouses to provide the stated opinions.
- [33] As Justice Devlin stated in *Harmes* at para. 26:
- [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.

- [34] I find this observation to be true of inferences respecting Constable Chamberlain's experience in this case as well.
- [35] Moreover, in the same passage where Constable Chamberlain describes safehouses, he states that he has come to learn of these through his experience and involvement in drug investigations. Thus, he has stated his experience as including dealing with safehouses.
- [36] I also find that Constable Chamberlain has set out some evidence in the ITO to explain his own subjective view that the residences to be searched were safehouses and therefore provides at least some factual basis for his belief as stated in the italicized passages in the ITO. In fact, I find that to be true for all of the italicized statements, as well as the passages in the police theory section and the summary section for the ITO. There is more support stated for some italicized passages than there is for others, but I would not excise any of those italicized statements as being conclusory. Rather, I would assess the beliefs and opinions stated in them based on the evidence presented ITO and Constable Chamberlain's stated experience.
- [37] Whether there is sufficiently cogent and credible evidence to objectively support the reasonableness of Constable Chamberlain's beliefs is another matter that I will address after reviewing the totality of the evidence.

RCMP Theory

- [38] Following a brief profile of Mr. Gelowitz, the ITO sets out the RCMP's theory and an overview of the investigation. As I read this section, its purpose is simply to give the Judicial Justice an understanding of the RCMP's theory behind the alleged offences that Constable Chamberlain believes have been committed and, in a summary fashion, explain why Constable Chamberlain believes the five addresses to be searched are implicated in that offence.
- [39] To the extent this section contains factual information, it is Constable Chamberlain's summary or synthesis of other information in the ITO. These statements can only be given weight if they are supported by the substantive evidence found elsewhere in the ITO.
- [40] The Crown agreed that the last three sentences in para. 18 of the ITO are not supported by other facts stated in the ITO, and thus they should be excised from the ITO by consent. I will disregard that excised portion in my analysis.
- [41] Briefly, the RCMP's theory, as stated in the ITO, was that Mr. Gelowitz was a mid-level drug trafficker who came to the RCMP's attention through observed interactions with other people - a Mr. Johnson and a Mr. Morin - who were separately under investigation for drug trafficking. Both of those individuals were eventually arrested and found to be in possession of significant amounts of cocaine. These arrests and the discovery of the cocaine came shortly after Mr. Gelowitz was seen making short-duration stops at their residences.

- [42] Constable Chamberlain states that these previous investigations led the RCMP to believe that Mr. Gelowitz was a mid-level drug supplier. He does not explain this conclusion and Mr. Gelowitz argues this part of the ITO should be excised as being conclusory. I disagree. Constable Chamberlain's belief is based on the fact that both Mr. Johnson and Mr. Morin were found to be in possession of significant amounts of cocaine, (71.3 grams and 84.81 grams respectively), soon after a short-duration interaction with Mr. Gelowitz.
- [43] Whether this is sufficiently cogent evidence to objectively support the belief, when considered in light of all the evidence, is another matter, but I find it is not an unsourced conclusory statement that must be excised.
- [44] Based on this belief, RCMP initiated surveillance of Mr. Gelowitz and observed him to attend at the five different locations, usually for short-term stops (other than Mr. Gelowitz's own residence), and frequently carrying a bag of some sort. Constable Chamberlain describes this as a "pattern", but on my read of the ITO, I cannot discern any specific pattern other than that Mr. Gelowitz appears to have attended at these locations multiple times during the surveillance, often for short-duration visits and often going from one location to another.
- [45] Constable Chamberlain believes that these locations are safehouses. Mr. Gelowitz argues this passage of the ITO should be redacted because it is conclusory. However, I find Constable Chamberlain has identified at least some basis for his belief, namely his own experience in drug investigations, a theory that Mr. Gelowitz is a mid-level dealer, and the observations of Mr. Gelowitz frequenting these places for short-duration stops. Again, whether this evidence is sufficient to sustain the search warrant remains to be seen, but the statement itself is not conclusory in that there is some evidence to support it. I would not excise this passage from the ITO.

Information from Confidential Informers

- [46] The next section of the ITO summarizes information received from confidential informers. Some of this information is redacted, presumably to protect the identity of those informers. Confidential Informer "A" reported through a handler in May 2019 that Mr. Gelowitz sells drugs, specifically cocaine, heroin, and methamphetamine. No other information is provided, such as the place or location from which he is said to sell drugs.
- [47] Confidential Informer "B" reported through a handler that "Tyler" sells heroin, methamphetamine, and cocaine. It is not known when he reported this. He did not identify "Tyler's" last name.
- [48] Confidential Informer "B" further states that Tyler is "trying to be hands off". Nowhere in the ITO does Constable Chamberlain explain what "trying to be hands off" means. Counsel for the Crown suggests it infers that "Tyler" is operating as a mid-level drug dealer in that "hands off" means he is not dealing directly to users at a street level. This explanation appears logical, but it is not given in the ITO. It is not so clear that I would be prepared to draw the inference suggested by the Crown and I find that while the issuing justice is

entitled to draw inferences from the evidence in the ITO, this is not one that was reasonably open to be made in this case.

- [49] Confidential Informer "B" also reported that a man named Travis Cardinal sells methamphetamine and heroin and has a girlfriend named "Janelle". As will be seen later, this had some significance because late in the surveillance of Mr. Gelowitz, Mr. Cardinal was seen to be let into the 1st Avenue apartment by Mr. Gelowitz for short-duration stops.
- [50] According to the ITO, it appears that Confidential Informer "A" has provided information on previous occasions, but the number of occasions and the date when the informer first became an informer are redacted. Thus, the informer's history cannot be assessed, although it is stated that the previous information provided, whatever it might have been, has never been found to be false, misleading, or inaccurate.
- [51] Informer "A"'s handler has been able to corroborate most but not all of the information that Informer "A" has previously provided. However, without the benefit of knowing the number of times the informer has provided information or how long the informer has been doing so, this information is of only limited assistance.
- [52] Confidential Informer "A"'s handler states that the informer is motivated by monetary gain but has not been paid to date nor received any benefits or special promises from police in return for the information provided for this ITO.
- [53] Confidential Informer "B" has also provided information in the past, but the dates and the number of occasions are redacted. This informer is motivated by monetary gain and has been paid in the past, but has not been paid any money or rewarded for the information provided for this ITO, at least as of the date it was sworn. There is a list of police activity with which Confidential Informer "B"'s information has assisted in the past, including undercover operations into local drug traffickers, seizure of controlled substances and illegal firearms.
- [54] It appears Confidential Informer "B" has a longer pedigree with the RCMP and has provided more extensive information than Confidential Informer "A". Informer "B"'s information has never been found to be false or inaccurate.
- [55] On balance, there appears to be reason to find the information provided by these two informers to be reliable, and Informer "B"'s information probably at least somewhat more so than Informer "A"'s. However, the shortcoming of this information is in its detail. In particular, there is no information about the location from which Mr. Gelowitz or "Tyler" sells drugs. There is no mention of the 1st Avenue site or of any of the other locations that were searched.
- [56] The RCMP's theory is that these locations are safehouses and the Crown argues it stands to reason that an informer would not know about them because their locations would be kept confidential. While that may be true, the issue here is whether there is sufficient evidence to establish a reasonable belief that drugs or drug-related items would be found at the specific locations to be searched. The confidential informants' evidence does not help with that

aspect. The most that can be taken from their information is that Mr. Gelowitz may be a drug dealer at some level. This, of course, must be corroborated by other evidence and other evidence is necessary to pinpoint any offence-related evidence to the places that were searched.

Surveillance Information

[57] The ITO then details the surveillance information relating to Mr. Gelowitz, starting with the observations made of him in the Johnson and Morin investigations and the observations in the surveillance that focused on him. I will start with the Johnson investigation.

The Johnson Investigation

[58] According to the ITO, Mr. Gelowitz first came to the RCMP's attention during a drug trafficking investigation of Mr. Johnson. Mr. Gelowitz was observed attending Mr. Johnson's residence for a short-duration visit of five minutes on May 8, 2019. Constable Chamberlain states in an italicized paragraph that, in his experience being involved in drug investigations, short-duration stops at locations or with persons are consistent with drug trafficking and transactions.

[59] Mr. Gelowitz argues that Constable Chamberlain does not explain what constitutes a short-duration visit nor explain why a short-duration visit is consistent with a drug transaction. However, in *R. v. Charlton*, 1992 CanLII 367 (B.C.C.A.), the Court of Appeal accepted that visits of a "fleeting sort" are to be expected when drug trafficking is occurring:

Even in circumstances where police do not have specific information that an accused is in possession of narcotics, they are entitled to "put two and two together" and conclude that the accused is in possession of narcotics. Thus, where an unknown accused makes a "furtive visit . . . of the fleeting sort which is to be expected when drug trafficking is going on" to a residence being surveilled by police pursuant to an informant's advice that cocaine was being sold out of the premises, the conclusion that the accused is in possession of cocaine would meet both tests enunciated . . .

[60] The quotes within this quote are from *R. v. Curson*, [1990] B.C.J. No. 674. I note, though, that unlike in *Charlton*, the RCMP in this case were not acting on the advice from an informant that Mr. Gelowitz is selling drugs from a specific location. Whereas the surveillance in *Charlton* was on a location, here it was on Mr. Gelowitz.

[61] Likewise, in *Harmes*, a case relied upon by Mr. Gelowitz, 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.

- [62] I accept it was open to the issuing justice to accept Constable Chamberlain's evidence, based on his experience, that short-duration visits, including the one observed on May 8, 2019 during the Johnson investigation, is consistent with drug trafficking, but of course it could also be consistent with many other things, which is why it is necessary to consider the evidence in its totality.
- [63] I also observe that while the italicized comment respecting the May 8, 2019, observation states Constable Chamberlain's belief that this was a drug transaction, that observation does not necessarily mean that this was or would have been Constable Chamberlain's belief at the time of the observation, nor does it mean that Constable Chamberlain believes this interaction was a drug transaction based only on this single observation. Constable Chamberlain's italicized statements of belief are based on the totality of the evidence presented in the ITO. His subjective belief that this first observation of Mr. Gelowitz was a drug transaction is informed by all the other observations of Mr. Gelowitz throughout the ITO. Thus, this conclusion of Constable Chamberlain cannot be impugned on the basis that it relates to a single interaction. His belief about this single interaction is informed by the totality of the evidence.
- [64] The next observation of Mr. Gelowitz was also during the Johnson investigation. On May 22, 2019, Mr. Gelowitz was observed by a Constable Morris entering Mr. Johnson's residence carrying a red and grey box. He departed 16 minutes later without the box. The same day, a search warrant was executed on Mr. Johnson's residence during which 71.93 grams of cocaine was seized, along with packaging materials and scales said to be consistent with a drug trafficking station. A red and grey cereal box was located in Mr. Johnson's bedroom and Constable Chamberlain confirmed with Constable Morris that it was the same box that Mr. Gelowitz had brought in earlier that day.
- [65] Mr. Gelowitz argues there is insufficient evidence to support the conclusion that the cereal box is the same one that he is said to have brought into the house. His counsel argues there is no explanation in the ITO for how Constable Morris was able to identify it as the same cereal box.
- [66] Constable Chamberlain seized the box during the execution of the warrant, and while he does not say in the ITO that he specifically showed it to Constable Morris, I find an inference could be drawn by the issuing justice based on the evidence that the communication between Constable Morris and Constable Chamberlain was sufficient to establish that it was the same box.
- [67] Mr. Gelowitz makes a more compelling argument which is that there is nothing in the evidence that shows the cereal box was found to contain drugs or traces of drugs. Constable Chamberlain states he believes that the short-duration visit is indicative of drug trafficking and that drugs were concealed in the box. He believes Mr. Gelowitz "loaded" Mr. Johnson with drugs to be trafficked and sold, because it is common for drug dealers to conceal their drugs or money in packages or bags to prevent detection.

- [68] I accept Constable Chamberlain's experience that drug dealers commonly conceal their drugs in packages and bags, but it does not necessarily follow that Mr. Gelowitz was doing so with the cereal box. That said, the belief must be tested on an objective standard against the totality of the evidence.

Morin investigation

- [69] On May 31, 2019, Constable Adam Moleski observed Mr. Gelowitz attending the residence of a Timothy Morin who was under investigation for drug trafficking by the street crew.
- [70] Mr. Gelowitz entered Mr. Morin's home carrying a brown satchel. Constable Chamberlain believes this was a short-duration visit consistent with drug trafficking. However, there is an obvious error in the ITO in that it reports Mr. Gelowitz arrived in Mr. Morin's house at 16:16 hours, and departed 18 minutes earlier at 16:02 hours.
- [71] It is not known whether this is an error in the original surveillance report from Constable Moleski, or whether Constable Chamberlain made a mistake in transcribing it into the ITO. Either way, I find this is not an error that can be corrected without speculation, and there was no way for the issuing justice to determine from the indicated times that this was a short-duration visit.
- [72] The Crown suggests that reliance can be placed on Constable Chamberlain's statement that this was a short-duration visit, even if the precise times cannot be determined due to error. However, since it cannot be determined whether the error is in Constable Moleski's original report or just in the ITO, it cannot be confirmed that Constable Chamberlain knew this to be a short-duration stop. Moreover, Constable Chamberlain does not state what he believes constitutes a short-duration stop. The stop could have been 15 minutes or it could have been 1.5 hours and either might fall within Constable Chamberlain's view of a short duration.
- [73] In my view, the time stated in these entries must be excised from the ITO on the facial review. All that can be taken from these entries is that Mr. Gelowitz was observed attending Mr. Morin's house on May 31, 2019, and seen leaving with a brown satchel on the same day.
- [74] One week later, on June 6, 2019, Mr. Gelowitz was observed arriving at the Morin residence carrying something in his right hand. One minute later, Mr. Morin and Mr. Gelowitz exited the residence. Mr. Gelowitz was carrying a Nike duffel bag. He went into his car and drove away. Mr. Morin left in a different car three minutes later. Mr. Morin was then arrested by police for possession for the purposes of trafficking and was found to be in possession of 84.81 grams of cocaine.
- [75] The Crown does not suggest that Mr. Gelowitz's observed interactions with Mr. Johnson and Mr. Morin in May and June 2019 on their own support a reasonable belief that Mr. Gelowitz was trafficking in drugs. However, the Crown argues that this information forms part of the totality of the circumstances that objectively provides the probable grounds for the warrant.

Gelowitz Surveillance

- [76] Based on these observations in the Johnson and Morin investigations, RCMP began surveillance on Mr. Gelowitz. That began on July 4, 2019, and was conducted on nine days through the month of July, concluding on July 31, 2019.
- [77] In the course of the surveillance, Mr. Gelowitz was observed coming and going from his own residence and to the four other residences for which search warrants were eventually obtained. Many but not all of these attendances were for a short duration, and Mr. Gelowitz was often seen carrying a bag or a satchel when he was entering or leaving one of these places. During these trips, he was seen driving or being driven by his spouse in either a Hyundai Santa Fe or a GMC Sierra pickup truck. Both vehicles are registered in his spouse's name.
- [78] The following is a summary of the observations.
- [79] On July 4 at 10:09, Mr. Gelowitz was seen arriving at the Eaglenest Crescent residence carrying a blue and black Corona bag. He departed 6 minutes later. I accept this was a short-duration stop and that drugs and/or cash could have been concealed in the Corona bag as Constable Chamberlain suggests. I note that Mr. Gelowitz did not leave the bag at the Eaglenest Crescent residence, which suggests he brought it into the residence for the purposes of dropping something off or picking something up. That may or may not have been drugs or cash.
- [80] On July 4 at 10:28, Mr. Gelowitz arrived at 152 McIntyre Crescent, (13 minutes after leaving Eaglenest Crescent), carrying a black and brown package. He was seen to depart 13 minutes later with his hands in his pockets. I accept this was a short-duration stop and it is reasonable to infer that Mr. Gelowitz left the package at 152 McIntyre Crescent. At this point, it appears that the RCMP did not know what unit or units within 152 McIntyre Crescent Mr. Gelowitz was attending at.
- [81] Following this account, Constable Chamberlain states in italics that, based on his experience, he knows drug traffickers commonly use apartment buildings and units rented in the name of third parties to store drugs or cash, because it is harder to detect. I infer from these comments that he is suggesting that a unit within 152 McIntyre was rented by Mr. Gelowitz for this purpose. However, later in the ITO, he suggests that the same unit in 152 McIntyre was occupied by someone else. This appears to undermine his theory that this unit was rented by Mr. Gelowitz for use as a safehouse.
- [82] On July 4 at 15:38, Mr. Gelowitz was seen leaving his home. He drove to Staples and at 15:55 was seen buying a laptop bag before leaving the store. Ten minutes later at 14:55, he was seen entering 166 McIntyre carrying the laptop bag. He accessed the building using a key and departed five minutes later at 16:10 carrying the laptop bag. Constable Chamberlain states that he believes Mr. Gelowitz was concealing drugs or cash in the laptop bag. This theory is plausible, since Mr. Gelowitz had just bought the bag and it would have been empty

when he took it into 166 McIntyre. Since he brought it out with him five minutes later, it is reasonable to infer that he carried something out of 166 McIntyre in the laptop bag. It does not otherwise make sense to go in and come out carrying an empty bag both ways. It is possible that he carried drugs or cash out, but it is also possible he carried out something else, such as a laptop computer.

- [83] On July 10, the second day of surveillance, Mr. Gelowitz was seen arriving at the 1st Avenue building at 20:02. This is the first observation of him entering this significant location. There is no reference to him carrying anything when he arrived. He left 25 minutes later with nothing in his hands and went to 166 McIntyre Crescent. There is nothing remarkable about his attendance at 1st Avenue on this occasion, except for it being a relatively short-duration stop.
- [84] Mr. Gelowitz was seen to arrive at 166 McIntyre Crescent at 20:31, four minutes after he left the 1st Avenue building. He entered the complex empty-handed and left two minutes later, also empty-handed. There is no indication of how he got in the building or what unit he went to. Aside from the short duration, there is nothing of note in this attendance, except that it was the second time he was seen making a short-duration stop at this address.
- [85] On July 11 at 21:26, the third day of surveillance, Mr. Gelowitz and his spouse were seen leaving their residence and driving off in the Santa Fe. Mr. Gelowitz was carrying a satchel when he left the home. Thirteen minutes later, at 21:39, the Santa Fe was seen arriving at 166 McIntyre where Mr. Gelowitz ran toward the building. One minute later, he came back to the Santa Fe and was seen retrieving something. He then returned to the building carrying a satchel. The ITO does not state that it is the same satchel he was carrying when he left his residence, but I find it was open to the Judicial Justice to draw that inference. This is potentially significant because it provides a link between the residence and 166 McIntyre.
- [86] Four minutes later at 21:43, Mr. Gelowitz returned to the car carrying a large black duffel bag which he placed in the back seat. It appears he was not seen exiting 166 McIntyre because he was seen walking on a path near that address with the duffel bag in hand before placing it in the car. However, I find it was open to the issuing justice to infer that he carried the bag out of 166 McIntyre. The car was then driven to the Eaglenest Crescent home with Mr. Gelowitz riding in the passenger seat.
- [87] At 21:50, the Santa Fe arrived at the Eaglenest home, six minutes after it left 166 McIntyre. Both Mr. Gelowitz and his spouse went inside. Mr. Gelowitz was carrying a black duffel bag and I find it is a reasonable inference that it is the same black duffel bag that he was seen with at 166 McIntyre. Thirteen minutes later, they departed with two persons from inside the Eaglenest residence. Mr. Gelowitz was carrying the black duffel bag when he left. In my view, it is a reasonable inference that Mr. Gelowitz was either moving something from 166 McIntyre to the Eaglenest Crescent residence, or he retrieved the bag from 166 McIntyre so that he could use it to carry something out of Eaglenest Crescent. There is a clear inference that he brought the bag into Eaglenest Crescent so that he could leave something there from

166 or take something away. It is, however, not the only plausible explanation. It may be that Mr. Gelowitz did not want to leave the bag in the car for fear of it being stolen, or he may have needed something in the bag while at Eaglenest, but it was certainly open to the Judicial Justice to infer that he brought the bag into the residence so he could leave something there.

- [88] On July 12, the fourth day of surveillance, there were no notable observations.
- [89] On July 13 at 14:05, the fifth day of surveillance, Mr. Gelowitz and his spouse were seen arriving at an apartment complex on North Tabor Boulevard, 23 minutes after leaving their own residence. Mr. Gelowitz was holding a bag. His spouse was observed waiting out front of the North Tabor Boulevard location. Seven minutes after they arrived, Mr. Gelowitz was seen leaving the apartment complex carrying a dark blue Adidas drawstring bag slung over his shoulder that appeared to be heavy. Mr. Gelowitz was observed looking back and forth, causing the surveillance officer to believe or suspect that he was looking to see if anyone was watching him.
- [90] On July 16 and 24, the sixth and seventh days of surveillance, no notable observations were made. Mr. Gelowitz was not sighted on the 24th.
- [91] On July 30, the eighth day of surveillance, Mr. Gelowitz was seen arriving at the 1st Avenue building at 17:30 with nothing in his hands. He was observed using a key to gain entry to the building. This observation is significant in that it shows he had his own access to that building.
- [92] Twenty minutes later, Mr. Gelowitz was observed departing unit 305 in the 1st Avenue building, using a key on the door to the unit. Thus he had key access to both the building and the unit. He had both hands in his front hoodie pocket and was looking around. Constable Chamberlain, who made this observation himself, states he was looking around to see if anyone was watching him.
- [93] Mr. Gelowitz objects to this commentary because Constable Chamberlain cannot know why Mr. Gelowitz was looking around. His counsel argues this observation should be excised because it is without foundation. However, I find this is simply a description of the way in which Mr. Gelowitz was looking around. In his argument, counsel for the Crown interprets this observation as being that Mr. Gelowitz "was looking around, as if to see if anyone was watching him." In my view, that is a reasonable characterization since it is descriptive of the manner in which Mr. Gelowitz was looking around rather than being a conclusory statement about why Mr. Gelowitz was looking around. I find it was open to the Judicial Justice to interpret the observation in that manner.
- [94] Constable Chamberlain then states in italics that, based on his experience and involvement in drug investigations, he believes that Mr. Gelowitz "attended Unit 305 for the purposes of either retrieving or storing drugs and/or cash." There is nothing in the observation that would suggest this conclusion. Mr. Gelowitz was simply entering and exiting the apartment

to which he had a key. This, together with Mr. Gelowitz looking around, may be sufficient to raise a suspicion, but this information alone does not elevate Constable Chamberlain's observation to more than a suspicion. Whether the belief can be objectively sustained on the totality of the evidence remains to be seen.

- [95] At 17:55, five minutes after leaving the 1st Avenue building, the Santa Fe was seen parked at a residence on Tabor Boulevard North. Ten minutes later, Mr. Gelowitz left that residence with his hands in his hoodie pocket and departed in the Santa Fe, which was then seen outside his own residence 15 minutes later at 18:22.
- [96] An hour later at 19:23, the Santa Fe departed Mr. Gelowitz's home and 18 minutes later, at 19:41, Mr. Gelowitz was seen parking the Santa Fe outside 166 McIntyre Crescent. He was then talking on a cellphone while carrying a black duffel bag over his right shoulder. He was not observed to go inside the building.
- [97] Twenty-nine minutes later at 20:09, Mr. Gelowitz was seen leaving the neighbouring building at 152 McIntyre carrying the large duffel bag over his shoulder. The ITO does not report seeing him enter 152 McIntyre or move his car, but since 166 and 152 McIntyre are connected as part of the same apartment complex, it would have been reasonable for the Judicial Justice to infer that Mr. Gelowitz had entered 152 McIntyre earlier. Mr. Gelowitz departed in the Santa Fe one minute later at 20:10. Three minutes later at 20:13, Mr. Gelowitz returned to the 1st Avenue building and went inside empty-handed. Two minutes later, he departed. Constable Chamberlain states in an italicized passage that he believes Mr. Gelowitz's short-duration stop at 1st Avenue was to retrieve or store drugs and/or cash, but Mr. Gelowitz was not seen to carry anything in or take anything out which, in my view, weakens this belief.
- [98] The Santa Fe was next seen parked outside Mr. Gelowitz's home almost an hour later at 21:06. There is no report of observations in the intervening hour.
- [99] On July 31, 2019, the last day of surveillance, Mr. Gelowitz left his residence at 13:47 in the GMC Sierra and was observed 10 minutes later at 13:57 parked near the Eaglenest Crescent home. As he walked towards the residence, he was carrying a duffel bag that he was swinging in his hand as though it was empty and light. He went into the carport and one minute later he exited with the duffel bag slung over his shoulder as if it was weighted. He was observed looking around as he returned to the GMC Sierra.
- [100] I note at this point that there are no observations of Mr. Gelowitz having his own key or independent access to the Eaglenest Crescent residence, which tends to undermine Constable Chamberlain's belief that it was a safehouse controlled by Mr. Gelowitz with a third party named as tenant. In this respect, I note that on July 11, Mr. Gelowitz was seen entering Eaglenest Crescent with his spouse and then departing with two other people. Those other people were not seen entering the residence, and thus it is reasonable to infer that they were there before Mr. Gelowitz. This suggests there may have been residents living in the home, or at least that persons other than Mr. Gelowitz had access to the home.

In my view, this diminishes the force of Constable Chamberlain's view that this was a safehouse.

- [101] At 14:05, six minutes after leaving Eaglenest Crescent in the GMC Sierra with the apparently weighted duffel bag, the Sierra was seen parked at the 1st Avenue building. There is no observation of Mr. Gelowitz entering the building on this occasion but he was seen leaving it with a bag over his right shoulder. I accept that it can be inferred that Mr. Gelowitz was inside the building from at least 14:05 to 14:43, even though he was not seen to enter the building. The ITO does not state whether the black duffel bag he was carrying as he left the 1st Avenue building was the same one as he was seen with at Eaglenest Crescent earlier in the day.
- [102] During the 38 or so minutes that Mr. Gelowitz was inside the 1st Avenue building, a blue Dodge Journey was seen in the building's parking lot. A man got out of that car and entered the building. At 14:30, Mr. Gelowitz let the man into unit 305 within the building. The man exited 10 minutes later at 14:35 and left in the Dodge Journey.
- [103] Constable Chamberlain states that the Dodge Journey was registered to a Shawn Walsh, and that it is the same Dodge Journey observed a month earlier on May 30, 2019 during the Morin investigation. At that time, an unidentified man was seen getting out of the Dodge Journey at Mr. Morin's residence and going inside the house. He departed less than 10 minutes later. The following day, Mr. Gelowitz was seen entering and leaving the Morin residence on a short-duration stop. Forty minutes after that, the Dodge Journey arrived at the Morin residence and a man got out and went inside for a short-duration visit. He left five minutes later. This seems to connect the Dodge Journey, and possibly the man seen entering the Morin residence, to the Gelowitz investigation. This provides some link between the drug trafficking activity that might be inferred from the Morin investigation to the activity under investigation here.
- [104] Constable Inman of the RCMP identified the person getting out of the Dodge Journey on July 31 from a Facebook photo as Travis Cardinal. Confidential Informer "B" identified Mr. Cardinal as a person who sells methamphetamine and heroin. Informer "B" also said Mr. Cardinal had a girlfriend named "Janelle". Constable Chamberlain looked at a surveillance photo of the driver of the Dodge Journey and identified her as Janelle Few, a woman who he knew from elementary and high school in Prince George. This provides fairly compelling evidence that Mr. Cardinal is the person who Informer "B" identified as a drug dealer.
- [105] As noted, at 14:43, eight minutes after Mr. Cardinal left the 1st Avenue building, Mr. Gelowitz was seen leaving that building carrying a black bag. He left in the GMC Sierra.

- [106] One minute later at 14:44, Mr. Gelowitz was seen parking the GMC Sierra at 166 McIntyre and going into the building carrying a large black duffel bag. The observation does not state whether it is the same black duffel bag he was seen with leaving 1st Avenue, but it was open to the Judicial Justice to make that inference. Constable Chamberlain then saw Mr. Gelowitz leave Unit 205 of 166 McIntyre six minutes later at 14:50.
- [107] At this point in the ITO, there are some errors with the time entries or observations. It is stated that at 14:40, Constable Dela Torre observed Mr. Gelowitz leave Unit 205 of 166 McIntyre using a key to lock the door behind him. However, Constable Reid observed Mr. Gelowitz leave the 1st Avenue building at 14:43 and Constable Chamberlain observed Mr. Gelowitz arrive at 166 McIntyre at 14:44. Thus there is an inconsistency between Constable Torre's observation and Constable Reid's. If Constable Torre's observation is correct, it calls into question Constable Reid's observation and Constable Chamberlain's observation. Conversely, Constable Reid or Constable Chamberlain are correct, then Constable Torre must be wrong.
- [108] Mr. Gelowitz argues I cannot reliably determine which of these times is correct, and I must therefore excise all the time references for:
- a) his departure from the 1st Avenue building at 14:43;
 - b) his arrival at 166 McIntyre at 14:44; and
 - c) the two observations of him leaving 166 McIntyre at 14:50, the Chamberlain observation, and at 14:40, the Torre observation.
- [109] The matter becomes more confusing in that at 15:04, Sergeant Chamberlain (not Constable Chamberlain) saw Mr. Gelowitz leave 166 McIntyre and go to 152 McIntyre carrying a large black duffel bag. If this time is correct, and either Constable Chamberlain's or Constable Torre's time entry is correct, it means that it took Mr. Gelowitz either 14 minutes or 24 minutes to leave the building after leaving the apartment unit within the building. This seems improbable and casts further doubt on the accuracy of the time entries.
- [110] In my view, these time records cannot be reconciled. The most that can be drawn from these observations is that Mr. Gelowitz left the 1st Avenue building sometime after 14:35 (which is the time that Mr. Cardinal left that building), drove to 166 McIntyre, went in the building carrying a duffel bag, and then left the building sometime before 15:05 to go to 152 McIntyre. I agree with Mr. Gelowitz that the specific time entries for this period are unreliable and should be excised. That said, little turns on these excisions because all of this activity took place in the course of about half an hour.

- [111] As noted, Sergeant Chamberlain observed Mr. Gelowitz leaving 166 McIntyre with a large duffel bag and go to 152 McIntyre. He was let into the building, which means he did not have a key. Two officers observed him leaving the building at 15:21. One of them reported that he was not carrying a bag. Thus, there is a clear inference that he left the bag and any contents of the bag at 152 McIntyre. He returned to 166 McIntyre and used the key to gain entry.
- [112] Two minutes later, at 15:23, Mr. Gelowitz again was seen leaving 166 McIntyre and going back to 152 McIntyre, again apparently empty-handed. He was let into the building one minute later at 15:24 by a woman who came out of Unit 195. They both then went inside the building and into Unit 195. Mr. Gelowitz then left eight minutes later at 14:32 carrying a black duffel bag. At the same time, another man left Unit 195 and got into a car that is registered to a Douglas Morin, who is the registered tenant of 152 McIntyre (and not the Timothy Morin who was the subject of the earlier Morin investigation). Forty-five minutes later at 16:15, Mr. Gelowitz was seen parking the GMC Sierra at his residence and going inside without the bag.
- [113] This concludes the direct surveillance of Mr. Gelowitz. The Crown argues the activity is consistent with transporting drugs and/or cash between the four suspected "safehouses" but acknowledges that, taken in isolation from other information, it could be consistent with transporting something else. The Crown argues these observations are not consistent with just visiting friends.

Vehicle Tracking Data

- [114] In addition to this direct surveillance, RCMP on the authority of a warrant issued July 17, 2019, placed a tracking device on each of the Santa Fe and the GMC Sierra. The tracking data summarized in the ITO is for dates on which there is no recorded direct surveillance of Mr. Gelowitz. The ITO summary indicates the following:
- a) On July 19, at 18:30 the Sierra was tracked to the vicinity of the Eaglenest Crescent residence. Two minutes later at 18:32, it departed and travelled directly to the vicinity of 152 and 166 McIntyre where it arrived at 18:47. Five minutes later it departed that vicinity and was tracked as going directly to the vicinity of the 1st Avenue building. One hour and 23 minutes later, at 20:15, it left the vicinity of the 1st Avenue building and returned about one hour and 25 minutes later at 21:39. The ITO did not disclose where the GMC was tracked to during that period. Thirty-one minutes later it departed the vicinity of the 1st Avenue building at 22:10.
 - b) On July 20, at 20:30 the Santa Fe was tracked from Mr. Gelowitz's residence to the 1st Avenue building, departing one hour and 46 minutes later at 23:16, and then returning again to the 1st Avenue building 12 minutes after that at 23:28. Again, the ITO does not state where the Santa Fe was during that time.

- c) On July 21, the Santa Fe left the Parent Road home at 18:56 and was tracked to the 1st Avenue building where it remained for 51 minutes until 20:01. It returned to the Mr. Gelowitz's home at 20:23.
- d) On July 22, the Santa Fe left Mr. Gelowitz's home at 09:55 and arrived at the 1st Avenue building 11 minutes later at 10:06. It remained there for one hour and seven minutes before departing at 11:13. It returned to the Gelowitz residence at 11:51. The ITO does not state where it went in the 38 minutes between leaving 1st Avenue and arriving at the Gelowitz residence.
- [115] The Crown acknowledges that the tracking information is of lower quality than the direct surveillance by police officers since it cannot show who was driving the cars. However, since Mr. Gelowitz was seen either driving or riding as a passenger in both the GMC Sierra and the Santa Fe during the surveillance, it is a reasonable, though not conclusive, inference that he was in the car when it was tracked to the locations just summarized. Moreover, since he was seen frequenting these locations during the surveillance, there is an inference that he did so on the days that cars were tracked there. I agree, though, that the evidence is less compelling in that it is less certain that it was Mr. Gelowitz who attended those places on the tracking days and there are no observations of what he was doing.
- [116] Contrary to Mr. Gelowitz's submission, though, I do not find it significant that some of the entries in the ITO respecting the tracking data state that the car was tracked to "the vicinity" of a location. There is some imprecision in GPS location data, and I read the use of the word "vicinity" as an acknowledgment of that imprecision. This might be a more significant factor if Mr. Gelowitz had not been directly observed attending these locations on other dates, but given those direct observations, I find it was open to the Judicial Justice to draw an inference that the tracked vehicle was at the stated locations, despite the use of the word "vicinity".
- [117] Obviously the tracking data did not identify whether Mr. Gelowitz was transporting items to or from locations. However, I agree with the Crown that the tracking data provides some information that supports Mr. Gelowitz's movements from these locations of interest.

Analysis

- [118] Considering all the evidence in the ITO in its totality and having regard to the test I must apply, namely whether the Judicial Justice could have issued the search warrants on this evidence and not whether I would have done so, I find the evidence presented in the ITO is not sufficiently compelling to cross the threshold from suspicion to a credibly-based probability. I would therefore set aside the search warrants, as I find the Judicial Justice could not have issued the warrant or warrants on the basis of this evidence. I reach this conclusion for the following reasons.
- [119] With respect to the substantive surveillance of Mr. Gelowitz, it amounts largely to this:

- a) Mr. Gelowitz was seen interacting in short-duration encounters with two persons on separate occasions shortly before each of those persons was found to be in possession of a reasonably sizeable amount of cocaine;
- b) a significant number of observations of Mr. Gelowitz coming and going, mostly in short-duration stops, from four locations that were the subject of the search warrant, plus his own home. During these stops he frequently, though not invariably, carried a bag in or out of the place he stopped. The contents of the bags were never seen;
- c) during one of those longer stops of 45 minutes, Mr. Gelowitz had a short-duration interaction with one person, Mr. Cardinal, in the 1st Avenue property. Confidential Informer "B" described Mr. Cardinal as a drug dealer; and
- d) RCMP had received advice of two confidential informants that Mr. Gelowitz was dealing drugs, but no more particulars, apart from the kind of drugs.

[120] With respect to the surveillance of Mr. Gelowitz specifically, starting in July 2019, at no time was he observed to be engaging in anything that might be characterized as a drug transaction. It might be inferred that Mr. Cardinal's attendance at the 1st Avenue apartment, being a short-duration stop by a person identified by an informer as a drug dealer, was a drug transaction, but there is little to go on in support of this. On all the other occasions that Mr. Gelowitz was seen coming and going from the various locations, there was nothing in the nature of a transaction observed. At best, it can be inferred that he was moving things to and from these locations which could have been drugs or cash. On several occasions, though, he was seen carrying nothing. I agree the activity is suspicious, but it does not cross the threshold to reasonable grounds for believing that Mr. Gelowitz was involved in drug trafficking or that drugs or evidence of drug trafficking would be found at these locations.

[121] The attendance by Mr. Cardinal at the 1st Avenue apartment on July 31, 2019 heightens the suspicion since Mr. Cardinal was identified by Informer "B" as a drug dealer. However, the RCMP's theory and statements in the ITO undermine the weight of this inference. The RCMP's theory is that the 1st Avenue apartment was a safehouse which is used by drug dealers to store their product and cash in an effort to evade detection by police or other drug dealers. Mr. Cardinal is considered to be a drug dealer and, based on Constable Chamberlain's explanation, one would expect that Mr. Gelowitz would not want him in a safehouse.

[122] It may be that Mr. Cardinal is a street-level dealer who is supplied by Mr. Gelowitz, in which case it may be that he would have allowed him in a safehouse, but there is no evidence to that effect in the ITO. All we know is that Confidential Informer "B" advised that Mr. Cardinal deals drugs.

- [123] The Crown argues it is reasonable to expect that surveillance would not disclose evidence of drug transactions because, as a mid-level supplier, Mr. Gelowitz would not have several buyers frequenting any one of the search locations for short-term duration transactions. As a mid-level supplier, Mr. Gelowitz would be supplying larger amounts of drugs to lower level dealers, and this would reasonably be done by moving larger amounts of product to different dealers and concealing the product in bags as he moved it around.
- [124] The Crown's argument is certainly logical, but the evidence supporting the RCMP's theory that Mr. Gelowitz is a mid-level supplier is, in my view, quite weak. It amounts to the fact that Mr. Johnson and Mr. Morin were found in possession of significant quantities of cocaine shortly after meeting with Mr. Gelowitz. This alone is not sufficient to arrive at a reasonable basis for anything more than a suspicion that Mr. Gelowitz is a mid-level dealer.
- [125] The nature of Mr. Gelowitz's movements between the various locations searched may elevate this suspicion in that carrying bags of something from one location to another would seem consistent with being a mid-level supplier, but it could also be consistent with carrying about other things. It is certainly suspicious but even when considered together with the observations made during the Johnson and Morin investigations and the advice from the confidential informers, I find it is not so compelling to make this anything more than a well-founded suspicion. As I said earlier, I find the statement from Informer "B" that Mr. Gelowitz "is trying to be hands off" is too vague and unexplained to support an inference that the informer was trying to suggest he was a mid-level supplier. In short, I find the evidence of Mr. Gelowitz being a mid-level supplier is weak.
- [126] I also find the RCMP's theory that the places searched are safehouses is not sufficiently compelling to equate with a reasonable belief or, when considered with all the evidence, supportive of a reasonable belief that drugs or evidence of drug trafficking would be found in those specific locations searched. As I have said earlier, the evidence in the ITO seems to suggest that there were people living in at least two of those places: Eaglenest Crescent and 152 McIntyre. The fact that Mr. Gelowitz appears to have had his own key for the 1st Avenue apartment and the 166 McIntyre apartment certainly enhances the Crown's theory in this respect, but even when considering this fact along with the totality of the evidence - including Mr. Gelowitz's movements in and out of all these places often but not invariably carrying a bag, and his short-duration interactions with others apparently involved in drug dealing - I find it falls short of being the kind of compelling evidence needed to lift this to the level of reasonable belief.
- [127] In this respect, I again note the lack of corroborating evidence from the two informants, neither of whom identified a place from which Mr. Gelowitz dealt drugs or otherwise engaged in trafficking activity. This is in contrast to Harmes, where a confidential informant relayed that the accused was dealing drugs in Maple Ridge, he was loading drug dealers in Maple Ridge, that he dealt drugs from one of the specific addresses that was later searched, and that he kept some amount of drugs in that place. This kind of detail is notably absent in the present case.

[128] I also find the evidence that Mr. Gelowitz rented the 1st Avenue apartment or any of the alleged safehouses in names of third parties unconvincing. It is suggested that the registered tenants of at least the 1st Avenue and 166 McIntyre apartments do not live in those locations, and Mr. Gelowitz has care and control of those places, as evidenced by his key. However, there is no evidence of sustained surveillance of those two locations to determine if anyone was living there. I would not suggest how the RCMP ought to conduct their surveillance but I agree with counsel for Mr. Gelowitz that the absence of evidence of activity or lack of activity at these locations, apart from Mr. Gelowitz coming and going, undermines the inference that there was no one living at these places.

Conclusion

[129] To conclude, I find the evidence in the ITO provides good reason to suspect that Mr. Gelowitz may be involved in drug trafficking, and it might even be characterized as a strong suspicion. However, I find the evidence in the ITO falls short of meeting the threshold for a reasonable belief or credibly-based probability that Mr. Gelowitz has committed an offence and that evidence of that offence would be found at the specific locations searched. Thus, I find the ITO was an insufficient basis on which the Judicial Justice could have issued the search warrants.

[130] I would therefore set aside the two warrants that Mr. Gelowitz has standing to challenge, namely the ones for the 1st Avenue apartment and for his own residence.

"Kirchner J."

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