

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *R. v.* [REDACTED]
2016 BCSC 1799

Date: 20160929
Docket: 163613
Registry: Victoria

Regina

v.

[REDACTED] [REDACTED]

Before: The Honourable Mr. Justice B.D. MacKenzie

Reasons for Judgment

(Application for Stay of Proceedings)

Counsel for the Crown:

T.J. Corsi

Counsel for the Defence:

R.L. Neary

Place and Date of Hearing:

Victoria, B.C.
August 3-5, 2016

Place and Date of Judgment:

Victoria, B.C.
September 29, 2016

SUMMARY: Application by the accused for a stay of proceedings due to breaches of s. 8 of the Charter.

The accused was charged with drug and firearm offences. Prior to the day of the arrest, Pilot, the officer directing the arrest, did not believe he had reasonable and probable grounds to order the accused's arrest. The arrest that day was dependent on the police making observations that he was actively involved or engaged in criminal activity.

The evidence of Pilot and the evidence of the arresting officer was contradictory as to whether the surveillance team had in fact observed the accused conduct a hand to hand transaction prior to his arrest. The accused argued that the Crown failed to establish that Pilot subjectively believed he had reasonable and probable grounds to direct the accused's arrest, thereby breaching s. 8 when they searched the accused after arrest. Pilot testified that it was not because somebody saw a hand-to-hand transaction that he directed the accused's arrest, but because he had overheard some members of the surveillance team describe suspicious meets that were consistent with drug trafficking.

The defence challenged the fact that 18 months after the arrest, Pilot provided considerable detail about these four purported suspicious stops, without reference to any notes or documentation made contemporaneously with the events he had described.

It was determined Police breached the accused's s. 8 Charter rights. A hearing was to be scheduled to determine whether the evidence should be excluded. The lack of any contemporaneous detailed note-taking by Pilot or any other officer was of concern, especially given the dramatic contradiction between Pilot's evidence and that of the arresting officer as to whether any police officers observed a hand-to-hand transaction prior to the arrest. Considering the totality of the circumstances. The lack of notes and the direct contradiction in the police evidence as to whether Pilot observed a hand-to-hand transaction and whether he transmitted this observation to the arresting officer undermined the reliability of Pilot's testimony as to his grounds for directing the arrest. As a result, the court was unable to accept the reliability of Pilot's testimony regarding the accused's four suspicious stops prior to his arrest. The court was thus not satisfied that there were reasonable and probable grounds for the arrest.

[1] Mr. [REDACTED] is charged with drug and firearm offences. There have been prior applications with respect to tracking warrants and a general warrant, obtained in order to allow the police to place the tracking devices on vehicles associated with Mr. [REDACTED]

[2] I found in these prior applications that the police had failed in their duty to make full and frank disclosure in preparing the Information to Obtain (“ITO”) for the tracking warrant, which resulted in certain paragraphs being excised. However, defence counsel agreed that what remained in the ITO would justify a conclusion that the authorizing judicial officer had sufficient information to issue the warrant, given the reasonable suspicion standard for issuing a tracking warrant. I also concluded that even with the offending portions removed from the ITO pertaining to the general warrant, what remained in the redacted ITO was again sufficient for me to conclude that the authorizing judicial officer would still have issued the general warrant.

[3] In this application, the defence submits that the police committed an “egregious breach” of Mr. [REDACTED] right under s. 7 of the *Charter* to make full answer and defence, and as a result, asks that the entire proceedings against Mr. [REDACTED] be stayed, under s. 24(1) of the *Charter*. In the alternative, the defence submits that the police violated Mr. [REDACTED] right under s. 8 of the *Charter* to be secure against unreasonable search and seizure.

[4] Mr. [REDACTED] bases his application for a judicial stay of proceedings on an insufficient contemporaneous record of the events leading up to his arrest. Defence counsel submits there is nothing that even “remotely resembles” a full and detailed account on these matters that would both “allow for effective cross-examination ... [and] reasonably support the claims of Cpl. Pilot with regard to the events on the day of the arrest and the reasons for arrest that he testified to in court.”

[5] With respect to Mr. [REDACTED] alternative submission, he says if I decline to accede to his primary position, I should find that the Crown has failed to establish

that Corporal Pilot subjectively believed he had reasonable and probable grounds to direct the arrest of Mr. [REDACTED]. The reason again is the lack of any contemporaneous record to support Corporal Pilot's testimony in this regard. As a consequence, the defence says that Mr. [REDACTED] s. 8 *Charter* rights have been breached and that any evidence obtained as a result of his arrest and subsequent search should be excluded under s. 24(2) of the *Charter*.

[6] In support of the application for a stay, defence counsel understandably reminds the court of the significant flaws in some of Corporal Pilot's earlier testimony and his lack of note-taking on other important issues surrounding the application for the warrants. This prompted the court to observe that proper note-taking by Corporal Pilot would have clarified whether he passed on important information to the affiant of the ITO, when the affiant directly contradicted the testimony of Corporal Pilot on this issue. On this particular point, I noted at that time that the lack of record-keeping by Corporal Pilot on this issue "does illustrate to a certain degree a *laissez-faire* attitude" on his part: *R. v. [REDACTED]* 2016 BCSC 498 at para. 13.

[7] The defence also observes that Corporal Pilot refrained from making any notes of a Google search he made pertaining to a courier business with which Mr. [REDACTED] was associated. In one of the earlier applications, I again agreed with defence counsel that such notes would have greatly helped clarify when any searches may have occurred and the results of such inquiries. The defence emphasizes that this subsequent search occurred after Corporal Pilot was extensively cross-examined on whether the courier business had a Victoria address, a significant issue regarding his duty to make full and frank disclosure when applying for the warrant.

[8] As a result, I stated during the earlier application that the "circumstances are a cause for concern, and again suggest a certain casualness with respect to important aspects of this significant investigation" ([REDACTED] at para. 17).

[9] The defence therefore submits that Corporal Pilot has consistently refrained from making proper notes of his involvement in this investigation and submits this

omission is even more serious because Corporal Pilot is a 26-year R.C.M.P. veteran. Moreover, at the time of this investigation he was in charge of the Western Communities street crime and drug enforcement unit and had been involved in over 100 drug investigations. The defence says Corporal Pilot should therefore have an “acute” understanding of the duty to make proper notes throughout an investigation. For his part, Corporal Pilot acknowledged during his testimony that he was clearly aware of this duty.

[10] This lack of proper note-taking came to a head on April 24, 2014, when Corporal Pilot instructed members of his team to arrest Mr. [REDACTED] for drug offences.

[11] On this point, it is clear from Corporal Pilot’s testimony that he did not believe he had reasonable and probable grounds to direct the arrest of Mr. [REDACTED] prior to the morning of April 24, 2014. Corporal Pilot agreed that “it was only if the surveillance team made observations suggesting he was presently engaged in criminal activity” that Mr. [REDACTED] would be arrested on April 24.

[12] Corporal Pilot confirmed in direct examination on the *voir dire* that Mr. [REDACTED] arrest was a “possibility.” Later in his direct examination, Corporal Pilot testified:

Q Turning to April 24th, Corporal, what information did you have on that date?

A On April 24th I had -- after noting that there had been a substantial amount of traffic on the -- the last three days, decided that we were going to try to do one final day of gathering data and hopefully effect an arrest if enough evidence was gathered on that day. So that day we had put together a group of members from different units to assist in our investigation.

[13] Corporal Pilot clearly and unequivocally acknowledged that the arrest of Mr. [REDACTED] would be justified only if further evidence was forthcoming. Given this, the defence says a reliable record of what occurred prior to Mr. [REDACTED] arrest is crucial in order to confirm that Corporal Pilot subjectively believed his suspicion was

raised to reasonable and probable grounds when he ordered Mr. [REDACTED] arrest for drug offences.

[14] This is not a fanciful or unwarranted assertion by defence counsel. Rather it mirrors what Constable Dovell, the officer who received instructions from Corporal Pilot to actually effect the arrest of Mr. [REDACTED] testified was his understanding of the situation on April 24, 2014.

[15] Constable Dovell's evidence on this issue is significant and underscores why the defence submits that evidence justifying an arrest should be carefully and accurately recorded, such that there can be an accurate record of the events that the police say actually occurred on the day in question.

[16] On this point, the following exchange took place between defence counsel and Constable Dovell:

Q Okay, but your recollection today of what you were told at the briefing was that you would possibly be asked later in the day to conduct an arrest, correct?

A. Yeah, I was provided with an arrest script and that my -- I was tasked or my role would be to effect the arrest if the suspect was seen committing an offence which was suspected to be dealing drugs.

Q So your understanding was that this individual -- there was a suspicion that this individual was dealing drugs, correct?

A Yes.

Q But before any arrest was to be effected surveillance was going to be conducted to see if he could be observed conducting an offence, correct? Committing an offence?

A That's my understanding of the reason for the surveillance.

Q All right, and it was only if an offence was observed by the surveillance team that you were going to get the green light to go ahead and arrest him, correct?

A Yes.

On this point, in his evidence-in-chief, Constable Dovell stated:

Q And did you have dealings with Frank [REDACTED] that day?

A I did that day, yes, I did.

Q How did that come about?

A I was parked in the area of the West Shore Town Centre in my marked vehicle. I was listening to surveillance over the radio by our undercover units. I was -- overheard that they observed Mr. [REDACTED] doing a hand-to-hand transaction selling drugs to someone at the mall, and at that point I was directed by Corporal Pilot that they wished for me to stop the vehicle and make an arrest of Mr. [REDACTED]

...

Q Were you advised by Corporal Pilot as to what Mr. [REDACTED] was arrestable for?

A Yeah, again he -- the information I had was there was a hand-to-hand drug transaction. Earlier in the day when I was briefed on what the surveillance project was for, I was provided with an arrest script. If Mr. [REDACTED] was to be found doing a drug deal, the reason for his arrest would be arresting him for possession for the purpose of trafficking drugs under the *Controlled Drugs and Substances Act*.

...

A So earlier in my shift I was briefed by the plainclothes units that the purpose for the surveillance was to observe Mr. [REDACTED] activity, that it was suspected that he was dealing drugs in the area of Langford and that I was provided with an arrest script that I would use to arrest him if the observations were made that he was dealing drugs.

[17] Not surprisingly, as he was relying on information from other sources, Constable Dovell testified as to the source of the alleged hand-to-hand transaction which was the catalyst for the arrest of Mr. [REDACTED]. In cross-examination the following took place:

Q You testified in chief that someone told you Mr. [REDACTED] had been observed conducting a hand-to-hand transaction, correct?

A Yes.

Q Do you remember who told you that information?

A From my memory it was actually Corporal Pilot that gave that direction over the police radio.

Q You don't have a note to confirm whether or not it was Corporal Pilot who reported the observation of the hand-to-hand though, do you?

A I don't believe I do. From my memory it is Corporal Pilot, but I don't -- I haven't referred to any transcript of the police recording of -- if there is one, exactly who said what. It was a bit of a dynamic situation conducting a vehicle stop so -- but my memory is that it was Corporal Pilot.

- Q Fair enough, but I'm also right, there's nothing in your notes or your occurrence report that you can look back to confirm that, use to confirm that, correct?
- A Not from what I see from a review of my notes earlier, no.
- Q And it was your understanding that this observed hand-to-hand was what triggered the arrest, correct? Triggered the direction to arrest?
- A Yes.
- Q And it was certainly your recollection that Corporal Pilot told you to go ahead and conduct and effect the arrest, correct?
- A Yeah, it's my memory of it.

[18] This evidence is cause for considerable consternation due to the following evidence from Corporal Pilot:

- Q Did you ever tell anyone that you observed a hand-to-hand conducted by Mr. [REDACTED] on April 24th, 2014?
- A I did not.
- Q Because you did not observe any hand-to-hand, correct?
- A I did not observe any dealing whatsoever.
- Q As far as you know, no one, no police officer observed any hand-to-hand transaction on April 24th, 2014, correct?
- A Just meets consistent with that of trafficking, that's it.
- ...
- COURT: And nor did anybody else in this investigation on the 24th see a hand-to-hand?
- A Nobody saw a hand-to-hand, no, My Lord.
- MR. NEARY:
- Q You didn't tell Constable Dovell that you'd seen a hand-to-hand transaction?
- A I did not.

[19] This dramatic inconsistency in the testimony of Constable Dovell and Corporal Pilot as to the basis for Mr. [REDACTED] arrest on April 24, 2014, clearly illustrates the problems that can and do arise when police officers fail to take notes or keep accurate records.

[20] The acknowledgement by Corporal Pilot that no officer observed any exchange as described by Constable Dovell raises the question: what did anyone

observe on that day which led Corporal Pilot to conclude that he had the requisite grounds, instead of mere suspicion, to direct the arrest of Mr. [REDACTED]

[21] On this point Corporal Pilot testified that it was not because somebody saw a hand-to-hand transaction that he directed Constable Dovell to arrest Mr. [REDACTED] but rather, because he had overheard some members of the surveillance team describe what Corporal Pilot felt were suspicious "meets":

Q What observations were you made aware of, if any?

A After Mr. -- I was in radio contact with the regional GIS over hearing what was going on. It appeared that Mr. [REDACTED] made several stops. Or not several, made three stops. He went from the address on Sikorsky to a driveway on Metchosin Road where the vehicle stopped for a couple minutes. The vehicle then made a stop at I believe it was Juan de Fuca park and ride area where they met another vehicle. A female got into the passenger side of the minivan and got out a moment later.

Q Do you have any further specifics of how long the female was in the Caravan for?

A My understanding, it was about a minute or two.

Q Backing up a bit to the Sikorsky -- sorry, leaving Sikorsky, going to Metchosin Road, any further detail other than what you've just provided in testimony?

A Just that it pulled into a driveway. I can't -- I can't recall anything else.

Q What happened after the female exited the Caravan at the park and ride in Juan de Fuca?

A Departed. The Caravan departed and headed to the West Shore Town Centre where it parked near the RONA, it's actually parked near the RONA. Actually West Shore Town Centre is a block over, so the RONA is on the other side of Langford Parkway, but it was parked in the parking lot at the RONA. A female pulled up in a pickup truck about five minutes after the Dodge Caravan had, about four minutes after the Dodge Caravan had arrived. Female exits the pickup and gets into the passenger side of the Caravan. Was in for maybe a minute or two. Gets out and both vehicles depart.

Corporal Pilot continued:

Based on the totality of the investigation at that point I made the decision that another meeting would result in the arrest and takedown of Mr. [REDACTED] driving the Dodge Caravan. I'm basing that, that opinion based on source information that he's dealing, the surveillance information that we gathered from Mr. Boddam dealing

after meeting with Mr. [REDACTED] possibly dealing after meeting with [REDACTED] the surveillance of the tracking device showing the constant coming and going to different areas, the going to the safe house which we considered calling Sikorsky the safe house and then making meets after that. It was decided that -- I decided that the next meet that was suspicious in nature that he would be arrested.

Q Did you observe such a meet?

A I was basically back on the road now at this point. I did not observe any meet, but the members of the GIS unit made observations that a male Mr. [REDACTED] drove to the TD Bank which is located on the southwest side of the West Shore Town Centre, picked up a male who had been standing there. The male gets into the passenger side of the vehicle. The vehicle drove around to the other side of the mall and the male exits by the Serious Coffee at the -- at the doorway. The male was -- the description of the male was given and actually one of the members that had seen him get in, walking into the van headed -- getting out of the van headed into the mall to apprehend the male that had made the -- that made the meet. My call at that point was made to stop and arrest the person making the meet for possession of a controlled substance and stop and arrest Mr. Frank [REDACTED] for possession for the purpose of trafficking based on the evidence that we gathered from that day.

[22] What the defence strenuously takes issue with is the fact that 18 months after the arrest of Mr. [REDACTED] Corporal Pilot provided this considerable, and according to the defence, "vivid" detail, about these four purported "suspicious" stops, without reference to any notes or documentation made contemporaneously with the events he has described. Nor are there any detailed notes from any other officers.

[23] In this regard, as I have mentioned, the defence emphasizes that as an experienced police officer, Corporal Pilot acknowledged he was "keenly aware" of the need to justify any warrantless search incident to an arrest and that he knew he would have to justify his actions on the day in question:

Q You knew it was going to be your call whether or not Mr. [REDACTED] was going to be arrested that day, correct?

A Absolutely.

Q You've been a police officer for 26 years, head of street crime for seven. You know the police are always going to bear the onus in court of justifying any search, warrantless search pursuant to arrest, correct?

A Absolutely.

Q You knew that you were in all likelihood many months or over a year later going to be sitting here much like you are today trying to explain to a judge why you did what you did, correct?

A That's correct.

Q And you say that these suspicious meets, these three suspicious meets that you heard about over the radio were the clincher, they were the key factors triggering you to direct Mr. [REDACTED] arrest, correct?

A That's correct.

Q All right. Yet you made no notes about them anywhere?

A I think we're clear on that, yeah.

[24] Given the testimony of both officers, there is no doubt that prior to April 24, 2014, Corporal Pilot did not believe he had reasonable and probable grounds to order the arrest of Mr. [REDACTED]. The arrest of Mr. [REDACTED] that day was dependent on the police making observations that he was actively involved or engaged in criminal activity. Corporal Pilot's testimony is clear on this point:

Q I want to talk a bit more now about the 24th. As I understand it from your evidence and -- from your evidence let's just stick with, it was not a done deal as of the morning of the 24th in the briefing that Mr. [REDACTED] was going to be arrested that day, correct?

A That is correct.

Q It was only if the surveillance team made observations suggesting he was presently engaged in criminal activity that he was going to be arrested on the 24th, correct?

A That's correct.

[Emphasis added.]

[25] Corporal Pilot then provided the "vivid detail" about the three "meets" Mr. [REDACTED] was allegedly involved in before the last meet, where he was arrested by Constable Dovell. I pause here to note that the suspected buyer at that last meet was also arrested, but for what it is worth, as the defence points out, the police found no drugs on that individual. Be that as it may, the defence submits the court should have great concern that neither Corporal Pilot nor any member of the surveillance team took any detailed notes of these events. The defence says one would expect such notes in the form of a surveillance report prepared by a designated author, who

is usually responsible for recording the observations made by members of the surveillance team.

[26] Nevertheless, as we have seen, Corporal Pilot testified about what he says he recalled overhearing from members of the surveillance team.

[27] First, there is the evidence that Mr. [REDACTED] stopped his vehicle on Metchosin Road. However, the only brief note made by a member of the surveillance team described nothing more than Mr. [REDACTED] drove to a “driveway” on Metchosin Road. The defence points out this hardly constitutes a suspicious activity.

[28] As far as Mr. [REDACTED] alleged stop at the Juan de Fuca park and ride, I note Corporal Pilot only “believe[d]” Mr. [REDACTED] stopped there. I do not know why he is apparently unsure of this. Corporal Pilot also says “they” met a woman but again there is no evidence that anyone else was with Mr. [REDACTED] in his vehicle. As far as Corporal Pilot’s evidence that he understood a woman got in and then got out a moment later, the defence points out the only available notes suggest a woman got out, not that she got in and out of the vehicle.

[29] Surveillance then observed the Caravan drive to a RONA store, the details of which defence describes as “mind-boggling,” given the totality of the police notes, apparently made by Constable Mobbs, simply detail a “Caravan” vehicle and a licence plate, parked at the RONA location. However, Corporal Pilot gives significant detail which the defence says is either a fabrication or an unreliable recollection of what Corporal Pilot believes occurred at that location. As far as this meet is concerned, the defence points out there is no note of a woman arriving after the Caravan has been parked for four or five minutes, getting out of her vehicle and then into Mr. [REDACTED] vehicle, for “maybe a minute or two,” and then getting out of the [REDACTED] vehicle, evidence that if true or reliable would be consistent with a dial-a-dope drug transaction.

[30] As the defence submits, it is also important to note that up until this point Corporal Pilot was at the Sikorsky Road address with “a notebook and pen in [his]

pocket” and could have made notes. The Crown counters this and says Corporal Pilot’s evidence is clear he believed there would be a surveillance report produced by another officer, who usually would be tasked with this crucial role during a final briefing prior to the day’s surveillance, an assignment which apparently never occurred on this crucial last day of surveillance.

[31] The defence therefore says that in these circumstances the court should conclude there has been a breach of Mr. [REDACTED] rights under s. 7 of the *Charter* and because the breach is so egregious, the court should direct a stay of proceedings.

[32] In this regard the defence refers to the Supreme Court of Canada decision in *Wood v. Schaeffer*, 2013 SCC 71. After referring to a report to the Attorney General of Ontario in 1993 by the Honourable G.A. Martin (the “Martin Report”) as well as to comments by the Honourable R.E. Salhany, the Court at para. 67 concluded:

Against that background, I have little difficulty concluding that police officers do have a duty to prepare accurate, detailed, and comprehensive notes as soon as practicable after an investigation. ...

[33] The defence also refers to *R. v. Eagle*, [1996] O.J. No. 2867 (Ont. C.J.), where, at para. 15, the court quotes the following comments from the Martin Report:

The statement should emphasize that disclosure requirements after *Stinchcombe* cannot be thwarted by making less accurate or less comprehensive notes.

The court in *Eagle*, also at para. 15, continues to quote from the Martin Report:

Another essential reason for carefully recording the course of a criminal investigation lies in the fact that the case must subsequently be presented in court, and meticulously analyzed by both the prosecution and the defence to ascertain whether it meets the legal standards that must be met before a conviction can result. Information must be recorded precisely enough to present the presentation of that which is admissible as evidence in court, often many months after it is assembled, clearly and comprehensively.

Finally, the court in *Eagle* at para. 16 notes the following comments in the Martin Report:

... the Supreme Court has mandated that nothing relevant that is discovered during the course of the investigation is to be withheld. This important principle of fairness cannot be undermined by putting less in a notebook than would properly be entered were it not subject to disclosure.

See also *R. v. Sundberg*, 2010 BCPC 171 at para. 48, and *R. v. Forster*, 2005 SKCA 107 at para. 28.

[34] The defence also refers to the following comments of Justice Grezell in *R. v. Tweedly*, 2013 BCSC 910 at para. 160:

... it is important to recall it has been held innumerable times in our courts that police testimony, without the advantage of contemporaneous notes, is unreliable and often not admitted into evidence for that purpose.

[35] Justice Grezell then goes on to note that it is especially important that police officers make notes when they regularly attend crime scenes, because without notes this runs the risk that a police officer could “import their general knowledge from such attendance into their recollection of the particulars of a particular incident when giving evidence” (*Tweedly*, at para. 161). Being guided by these authorities and when considering the testimony of Corporal Pilot in this particular matter and the fact that there are no detailed notes to support his recollection of the events of April 24, 2014, the defence says it has established that there has been a serious breach of Mr. [REDACTED] s. 7 *Charter* rights.

[36] The Crown in reply submits that the police did not breach Mr. [REDACTED] s. 7 *Charter* rights and even if I did reach such a conclusion, this is not one of those clear or exceptional cases where a stay of proceedings would be warranted. In this particular case, the Crown says there has been a “record” of the grounds for Mr. [REDACTED] arrest that were gathered over the eight-week investigation and which Corporal Pilot referred to when he summarized why he felt, after there were reports of Mr. [REDACTED] making four stops on April 24, that he had reasonable and probable grounds to direct the arrest. On this point the Crown submits that Corporal Pilot on April 24 was just confirming his grounds for the arrest and that the events on April 24, 2014, were not even that significant and were merely a “rubber stamp,” leading up to the arrest of Mr. [REDACTED] I pause here to say I am unable to agree with

learned Crown counsel's characterization of this aspect of Corporal Pilot's evidence and why he felt he needed further corroboration or information with respect to Mr. [REDACTED] activities on April 24, 2014, for the simple reason that up to this point in time, there was very little direct evidence of Mr. [REDACTED] being involved in drug trafficking. In addition, the Crown says Corporal Pilot's detailed recollection of the four stops made by Mr. [REDACTED] should add to his credibility or reliability that this is indeed what the police actually observed on this last day of surveillance.

[37] The Crown also submits that Corporal Pilot was acting in good faith when he stated he was relying on someone else to make notes, even though he was the lead investigator and would have probably been the officer who would have designated the author of the surveillance report. As a result the Crown says trial fairness is not affected by Corporal Pilot's lack of notes with respect to the activities of Mr. [REDACTED] on April 24. Rather, the lack of notes should only go to the weight I attach to Corporal Pilot's testimony. The Crown says a s. 8 *Charter* analysis is the proper place for this consideration. In the end the Crown acknowledges it would have been "far better" if Corporal Pilot had made notes but that because it would not affect trial fairness, what Corporal Pilot did or did not do with respect to note-taking should not result in a stay of proceedings. Moreover, the Crown submits that it would be inappropriate to reconsider the lack of notes and the inconsistency in Corporal Pilot's evidence on matters pertaining to the sufficiency of the information to obtain the earlier warrants as the court has already dealt with that matter and imposed a remedy, that is the removal of the offending paragraphs from the ITOs. The Crown submits that it is unnecessary and inappropriate to re-visit these issues again on this particular application, as the defence has suggested. In addition, the Crown submits that it would be inappropriate to conclude that Corporal Pilot was fabricating his testimony and that it is more likely that he was merely careless about his own note-taking and was relying on another officer to make comprehensive surveillance notes. The Crown submits that the lack of contemporaneous notes should not result in a stay being entered in these particular circumstances.

[38] There is no question the lack of any contemporaneous detailed note-taking by Corporal Pilot, or any other officer, is of concern. This is especially true given the dramatic contradiction between Corporal Pilot's evidence and that of Constable Dovell as to whether any police officers observed a hand-to-hand transaction prior to Mr. [REDACTED] being arrested. According to Corporal Pilot's evidence, no officer observed such a transaction.

[39] While I am not prepared to conclude that Corporal Pilot was fabricating this evidence, in my view the conclusion reached by Feldman P.C.J. in *R. v. Lozanovski*, 2005 ONCJ 112, is more apropos the present situation. In *Lozanovski*, the court refers to *R. v. Zack*, [1999] O.J. No. 5747 (Ont. C.J.), and the conclusion by the trial judge there that:

In my view, the absence of the questioned observations in his notebook lead to the conclusion that those observations were not, in fact, made at the time but are perhaps something that over the course of time the officer has come to believe that he saw (*Zack*, at para. 6).

The court in *Lozanovski* then went on to conclude:

It is important to the proper functioning of the judicial fact finding role that significant facts be recorded by police and not left to the whim of memory (at para. 14).

I accept without hesitation these general principles. But the question remains: did the police breach Mr. [REDACTED] s. 7 *Charter* right and if so, is this one of the clearest of cases where the conduct of Corporal Pilot mandates a stay of the complete proceedings?

[40] Defence counsel has not pointed me to any cases which suggest that a police officer's failure to take adequate notes automatically breaches the accused's right under s.7 of the *Charter* to make full answer and defence. In this regard, I respectfully adopt the analysis of Van de Veen P.C.J. in *R. v. Bailey*, 2005 ABPC 61:

[42] It is clear from credible legal texts and reports that there is a duty upon officers to take complete, accurate and comprehensive notes. The primary reasons for this is to enable an officer to give accurate testimony in court, given the fact they may be called upon to provide this evidence weeks, months or even years after the incident. Evidence not contained in officers'

notes may be suspect or given less weight on the basis of credibility, not *Charter* breach.

[43] There is no legal authority that I am aware of which has held incomplete police notes, in themselves, to amount to a *Charter* breach of the accused's right to make full answer and defence under Section 7 and 11(d). So far some cases have merely held that evidence testified to in court, but not confirmed in some fashion in police notes disclosed prior to trial, is not reliable. Such evidence has therefore been held to be suspect and not proven beyond doubt, with the result there has been insufficient objective evidence in such cases upon which the officer is entitled to rely to constitute the reasonable and probable grounds necessary to make the breath demand. Evidence not found in notes has been found suspect when notes are clearly deficient on key factual issues which an officer would be expected to record.

[44] While there is a growing recognition of the additional purposes of police notes, the law has not reached a state where incomplete notes, in themselves, result in a breach of the accused's *Charter* right to make full answer and defence pursuant to Sections 7 and 11(d) of the *Charter of Rights and Freedoms*. However if it is shown the police deliberately omitted evidence from the notes to avoid their obligation to disclose such evidence to the defence, there is authority which may support that result (*R. v. Carosella* 1997 CanLII 402 (SCC), [1997] 1 S.C. R. 80 and *R. v. La* [1997] 2 S. C. R. 280). In addition, police evidence testified to at trial but not found in notes earlier disclosed can be suspect especially if the notes are deficient on a significant factual issue in the case.

[Emphasis added.]

(See also: *Wood v. Schaeffer* at footnote 3, where Moldaver J. referred to the “thoughtful consideration” given to this issue in *Bailey*; *R. v. Peterson*, 2008 MBQB 127 at para. 78; *R. v. Davidoff*, 2013 ABQB 244 at para. 28; *R. v. Mpofu*, 2015 ABQB 322 at para. 17).

[41] When I consider the totality of the circumstances, I am not satisfied that the lack of fulsome notes precludes Mr. [REDACTED] from making full answer and defence or renders the trial unfair, such that a breach of s. 7 of the *Charter* has occurred. This issue is certainly relevant to Corporal Pilot's credibility, which I will discuss further below. However, if I am wrong to conclude there was no breach of s. 7 of the *Charter*, I will consider whether a stay of proceedings would be an appropriate remedy for a breach of Mr. [REDACTED] right to make full answer and defence.

[42] In this analysis, one of the crucial factors for consideration is whether there are alternative remedies to entering a stay of proceedings. In this regard, courts

have noted that where stays have been entered, there is usually no other less drastic form of relief that could remedy any prejudice flowing from the conduct of the police in not keeping a contemporaneous record of the events that have transpired on important issues. Options such as ordering further disclosure or a mistrial cannot remedy the fact of lost, destroyed or non-existent notes. As the Court said in *R. v. O'Connor*, [1995] 4 S.C.R. 411 at para. 77, “a stay of proceedings is a *last resort*, to be taken when all other acceptable avenues of protecting the accused’s right to full answer and defence are exhausted.”

[43] One alternative to directing a stay of proceedings is to exclude the evidence that compromises the accused’s right to full answer and defence. In some cases, “[e]xcluding the evidence really has the same effect as the granting of a stay”: *Tweedly*, at para. 165.

[44] In this particular case, the defence acknowledges this would be the case if the application were only to exclude as evidence the drugs in Mr. [REDACTED] possession when he was arrested. However, following Mr. [REDACTED] arrest, the police obtained a warrant to search his home in Mill Bay. Through this second search, the police found additional drugs and firearms, the subject matter of several counts on this indictment. Accordingly, if I were to exclude as evidence only the drugs found at the scene of the arrest, it would not amount to the same remedy as a stay of the entire proceedings. Even if the evidence were excluded, there would still be the question of the subsequent search of Mr. [REDACTED] home. In addition, the defence says that if notes had in fact been created, there may very well have been some material that “might” have been useful to the defence with respect to the search of Mr. [REDACTED] residence.

[45] When I consider the defence applications I recall Blake P.C.J.’s comments in *R. v. Russell* (23 July 2014), Victoria 160044-2C (B.C.P.C.) at para. 25:

... the failure to take adequate notes, particularly on matters of crucial importance, may indeed reflect negatively on the credibility of a police witness. But the assessment of credibility is a cumulative exercise; it depends

upon the analysis of many factors which arise during the course of a court proceeding.

[46] Even though Saunders J.A. did not refer to *Wood v. Schaeffer*, her following observations in *R. v. Acosta*, 2014 BCCA 218 are also instructive:

[15] It is, of course, desirable that notes be made reasonably contemporaneously with the events. There is, however, no rule of law to that effect, and it is always for the trier of fact to determine who to believe, and who not to believe, what evidence to accept, and what evidence not to accept. In this case, whether the constable's evidence of his observations was credible was for the judge who was charged with determining the credibility and reliability of the officer's testimony. Although Mr. Acosta has referred to many cases in which trial courts have referred to the absence of contemporaneous notes as a reason to question the reliability of evidence, none of them undermine that proposition. This is particularly so where the judge, as here, reflected this feature of the evidence in his reasons for judgment. Accordingly, this is not a basis upon which we can interfere with the result at trial.

[47] While it was no accident Corporal Pilot made no notes as to Mr. [REDACTED] activities on April 24, 2014, I am not persuaded he did so with the intention of frustrating the legal process. At the same time, I recognize a finding of bad faith on the part of the police is not a precondition to the granting of a stay (*O'Connor*, at para. 79).

[48] Ultimately, even if I had concluded there was a breach of Mr. [REDACTED] right under s. 7 of the *Charter* to make full answer and defence, I would not find that this is one of those clearest of cases where the administration of justice demands that a stay of proceedings be entered. I am also not persuaded that in these particular circumstances there would be irreparable harm or prejudice to the justice system if Mr. [REDACTED] trial proceeds to the next stage.

[49] However, I do accept the defence's alternative submission that there has been a breach of Mr. [REDACTED] rights under s. 8 of the *Charter*. As the decisions I have referred to in para. 40 illustrate, the lack of notes and the direct contradiction in the police evidence as to whether Corporal Pilot observed a hand-to-hand transaction and whether he transmitted this observation to Constable Dovell, undermines the reliability of Corporal Pilot's testimony as to his grounds for directing

the arrest of Mr. ██████ As Bruce J. said in *R. v. McConnell*, 2008 BCSC 505 at para. 133, “[w]here such important details are absent from contemporaneous record of the events ... their reliability is suspect.” As a result, I am unable to accept the reliability of Corporal Pilot’s testimony regarding Mr. ██████ four “suspicious stops” prior to his arrest on April 24, 2014. Therefore, I am not satisfied that the Crown has established that there were reasonable and probable grounds for the arrest of Mr. ██████ As a consequence, I find that the police have breached Mr. ██████ right under s. 8 of the *Charter* to be secure against unreasonable search and seizure.

[50] The next issue is whether the evidence should be excluded under s. 24(2) of the *Charter* pursuant to the principles enunciated by the Supreme Court of Canada in *R. v. Harrison*, 2009 SCC 34, and *R. v. Grant*, 2009 SCC 32. Counsel will arrange a date with trial scheduling for the s. 24(2) hearing.

“B .D. MacKenzie, J.”

The Honourable Mr. Justice B.D. MacKenzie