

CANADA / JUDGMENT

R. v. Cade, Ceal, and Whaling

2022 BCSC 2326

COURT

Supreme Court of British Columbia

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2022 BCSC 2326 R. v. Cade, Ceal, and Whaling

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Cade, Ceal, and Whaling,

2022 BCSC 2326

Date: 20221024

Docket: 74031

Registry: Prince George

Rex

v.

Marshall Luther Cade, John Jacob Ceal, and Shawn Brian Omark Whaling

Corrected Judgment: The text of the judgment was corrected at paragraphs 4 and 102 on June 26, 2023.

Before: The Honourable Mr Justice Crerar

Oral Reasons for Judgment

Section 8: challenge to search warrant

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No other appearances

Place and Dates of Hearing:

Prince George, B.C.

October 17-20, 2022

Place and Date of Judgment:

Prince George, B.C.

October 24, 2022

I. INTRODUCTION

- [1] The accused Messrs Ceal and Whaling are charged with possession of cocaine for the purpose of trafficking, contrary to s. 5(2) of the Controlled Drugs and Substances Act, SC 1996, c. 19.
- [2] The Crown's theory of the case is that Messrs Ceal and Whaling together operated a street-level dial-a-dope trafficking operation out of their respective apartments. The Crown theorises that the third accused, Mr Cade, was a mid-level trafficker who sold bulk quantities of drugs to Messrs Ceal and Whaling.
- [3] The accused Messrs Ceal and Whaling apply under sections 8 and 24(2) of the Canadian Charter of Rights and Freedoms to quash the search warrants issued on July 5, 2019, authorising police searches on each of their apartments. They argue that the Information To Obtain ("ITO") in support of the search warrant sets out insufficient evidence to establish reasonable and probable grounds, credibly and beyond mere suspicion, that cocaine and other trafficking evidence would be found in those apartments. They challenge the ITO on its face, without cross-examination of the officers who provided the information on which it is based.
- [4] Both apartments are located in Prince George: 3820 15th Avenue (Ceal) and 277 Ospika North (Whaling).
- [5] As a final background matter, the ITO also refers to vehicles driven by those individuals: a blue Volkswagen Jetta with the BC license plate HP---- (Ceal) and a black Ford F150 truck with the BC license plate JE---- (Whaling; the truck is registered in his mother's name).

II. LAW: REVIEW OF A SEARCH WARRANT

[6] The parties agree on the applicable law, as summarised by Garson JA in *R. v. Liu*, 2014 BCCA 166, at para 39:

- The trial judge's role in reviewing the validity of a search warrant is to consider whether the material filed in support of the warrant, as amplified on review, could support the issuance of the warrant.
- The trial judge should examine the information in its totality, not on a piece meal basis, in a "practical, non-technical, and common sense basis".
- The question is not whether the reviewing judge would have granted the order, but whether there was an objective basis on which the issuing justice could have done so.
- The appropriate standard is one of "reasonable probability" rather than "proof beyond a reasonable doubt" or "prima facie case". The phrase "reasonable belief" also approximates the requisite standard.
- Reasonable grounds may be said to exist at "the point at which credibly-based probability replaces suspicion".

[emphasis in original]

[7] In *R. v. Kim*, 2020 BCSC 1115 at para 12 [Kim 1115], Devlin J summarises further principles guiding the court:

the question for the reviewing judge is to assess whether there is "reliable evidence that might reasonably be believed on the basis of which the authorization could have been issued " not whether it should have been granted [emphasis added.] Further, the reviewing judge must take into account "that authorizing justices may draw reasonable inferences from the evidence in the ITO; the informant need not underline the obvious".

[emphasis in original]

III. DISCUSSION AND DECISION

[8] Did the information set out in the ITO sufficiently tie the alleged drug trafficking activity to the two apartments such as to establish reasonable and probable grounds justifying the warrant?

[9] I have divided this analysis into sections reflecting the applicant who primarily advanced each argument. That said, Mr Ceal and Mr Whaling largely adopted each other's arguments, and there is considerable overlap in the underlying facts. Where these reasons address arguments advanced by Mr Ceal, they will avoid repeating that analysis with respect to similar arguments advanced by Mr Whaling, and vice versa.

i. Mr Ceal

- [10] There is only one allegation of trafficking against Mr Ceal supported by direct evidence. On July 5, 2019 at 7:18 pm, a person identified as "[name omitted in published reasons: "AB"]" entered the front passenger seat of the blue Jetta, driven by Mr Ceal, then parked in the Earls restaurant lot. AB negotiated the purchase of one gram of cocaine for \$80. Mr Ceal then departed, returning at 8 pm. AB entered the back seat of the Jetta and obtained the cocaine; the transaction took less than 30 seconds. AB then reported the transaction to an undercover police officer in Earls.
- [11] That said, the ITO sets out surveillance evidence on July 3rd, 4th, and 5th, of two distinct patterns of suspicious activity that establish a reasonable probability of drug trafficking. These two patterns are bolstered when viewed together, and bolstered further when viewed in the totality of the evidence against Messrs Ceal and Whaling, as set out in the ITO. They also suggest a reasonable link between those suspicious activities and the 15th Avenue apartment building that goes beyond the mere fact that Mr Ceal appears to reside there. The patterns as alleged in the ITO also establish a nexus between Mr Whaling to evidence of a drug trafficking business involving both the 15th Avenue apartment and the Ospika apartment, as well as his truck.
- [12] On July 3, 2019, between 4:32 pm and 6:10 pm, police surveillance noted 6 very short visits of seconds or minutes to the 15th Avenue apartment building (at a time when the vehicles of Mr Whaling and Mr Ceal are parked near and at the building).
- [13] On July 4th, police surveillance noted three more such visits, between 3:23 and 4:22 pm (at a time when Mr Whaling is at the building), followed by a further 11 visits, between 4:22 and 10 pm.
- [14] On July 5th, police surveillance noted three more such visits, between 1:56 and 2:05 pm (at a time when Mr Whaling is in the building, and Mr Ceal's Jetta is parked at the building).
- [15] In short: 23 short duration visits to the 15th Avenue apartment building in less than 48 hours.
- [16] Against this backdrop of a steady stream of unusual short duration visits to the 15th Avenue apartment building, Mr Ceal and Mr Whaling (as later discussed) are observed making similarly brief stops, seemingly transactions, in their vehicles around Prince George: 19 in total, over the three days, with six for Mr Ceal, and 13 for Mr Whaling.
- [17] Messrs Ceal and Whaling are also observed briefly meeting, and visiting both apartment locations. On July 3rd, at 6:56 pm, after the multiple short afternoon visits to the 15th Avenue apartment building, Mr Whaling is viewed meeting with Mr Ceal near Mr Whaling's Ospika apartment. A few minutes later, at 7:04 pm, Mr Whaling is seen entering the 15th Avenue apartment building. At 7:44 pm, Mr Ceal returns to the 15th Avenue apartment. He parks in parking stall A10 at the apartment complex. He briefly exits the car and looks at his telephone.

- [18] Police then spot Mr Ceal's blue Jetta making a series of short duration stops at various downtown Prince George locations:
- a) At 7:54 pm he stops on Quince Street. A male wearing a black hoodie and bandanna reaches into the Jetta on the passenger side and then left. A few minutes later the male comes back and enters into the front passenger seat, before leaving a minute later.
 - b) At 8:04 pm Mr Ceal parks at the back of the Sandman Signature Hotel lot. A minute later a male wearing black pants and a red shirt counts out multiple \$20 bills and hands them to Mr Ceal. Mr Ceal then hands the male a white item, which he pockets before walking away.
 - c) At 8:14 pm Mr Ceal parks at the 7-Eleven on Central Street West. Another vehicle approaches. A male leaves the vehicle and gets into the front passenger seat of the Jetta. He leaves seconds later and departs in his vehicle.
 - d) At 8:20 pm Mr Ceal returns, in his Jetta, to the 15th Avenue apartment building, which he enters freely, as would a tenant.
- [19] On July 4th, Mr Ceal is again spotted at the 15th Avenue apartment building. At 6:45pm, he gets into his Jetta, then parked at the apartment, and drives to Tabor Plaza. While parked at Tabor Plaza, a male from an adjacent residence enters the passenger seat of the Jetta. The male exits three seconds later, with something in his hand.
- [20] On July 5th, the ITO reveals no activity for Mr Ceal until the Earls transaction.
- [21] Apart from the presence of Mr Ceal and his Jetta at the 15th Avenue apartment building on multiple dates, and his ability to enter the apartment building freely, without the need to be buzzed in, the ITO states that the landlord of the 15th Avenue apartment complex confirmed that Mr Ceal is the tenant of apartment 10, on the third floor of that apartment building.
- [22] I am satisfied that the multiple short duration stops, both at the 15th Avenue apartment building, as well as at and in Mr Ceal's Jetta, as well as Mr Whaling's multiple stops at the 15th Avenue apartment building, as well as Mr Whaling's observed actions, as summarised below, and their apparently free access to that building, set out credibly-based probability, rather than mere suspicion, that evidence in respect of an offence would be found. These patterns would not only evidence probable drug transactions to the questioning and jaundiced eye of a police officer (to use the phrase from *R. v. Pope*, 2015 BCSC 2391 at para 60), but to any person: it is difficult to conceive of any plausible innocent explanation for the 23 short duration visits to the 15th Avenue apartment building or the various short vehicle stops.
- [23] Mr Ceal emphasises that there is no surveillance linking Mr Ceal or the Jetta to the 15th Avenue apartment building immediately before or immediately after the Earls parking lot transaction: Mr Ceal could have obtained the cocaine sold for \$80 from anywhere. The ITO does not rely solely upon the Earls transaction, however, to posit that cocaine and other evidence of trafficking would be found in the apartment. Again, the Earls transaction,

viewed in the totality of the multiple short duration apartment building and vehicle visits, establishes a plausible pattern of trafficking in connection with the apartment building where that Jetta is parked and where Mr Ceal resides.

- [24] With respect to the 15th Avenue apartment, Mr Ceal emphasises that the building contains 14 apartment units, over three floors; only four of the visitors in question are observed to go up the stairs, and none are observed entering or in apartment 10: indeed, given that many of the visits lasted mere seconds, it is unlikely that even those persons heading up the stairs could have reached apartment 10. Those 23 brief visitors could have been visiting any of the 14 apartment units in the building, for any reason.
- [25] There is no evidence in the ITO that these short duration visitors were carrying anything before or after the visits, in the manner of a plausible and innocent brief visit: a delivery person dropping off a package, or a friend picking up something from a resident. The brevity of the surveilled visits suggest that none of the visitors were in the 15th Avenue apartment building for a social visit. While it would have been preferable to have had better evidence of the architecture and visibility of the 15th Avenue apartment building, the fact that only four visitors are observed going upstairs is not determinative: the alleged transaction could well have occurred on the stairwell rather than in the apartment itself: as a matter of common sense, a hand-off in the hall or on the stairs would be more prudent and swift than in the third-story apartment itself. While there are multiple units, it is a small apartment building, and the frequency of unusual short duration visits, viewed in the totality of the evidence directed against Messrs Ceal and Whaling, is suspicious. I am satisfied that the brevity and frequency of the visitors, viewed in the totality of the evidence, establishes a pattern that transcends mere suspicion and establishes credibly-based probability of illicit transactions.[1]
- [26] Similarly, the fact that police witnessed nothing in the hands of any of the brief visitors leaving the apartment building (or in the hands of Messrs Ceal and Whaling when observed in their apartment arrivals and departures, or in their Prince George peregrinations) does not undermine the ITO, but is consistent with its theory for the reasons set out above. Messrs Ceal and Whaling are accused of trafficking cocaine, not a bulkier product such as marijuana or firearms. It is highly unlikely that such customers would hold a small baggie in their hands while leaving, rather than tucking it quickly in their pocket upon purchase. And, apart from the Earls transaction, in at least one vehicular interaction the supposed customer, an unidentified male, leaves with a "white item."
- [27] Court have frequently accepted such short duration visits as evidence of drug transactions: see, for example, *R. v. Harmes*, 2022 BCSC 262 at paras 44, 58; *R. v. Luong*, 2010 BCCA 158 at paras 13, 26; *R. v. Glasner*, 2022 ONCA 65 at paras 2, 12; and *R. v. Dezainde*, 2014 ONSC 1420 at paras 118, 144-145. Court have also frequently accepted short duration vehicular stops as evidence of drug transactions: see, for example, *R. v. Luong*, *supra*, at para 26; *R. v. Thompson*, 2018 BCSC 619 at paras 17, 34; *R. v. Johnston*, 2019 ONSC 1993 at paras 7, 30; and *R. v. Paxton*, 2016 ONSC 2906 at para 47.

[28] As stated in the frequently-cited passage of Cumming JA in *R. v. Charlton*, 15 BCAC 272:

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 in *R. v. Storrey*, (supra). See also *R. v. Curson*, [1990] B.C.J. No. 674 (22 March, 1990), *Victoria V00951* (B.C.C.A.) at 6.

[29] Mr Ceal strove to analogise the present ITO to those in other cases where the s. 8 rights of the accused were found to have been violated, and the warrants set aside: *R. v. Le*, 2014 BCCA 166; *R. v. Sunner*, 2017 BCSC 2445; *R. v. Hall*, 2019 BCPC 349; and *R. v. Reid*, 2020 ONCJ 35.

[30] All of these cases can be readily distinguished on their facts.

[31] In none of those decisions was there evidence in the ITO of the pattern of multiple short duration visits by individuals to the apartment buildings that were subject to the authorised search, as exists here: for a similar analysis, see *R. v. Harmes*, supra, at para 58. Nor was there evidence of plausible drug sales at the apartment buildings in question, as here. In *Sunner*, for example, Riley J stated:

[41] My conclusion is that these three events, even when viewed in totality and taken together with all of the other grounds, are not capable of supporting a credibly-based probability that evidence of the drug trafficking offences under investigation would be found within the residence at 8815 116 Street. It was not possible or reasonably open to the issuing justice to find any pattern of behaviour or movement of the suspects or vehicles to support a credibly-based probability that 8815 116 Street was being used as a stash house or otherwise being used to store drugs or other items used in the trafficking activity. I note that in a number of the instances where drug transactions were concluded, there is no connection whatsoever with 8815 116 Street, and I also note that on some occasions (or at least one occasion) where Mr. Sunner is directly involved in the transaction, there is no connection whatsoever to 8815 116 Street. In these circumstances, as I say, there is no discernible pattern that could have been identified by the issuing justice as a basis for concluding that 8815 116 Street was a place where drugs or evidence of drug trafficking offences would be found.

[emphasis added]

[32] In essence, in each of these cases, the police hypothesised that as the accused was ostensibly involved in drug trafficking, drugs and other evidence of that trafficking would likely be found in their residence, or a residence associated with them. That is an insufficient basis on which to justify a state-sanctioned search of a personal residence.

- [33] Sunner and Reid can be further distinguished: there was no evidence that those accused lived at the residences in question, or ever stayed there, although they were seen visiting and parking in the respective residences.
- [34] In *Le*, the Court noted that police had placed a tracking device on the vehicle of the accused. Yet this comprehensive and compelling evidence of the accuseds' movements never once showed them travelling straight from their residence to that of a known drug dealer, to whom they were accused of supplying product from their residence: see paras 44-45. In short, the lack of evidence of direct deliveries, which the high-tech surveillance would be expected to show, spoke volumes.
- [35] Here, the police enjoyed no such technological assistance; indeed, Mr Ceal placed great weight on the lack of continuous police tracking of the Ceal Jetta. There is no single police tracking of his vehicular movements from the 15th Avenue apartment building, to his three suspicious brief stops, and back to the 15th Avenue apartment building on July 3rd: rather, separate officers spotted Mr Ceal in separate locations. There is thus a gap between his 7:44 pm departure from the 15th Avenue apartment building and his 7:54 pm arrival on Quince Street, and then to the next two stops, and then between his departure at 8:14 pm and arrival back to the apartment building at 8:20 pm.
- [36] As indicated by the timeline, however, we are not talking about a discrepancy of hours: Mr Ceal leaves and returns to his 15th Avenue home base, with three discrete suspicious stops, in an efficient 36 minutes. Defence argues that on the Crown's theory of the case, and as set out in the ITO, there could hypothetically have been multiple re-supplies of drugs from sources other than the apartment, in the space of these 36 minutes. But even if that were temporally plausible, which is unlikely, would that make any sense? Again, the court must approach the issue on a "practical, non-technical, and common sense basis": *Le* at para 39.
- [37] The present timing stands in significant contrast to that in *Reid*, with its three-hour gap between the initial location of the vehicle of the accused and the alleged drug transaction, followed by a 2.5 hour gap between that transaction and the accused's return to the apartment building. That ITO was vague on the activities of Mr Reid in the three hours between the location of the vehicle at the gas station and the alleged transaction: he could well have obtained any drugs later sold during this significant time gap in the evidence: *Reid* at paras 145-146. Pointedly, there was no way of knowing whether Mr Reid was at the apartment before the suspected hand-to-hand drug transaction: para 185.
- [38] Reid further turns on the materially misleading omission in the ITO that the vehicle of the accused was first seen not at the apartment in question, but rather at a gas station a kilometre away: para 145. Further, in contrast to the landlord's confirmation that Mr Ceal lives at the 15th Avenue apartment, and the observation of his multiple free entries to the building, there was no evidence in the Reid ITO of the accused entering or exiting the apartment eventually subject to search.

- [39] Hall similarly turns on misleading language in the ITO. That ITO asserted conclusively that the accused "drove directly" to the alleged drug exchange site. The police in cross-examination conceded that the police had lost visual continuity with the vehicle, and that a "drug reload" could have occurred during the drive, which may not in fact have been "direct" from the residence to the meeting point. The Court specifically found the affirming officer's account to be unreliable and misleading: para 43.
- [40] Finally, we must remember that the present search warrant was not only obtained for the narrow purpose of locating cocaine at 15th Avenue or Ospika. Mr Ceal, for example, argues that there was not "a credibly based probability that controlled drugs or substances will be found at ." the 15th Avenue apartment. But the ITO anticipates much broader evidence of the alleged offence: "reasonable grounds to believe that illegal drugs, cell phones, score sheets, currency, packaging material, and documents of residence" will be found in those apartments. Such evidence would provide items or information fitting several of the four listed categories under the s. 487 Criminal Code authority for the issuance of a search warrant:

Information for search warrant

487 (1) A justice who is satisfied by information on oath in Form 1 that there are reasonable grounds to believe that there is in a building, receptacle or place

- (a) anything on or in respect of which any offence against this Act or any other Act of Parliament has been or is suspected to have been committed,
 - (b) anything that there are reasonable grounds to believe will afford evidence with respect to the commission of an offence, or will reveal the whereabouts of a person who is believed to have committed an offence, against this Act or any other Act of Parliament,
 - (c) anything that there are reasonable grounds to believe is intended to be used for the purpose of committing any offence against the person for which a person may be arrested without warrant, or
- (c.1) any offence-related property

- [41] In this, even if it were conceivable that the two accused obtained cocaine from some source other than the apartments in the short time between the surveilled suspicious activity, the ITO evidence, as alleged, viewed in its totality, offers sufficient grounds on which the justice could have issued the warrant: the apartments "could afford evidence with respect to the commission of an offence ." even if they do not contain cocaine or serve as a "stash house" for drugs.
- [42] Mr Ceal argues that the ITO is poorly drafted and ambiguous, particularly in setting out the sole concrete instance of Mr Ceal allegedly selling cocaine, at Earls: paras 33-34. For example, the paragraphs do not specify that AB was the source of the undercover officer's information that AB had purchased one gram of cocaine for \$80 from Mr Ceal. I agree that

the paragraphs could have been better worded. But read carefully, and with the proper permissible inferences, the context makes clear that it discusses that single transaction. In this, I agree with the observation of Riley J in *Sunner* at para 30:

In any event, I question whether the complaints about bad drafting or inclusion of irrelevant material are particularly helpful to the analysis. If the affidavit is so unclear that the grounds cannot be discerned, that is one thing, but a reviewing judge's opinion that an ITO is poorly drafted or contains irrelevant material would not necessarily advance the ultimate inquiry, which is whether the ITO contains sufficient reliable information on which the issuing justice could have granted the warrant. See *R. v. Araujo* at para. 51-53. In my view, the only relevance of bad drafting is where it actually impacts upon the reliability of the grounds set out in the document.

[43] As Riley J stated in *R. v. Belanic*, 2019 BCSC 1411:

[11] With regard to quality of drafting, I am guided by *R. v. Sanchez* (1994), 93 C.C.C. (3d) 357 (Ont. S.C.), wherein Hill J. stated that: "[t]he specificity and legal precision of drafting expected of pleadings at the trial stage is not the measure of quality required in a search warrant information". To the same effect are the remarks of Gibbs J.A. in *R. v. Melenchuk* (1993), 24 B.C.A.C. 97 at para. 15, explaining that it would be "impractical to expect of an officer swearing an information in these circumstances the precise prose of an Oxford grammarian, the detailed disclosures of a confessional and the legal knowledge of a Rhodes scholar." To paraphrase the remarks of Campbell J. in *R. v. Boussoulas*, 2014 ONSC 5542 at para. 12, while "reasonable latitude" should be accorded to the drafter of an ITO, considering the precision of the language, such latitude can never be extended so far as to relieve the affiant of his or her duty to act with "integrity and reasonable diligence", mindful of the duty to make full and frank disclosure in an ex parte proceeding.

[44] The impugned wording (as well as that in other passages criticised by the defence for awkward diction) does not affect the reliability or integrity of the ITO, or diminish the fact that the issuing justice could have granted a warrant on its allegations, viewed in their totality.

ii. Mr Ceal's apartment number

[45] Mr Ceal argues that his s. 8 Charter right to privacy was also breached when Constable Reid confirmed with the landlord of the 15th Avenue apartment building that Mr Ceal was the tenant in apartment 10. Police had earlier noted that the Jetta, seen making multiple short duration interactions around Prince George, parked multiple times and consistently in "the assigned parking spot" of A10 at the 15th Avenue building. The preliminary inquiry transcript expands on the brief reference in the ITO, and confirms that Constable Reid asked for and received a tenant list from the landlord, from which he took notes. The officer did not keep the list.

[46] In *R. v. Kim*, 2019 BCSC 2150 [Kim 2150], Devlin J set out the legal principles guiding such a s. 8 application. I adopt them, as did the Court in *R. v. Latimer*, 2020 BCSC 488 at para 104:

- [22] To assert a s. 8 claim, a claimant must establish a reasonable expectation of privacy in the subject matter of the search. As set out in *Edwards*, a person must establish that they subjectively expected the subject matter of the search would be private and this expectation was objectively reasonable: *Edwards* at para. 45; *Spencer* at para. 17; *Tessling* at para. 18.
- [23] If the claimant establishes a reasonable expectation of privacy, the second inquiry assesses whether the police activity in question amounts to an unreasonable search. As established in *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 at 159, "the guarantee of security from unreasonable search and seizure only protects the reasonable expectation."
- [24] The determination of a claimant's reasonable expectation of privacy requires a contextual assessment of the "totality of circumstances" (*Edwards* at paras. 31, 45; *Spencer* at paras. 16-18). In *Edwards*, the Supreme Court of Canada set out some factors which may inform a finding of a claimant's reasonable expectation in the subject matter of the search. These factors include: the claimant's presence at the time of the search; ownership, possession or control of the place searched, which includes the ability to admit or exclude others, and the historical use of the property (at paras. 45, 46). No factor alone is dispositive.
- [25] The Court in *Tessling*, recognized that the query of whether a person reasonably expects privacy is necessarily normative. Reasonable expectations of privacy are assessed in light of the norms of conduct of society (*Tessling* at para. 42). Where the subject matter of a search is informational, the nature and quality of that information is relevant (*Tessling* at paras. 59-62). In *Tessling*, the investigative technique used by the police revealed patterns of heat distribution on the external surfaces of a house. The Court found that these heat images did not reveal information in which a person would have a reasonable expectation of privacy. The heat images disclosed that there were some activities in the house that generated heat. However, the heat distribution offered no insight into the claimant's private life and revealed nothing of the individual's "biographical core of personal information" (*Tessling* at para. 63). As *Sandhu* recognized, the Supreme Court in *Tessling* tailored the *Edwards* factors in response to technological advancements in police investigative techniques (*Sandhu* at para. 27).
- [26] *Patrick*, *Tessling* and *Spencer* establish that a court must not narrowly approach the determination of the subject matter of an alleged search. Rather than focusing on the physical acts involved or the physical space invaded, the court must consider the nature of the privacy interests which are potentially compromised by the state action. For example, in *Patrick*, the target of the search was not the contents of the garbage bags per se but the personal information that could be gleaned from an examination of the contents of the garbage bags. In *Tessling*, the focus was not on the heat emitted from the surface of a residence, but on the information captured in those heat images that could potentially reveal the kinds of activities occurring inside the residence. Similarly, the subject matter of the search in *Spencer* was not simply the name and address of the internet subscriber, but the identity of an internet subscriber corresponding with particular internet usage. (See also: *R. v. Ward*, 2012 ONCA 660 [*Ward*].)

- [27] Further, in *R. v. Marakah*, 2017 SCC 59 [Marakah] the Supreme Court recognized that control is not an absolute indicator of a reasonable expectation of privacy, nor is the lack of control fatal to the existence of a privacy interest (at para. 38).
- [28] In *Spencer*, the Court set out four lines of inquiry to assist in the analysis in the context of an informational privacy claim. These considerations were summarized in *Jones* at para. 13 as follows:
- 1) an examination of the subject matter of the alleged search;
 - 2) a determination as to whether the claimant had a direct interest in the subject matter;
 - 3) an inquiry into whether the claimant had a subjective expectation of privacy in the subject matter; and
 - 4) an assessment as to whether this subjective expectation of privacy was objectively reasonable, having regard to the totality of the circumstances.
- [29] The concept of privacy in a s. 8 analysis is not an all-or-nothing proposition: see *R. v. Duarte*, 1990 CanLII 150 (SCC), [1990] 1 S.C.R. 30 and *R. v. Wong*, 1990 CanLII 56 (SCC), [1990] 3 S.C.R. 36 [Wong]. This concept was recently discussed by the Supreme Court in *R. v. Jarvis*, 2019 SCC 10 [Jarvis] at para. 62:

An example of this broader principle that is recognized in the jurisprudence is that the intrusion into our privacy that occurs when a person hears our words or observes us in passing is fundamentally different than the intrusion that occurs when the same person simultaneously makes a permanent recording of us and our activities: see *Duarte*, at p. 48; *Wong*, at pp. 44 and 48-53; see also *Alberta v. UFCW, Local 401*, at para. 27. A visual recording may be able to capture a level of detail that the human eye cannot. A visual recording can also capture this detail in a permanent form that can be accessed, edited, manipulated and studied by the person who created the recording and that can be shared with others: see *R. v. Sandhu*, 2018 ABQB 112, 404 C.R.R. (2d) 216, at para. 45; see also *Alberta v. UFCW, Local 41*, at para. 27.

[underlined emphasis in original, bolded emphasis in italic added]

- [47] With respect to the important fourth consideration -- was the expectation objectively reasonable? -- *R. v. Tessling*, 2004 SCC 67 at para 32 provides further considerations:
- a. the place where the alleged "search" occurred;
 - b. whether the subject matter was in public view;
 - c. whether the subject matter had been abandoned;
 - d. whether the information was already in the hands of third parties; if so, was it subject to an obligation of confidentiality?
 - e. whether the police technique was intrusive in relation to the privacy interest;

- f. whether the use of surveillance technology was itself objectively unreasonable;
 - g. whether the [information obtained] exposed any intimate details of the respondent's lifestyle, or information of a biographical nature.
- [48] In *R. v. Marakah*, 2017 SCC 59, a case heavily relied upon by the defence, the Supreme Court emphasises that s. 8 focuses on protecting sensitive and private information, going to one's biographical core, from unwarranted dissemination to or seizure by the state:
- [31] The purpose of s. 8 is "to protect a biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state": *R. v. Plant*, [1993] 3 S.C.R. 281, at p. 293. It follows that the potential for revealing private information is a factor to consider in determining whether an electronic conversation attracts a reasonable expectation of privacy and is protected by s. 8 of the Charter.
- [32] In considering this factor, the focus is not on the actual contents of the messages the police have seized, but rather on the potential of a given electronic conversation to reveal personal or biographical information. For the purposes of s. 8 of the Charter, the conversation is an "opaque and sealed 'bag of information'": Patrick, at para. 32; see also Wong, at p. 50. What matters is whether, in the circumstances, a search of an electronic conversation may betray "information which tends to reveal intimate details of the lifestyle and personal choices of the individual" (*Plant*, at p. 293), such that the conversation's participants have a reasonable expectation of privacy in its contents, whatever they may be: see Cole, at para. 47; Tessling, at paras. 25 and 27.
- [emphasis added]
- [49] Defence counsel were unable to provide a case where the Court quashed a warrant where police obtained the bare address of a suspect from a landlord, without prior judicial authorisation. Nor were they able to provide authority for the proposition that such acquisition of a municipal address breaches the s. 8 rights of the accused. Nor were they able to provide judicial authority for the proposition that an accused has a reasonable expectation of privacy in their municipal address alone. Given that many police investigations ascertain or confirm the address of a suspect with someone associated with that residence, be it a property manager or landlord or otherwise, this jurisprudential silence speaks volumes.
- [50] In contrast, there is direct authority, including authority on near-identical facts, for the contrary propositions: that there is no objectively reasonable privacy interest in a municipal address, and that police may obtain that information from a landlord without prior judicial authorisation.
- [51] In *R. v. Saciragic*, 2017 ONCA 91, the police had obtained the accused's unit number from the property manager. The appellant accused argued that:

[25] .Given the reasonable expectation of privacy in his municipal address, the appellant argues, questioning the property manager constituted a warrantless search which violated his rights under s.8. Furthermore, the appellant argues that the property manager engaged in an unlawful search as agent of the state, committing an additional s.8 violation. The appellant argues that these infringements of s.8 are significant, necessitate a fresh analysis under s.24(2) of the Charter, and ought to result in the exclusion of the physical evidence seized from unit 1107.

[52] The Ontario Court of Appeal rejected this ground of appeal:

[31] Of course, in assessing whether an individual has a reasonable expectation of privacy, it is necessary to look not only at the immediate information sought by the police (the address corresponding to the fob, the attendance on the 11th floor), but the further information that it ultimately reveals: Spencer, at para 31. In this instance, the ultimate information sought by the police is the particular unit the appellant accessed: the appellant's municipal address.

[32] Did the appellant have a reasonable expectation of privacy in his municipal address? The appellant did not advance any authority in support of the proposition that, categorically, there is a reasonable expectation of privacy in one's municipal address. A physical address does not, of itself, reveal intimate details about one's personal choices or way of life, and, ordinarily, it is publicly available information to which many people have access.

[emphasis added]

[53] R. v. Webster, 2015 BCCA 286, lv to appeal to SCC ref'd: SCC 36635 (17 December 2015), and R. v. Law, 2017 BCSC 1241 also confirm that an accused has no reasonable expectation of privacy in his municipal address, and that the police's acquisition of that information from the property manager does not breach the rights of the accused.

[54] As stated in Webster:

[68] The appellant asserts that the question is not whether the building manager was tricked, but whether he was an agent of the state. He contends this was a warrantless search.

[69] I tend to agree with the Crown. Objectively, the appellant had, at best, a limited expectation of privacy. The document was in the hands of a third party. By statute some people were entitled to the information. I see no reason why the police could not ask for it. The building manager was quite free to refuse the request, although the lead investigator ostensibly may have had a right to the information.

[70] It is surmised that the building manager knew the lead investigator was a police officer and that he was investigating the appellant, but we do not know what was in the mind of the building manager. In my view, merely complying with a request for the provision of information in his possession does not make the building manager a state agent.

[55] As stated in Law at para 98:

the information in the Form K -- Mr. Law's municipal address -- was not personal information, the dissemination of which would violate his reasonable expectation of privacy in the objective sense.

- [56] Citation of Webster and Law necessitates a note on Latimer (decided five years after Webster and three after Law), on which the applicants place great weight. There, the head concierge of the condominium complex had given the police, inter alia, a Form K document (entitled "Notice of Tenant's Responsibilities"), confirming that the accused resided in a certain unit. The Court found that the police's receipt of that document, combined with CCTV security footage, key fob data, and other materials also provided by the concierge, constituted a warrantless search and seizure. The Crown advised that it would not seek to justify that seizure, and the material was excluded.
- [57] As discussed below, however, the facts and concerns in the present case differ considerably from those in Latimer, and more closely resemble those in Webster and Law. Latimer does not purport to hold that police require judicial authorisation before obtaining a suspect's bare municipal address. Rather, Latimer specifically addresses disclosure of a Form K, discussed under the heading of "Form K Information: Webster and Law." [2] Latimer emphasised that the Form K provides personal information beyond the mere unit number; that it provided on its face express reassurances to the tenant of its limited use and distribution; and that the concierge breached condominium bylaws and policies in providing the document to the police. None of these arguments appears to have been put before the Webster or Law Courts.
- [58] This Court thus relies on the broader and binding pronouncements in Webster and particularly Law, quoted above, for the proposition that the warrantless provision of a municipal address, on its own, outside of a Form K, as here, does not violate the rights of the accused.
- [59] This approach has been adopted by other courts. In *R. v. Abo Zead*, 2020 BCSC 2145, decided after Latimer, Sharma J held:
- [92] Furthermore, I agree with the Crown that the fact a person resides at a particular residence or has a connection to it is not the type of personal information that attracts Charter protection: *Drakes* at para. 10; *R. v. Saciragic*, 2017 ONCA 91 at paras. 29-34; and *Law* BCSC at para. 98.
- [60] With respect to Latimer, Sharma J noted that a s. 8 privacy enquiry is a "highly fact-specific, nuanced analysis that requires the court to look at the totality of circumstances." She concluded that Latimer turned on its own, particularly intrusive facts, including, importantly, that the Form K (as well as CCTV footage and key fob data) was provided in breach of condominium bylaws and policies. She declined to apply Latimer to the facts before her, where the building manager voluntarily provided to the police CCTV video footage. Sharma J ultimately concluded that the accused had no reasonable privacy interest in that footage. This Court agrees with and applies the analysis of Sharma J, to these facts.

- [61] To complete the jurisprudential survey, outside of the criminal law context, but still concerning a claimed s. 8 Charter breach, the Supreme Court of Canada held in *Bernard v. Canada (Attorney General)*, 2014 SCC 13 that there could be no reasonable expectation of privacy in an employee's home address and telephone number, and that that information did not form part of the biographical core of personal information revelatory of the applicant's lifestyle: paras 41, 112.
- [62] I return to *Latimer*. A close analysis of the case reveals further important distinctions from the present case. *Latimer* focuses on the combined effect of the Form K document with the other materials inappropriately provided by the concierge: CCTV footage and key fob access records, as well as information about the parking spots associated with the unit, and emails concerning the unit.
- [63] These materials were personally invasive, going to the personal biographical core of the accused's privacy interests, discussed in *Tessling* at para 32 and *R. v. Patrick*, 2009 SCC 17 at para 27: see *Latimer* at para 147. Security camera footage, for example, would directly depict to the actions of the unsuspecting individual. Such video would also reveal intimate details of who visited that individual, including, for example, who stayed the night. The key fob data would reveal similar movement-by-movement lifestyle information.
- [64] Such data also raises the panopticon spectre of the state investigators tapping into omnipresent and intrusive electronic tracking of unsuspecting individuals through video cameras, smart phones, watches, key fobs, bank machines, vehicular GPS, health devices, browser and viewing history: even smart refrigerators. *Latimer* describes this threat to privacy:
- [152] While the information obtained by the police in this case may, at first blush, appear fairly innocuous, in my view it would be erroneous to proceed on that assumption. It is beyond dispute that we are going through a technological and digital revolution where changes in how we communicate, do business, live and play are exponential. Indeed, with the numerous advances in digital technology it would be fair to say that our society is rapidly evolving into a digital surveillance state where our movements, associations and activities are constantly watched, recorded and preserved through a proliferation of smart phones, CCTV surveillance cameras and the resort to the modern convenience of electronic key fobs both at work and in the residential context.
- [65] Such de facto electronic tracking evokes even stronger privacy concerns where it is compelled rather than voluntary:
- [153] The information obtained in this case is a result of the larger societal shift to life in multi-unit buildings under the watchful eye of CCTV surveillance cameras that record all movements into, out of and within a complex. Additionally, many modern residential complexes require owners and tenants to use electronic key fobs to access most areas of such buildings. In the present case, for example, without a key fob, the applicants could not gain access to the building lobby, underground parkade and elevators of their residential

complexes.

[emphasis in original]

- [66] Where the police obtain access to the data generated by multiple such electronic devices, they often obtain a near-comprehensive record of the subject's actions and lifestyle, down to intimate details:
- [154] The key fobs record the movements of the fob associated to an owner or tenant of the complex. The fob access records contain data regarding the time, date and area accessed by a registered fob, and thus capture a significant amount of information about a fob user's movements. That information is even more powerful when cross-referenced with CCTV footage of the areas accessed, and collectively they can establish a comprehensive record of lifestyle choices within the residential complex - who went where when, with whom, and what they were carrying, wearing, and doing.
- [67] Where the police obtain video footage, or material or information that breathes meaning into video footage, police obtain a powerful investigative tool commensurate with the privacy invasion represented by the permanent capture of the subject's actions in digital form:
- [155] Moreover, much like video replay at sporting events, CCTV footage permits a viewer to play back, pause, study and interpret the images captured. In that regard, CCTV footage is completely different from the brief and fleeting observations made by eye-witnesses or surveillance officers. It is reviewable, permanent and far more informative. CCTV footage memorializes the interactions and movements of individuals, transforming the passing observations stored in human memory into a permanent visual record of a person's movements.
- [68] None of these profound privacy concerns are present here. No video footage or key fob data or other such information was provided. Police only obtained confirmation of Mr Ceal's apartment number, in the course of a markedly low-tech gathering of surveillance evidence.
- [69] As a further distinction from the present case, as noted, the police in Latimer did not merely obtain confirmation that the tenant lived in a certain unit, as here. Instead, the police acquired the Form K Notice of Tenant's Responsibilities. That document does not merely provide the name of an occupant of a unit, but also provides the core personal data of the tenant's driver's licence number, email address, telephone number, and signature.

[70] Further, the Form K on its face expressly limits its use:

The personal information requested and subsequently provided in this document is for the purpose of communicating with tenants and owners, ensuring the orderly management of the Strata Corporation and complying with legal requirements.

[at para 45]

- [71] Ker J found these reassurances of limited distribution, coupled with legislative restrictions on distribution, in the face of the tenant's legislatively-compelled provision of that form, to be "significant" to her decision:
- [128] Significantly, the Form K in issue here includes a qualifier or limitation in the footer of the document that contains a statement of its purpose: providing the personal information contained in the Form K is "for communicating with tenants and owners, ensuring the orderly management of the Strata Corporation and complying with legal requirements." By virtue of s. 146 of the SPA a landlord and their tenant must provide this information to the strata corporation. Sections 35 and 36 of the SPA delineate the circumstances in which a Form K can be disclosed. It does not include provision to law enforcement agencies upon request.[3]
- [emphasis in original]
- [72] Further, as noted in Latimer paras 52 and 56, the head concierge breached both strata bylaws and policies in providing these materials to the police.
- [73] Such privacy intrusions, reassurances, and breaches are absent here. There is no evidence of any promises or restrictions with respect to the landlord's confirmation or disclosure of the bare fact of the municipal address, either in a tenancy agreement, or building bylaws, or otherwise.[4] There is no evidence that the landlord's voluntary provision of this information breached any rules, or confounded the tenant's expectations. No Form K was provided. The only information provided, in the form of verbal confirmation and a borrowed tenant list, was that Mr Ceal resided in the apartment: confirmation of the applicant's municipal address.
- [74] For an ordinary person, such information generally does not go to the personal core of privacy. To state the obvious, unlike surveillance video, key fob data, or browser history, one's address does not reveal anything particularly personal about the individual: that person is merely one in a series of people who resides at that address.
- [75] Further, one's residential address is generally not private information: as the public address for delivery, contact, and identification, it is the antithesis of private information. The individual generally provides their home address to multiple government agencies, and to many people and businesses, with few if any limitations on how it may be used. Unless proactive steps are taken, that address is usually available on various public databases and directories, online and otherwise. The address will be usually known to other dwellers of the apartment complex, as well as friends and relatives. As an inoffensive daily occurrence, a delivery person of goods or food might well ask a neighbour or the landlord in which suite the recipient tenant resides: the tenant would likely expect and indeed encourage such disclosure. Many if not most tenants will have their names posted on the buzz-in system at the front door of an apartment complex.

- [76] Importantly, Mr Ceal's municipal address (as that of most individuals) is already in the hands of the state: likely in many hands of the state (in drivers licence records, health records, social insurance databases, tax records, voting rolls, passport records, police records, etc.). It thus is antithetical to Marakah's statement on the purpose of s. 8: "to protect a biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state": para 31.
- [77] Nor does the confirmation of Mr Ceal's tenancy unlock a investigative bounty of biographical information, when combined with other disclosed materials. Ultimately, Latimer turns on the fact that the overly-helpful concierge provided, on a silver platter, the highly invasive key fob data and CCTV footage, which are in turn animated by the Form K confirmation of tenancy:
- [176] Thus, it was the cumulative value of the information considered in its totality that the police were really after. They were able to take all the data obtained from these two locations and stitch it together with other investigative information to create a virtual picture of what was going on inside the suites and, from that, draw inferences and conclusions to advance the investigation. To that end, then, the information obtained was far more "invasive" than simply name and address information or images from lobbies, secure parking garages and elevators.
- [emphasis added]
- [78] Further, that tenancy information contained in the Form K was critical for the police investigation in Latimer. In contrast to the small 14-unit 15th Avenue apartment building in the present case, the condominium complexes in Latimer contained 454 and 175 units each: pinpointing a specific unit was critical for animating, informing, and interpreting the CCTV footage and key fob data.[5] The combined effect of the package of the materials provided, both in terms of the resulting biographical intrusion and investigative power, significantly heightened the s. 8 privacy concern.
- [79] Similarly, in *R. v. Spencer*, 2014 SCC 43, it was not the internet service provider's mere confirmation that the applicant was linked to specific internet protocol ("IP") addresses that violated the s. 8 rights of the accused. Without the subscriber information obtained by police, the warrant could not have been obtained: para 74. That marriage of subscriber information and the IP addresses unlocked the investigative treasure chest of the accused's browsing history (including, pertinently, searches of a sexual nature): highly personal information going to the applicant's private biographical core.[6] In this, as well, Mr Ceal's analogising the landlord to an internet service provider also fails.
- [80] Similarly, in *R. v. Roudiani*, 2018 BCSC 1101, the information provided from the BarWatch database revealed more information, which information was closer to the biographical core of the accused: his photograph, name, date of birth, driver's license, and nightclub entry times. That data allowed the police to understand and use what would otherwise be a sea of difficult-to-discern surveillance video, and its combination with other evidence was more

invasive: para 28. Finally, the BarWatch data did not merely confirm the police's belief in the identity of the accused, but provided police with his name in the first instance. As succinctly summarised in para 2: "By accessing that data at one of those establishments, police were able to compare the nightclub's photograph of the accused with the alleged assailant shown on other surveillance video and, crucially, to obtain the accused's name."

- [81] I will briefly address other cases advanced by the applicants.
- [82] In the recent decision of *R. v. Biring*, 2022 BCSC 3, the Court found that the accused had a reasonable expectation of privacy in a secured parking and storage space that he rented in a truck yard. A truck yard employee provided police with a copy of the accused's lease agreement, and advised that the accused rented a specific space within the yard. The employee also gave the police extensive security footage and photographs,[7] including of the accused's occupation and use of his rented space, the accused's key fob activity log showing comings and goings, and the accused's access log. As in *Latimer*, the evidence provided was far more extensive, and its cumulative investigative value stronger, and its invasion of privacy much more intrusive, than in the present case: see para 67. Further, a secured parking and storage area does not serve as the public and delivery point of contact for an individual, as does a municipal address in the present case.
- [83] Relying on the above analysis and attempting to avoid repetition, I summarise the application of the four-part *Spencer/Jones* s. 8 considerations to these facts.
- [84] First consideration: the subject of the search was to confirm that the person driving the Jetta that had been observed making various suspicious short duration stops was a resident of the 15th Avenue building that the police also suspected was the location of frequent short duration drug transactions. The fact that the Jetta had consistently parked in the A10 parking spot already pointed towards apartment 10. In contrast to *Latimer*, the subject matter of the request for the address was not the identity of persons coming and going to apartment 10 (Mr Whaling being an exception), which might reveal intimate lifestyle information. As emphasised by defence counsel themselves, the ITO makes no mention of the names of the 24 short duration visitors over the 48-hour period. The focus of the investigation is the frequency, duration, and nature of those visits: revealing no biographical information about Mr Ceal and the visitors beyond the fact that he may be involved in trafficking drugs to those visitors.
- [85] Second consideration: the applicant passes this typically unchallenging consideration: Mr Ceal did have an interest in the subject matter of the search.[8]
- [86] Third consideration: if the applicant had a subjective expectation of privacy in the subject matter of the search, it was, as per *Webster*, and the observations above, at the low end of the spectrum.

[87] Fourth consideration: any expectation that the landlord would refuse to provide or confirm the applicant's municipal address is not objectively reasonable. As stated in Tessling, " a person can have no reasonable expectation of privacy in what he or she knowingly exposes to the public, or to a section of the public ": para 40. Again, a municipal address is for public identification and delivery. It is widely available: in the hands of the landlord, in various state, public, and private entities, and individuals. The landlord was not subject to any obligations of confidentiality. The police technique was not intrusive in respect of the privacy interest: an enquiry to the landlord, coupled with low-technology surveillance of the 23 short duration visits to the 15th Avenue apartment building, all of which visits were in public view. The municipal address reveals no intimate details of his lifestyle, or information of a biographical nature.

iii. Mr Whaling

- [88] As with Mr Ceal, the Court summarises the allegations against Mr Whaling on July 3, 4, and 5, 2019. For clarity of narrative, there will be some repetition from the description above.
- [89] On July 3rd, at 2:08 pm, Mr Whaling's truck is observed making what seemed to be a short duration driver's side window transaction with a male.
- [90] At 4 pm, Mr Whaling's truck is seen parked on the street outside of the 15th Avenue apartment building. It is there during the three brief visits to the building between 4:32 pm and 4:50 pm.
- [91] Soon after, at 4:55 pm, Mr Whaling's truck is observed on Douglas Street, with a short exchange between the driver and a female.
- [92] At 5:40 pm, Mr Whaling, in his truck, stops at a Panago Pizza. A male meets with Mr Whaling at his driver's side window for five seconds; Mr Whaling then departs.
- [93] At 5:46 pm, Mr Whaling returns to the 15th Avenue apartment. He parks his truck on a side street, and enters the building. He is likely present in the 15th Avenue apartment building for at least two of the short duration visits (at 6:02 pm and 6:10 pm).
- [94] At 6:32 pm, Mr Whaling is then observed parking at the Ospika apartment building. Mr Whaling uses a key to enter the building, indicating tenancy. At 6:56 pm, he leaves Ospika and meets with a person later identified as Mr Ceal for some 10 seconds. Mr Whaling then leaves in his truck.
- [95] At 7:04 pm, Mr Whaling is back at the 15th Avenue apartment building. He parks. He is seen carrying a small black object the size of a pencil case. At 7:44 pm, Mr Ceal also returns to the 15th Avenue apartment building.
- [96] On July 4th at 4:50 pm, police observe Mr Whaling leaving the 15th Avenue apartment building. He then makes four short vehicle stops in his truck in various locations around Prince George, before returning to the Ospika apartment building at 5:28 pm. He leaves Ospika at 5:43 pm, conducted three more short vehicle stops, and then goes to the 15th

Avenue apartment building. Once Mr Whaling arrives, Mr Ceal then leaves the 15th Avenue apartment building, at 6:45 pm. Mr Ceal then does his own short duration stop in his Jetta, as noted above. Mr Whaling is alleged to be present at the 15th Avenue apartment building during at least three of the short duration stops witnessed in the early evening (at 3:23 pm, 3:33 pm, and 4:22 pm). At 7:59 pm, Mr Whaling leaves the 15th Avenue apartment. He is observed making a single short duration vehicle stop, before driving back to the 15th Avenue apartment building at 8:03 pm.

- [97] On July 5th, at 11:37 am, police see Mr Whaling leave the Ospika apartment building in his truck. At 11:48 am, he is observed parking his truck on Third Avenue, with a two-second interaction with a woman on the driver side. At 1:32 pm, Mr Whaling is observed at Earls. A woman leans in the passenger window. Mr Whaling is seen reaching from the driver's seat towards the woman. The exchange takes two seconds.
- [98] At 1:38 pm Mr Whaling then drives to the 15th Avenue apartment, where Mr Ceal's Jetta is also observed in the A10 parking stall. Over the next 30 minutes, there are three short duration visits at the 15th Avenue apartment building, as set out above. Later that afternoon, at 4:56 pm, Mr Whaling goes to Ospika, where he stays for only 3.5 minutes, before leaving.
- [99] Mr Whaling notes that there is no steady stream of visitors to his Ospika apartment building in the manner alleged with respect to the 15th Avenue building. He also notes that there are fewer visits by himself and Mr Ceal to his Ospika apartment building. He argues that it is pure speculation that there may be drugs or other evidence in his Ospika apartment. He argues that there are many potential innocent explanations for his returns to his apartment.
- [100] While the evidence in the ITO is less compelling with respect to Ospika than to 15th Avenue, the evidence as a whole, viewed in its totality, provides a sufficient basis on which the warrant could have been issued against that location. Mr Whaling had key access to the Ospika building, and he was observed in the specific apartment unit. The timing of his Ospika visits in relation to his observed or likely meetings with Mr Ceal, in relation to his own short duration vehicle stops, and in relation to his trips to 15th Avenue, particularly during periods of multiple short duration visitors, viewed as a whole, indicate a potential pattern of trafficking and supply involving the Ospika apartment, and the reasonable possibility that evidence of that offence -- not only cocaine, but other evidence of trafficking -- would be found at Ospika. The surveillance evidence, including brief meetings, also establishes his relationship with Mr Ceal, importing all of the evidence of trafficking by Mr Ceal, proximate in time and space to Mr Whaling's movements and actions in relation to Mr Ceal and 15th Avenue, into the analysis of the overall evidence against Mr Whaling.

iv. Mr Whaling's application for excision

- [101] Mr Whaling applies to excise certain portions of the ITO. Mr Ceal joins in that application, and adopts his submissions.

[102] Mr Whaling points to certain statements in the ITO that are not consistent with earlier evidence provided in the ITO, where surveillance observations made of Mr Ceal were also attributed to Mr Whaling, and where the ITO claims that certain actions were seen in apartment 10 of the 15th Avenue apartment building. I agree that the ITO should be corrected with the following excisions, as indicated below by bolded strike-through lines:

- a) para 37(d): "Observations made by the surveillance team of the Prince George RCMP detachment was the steady flow of traffic of clients arriving at 3[8]20 15th Avenue, to purchase drugs from unit 10 of 3[8]20 15th Avenue "
- b) para 38(a)(ii): "During surveillance Sean Whaling was observed arriving at apartment 10 3[8]20 15th Avenue, Prince George. While inside apartment 10 of 3[8]20 15th Avenue Prince George "
- c) para 38(d): "during police surveillance, the surveillance team was able to see clients counting currency prior to doing an exchange with Sean Whaling and John Ceal;"

[103] Mr Whaling complains that four references in the ITO to past police suspicions and involvements with him are prejudicial and irrelevant, citing R. v. Emery, 2019 BCSC 1710 at paras 29-34.

[104] It is not in itself offensive for an ITO to refer to the suspect's past police involvement or past investigations: see R. v. Gill, 2020 BCSC 1216 at para 48. As stated in Sunner:

[29] Similarly, I do not agree with the submission that the ITO contains prejudicial material. Although there may be instances where an affiant improperly includes facts or averments or allegations that have absolutely no bearing on the subject matter of the application, this is not such a case. The rule against uncharged criminal conduct or bad character evidence is a rule that applies in the trial of a criminal charge. It is not a rule that applies to an ITO sworn in support of a search warrant. A search warrant is an investigative tool and the affidavit sworn to support its issuance may indeed contain facts, information, or allegations that have never been proven in court. See, for example, R. v. Loewen at para. 49-51, citing R. v. Della Penna, 2012 BCCA 3 at para. 31, 36-37. The fundamental concern is that the contents of the affidavit must be objectively reliable and relevant.

[105] After noting that that passage in Sunner, not earlier provided to the Court, might have informed its earlier decision to excise references to past investigations of the accused, the Emery Court identified the driving factor in that earlier ruling: the Emery ITO made the false and misleading statement that the accused " was the subject of previous investigations 'in which charges have been or will be recommended,' ": para 34. In fact, charges were never laid. The ITO was false and misleading.

- [106] In the present ITO, there is no such misleading affirmative representation. A judicial reader of the ITO would know that the police would be motivated to highlight the fact that a charge had been laid in reference to a past incident. Conversely, silence as to charges would indicate that no charges were laid. The past incidents cited, including one in 2017 and two in 2019, are germane to the subject matter of the present ITO and investigation: potential indicia of trafficking. The Court declines to excise these passages.
- [107] Mr Whaling seeks to redact passages in the ITO where the affiant officer, after reciting the evidence of the various short duration apartment building and vehicular stops, opines that in his experience, such activity evidences trafficking.
- [108] The Court declines to excise these passages. At para 12 of the ITO, the affiant sets out his experience and expertise in this area: he has been an RCMP officer for nine years, conducting approximately five drug investigations a month. His analysis is carefully separated from his recitation of the evidence, and delineated with square brackets, for greater clarity. Such analysis is provided in many if not most ITOs, and is necessary for the issuing justice and reviewing justice to understand the context of the evidence, and assess the reasonableness of the police theory of the investigation. None of the analysis constitutes wild or unwarranted speculation based on the cited evidence. They are not conclusory statements, as asserted, but are permissibly and appropriately tied to the "factual underpinning supporting the statement to permit the issuing justice to evaluate the factual basis for the conclusion": Sunner at para 31; Kim 1115 at para 13; Emery at paras 36-40. And, ultimately, the officer's explanation is not controversial: as noted above, many court decisions cite such activities as evidence of trafficking.
- [109] Finally, Mr Whaling seeks to excise references to anonymous Crimestopper tipsters and an informant. The ITO, as presented to the Court, largely redacts the content of those tips, along with the evidence of a "handler" on the reliability of the informant. He argues that the passages fall short of the "3Cs" -- compelling, credible, corroborated -- required under *R. v. Debot*, [1989] 2 SCR 1140 at p. 1168:

In my view, there are at least three concerns to be addressed in weighing evidence relied on by the police to justify a warrantless search. First, was the information predicting the commission of a criminal offence compelling? Second, where that information was based on a "tip" originating from a source outside the police, was that source credible? Finally, was the information corroborated by police investigation prior to making the decision to conduct the search? I do not suggest that each of these factors forms a separate test. Rather, I concur with Martin J.A.'s view that the "totality of the circumstances" must meet the standard of reasonableness. Weaknesses in one area may, to some extent, be compensated by strengths in the other two.

- [110] As indicated in the above passage, the evidence of anonymous tipsters must be considered in the totality of the evidence. The Debot passage above does not solely concern anonymous informants, but the totality of evidence in an ITO. In contrast to some cases,[9] the present ITO does not rely solely or primarily on informants, but rather on the extensive police

surveillance observation of activity consistent with a dial-a-dope operation. In this ITO, reference to the tipsters and informant is a minor aspect of the evidence, merely providing context leading to the investigation. The Court declines to redact these passages.[10]

IV. CONCLUSION

[11] While defence counsel have zealously and thoroughly raised various piecemeal objections to the contents of the ITO, the evidence of short duration apartment building stops, and short duration vehicle stops, and the movements and actions of Messrs Ceal and Whaling, as set out in the ITO, viewed in their totality, even after excisions, provided reasonable and probable grounds to believe that evidence of the offences alleged, such as illegal drugs, cell phones, score sheets, currency, and packaging material, would be found in the two apartments. The evidence in the ITO provided a sufficient basis on which the issuing justice could issue the warrant.

[12] The applications are dismissed.

"The Honourable Mr Justice Crerar"

- [1] See Kim 1115 at paras 52-53 for a similar analysis, in response to an argument that there was no evidence that any of the targets of the investigation entered the specific unit in question.
- [2] Para 118.
- [3] Other cases cited by the applicants also note the express restrictions on distribution of the seized items in question. For example, in *R. v. Flintroy*, 2018 BCSC 1692, Citizenship and Immigration Canada reassures passport holders such as the accused, whose photograph was obtained by police, that: "Protection of Information All personal information provided on this application form is protected and used in accordance with the provisions of the Privacy Act ": para 35.
- [4] Indeed, the landlord may well have had a duty to provide information to the police in relation to possible crime occurring in an apartment building under his professional watch: see *Abo Zead* at para 57.
- [5] See paras 34 and 80.
- [6] In the end, the Court found that notwithstanding the breach of s. 8, exclusion of the evidence rather than its admission would bring the administration of justice into disrepute, upholding its admission: para 81.
- [7] Four hours and 25 minutes, made up of 101 individual clips: para 24.
- [8] As noted in *Marakah* at para 22, the third factor is usually "not a high hurdle."
- [9] See, for example, *R. v. Quilop*, 2017 ABCA 70 at para 29, and *Debot* itself: para 54.

[10] At para 14, the ITO affiant takes care to advise the judicial reader that because the Crimestopper tipsters are anonymous, he cannot attest to their credibility.

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