

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

Between:

**HER MAJESTY THE QUEEN**

Respondent

-and-

[REDACTED]

Applicant/Accused

**NOTICE OF APPLICATION**

**TAKE NOTICE** that an application will be made by Counsel on behalf of the Applicant at the trial of this matter in the British Columbia Supreme Court in Kelowna, on [REDACTED] at 10:00 AM or so soon thereafter as the application may be heard, at the courthouse located at 1355 Water St, Kelowna, British Columbia, V1Y 9R3, for an order granting the exclusion of evidence under s. 24(2) of the *Charter*.

**AND FURTHER TAKE NOTICE** that the application will be made pursuant to the following Sections 8, 10(b), and 24(2) of the *Canadian Charter of Rights and Freedoms*.

**GROUNDS FOR MAKING THIS APPLICATION:**

1. On April 22, 2016, the Kelowna RCMP began investigating a tip from a confidential informant. Informer "A" had provided information that [REDACTED] was the licence plate on a vehicle being used to traffic drugs in Kelowna. Informer "A" was an individual who had provided reliable information to the RCMP in the past.
2. The licence plate [REDACTED] was associated with a brown Hyundai Accent. The RCMP queried the license plate and learned that it was registered to [REDACTED]. The vehicle was the subject of a traffic stop on April 19, 2016. [REDACTED] was identified as the

driver. [REDACTED] was known to the RCMP from ongoing drug investigations involving [REDACTED] and [REDACTED]. Police began surveillance on the known residences of [REDACTED] and [REDACTED] on May 11, 2016.

3. On May 31, police established surveillance on [REDACTED]'s listed residence at [REDACTED] in Kelowna. A blue Toyota Celica registered to [REDACTED]'s mother was parked in front. Police observed [REDACTED] depart the residence with a male later identified as [REDACTED]. They went to a restaurant together and later met up with an unknown person driving a Pontiac Grand Am, registered to [REDACTED] of [REDACTED] in West Kelowna.

**June 2 - Arrest of [REDACTED]**

4. On June 2, [REDACTED] and a male (later identified as [REDACTED]) were observed in front of [REDACTED], working on [REDACTED]'s GMC Sierra. [REDACTED] arrived in the Toyota Celica. [REDACTED] arrived shortly afterwards driving the Pontiac Grand Am.
5. Police observed [REDACTED] lean through the driver's window of the Grand Am to speak to [REDACTED] before returning to the Toyota Celica. [REDACTED] then entered the passenger seat of the Celica, which departed with [REDACTED] as the driver. [REDACTED] drove away separately in the Grand Am.
6. Police maintained mobile surveillance on [REDACTED]. Two suspected drug transactions were observed. The second meeting involved a male, later identified as [REDACTED], approaching the white Pontiac as it was parked.
7. After [REDACTED] returned to his own vehicle and [REDACTED] drove away, Cst. Mousney arrested [REDACTED] for possession of a controlled substance. The arresting officer found heroin in [REDACTED] front right pocket during a search incident to arrest. [REDACTED] also had more than \$1000 cash on his person. [REDACTED] later provided a statement that there were four individuals associated with the phone number he had called.
8. RCMP members conducted a traffic stop on the Grand Am. Cst. Minkley arrested [REDACTED] for possession for the purpose of trafficking at 6:45 p.m. The officers conducted a search on the vehicle. Police located heroin, cocaine, and various pills within a make-up bag.

**Further confidential informant information**

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

10. Informer "B" told police that [REDACTED] ran a drug line, with dealers named [REDACTED] and [REDACTED].
11. Informer "C" told police that [REDACTED] sold hard and soft cocaine, heroin, and methamphetamine, and that he had multiple people selling for him, including [REDACTED] and [REDACTED]. [REDACTED] was the driver of a BMW, and [REDACTED] was the driver of a blue Ford Taurus.

**Surveillance continued at [REDACTED].**

12. On June 3, RCMP observed the Toyota Celica parked at [REDACTED]. The Celica and the GMC Sierra left [REDACTED] together and parked at [REDACTED], a condo complex on [REDACTED]. The GMC Sierra, with [REDACTED] driving and [REDACTED] as passenger, was later observed back at [REDACTED]. The tailgate was open and three people were loading items into the box of the truck.
13. Police also observed a BMW registered to [REDACTED] was parked out front of [REDACTED] [REDACTED] in West Kelowna (the address associated with the Pontiac Grand Am). An individual believed to be [REDACTED] was standing on the back porch. The trunk of the BMW was open and appeared to be full of luggage. [REDACTED] and two others were observed unloading the BMW and taking items inside the residence.
14. From June 6-13, police continued to conduct mobile surveillance on [REDACTED] [REDACTED] and [REDACTED]. [REDACTED] was often observed driving the GMC Sierra with [REDACTED] as a passenger.
15. On June 7, Police conducted a traffic stop on [REDACTED]'s BMW. [REDACTED] was identified as the driver with [REDACTED] as a passenger. After the traffic stop, police continues surveillance. Police observed an unknown female walking away from the BMW after it stopped briefly.
16. Police observed [REDACTED] and [REDACTED] visit several shops, including an electronics store where they had a clerk inspect the speakers in the BMW. They eventually arrived at [REDACTED] [REDACTED] where they picked up a gold Hyundai Accent with license plate [REDACTED], registered to [REDACTED].
17. [REDACTED] and [REDACTED] drove the Accent and the BMW to the parking lot of the Accent Inn, where they met up with [REDACTED]. [REDACTED] got into the BMW to speak with [REDACTED]. [REDACTED] was observed handing something to [REDACTED]. A mobile locksmith arrived and cut new keys for a black Ford Taurus, registered to [REDACTED], that was parked in the same lot. [REDACTED] and [REDACTED]

████████ left in the BMW, leaving the Accent behind. ██████ left the parking lot in the Accent a short time later.

18. Police maintained surveillance on ██████. They observed her meeting with two people for a few minutes at a time.
19. On June 8, the police entered the underground parking lot at ██████████ and observed the blue Toyota Celica parked in stall ██████. Cpl. Hare contacted the building management at ██████████ and was informed that parking stall ██████ was associated to unit ██████. The property manager explained that parking was very strict and security was on site to monitor any vehicles parked in the wrong stalls. Cpl. Hare also learned that the owner of the unit was an Alberta man who used a local management company to rent the suite out and had no contact with the tenants.
20. The police observed ██████ park the Hyundai Accent in the visitor parking area. ██████ entered building ██████████. A few minutes later, the GMC Sierra arrived at ██████████. ██████ left ██████████ with ██████ in the GMC Sierra. ██████ left a few minutes after him. She was later observed conducting suspected drug transactions at other apartment complexes while driving the Hyundai Accent.
21. On June 9, a grey BMW (believed to be ██████'s vehicle) was observed driving on the same road as the GMC Sierra before turning off in another direction. Mobile surveillance was maintained on the GMC Sierra. ██████ and ██████ were observed running errands in the GMC Sierra. ██████'s BMW was located later that day. Police observed the vehicle making multiple suspected drug transactions.
22. On June 10, ██████ was observed meeting with the occupants of the BMW while driving the Toyota Celica. They moved a pair of speakers from the BMW into the backseat of the Toyota Celica.
23. On June 13, police observed ██████ exit the ██████████ residence and begin driving her black Ford Taurus. Police lost track of her vehicle for approximately 20 minutes. When the vehicle was re-located, ██████ was observed meeting with known drug users in West Kelowna.
24. Cst. Ricoppo conducted a traffic stop and arrested ██████ for possession for the purpose of trafficking. A search incident to arrest did not locate any drugs, so ██████ was released without charges.

**Arrest of [REDACTED] and [REDACTED]**

25. On June 14, [REDACTED] was observed leaving the [REDACTED] residence at 9:25 a.m. Police maintained mobile surveillance of her black Ford Taurus and observed two suspected drug interactions.
26. Cst. Diachok arrested the second person that she met with, [REDACTED], for possession of a controlled substance. After the arrest, the police observed three individually wrapped pieces of crack cocaine and heroin in the grass where [REDACTED] had been placed in handcuffs. [REDACTED] was taken back to the detachment and strip searched at 10:43 p.m. Nothing was found. He was not immediately provided with access to counsel as a search warrant for [REDACTED]'s residence was not yet approved.
27. Cst. McQuade arrested [REDACTED] at 11:30 a.m. for possession for the purpose of trafficking. A pat down search was conducted at the roadside. Cst. McQuade located a folded up \$50 bill in the right side of [REDACTED]'s bra. A warrantless search of the Ford Taurus located a small bottle of GHB. [REDACTED] was transferred to the Kelowna RCMP detachment. A strip search was conducted but nothing was found. [REDACTED] was not provided with access to counsel as a search warrant for [REDACTED]'s residence had not yet been approved.

**Arrest of [REDACTED] and [REDACTED]**

28. At 12:15 p.m., police observed [REDACTED] walking away from his apartment at [REDACTED]. [REDACTED] was observed entering the passenger seat of [REDACTED]'s GMC Sierra.
29. At 12:24 p.m., police arrested [REDACTED] and [REDACTED] for possession for the purpose of trafficking. The arresting officer provided [REDACTED] with his rights and caution from memory. When asked if he wanted to contact a lawyer, [REDACTED] identified [REDACTED] as his lawyer of choice. [REDACTED] was transported to the RCMP detachment and placed in a cell. He was not provided with access to counsel as the investigation was ongoing.
30. The GMC Sierra was searched at the scene. Documents were seized from the vehicle, including a document relating to a storage locker at [REDACTED] rented by [REDACTED] on June 3, 2016.

**Warrant Execution at [REDACTED] and Arrest of [REDACTED]**

31. Cst. Minkley was the affiant for the Information to Obtain a telewarrant to search the [REDACTED] apartment at [REDACTED]. His theory of the case was that [REDACTED] was the leader of a drug trafficking operation with multiple people selling drugs under him, including [REDACTED] and [REDACTED].

32. The warrant was requested to search for cocaine and heroin for the purpose of trafficking as well as Canadian Currency, drug trafficking paraphernalia including scales, score sheets, drug packaging materials, and documents identifying the residents.
33. The warrant was granted and executed at 2:45 p.m.
34. The police used an electronic door code to open the door. A male, identified as [REDACTED] was located inside. Police arrested him for possession for the purpose of trafficking. He indicated his desire to contact a lawyer, but police deliberately delayed his access to counsel.
35. A search of the residence located documents belonging to [REDACTED] and [REDACTED] as well as crack cocaine, heroin, pills, Canadian currency, a money counter, score sheets, and drug packaging materials throughout the residence. Police also seized an electric toothbrush from the master bedroom.

#### ***Police Efforts to Contact Counsel***

36. At 6:15 p.m., [REDACTED] was informed that she was being further charged for possession of trafficking on the basis of the findings from the search at the [REDACTED] condo. Cst. Celli told her that a call would be placed to her lawyer's office on her behalf.
37. At 6:20 p.m., police informed [REDACTED] that they were not charging him with an offence but asked him to provide a witness statement. [REDACTED] told police that he was staying with police because he was homeless and had no place to stay. He had just gotten out of jail and was sleeping on the couch. He had known [REDACTED] for a long time, and [REDACTED] was helping him get clean. [REDACTED] denied any knowledge about the drug trafficking operation.
38. At 6:21 p.m., [REDACTED] was informed that he was being further for possession for the purpose of trafficking based on the results of the search warrant. He was asked if he wanted to call a lawyer. [REDACTED] identified the same lawyer that he had mentioned earlier, [REDACTED], but noted that she was no longer at work. Cst. Celli told him that a call would be placed to [REDACTED]'s office on his behalf.
39. At 6:30 p.m., a call was made to lawyer [REDACTED] for [REDACTED] and [REDACTED]. An answering machine indicated that [REDACTED]'s office was closed after 2:00 p.m.
40. At 6:32 p.m., [REDACTED] was informed that they were waiting for [REDACTED] to call back but that she could speak to a different lawyer in the meantime or contact legal aid. [REDACTED] stated that there was no point in switching lawyers, so she would wait for court. Cst. Celli told her to let the guards know if she changed her mind.

41. At 6:37 p.m., [REDACTED] was informed that they were waiting for his lawyer to call back, but that her voicemail indicated she was not available. [REDACTED] was told he could call another lawyer or legal aid. [REDACTED] stated that there was no point and that he did not want to speak to a different lawyer. Cst. Celli told him to let the guards know if he changed his mind.
42. At 6:42 p.m., [REDACTED] was asked if he wanted to call a lawyer. He asked for [REDACTED] [REDACTED]. Cst. Celli asked [REDACTED] if there was a different lawyer he could call. [REDACTED] indicated that he would wait for a call back from Ms. [REDACTED]. At 6:47 p.m., a message was left for [REDACTED] on [REDACTED]'s behalf.
43. At an unknown point in the evening, Cst. Celli spoke with [REDACTED] on the phone. [REDACTED] had called wanting an update on her clients. Cst. Celli told her that there were problems between the court and the JJP counter over where to conduct the bail hearing. The police were seeking a further 24 hours to prepare the Report to Crown Counsel, but the judicial case manager would not authorize the JJP centre to hear the bail hearing because there was a sitting judge present in Kelowna, and the court would not approve the bail hearing without the Report to Crown Counsel.
44. Cst. Celli told her he would pass a message on to Cpl. Hare, who was dealing with the issue. Cst. Celli's notes indicate that Cpl. Hare was too busy at the courthouse to respond to the message.
45. Police released [REDACTED] at 11:40 p.m. on a Promise to Appear. After [REDACTED]'s release, [REDACTED] [REDACTED] arrived at the detachment to speak to her clients. When [REDACTED] showed up at the detachment in person, Cst. Celli was directed to refuse her access to her clients until the issue with the bail hearing was sorted out.

***Search of the Storage Locker at [REDACTED]***

46. A second ITO was drafted for a search of the storage locker that was listed on the documents found in the GMC Sierra.
47. Cst. Minkley believed that [REDACTED] was using the storage locker to hide "bulk" amounts of cocaine and heroin because no bulk amounts were found in his residence.
48. The warrant was requested to search for cocaine and heroin for the purpose of trafficking as well as Canadian Currency, drug trafficking paraphernalia and drug processing materials such as a pill press.
49. The warrant was granted and executed at 10:18 p.m. The police located some suspected score sheets inside of a laundry basket.

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

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

**Deficiencies in the ITO for [REDACTED]*****Reason for Seeking a Telewarrant***

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

### **Confidential Informants**

63. Where an ITO relies upon the information of a confidential informant, that information should be corroborated and/or the underlying circumstances for the confidential informant's conclusions must be set out to enable the authorizing justice to satisfy themselves that there are indeed reasonable grounds for believing what is alleged.
64. Hearsay statements from an informant can provide reasonable and probable grounds to justify a search. However, evidence of a tip from an informer, by itself, is insufficient to establish reasonable and probable grounds. The reliability of the tip is to be assessed by recourse to "the totality of the circumstances". The results of the search cannot, *ex post facto*, provide evidence of reliability of the information.
65. In this case, the affiant did not disclose whether the information provided by the confidential informants was first-hand knowledge or hearsay from third parties. In addition, the pedigree information for confidential informers "B" and "C" are completely lacking. Taking into account the circumstances laid out in the ITO, the reliability of the confidential informers' information cannot properly be assessed, and together with the rest of the ITO, there were no reasonable and probable grounds that evidence of drug-trafficking would be found at [REDACTED].

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

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

search warrant investigations. In addition, the affiant had attended a three-week Drug Investigative Techniques course in 2009, and an Expert Opinion Workshop in 2015.

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

in the driveway for two minutes before driving away again. There is no description about [REDACTED]'s specific actions during this stop, nor is any other person described at that location. The affiant supports his conclusion by reference to his experience as a drug expert.

- vi. At paragraph 50(c) the affiant writes that [REDACTED]'s BMW was located on June 9 by Cst. Rattee. At paragraph 50(g), the affiant writes that 7 short duration meetings were observed and that he believes, as a drug expert, that [REDACTED] sold drugs on each of these meetings due to the short duration of the meets. The affiant includes no details about these seven meetings.
  - vii. At paragraphs 53(c)-(d), the affiant describes observations from June 13 which recorded [REDACTED] driving her Ford Taurus down a dead-end road. No meeting was observed but the affiant states that in his opinion, a quick stop on a dead-end street is consistent with drug trafficking. He does not explain why.
  - viii. At paragraphs 53(f) and (g), the affiant states for two separate observations that in his experience as a drug expert, "this type of short duration meeting is consistent with drug trafficking" and he believes that [REDACTED] "sold drugs" to the individuals observed exiting [REDACTED]'s vehicle.
  - ix. At paragraph 54(a) the affiant describes the arrest of [REDACTED] on June 13 by Cst. Ricioppo. The affiant speculates that no drugs were found on [REDACTED] or in her vehicle because she might have hidden them in her vagina or anus before Cst. Ricioppo approached the vehicle. This is pure speculation.
  - x. At paragraph 58, the affiant indicates that his grounds for believing [REDACTED] and [REDACTED] are in possession of cocaine and heroin is based on the three confidential informants and the arrest of [REDACTED] on June 14. A sentence which purports to list the drugs found during the arrest of [REDACTED] begins, but as no cocaine or heroin were found, the sentence trails off, which leaves the impression that cocaine and heroin were found during her arrest.
71. A number of details which do not support the affiant's theory are left out of the ITO. These omissions are misleading and have the effect of making the ITO's grounds seem stronger than they might have been were the omitted details included.
- i. At paragraphs 48(a)-(e), the affiant describes the observations from surveillance on [REDACTED] and [REDACTED] on June 7. The affiant does not include in the observations the fact that police observed a possible drug encounter immediately

following the traffic stop. This detail would not support the affiant's theory that [REDACTED] was selling drugs obtained from [REDACTED]'s residence.

- ii. The Surveillance Report from June 7 indicates that [REDACTED] and [REDACTED] had a private conversation inside the BMW, and that [REDACTED] was observed handing something to [REDACTED], but this is not included in the ITO.
  - iii. At paragraph 48(f), the affiant writes that [REDACTED] and [REDACTED] left [REDACTED] with the Hyundai Accent while she waited for new keys to be cut for the car. This statement implies that new keys were cut for the Hyundai. The Surveillance Report for June 7, which the affiant authored, indicates that the new keys were in fact cut for [REDACTED]'s Black Ford Taurus which was parked nearby. Failure to provide this detail limits the number of inferences that the issuing JJP could have drawn from these observations.
  - iv. At paragraph 50(a), the affiant writes that "the BMW, believed to be [REDACTED] [REDACTED]'s" was seen driving together with [REDACTED]'s GMC Sierra. The affiant does not make it clear that the BMW was identified by description only. By using the definite article (the) instead of the indefinite article (a/an), the affiant obscures the possibility that a different grey BMW could have been driving on the same road.
  - v. Likewise, paragraph 61(a) lists [REDACTED]'s visit to [REDACTED] on June 8 as a ground for believing that cocaine and heroin would be found within [REDACTED]'s residence. The affiant omits the fact that [REDACTED] was not carrying anything but her phone when she left the [REDACTED] apartments.
  - vi. The affiant also omits observations from the Surveillance Report which were not consistent with drug trafficking. For example, [REDACTED] was seen meeting with an unknown female for approximately 10 minutes. During that time, [REDACTED] and the woman were smoking a cigarette together and laughing, but police did not witness [REDACTED] give anything to the woman or *vice versa*.
  - vii. The affiant notes that [REDACTED] told Cst. Ricioppo that she lived at [REDACTED] on June 13. However, the affiant did not include the fact that [REDACTED] provided a different address to police during her arrest on June 14.
72. Furthermore, the reasonableness of the affiant's belief that [REDACTED] was supplying [REDACTED] and [REDACTED] with cocaine and heroin is undermined by the fact that, with the exception of the drugs found in connection with [REDACTED] and [REDACTED], no cocaine or heroin was located during the course of the investigation. The only drug found on [REDACTED] in this

investigation or the related investigation from May 25, 2016 was GHB. The affiant does not suggest that [REDACTED] was trafficking in GHB.

***Conclusion on Garofoli Review of [REDACTED] Warrant***

73. The Applicant submits that the Information to Obtain a search warrant of [REDACTED] [REDACTED] is deficient on its face and should not have issued because it fails to set out objectively reasonable and probable grounds for believing that a search of the residence would reveal evidence of an offence.
74. In addition, as this was an *ex parte* application, the affiant had a duty to provide full, frank, and fair disclosure of the facts of the investigation. This is so that alternative inferences that the accused might have suggested had he been present are left open to be drawn. A number of details which do not support the affiant's theory are left out of the ITO. These omissions are misleading and have the effect of making the ITO's grounds seem stronger than they might have been were the omitted details included.
75. Thus, upon excision of conclusory and misleading statements from the ITO, this Court should conclude that the issuing justice could not have issued the warrant in this case.

**Deficiencies in the ITO for [REDACTED]**

76. The Applicant submits that the Information to Obtain a telewarrant to search the Storage Locker at [REDACTED] is deficient on its face and could not have issued because it fails to set out objectively reasonable and probable grounds to believe that a search of the storage locker would reveal evidence of an offence.

***Insufficient Grounds for Seeking the Warrant***

77. The affiant's belief was that [REDACTED] had moved his residence and drug trafficking operation from [REDACTED] on June 3, after [REDACTED]'s arrest. The affiant further believed that the storage locker was rented to hide additional drugs, drug packaging materials, and drug manufacturing equipment. At paragraph 59(a), the affiant notes that the storage locker was rented on the day that [REDACTED] moved into the [REDACTED] apartment.
78. At paragraph 62, the affiant lists his grounds for believing that drugs, drug packaging materials, and drug manufacturing equipment would be found inside the storage locker.

79. Twice, at paragraphs 62(a) and 64(a), the affiant indicates that his grounds for seeking the warrant are that “no bulk quantities of cocaine or heroin” were located within [REDACTED]. The affiant’s speculations that [REDACTED] “could” attend the storage locker to retrieve bulk packages of heroin and cocaine is not grounded in any objectively discernible facts from the investigation. This type of wishful thinking is not a proper ground for belief.
80. At paragraph 64(c), the affiant writes that drug manufacturing equipment would be found in storage locker an industrial pill press was found in the December 2015 investigation. The ITO for [REDACTED] did not suggest that [REDACTED] was keeping this type of manufacturing equipment within his residence. At no point in the previous ITO or investigation did the affiant disclose any basis to believe that [REDACTED] was trafficking in pills.
81. None of the observations made over the course of the investigation suggested that there was any drug activity happening in relation to the Storage Locker. Therefore, nothing in the ITO could support a reasonable belief that drugs would be found inside the locker.
82. The Applicant submits that reasonable and probable grounds for this search were entirely absent and as such the warrant could not have issued. The search was therefore warrantless and conducted in breach of [REDACTED]’s right to be free of unreasonable search and seizure pursuant to section 8 of the *Charter*.

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

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

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

access to her clients. The disclosure does not indicate whether the police finally granted access to counsel of choice before conscripting a statement from the Applicant.

93. The Applicant submits that the Kelowna RCMP deliberately denied him access to counsel without cause, in violation of section 10(b) of the *Charter*.

**MATERIAL RELIED ON:**

94. The Applicant will be relying on the following authorities:

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

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

████████████████████ Solicitors for the Applicant herein whose address for service is in care of the said Solicitors.

**PRINGLE CHIVERS SPARKS TESKEY**

PER:   
\_\_\_\_\_  
**DANIEL J. SONG**  
COUNSEL FOR THE APPLICANT

TO: CLERK OF THE COURT  
AND TO: PUBLIC PROSECUTION SERVICE OF CANADA

Court File No.: [REDACTED]

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**IN THE SUPREME COURT OF  
BRITISH COLUMBIA**

**JUDICIAL DISTRICT OF KELOWNA**

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BETWEEN:

**HER MAJESTY THE QUEEN**

Respondent

- and -

[REDACTED]

Applicant/Accused

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**NOTICE OF APPLICATION**

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**PRINGLE CHIVERS SPARKS TESKEY**

[REDACTED]

**DANIEL J. SONG**

[REDACTED]