

CANADA / JUDGMENT

R. v. Rai

2020 BCSC 1579

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 1579 R. v. Rai

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Rai,

2020 BCSC 1579

Date: 20201023

Docket: X077491

Registry: New Westminster

Regina

v.

Amrit Singh Rai

Restriction on publication: Pursuant to s. 486.5 of the Criminal Code

Before: The Honourable Mr. Justice Crossin

Oral Reasons for Judgment

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Place and Date of Trial/Hearing:

New Westminster, B.C.

July 20-23 and 27-29, 2020

Place and Date of Judgment:

New Westminster, B.C.

October 23, 2020

Introduction

- [1] The accused is before the Court charged with three counts of trafficking in controlled substances contrary to s. 5(1) of the Controlled Drugs and Substances Act, S.C. 1996, c. 19. The alleged activity consists of 17 separate transactions occurring between January 19, 2012 and May 15, 2012 in Surrey, British Columbia. In particular, the accused is charged with:
- a) trafficking in cocaine between January 19, 2012 and May 15, 2012;
 - b) trafficking in heroin between January 19, 2012 and May 15, 2012; and
 - c) trafficking in methamphetamine between April 27, 2012 and May 4, 2012.
- [2] At the relevant time, the accused was involved in the business of at least one drug recovery house in Surrey, and regularly associated with addicted persons, including persons that were both active and recovering from their addictions. Two or three of these persons with whom the accused associated are alleged to be involved in the trafficking operation.
- [3] It is common ground that the accused is not a principal participant in any of the drug transactions. Thus, the route to conviction on the theory of the Crown is proof the accused aided and abetted the alleged trafficking by directing others. Criminal liability on the part of the accused for the charges rests on s. 21(1) of the Criminal Code, R.S.C. 1985, c. C-46, which establishes party liability for aiding and abetting a principal offender.
- [4] There is no conspiracy charge before the Court. The Crown, however, seeks to establish a conspiracy to traffic drugs because critical pieces of evidence against the accused are two statements made by Raj (Roger) Datt ("Datt") to an undercover operator. Datt was not called as a witness. The statements are hearsay and are thus presumptively inadmissible. The Crown seeks to introduce the statements for the truth of their contents. The statements are said to be admissible pursuant to the so-called Carter exception: *R. v. Carter*, [1982] 1 S.C.R. 938.
- [5] Finally, a significant portion of the evidence at trial was tendered by Admissions of Fact pursuant to s. 655 of the Criminal Code.

Overview

- [6] The investigation that underpins the allegations is built upon an RCMP undercover operation. The evidence at trial consisted of the testimony of an RCMP undercover operative posing as a buyer of drugs; surveillance evidence conducted by various members of the RCMP; recorded discussions between the undercover operator and one or more of the targets, including the accused; and certain cell phone records.
- [7] In addition, various items were seized following searches conducted at various places.
- [8] Certain individuals are prominent in the narrative. The featured officer in the undercover operation was "UO". It was UO, armed with a cover story, who inserted himself into the orbit of potential targets. UO posed as a consumer of illicit drugs and a seller of a variety of goods, including foodstuffs and electronic devices. UO offered these goods at reduced prices to anyone in the need, and it was obvious to anyone in the need that the goods were apparently stolen ("the goods").
- [9] UO was initially introduced to a man named Hendy ("Hendy"). Hendy was involved, it appears, in an eclectic mix of criminal activity, including drug trafficking. Many of the transactions in issue are between UO and Hendy.
- [10] In the course of UO's initial dealings with Hendy, Hendy mentioned the name of the accused as someone that might be interested in purchasing the wares of UO. According to Hendy, the accused operated treatment residences for recovering addicts and may well be in the market for the goods UO was selling, particularly food at low cost.
- [11] The recovery house in issue in these proceedings is at 14688 106th Avenue in Surrey ("the recovery house"). The accused is referred to from time to time throughout the narrative as "Free" or "Freedom". This is because, I gather, the recovery house that featured throughout the investigations is known as "Freedom for Life".
- [12] In due course, UO was introduced to Datt. Datt also knew Hendy and the accused.
- [13] The balance of the transactions in issue took place between UO and Datt.
- [14] Mr. Mandeep Singh Randhawa ("Randhawa") also figures prominently in the Crown's case. The evidence discloses, generally speaking, that Randhawa was often in the company of Hendy and/or Datt as the various transactions crystallized with UO. The Crown's theory is, and it is quite clear on the evidence, that Randhawa distributed the drugs to Hendy and Datt to sell to UO during the period of the indictment.
- [15] The accused and Randhawa also had a history together. Similar to Datt and others, it appears Randhawa had been a client at the recovery house at some point. It also appears on the evidence that during the relevant period Randhawa may have continued to struggle with addiction while at the same time trafficking in drugs.

Significant Locations

- [16] The distribution of the drugs and the culmination of the various transactions centred around an area in Surrey where stood two high rise apartment buildings, The City Point Towers ("the two towers"). The two towers are identified as Tower One and Tower Two. They are more or less side-by-side and share a common underground parking facility. The address of Tower One is 10777 University Drive ("Tower One"), and the address for Tower Two is 13380 108th Avenue ("Tower Two").
- [17] Much of the surveillance captured the activity in and around the two towers by way of CCTV cameras that the RCMP monitored throughout the investigation.
- [18] There are three units or apartments in the towers that play a role in the investigation. These are as follows:
- a) Tower No. Two - Unit 1902: the evidence discloses that Randhawa resides in this apartment ("1902");
 - b) Tower No. One - Unit 1804: Datt lived in this apartment along with two others, a male and a female. It appears all three were at some point clients of the recovery house. The accused paid the rent on behalf of Datt. The Crown's theory is that this unit was used, at least for a period of time, as a stash site. In other words, the drugs that Randhawa supplied were present from time to time in Unit 1804 ("1804"); and
 - c) Tower No. Two - Unit 1509: It is unclear on the evidence what person or persons might have resided in this unit, but the evidence does reveal it appears to have been lived in. The Crown's theory is that Randhawa also used this apartment as a stash site from time to time ("1509").

The Transactions

- [19] There is no serious challenge to the proposition that the evidence establishes beyond a reasonable doubt proof of the relevant drug transactions in issue. There are two transactions early in the narrative. Otherwise, UO paid for and received the drugs from Hendy and Datt. The particulars of the transactions are as follows:
1. January 19, 2012 - HENDY to [UO1]; \$200 for 1/8 ounce of crack cocaine (weighed at 2.3 grams)
 2. January 24, 2012 - HENDY to [UO1]; \$80 of crack cocaine (weighed at .81 grams)
 3. January 31, 2012 - HENDY to [UO]; \$700 for half an ounce of powder cocaine (weighed at 10.68 grams)
 4. February 17, 2012 - HENDY to [UO]; \$1,400 for an ounce of crack cocaine (weighed at 25.62 grams)

5. February 22, 2012 - HENDY to [UO]; \$2,900 for two ounces of crack cocaine (weighed at 48.2 grams)
 6. February 25, 2012 - HENDY to [UO]; \$1,450 for an ounce of crack cocaine (weighed at 32 grams)
 7. February 29, 2012- HENDY to [UO]; \$2,900 for two ounces of crack cocaine (weighed at 56.9 grams)
 8. March 9, 2012 - HENDY to [UO]; \$2,900 for two ounces of crack cocaine and \$250 for 2 grams of heroin (weighed at 55.5 grams and 1.91 grams)
 9. March 14, 2012 - HENDY to [UO]; \$2,900 for one ounce of crack and one ounce of powder cocaine (weighed at 27.94 grams and 27.8 grams)
 10. April 12, 2012 - DATT to [UO]; \$2,600 for two ounces of crack cocaine (weighed at 49.2 grams)
 11. April 24, 2012 - DATT to [UO]; \$5,600 for four ounces of crack cocaine and four grams of heroin (weighed at 113 grams and 3.11 grams)
 12. April 27, 2012 - DATT to [UO]; \$4,680 for two ounces of crack cocaine, three grams of heroin and an ounce of methamphetamine (weighed at 56.78 grams, 3.5 grams and 29.29 grams)
 13. May 3, 2012 - DATT to [UO]; \$3,000 for 2 ounces of crack cocaine and three grams of heroin (weighed at 55.10 grams and 2.87 grams)
 14. May 4, 2012 - DATT to [UO]; \$3,200 two ounces and additional \$300 worth of methamphetamine (weighed at 55.60 grams and 3.37 grams)
 15. May 9, 2012 - DATT to [UO]; \$3,500 for two ounces of crack cocaine and seven grams of heroin (weighed at 54.93 grams and 6.90 grams)
 16. May 11, 2012 - DATT to [UO]; \$9,200 for six ounces of crack cocaine and five grams of heroin (weighed at 169.60 grams and 4.99 grams)
 17. May 15, 2012 - DATT to [UO]; \$1,750 for one ounce of crack cocaine and three grams of heroin (weighed at 25.33 and 2.96 grams)
- [20] Much of the evidence in relation to the transactions centre around the activity at the two towers. In this regard, generally speaking, Randhawa is tracked securing the order for drugs from either Hendy or Datt; providing the drugs to Hendy or Datt; receiving the cash from either Hendy or Datt, and then retreating to his residence. The evidence then discloses Hendy or Datt physically providing the drugs to UO.
- [21] These observations have, on occasion, additional relevance. From time to time, the accused and others are seen interacting with Datt and/or Randhawa, and others, at the two towers.

Relevant Cell Phone Numbers

- [22] Certain phone numbers also became relevant in this matter.
- [23] The subscriber to phone number 604-318-8901, at least up until March 6, 2012, was associated with Randhawa ("Randhawa's phone"). The subscriber to phone number 778-223-5463 from April 11, 2012 and onward was Datt ("Datt's phone").
- [24] The subscriber to phone number 778-855-3172 during the relevant period of time was the accused ("Rai's phone").

Transaction Particulars

January 25, 2012

- [25] UO1 introduced UO to Hendy on January 25, 2012. UO1 had been posing as a purchaser of drugs and had in fact completed two transactions with Hendy. The investigators had determined to introduce the character of UO to pursue matters in place of UO1. The accused was a target. The goal, according to UO, was to implicate the accused in drug trafficking, and in particular to persuade the accused to engage in trading drugs for food and electronics. UO1 introduced UO to Hendy as a person who dealt in stolen goods, including food items and electronics.
- [26] During these initial discussions with UO, Hendy confirmed he was a drug dealer and also that he knew persons who may be interested in purchasing UO's goods, including a person that ran a recovery house (or houses). UO asked Hendy to speak to the person to determine whether he might be interested in buying anything from UO.
- [27] Thereafter, there is some evidence of UO and Hendy exchanging calls, but there does not appear to be any movement by Hendy.
- [28] UO continued to press Hendy to call about the prospect of selling his goods. There is some evidence Hendy and the accused exchanged text messages.
- [29] UO testified Hendy was nervous about discussing a drug transaction. UO testified that he had previously asked Hendy to supply him (UO) an ounce of cocaine. It is not clear on the evidence when the discussion of drugs had previously occurred but, in any event, Hendy indicated that proceeding with a drug transaction with UO made him nervous and he wanted to slow that down.

January 30, 2012

- [30] On January 30, 2012, UO told Hendy that he had a pallet of food worth \$1,000 and wanted to exchange it for one-half ounce of cocaine. There is no evidence at this stage how, if at all, this would, or could, unfold.

January 31, 2012

- [31] The next day, January 31, 2012, Hendy and UO arranged to attend the recovery house to determine if the accused would be interested in purchasing the food. It appears Hendy and UO also arranged, between the two of them, that at some point after this attendance at the recovery house, Hendy would sell to UO one-half ounce of cocaine.
- [32] The accused was not at the recovery house when Hendy and UO arrived. They waited. As they waited, UO and Hendy privately negotiated a price for the drug transaction that was to follow.
- [33] The accused ultimately did arrive at the recovery house and discussions took place with the accused concerning purchasing food items. The accused paid cash for the food. UO then left with the sense that the accused might be interested in buying goods for the recovery house in the future. There is no evidence the accused had any knowledge of the arrangements Hendy and UO had made concerning the drug transaction.
- [34] This led to the first transaction between UO and Hendy on January 31, 2012.
- [35] Hendy and UO left the recovery house to conclude the drug transaction. Hendy indicated that "his guy" was not available for an hour. Ultimately, the two stopped at Gateway Skytrain in Surrey (very near the two towers). UO gave Hendy \$700. A minute or two later, a call was placed from Randhawa's phone to Hendy's phone. A few minutes after that, Randhawa entered the elevator on the 19th floor of Tower Two and headed down to the parking lot. More or less at the same time, Hendy was heading towards the underground parking. Randhawa then proceeded to the 18th floor in Tower One, and again Hendy's phone called Randhawa's phone. Randhawa then headed back down to the parking garage from the 18th floor of Tower One. Shortly thereafter, Hendy was observed exiting the parking area and returning to UO's vehicle to hand over the drugs to UO. At the same time, Randhawa returned to the 19th floor of Tower Two.
- [36] Generally, this pattern of movement repeated itself throughout the unfolding of these drug transactions. It is apparent that "his guy" was Randhawa and Randhawa was providing the drugs from the apartments in the towers.
- [37] Thereafter, there is no evidence concerning the accused until February 10, 2012.

February 10, 2012

- [38] On February 10, 2012, the surveillance revealed the accused and several other unknown persons arrive at Tower One and exit the elevator on the 18th floor. As previously stated, it appears to be common ground Datt and others resided in 1804. Who was in the apartment, and what was in the apartment at this time on February 10, is unknown.

February 14, 2012

- [39] The next day of any relevance concerning the accused was a few days later on February 14, 2012. The accused was observed again at Tower One on this date.
- [40] This particular attendance was later in the evening. Other unknown males, and a dog, accompanied by the accused, exited the elevator on the 18th floor once again. The accused used a fob in the elevator to access the floor. A fob is required to direct the elevator to a particular floor and only a particular floor. Some minutes later, the accused, the unknown males, and the dog exited the apartment building. The accused then later returned to Tower One with one of the same males some minutes later. He again went to the 18th floor.

February 17, 2012

- [41] There is a drug transaction between Hendy and UO on February 17, 2012.
- [42] A great deal of evidence was led in relation to this particular transaction. The evidence again tracked the movement and interaction of Hendy and Randhawa leading up to the purchase by UO from Hendy of an ounce of crack cocaine.
- [43] Randhawa is seen, for the first time, actually entering 1804 during the unfolding of the transaction. Randhawa was also seen exiting 1804 about 10 minutes later and meeting with Hendy at the front of the building. Hendy and Randhawa then engaged in a conversation. Hendy walked away with a white plastic bag. There is no evidence of a handover, nor evidence Randhawa carried anything from 1804 but, in any event, Hendy, within a minute, returned to the vehicle where UO waited and handed the white plastic bag (that contained the drugs) to UO in exchange for \$1,400. It is evidence, at least consistent with the Crown theory, that Randhawa was obtaining drugs from someone, and/or from some location, within 1804.

February 22, 2012

- [44] On February 22, 2012, the accused and several other people, including a young child, were again seen attending the 18th Floor of Tower Two. Again, aside from the accused, the identities of these persons were not offered in evidence.
- [45] The group of people entered 1804. Randhawa also arrived at 1804 separately in and around the same time and entered 1804.
- [46] The activity above occurred at approximately 4:00 p.m. in the afternoon. The accused, Randhawa and the others all exited 1804 about 20 minutes later. The accused exited the tower and departed in his vehicle; a Dodge Durango SUV. Randhawa then took the elevator to the 15th floor of Tower Two. It is not known whether Randhawa entered 1509. Some minutes later Randhawa let himself into 1902.

- [47] It was after these observations of the group of persons coming and leaving, and of Randhawa then proceeding alone to the 15th floor of Tower Two and subsequently returning to 1902, that UO and Hendy began discussions concerning UO purchasing two ounces of crack cocaine.
- [48] Hendy phoned UO at approximately 5:40 p.m. to advise UO he would sell him 'two ounces' for \$2,800. Somewhat later, Hendy called UO to say that "his guy" had increased the price. UO agreed to the new price. Ultimately, Hendy and UO travelled to the Gateway Skytrain station where UO provided Hendy with \$2,800 in cash (the price they had settled on) and Hendy then exited the vehicle, heading to the towers.
- [49] Randhawa and an unknown male and female were then observed proceeding to the 15th floor where Randhawa ultimately met with Hendy at 7:00 p.m. Hendy then returned to the vehicle and provided UO with crack cocaine.

February 25, 2012

- [50] This day was the first attempt by UO to seek an introduction to the person that was supplying the drugs to Hendy, that is, Randhawa. It was also a day that again places the accused in the proximity of the towers.
- [51] The evidence is as follows. Having spoken to UO a couple of days earlier, Hendy indicated to UO that he would call "his guy" about purchasing an ounce of cocaine. Later in the afternoon of February 25, 2012, at about 3:00 p.m., Hendy advised UO that it was ready. UO picked up Hendy about 4:00 p.m. but Hendy advised that the "cook" had not shown up, presumably indicating there was going to be a delay.
- [52] UO's evidence is that the investigators had decided, in aid of advancing the investigation, to try to bypass Hendy and get introduced directly to the supplier.
- [53] To this end, UO pressed this idea with Hendy but Hendy resisted. Hendy, however, did agree to call "his guy". He did so in the presence of UO and in fact, a discussion ensued on the speakerphone. The male on the other end of the discussion indicated he would be ready in half an hour. There is no evidence from UO as to who the male was, might be, or the location of the person.
- [54] In addition, later, at about 5:00 p.m. UO and Hendy drove to Gateway Skytrain station and UO then attempted to persuade Hendy to take him to the towers and meet his supplier. Hendy resisted again. According to Hendy, "his guy" didn't meet new people. Thereafter, UO gave the money to Hendy and Hendy left UO in the car in the usual way. This was at about 5:15 p.m. Hendy returned to the vehicle just before 6:00 p.m. with a bag of cocaine.
- [55] During this period on February 25, 2012, between approximately 3:00 p.m. and 6:00 p.m., there is evidence of the activity of the accused.

- [56] On this day, at approximately 3:40 p.m., the accused was buzzed up to the 15th floor of Tower Two. It is not known whether he went inside the unit but certainly, an inference is available that he did so. He was in the building between approximately 3:40 p.m. until approximately 5:49 p.m.
- [57] Between approximately 4:00 p.m. and 4:15 p.m., Randhawa is observed, leaving the 15th floor to meet a pickup truck. He then travelled back and forth between the 15th floor of Tower Two and the 18th floor of Tower One. There is no evidence of where the accused is located during this period, nor what he was doing.
- [58] Approximately an hour later, at about 5:15 p.m., Hendy alighted from UO's vehicle parked at Gateway Skytrain station possessing \$1,450 received from UO for the purchase of an ounce of cocaine (as previously referenced).
- [59] In any event, approximately one-half hour later, at 5:49 p.m., Randhawa, the accused and an unknown male entered the elevator on the 15th floor. Randhawa and the unknown male, but not the accused, exited the elevator on the ground floor and ultimately met up with Hendy. The accused carried on in the elevator to the parking garage. Hendy ultimately received the drugs from Randhawa and the unknown male, and Hendy returned to UO's vehicle at approximately 5:55 p.m.
- [60] Randhawa then returned to the towers and made his way to the 19th floor at 5:53 p.m. It appears the vehicle linked to the accused, a gold Dodge Durango, was then seen outside the front entrance of Tower Two around this time. The driver was not identified, but it was believed to be the accused.
- [61] The suggestion appears to be that the accused had gone to his vehicle, had exited the parking garage, and was now parked outside Tower Two. This is after the transaction had taken place and Hendy had departed.
- [62] Corporal Sielsly testified at approximately 5:57 p.m., he observed the driver of the Durango speaking with an unknown male. Randhawa was observed standing at "the front of the front passenger door". When, and from where, Mr. Randhawa had re-emerged after going to his residence is unclear.
- [63] In any event, approximately two minutes later (at 6:00 p.m.) three additional people: two unknown males and an unknown female, were also seen apparently speaking with the driver of the Durango at the front of the building.
- [64] The evidence does not disclose when Randhawa left the area of the Durango nor where he went, although he is seen entering the elevator on the 15th floor of Tower Two at 6:02 p.m. Randhawa is then observed emerging on the ground floor and apparently passing something through the passenger side window onto the passenger seat of the Durango. There is no evidence of what became of the gaggle of people around the Durango that were present. The Durango departed.

- [65] There is no evidence as to what Randhawa might have placed in the Durango. The observations of the RCMP in relation to this activity was as a result of observing the activity from the video monitor room.
- [66] Photographs were produced that presented the best evidence as to what the officers observed as depicted on the video monitor screen. The still photos do not show Mr. Randhawa putting anything into the Dodge Durango. The witness conceded that the photo best represented the observations by the police.
- [67] There was continued surveillance at the two towers over the course of the relevant timeframe in the indictment but the evidence does not reveal any activity of the accused until approximately three weeks later; on March 14, 2012.
- [68] Two other transactions, however, occurred in this intervening period. On February 9, 2012 and March 9, 2012, transactions again occurred between Hendy, UO and Randhawa.

March 14, 2012

- [69] This day created the second opportunity for the undercover operation to directly target the accused. The goal was to implicate him, through discussions, in the drug trafficking that was taking place at the towers with Randhawa.
- [70] This investigative effort was against the backdrop of two arrangements. One, UO would attempt to sell some food (and TVs) to the recovery house. Two, UO and Hendy would arrange, at some point that day, to conduct another drug transaction.
- [71] The first order of business from the investigation's point of view was for UO and Hendy to deal with the recovery house transaction.
- [72] The attempt to sell the goods at the recovery house appeared again to evolve in a somewhat haphazard way. Hendy advised UO, on the drive to the recovery house, that in fact, once again, the accused was not even present at the recovery house.
- [73] In the course of this, Hendy advised UO that the accused was in fact a former addict. Hendy also informed UO that the accused now just assists addicts in his recovery houses.
- [74] In any event, it was upon his arrival at the recovery house that UO first encountered Datt. The evidence would reveal Datt is also a recovering addict and, as previously referenced, lives in 1804 with others.
- [75] Given the absence of the accused, UO and Hendy then determined to depart the recovery house and complete the drug transaction.
- [76] Thereafter, the whereabouts of the accused continued to be unknown and ultimately UO dropped Hendy off at a residence. Hendy suggested UO speak to Datt. UO then returned to the recovery house in an attempt meet up with the accused in order to try to engage the accused while negotiating the selling of his pallet of goods.

- [77] Upon UO's return to the recovery house that afternoon, Datt was still present. The accused was not. Datt provided UO with a business card of the accused. UO called the accused and ultimately the accused did agree to attend at the recovery house to meet with UO. Thereafter negotiations ensued for goods.
- [78] The negotiations between UO and the accused apparently occurred in the presence of a number of people milling about.
- [79] UO then asked to speak to the accused in private. The accused obliged. UO disclosed his drug dealings with Hendy and indicated that he had become frustrated with Hendy. UO testified that the accused stated at this time, that he, the accused, was not involved in that anymore; he just operates recovery houses and couldn't help. The statement of the accused, implicitly containing an admission of his previous, but abandoned drug involvement, was led by the Crown without objection.
- [80] UO continued to press the accused. He asked the accused if he simply had a name that he (UO) could connect with to facilitate a purchase instead of using Hendy.
- [81] Again, the accused demurred. He indicated, "he used to be in the game". He understood how time was money. Finally, the accused capitulated. According to UO, the accused stated, "okay I will hook you up with my guy" (UO's notes indicated the accused said, "I will hook you up with my guys"). This statement, according to UO, was accompanied with a nod in the general direction of the two towers, although the two towers were well away from the recovery house, a ten-minute drive as I understand it.
- [82] There was nothing else discussed in this regard. The conversation immediately returned to the prospect of doing more business regarding goods without any reference to drugs or hookups.
- [83] There is no evidence immediately thereafter that either the accused or UO acted upon the declaration of a hookup. There was no evidence of any further discussion between the accused and UO on the prospect of the hookup, at least for some time.
- [84] The next day of significance from an evidentiary point of view is approximately a month later, on April 12, 2012.
- [85] In those intervening weeks, there was continued surveillance on the two towers although no evidence of other drug transactions being arranged or observed.
- [86] On one of these days, the surveillance showed the accused, an unknown male, and Randhawa exiting 1509. It was also revealed during this period of time that Randhawa was also known as "Money" or "Munny".

[87] The only evidence of any further communication between UO and the accused after the discussion of March 14, 2012 were text exchanges during the first week of April. These messages culminated in arrangements for UO to once again attend the recovery house with the prospect of selling some of his goods.

April 12, 2012

[88] A body pack on the person of UO largely captured the activity of this day

[89] The hope was for UO to visit the recovery house, cause the accused to meet him there, and once again attempt to implicate the accused in directing the drug trafficking that had been unfolding at the towers.

The Recorded Discussions: April 12, 2012 ("the discussions")

[90] The discussions obviously always included UO. The other participants on this day were the accused, Datt, and "Ray".

[91] The discussions took place largely in English. There is a small amount of discussion in the Punjabi language. The discussions in the Punjabi language have been translated, and the parties accept the translation as accurate.

[92] Upon UO's arrival at the recovery house on this day, the accused was present. UO and the accused engaged in a discussion concerning another transaction for goods.

[93] There was extensive banter concerning the nature of the goods and the price. These discussions appeared to be in the presence of others including someone identified as "Ray".

[94] Ultimately, UO indicated, again, that he would like to talk privately with the accused. UO, the accused, and Ray then entered the recovery house and had a discussion apparently on a balcony. There is some evidence there appeared to be others milling about as well, including Datt; but this evidence is vague.

[95] The transcript reveals the fact that the accused was ill with the flu and had been for some time. UO then reminded the accused about "the stuff we talked about last time". UO mentioned the fact that the phone of the accused may have been forwarded to "buddy" and the accused indicated that he had been ill and he hadn't bothered with his phone.

[96] What the accused wanted to know was how much he owed for the goods. UO deflected at this point and began to speak of drug matters. The conversation is as follows (AR is the accused, and R is Ray):

AR: So what do I owe you for this now?

[UO]: Well that, well that depends, right?

AR: Yeah-yeah

[UO]: I mean lookin' for two zip but uh, so if we can, I mean, I don't know how you fuckin', we can work that if you want me to fuckin' pay you or just take it off the top of whatever. So.

AR: Yeah-yeah, I'm gonna give you, right? I'm not dealing, buddy there's a bad fuckin', I was in and now I cleaned up myself fuckin', off the drugs and all that so I don't wanna deal with that but you, you-

[UO]: Well, that's, no, you know what? That's good. I don't gi-, I don't give a fuck about that. It's just like we talked the last tie, I'm just lookin' for a connect so I don't have to go through fuckin' Ernie with this. A) He's done fuckin'

AR: Yeah.

ET 00:18:54

[UO]: I waste my fuckin' time every time I deal with him.

AR: Yeah.

[UO]: And plus whoever the fuck he's dealin' with he owes them a bunch of money so he's fuckin', I'm payin', I'm payin' his fuckin' debt-

AR: Yeah.

[UO]: -y'know, so I wanna go back to the fuckin' regular prices.

AR: Yeah, yeah.

[UO]: Like, when I first started with him it's fourteen a fuckin' night. And all of a sudden it was fourteen fifty. So-

AR: Holy fuck.

[UO]: Right? So I'm, I'm not lookin' for bitch price-

AR: Right.

[UO]: -I wanted to get fuckin', I wanted to get-

UM: (Background: Chico.)

[UO]: -fuckin' friend prices, right? So that's my point if I can, if I can get it down to like, fuckin', well, fuckin', I mean, I know it should be around thirteen for, for hard, right?

AR: I think so.

[UO]: Right?

AR: Yeah.

[UO]: So, if I can-

AR: Even, I don't know, people talk about it, I don't know too much.

[UO]: No-no, fair enough.

AR: I wasn't involved, what I'm trying to tell you like, I was involved before.

ET 00:19:36

[UO]: Yeah, yeah-

AR: But I cleaned up myself like, it was fuckin', I cleaned up from drugs-

[UO]: Yeah.

AR: -and I moved forward to recovery now.

[UO]: Perfect.

AR: And I don't wanna be a hypocrite now-

[UO]: No-no.

AR: 'Cause I just wanna fuckin' I take these guys to gym but all these all other guys, if they wanna do it it's up to them but I wanna stay on one side only recovery now. 'Cause this house changed a lot. Bernie used to live here. They used, now I kicked everybody out, I got-

[UO]: Dude, I-I hear what you're saying.

AR: I, yeah, you can talk to him, talk to him-

[UO]: I don't, I don't care about any of that shit. I, I get it, you're not involved.

AR: Yeah.

[UO]: I just need your fuckin' connect-

AR:

[UO]: -to help me out.

AR: Yeah, I can do that.

[UO]: So I don't have to go through fuckin' -

AR: Yeah-yeah, I can do it. W-what's, how much is uh, how much you want for this,

[97] In any event, UO continued to press the accused to put UO in contact with someone that will sell UO cocaine at \$1,300 an ounce. "Ray" appears to have been present throughout the discussion and is able to converse in English. The accused finally turned to Ray and spoke to Ray in Punjabi. This is translated as follows:

AR: *Do you know, what he's saying?

R: *Huh*.

AR: *He's saying-, I told him I don't work. He wants a rock*.

R: *Yes*.

AR: *Right?*

R: *What did he say?*

AR: He said, "I'll give it to you for thirteen, thirteen hindered."

R: *Huh.

AR: Earlier, he said "I will charge you less".

R: Hm.

AR: *I said, I don't know, I gave it up, right?

R: *Yeah.

AR: *If someone knows you, then you talk to him*.

R: *About what*?

AR: *About the rock.*

R: *About the rock?*

AR: *Yeah*.

R: *Who knows me?*

AR" *That's what I'm saying, you know.*

R: *We don't know anybody.*

AR: *Huh*?

R: *Otherwise, do you know anyone else?*

AR: *No, no*.

R: *Otherwise, yeah I have someone*.

AR: *Take him to Money.*

[98] The accused and Ray returned to the discussion with UO in English as follows (UM is Ray):

UM: Yes. Okay. Yeah, okay, I'm going to introduce you to

[UO]: Okay.

AR: He'll do it. Not me, man.

[UO]: No-no, that's fair enough, uh.

AR: Yeah. I got fuckin'

UM: can, can we do it a little bit later?

[UO]: No, I gotta do it ASAP.

UM: ASAP?

[UO]: Yeah 'cause I gotta get back to my side, so.

AR: *He's going to take two.*

R: *Huh?*

AR: * He's going to take two * He will call you. I don't, I'm not gonna do it. That's right?

[UO]: I p-, I hear you, man. You're-

AR: Four, five.

[99] The accused then immediately returned to discussing the food items.

[100] Finally, this exchange between the accused and Ray as follows:

R: *The guys asked us to come downtown, to bring the food.* How should I do it? Should I give them the truck?*

AR: Oh, yeah. *Take him there-

R: *Tell him, I will be back fast from* downtown.

AR: *Take him on your way.*

[101] UO and Ray departed. The subsequent efforts between Ray and UO, as revealed in the discussions, in the attempt to facilitate some sort of introduction to Money, demonstrates Ray is indeed reluctant. Ray stated it was his understanding that it was up to him (Ray) as to how to proceed, if at all. Ultimately, Ray simply decided not to proceed with the introduction.

[102] Before ending the effort however, he suggested to UO that he talk to Roger (Datt is also known as Roger). "He knows the guy", according to Ray. Whether this may indicate Datt has some knowledge of the task Ray has undertaken with UO is unknown. UO, for some reason, tells Ray that in fact Roger does not know "the guy". Ray then provided the name of Boleo to UO as a hookup. He indicates that Roger knows Boleo. Who Boleo is, and why he entered into Ray's thinking, is not known. The nature of the discussions Ray and Roger have had in this regard, if any, is also unknown. In any event, Ray abandoned UO in fairly short order.

[103] The testimony revealed that UO, having now become completely frustrated, phoned the accused, but there was no answer. He also sent a text to the accused. He returned to the recovery house and asked someone to go see if the accused was about. As he was waiting, he received a call back from the accused's phone number that he believed was Randhawa.

[104] In any event, UO never did see or speak with the accused thereafter on this day. Datt, however, approached UO at the recovery house. Datt told UO that he, Datt might do something for him.

[105] Datt momentarily retreated into the area of the recovery house and thereafter told UO that he had everything arranged, and off the two of them went in UO's vehicle.

[106] The first discussion between Datt and UO the Crown seeks to introduce into evidence by way of the Carter exception occurs in the car:

[UO]: So what the fuck's goin' on?

RD: What, what d'you need, two?

[UO]: Well, did Freedom explain what I'm lookin' for, though?

RD: Yeah, two, for two.

[UO]: Yeah, but not, not Ernie's prices.

RD: No, twenty-six hundred.

[107] Almost immediately there is a further exchange between UO and Datt. The following exchange is not a discussion the Crown seeks to introduce under the Carter exception. It is placed before the Court as a statement by Datt that is to be weighed in the context of assessing the overall circumstances:

Dude, right now I'm just doing a favour, you know what Freedom said he don't want d-, you know he's running a recovery house, what the fuck is going on. I say no.

[UO]: He what?

RD: That's why I moved out from this house. 'Cause I'm, I'm not a clean person. I'm not gonna be clean

[UO]: Well, that's fine, dude, I-

RD: So you know what? I said, buddy I'm going to the high-rise now. He said okay, so he called me and he say, wonder what's going on. He said, this is recovery house and I have nothing. He doesn't know nothing about it now. So I say, okay

[UO]: I don't know what you're talkin' about, dude.

RD: No, about the stuff. He, he's ask me. You talk to him already.

[UO]: Who, Free.

RD: No, yea, Free. He's good now. He doesn't touch anything. He doesn't carry anything.

[UO]: No, no, I get-

RD: Yeah/

[UO]: Buddy, I get that, I told him.

[108] Similarly as follows:

RD: Beat around the bush, yeah-yeah-yeah. that's what Freedom say, I'm a part of the recovery house and he, he say, you know what? You come in the high-rise don't do it around me. But he's still part of the recovery house. And he told go anyway. Left here. You can park on the street, hmm?

[109] UO and Datt arrived at the towers and in fact they both entered Datt's apartment, 1804, where UO gave Datt \$2,600 for the purchase of two ounces of crack cocaine. Datt then appeared to have discussions concerning the transaction on the phone with Randhawa, and then Datt left the apartment with the money (leaving UO in the apartment) and immediately met up with Randhawa and an unknown male where all three entered 1509. Within some minutes, Datt returned to 1804 and provided UO with the drugs.

[110] Ultimately, the following discussion arises. This is the second discussion the Crown seeks to lead under the Carter exception. This discussion follows after the drug transaction has been completed:

RD: (Laughs) So you, you have to hook me up on your side now. I'm, I'm no deal yet, I just gave what everybody ask for, the price was done before that. I, they, they, I didn't make any middle money in here.

[UO]: Oh, so Freedom set that up.

RD: Yeah, Freedom set everything up that way I gave, whatever I gave to you.

[UO]: Alright.

ET 01:33:17

RD: So, you have to make me happy. I'm not a very fussy guy. Whatever you feel like.

[UO]: Well, I'll fuckin' uh, how 'bout the next time we fuckin' drive around I'll give you a fuckin' uh, we'll hook you up with a TV.

RD: Uh, well at least for the weekend though. Some whatever money you get, I don't two hundred, two hundred, three hundred dollar

[UO]: Ah fuck-

RD:

[UO]: -I can, uh, hook you up probably here. It's uh-

RD: Yeah, no problem.

[111] Finally, at the end of the interaction UO sent a text to the accused thanking him for the hookup. The accused responded that he does not know what he's talking about and did not set up anything.

April 24, 2012

[112] It is on this day that observations were made concerning another drug transaction between UO and Datt. This transaction involved Randhawa entering and exiting 1509.

April 27, 2012

[113] Again, this was a typical transaction in which Datt met with Randhawa in 1509. Again, Datt was observed coming and going from the 18th floor. The transaction occurred between 4:00 p.m. and 5:20 p.m. when UO left the area with the drugs. Other unidentified persons were also seen entering and exiting 1509 during this time.

[114] Some minutes after UO had departed, at approximately 5:34 p.m., the accused, with another male and female, arrived at the towers, and knocked and entered 1509. Randhawa was observed leaving 1509 and returning some minutes later. Ultimately, the accused, the unknown male, and female exited 1509 at approximately 6:45 p.m. and locked the door behind them.

May 3, 2012

[115] This occasioned another transaction involving Datt, UO and Randhawa and 1509. It is otherwise of import from the Crown's perspective for two reasons. Firstly, statements made to UO by Datt, and secondly, in relation to a discussion the accused had with UO.

The Statements of Datt

[116] The Crown did not proffer these statements by Datt for the truth of the contents.

[117] UO testified that Datt made certain statements in the vehicle as they travelled to and perhaps from the towers on this particular day. UO testified Datt indicated that he sold drugs for the accused but that the accused keeps himself removed. Datt indicated the accused pays for his rent and food at the tower. Datt told UO that the accused pays Datt; not in cash, however, but in drugs. According to UO, Datt said he was one of the accused's best earners. Finally, Datt advised UO that he, Datt, was upset that he was not paid in cash and wanted UO to persuade the accused to purchase some minutes on Datt's phone.

[118] Objection was taken to the introduction of this evidence notwithstanding it was not introduced for its truth.

[119] The Crown submitted that it seeks to lead these statements for the fact that Datt made them, as a relevant consideration in assessing the entirety of the circumstances. The relevance, the Crown submits, is that Datt discussed ongoing drug dealing with UO, which in turn indicates that Datt felt it was safe to disclose this kind of information to UO. The Crown submits it is relevant in the context of the other circumstantial evidence - namely, the fact that Datt explained how the drug dealing took place, which the surveillance evidence confirmed. The statements were admitted, based upon the submissions of the Crown. I have had an opportunity to assess this issue in the context of all the evidence.

[120] The Supreme Court of Canada discussed the trial judge's discretion to exclude Crown evidence in *R. v. Seaboyer*, [1991] 2 S.C.R. 577 at 609:

It is fundamental to our system of justice that the rules of evidence should permit the judge and jury to get at the truth and properly determine the issues. This goal is reflected in the basic tenet of relevance which underlies all our rules of evidence: see *Morris v. The Queen*, [1983] 2 S.C.R. 190, and *R. v. Corbett*, [1988] 1 S.C.R. 670. In general, nothing is to be received which is not logically probative of some matter requiring to be proved and everything which is probative should be received, unless its exclusion can be justified on some other ground. A law which prevents the trier of fact from getting at the truth by excluding relevant evidence in the absence of a clear ground of policy or law justifying the exclusion runs afoul of our fundamental conceptions of justice and what constitutes a fair trial.

The problem which arises is that a trial is a complex affair, raising many different issues. Relevance must be determined not in a vacuum, but in relation to some issue in the trial. Evidence which may be relevant to one issue may be irrelevant to another issue. What is worse, it may actually mislead the trier of fact on the second issue. Thus the same piece of evidence may have value to the trial process but bring with it the danger that it may prejudice the fact-finding process on another issue.

The law of evidence deals with this problem by giving the trial judge the task of balancing the value of the evidence against its potential prejudice. Virtually all common law jurisdictions recognize a power in the trial judge to exclude evidence on the basis that its probative value is outweighed by the prejudice which may flow from it [Emphasis added].

[121] It is difficult to discern that this evidence has any relevance if not for its truth. That said, its relevance, as framed by the Crown, is exceedingly marginal at best. The statements are also highly prejudicial. In all of the circumstances I exercise my discretion to exclude this evidence. I have an additional concern. Even if admissible, and to the extent the statements are to be given any weight, I would afford the statements no weight. I have grave doubts concerning the reliability of Datt generally, and his utterances in particular. I will deal with this issue more fully in a different context in these reasons.

The Discussion with the Accused

- [122] These discussions occurred around the towers later that day. The context is that earlier in the day UO had arrived at the recovery house with food items for drop off and payment. Again, the accused was not there. Arrangements were made for "Mac" to take delivery of the items. It appears the accused would make payment later in the day.
- [123] As UO and Datt left the area of the towers after the drug transaction, Datt apparently called the accused and the two made arrangements for the accused and UO to meet back at, or near, the towers for the purpose of payment for the pallet of food.
- [124] Upon UO's arrival back in the vicinity, the accused was seen standing on the street outside the tower speaking with an individual. UO approached, paid for the food, and there was a short discussion. There was no overt discussion about drugs but again UO made an attempt to extract inculpatory statements. UO asked the accused if he wanted to move locations because of the cameras in the towers that were capturing the scene. The accused indicated he was not concerned.
- [125] UO testified that UO then said, "you can't fault someone for being cautious". UO testified the accused and he both smiled. The accused indicated he ran recovery houses. UO then said, "yeah, I just run warehouses".
- [126] UO said words to the effect that he, UO, was okay now, despite how matters had turned out with Ray. There was no mention of any of the Datt transactions generally, or in particular the transaction on April 12. The accused again indicated that he did not know what UO was talking about.
- [127] This was the last interaction or communication that UO had with the accused prior to the arrests on May 16 and 17, 2012. This was also the last observation made of the accused in or around the towers or in the company of Datt or Randhawa prior to his arrest.

May 15, 2012

- [128] On this date, Datt provided UO with a new phone number. On this date as well, UO ordered two ounces of crack cocaine and three grams of heroin. Datt called UO to tell him his guy only had one ounce of crack cocaine left. UO asked Datt to put together whatever he had and sent a text regarding one ounce of crack cocaine and three ounces of down for \$1,450. Datt called to say the ounce of crack would be \$1,450 and the three grams of heroin would be \$300.
- [129] When UO met Datt concerning this transaction, he asked Datt if he could find out the price for 16 ounces of methamphetamine. Datt called him later that day to say the price would be \$1,350 per ounce. The request for the price of 16 ounces of methamphetamine and the sale of cocaine is significant, in the Crown's submission, because of text messages to the accused found on the phone seized from Randhawa.

The Events of May 16, 2012

Text messages from Mr. Randhawa's Phone to the Accused's Phone

[130] The Crown seeks to introduce text messages between the accused's phone and Mr. Randhawa's phone on this date. The admissibility of these texts is in issue.

[131] The text messages are as follow:

May 16

20:15

To Rai's Phone

Buddy wanted 16 side askn he we do 1100 I told him that's low but I'll get back to him

May 16

20:25

From Rai's Phone

K. 1400 hun for hard

May 16

20:26

To Rai's Phone

K bro

[132] There is context regarding the text messages that include some of the evidence of May 15 as previously referenced.

[133] The police seized the phones of the accused, Datt, and Randhawa. Throughout the course of these months of the investigation I was not taken to any evidence of any telephone calls between Randhawa and the accused. There is no evidence of text messages between Randhawa and the phone of the accused, and certainly no evidence of text messages between Randhawa and the phone of the accused discussing drugs; except on one occasion, May 16, 2012.

[134] For the purpose of this evidence, it is apparent, in accordance with the expert evidence, that "side" refers to methamphetamine and "hard" refers to crack cocaine.

[135] As previously referenced, on May 15 2012, UO and Datt completed the transaction for cocaine and heroin at 13:53 in the afternoon. At the time of completing the transaction, UO asked Datt what the price per ounce would be for 16 ounces of methamphetamine. Later that evening, at 20:04, Datt called UO to quote the price of \$1,350 an ounce.

- [136] There is no evidence of any telephone communication between Datt and Randhawa on May 15; nor is there any evidence that UO pursued the request and the quote of a price in any way. There is no evidence UO and Datt discussed the matter again.
- [137] On May 16, at approximately 19:00, UO asked Datt if there was "any word". It appears to be the shared view of counsel that this was an inquiry concerning the availability of crack cocaine. In any event, at 20:29, Datt advised UO the price was \$1,650 an ounce, and at 20:38, UO ordered five ounces at \$1,650 an ounce. I will address whether the text messages between the parties are admissible, and if admissible, whether 'significant', as the Crown submits, in due course.

May 16, 2012 - Arrest of Mr. Randhawa

- [138] On May 16, 2012 at 23:10, Randhawa was arrested in a parking lot located at 14650 104 Avenue, Surrey, where the Honda Accord, bearing BCL 128 PTE was located. Randhawa was holding an iPhone and a set of four keys with a fob. He placed these items on top of the car when the police approached.
- [139] One of the keys opened 1509, Tower Two.
- [140] Two keys opened 1902, Tower Two.
- [141] The fob provided access to, the 19th floor of Tower Two and the 18th floor of Tower One.
- [142] During the search of the Honda Accord, the following items were located:
- 1) A service invoice from Harley Davidson, addressed to Amrit Rai and dated April 5, 2012; and
 - 2) A set of Harley Davidson keys inside the cup area of the center console.

Search of 1804-10777 University Avenue

- [143] On May 16, 2012, a search warrant was executed at 1804-10777 University Drive, Surrey. Entry to 1804 was made at approximately 23:16. Inside the suite were Bradley Morris, Lisa Romaniuk, and Raj Datt.

Search of 1902-13380 108th Avenue

- [144] On May 16, 2012, a search warrant was executed at 1902-13380 108th Avenue, Surrey, BC. The following items were located and seized from a bedroom:
- a. A money counter;
 - b. \$160.51;
 - c. 1.53 grams of methamphetamine;
 - d. .58 grams of heroin;

- e. .53 grams of crack cocaine;
- f. .33 grams of methamphetamine;
- g. A pink bowl and a wooden spoon with methamphetamine residue;
- h. A large white scale;
- i. A large black scale with white residue; and
- j. An invoice from Harley Davidson Financial Services Canada addressed to Amrit Rai and dated March 28, 2012.

[145] The following items were seized from the kitchen:

- a. A bundle of Canadian currency in the amount of \$1,700;
- b. A bundle of Canadian currency in the amount of \$800;
- c. .13 grams of methamphetamine;
- d. A grey digital scale; and
- e. A scale cover and zip lock bags.

[146] \$1,680 of the \$1,700 cash seized from the kitchen was money UO provided for the purchase of controlled substances.

[147] The following items were seized from the living room:

3 keys; and

\$100.

[148] A set of Harley Davidson keys was located in the master bedroom.

[149] A Harley Davidson motorcycle (Vehicle Identification Number 5HD1KBMA2CB657623) was found in the underground parking lot of 13380 108th Avenue.

Search of 1509-13380 108th Avenue Surrey

[150] During the execution of a search warrant at 1509-13380 108th Avenue on May 16, 2012 the following items were seized from the kitchen:

- a. Three glass Pyrex measuring cups with cocaine residue;
- b. A white plate with cocaine residue;
- c. A strainer with cocaine residue;
- d. Two forks with cocaine residue;
- e. A silver measuring scoop with cocaine residue;

- f. A digital scale with residue; and
- g. A box of sandwich baggies.

[151] A television that UO sold to Rai on March 14, 2012 was seized from the living room.

[152] A partial fingerprint was found on the silver measuring scoop. It was not identified to Rai, Randhawa or Datt.

Search of Recovery House

[153] The following items were located and seized in what has been referred to as a master bedroom of the recovery house:

- a. 36 Oxycontin 80's;
- b. 54 Oxycontin 80's;
- c. 5.61 grams of tar heroin;
- d. A silver scale with white residue;
- e. A money counter;
- f. 41 cartons of cigarettes;
- g. 6 computers (including laptops, tablet and iPad); and
- h. Bulletproof vest located in the closet.

[154] In addition, a total of \$77,020 cash was seized. The cash was divided into 17 bundles:

Bundle #1 - \$5,000; Bundle #2 - \$5,000; Bundle #3 - \$5,000; Bundle #4 - \$5,000; Bundle #5 - \$4,980 + \$60 US currency; Bundle #6 - \$4,990 + \$30 US currency; Bundle #7 - \$1,000; Bundle #8 - \$1,000; Bundle #9 - \$5,000; Bundle #10 - \$5,000; Bundle #11 - \$5,000; Bundle #12 - \$5,000; Bundle #13 - \$5,000; Bundle #14 - \$5,000; Bundle #15 - \$4,950 + \$50 US; Bundle #16 - \$5,000; and Bundle #17 - \$5,000.

[155] \$2,160 (38 x \$20 bills and 28 x \$50 bills) of the cash seized was the cash that UO gave to Datt for the purchase of methamphetamine on May 4, 2012.

[156] \$9,040 (452 x \$20 bills) of the cash seized was the cash that UO gave to Datt for the purchase of cocaine and heroin on May 11, 2012 ("the buy money").

[157] Some of the bundles were located on a shelf in a closet in the master bedroom and some of the cash was located in the pocket of a jacket hanging in the same closet. Some of the "buy money" was located amongst the bundles located on the shelf and other buy money was amongst the bundles located in the jacket pocket.

The Expert Evidence

- [158] The expert evidence of Sgt. John Furac was tendered without objection in the form of a transcript from his viva voce testimony in previous proceedings. Sergeant Furac was qualified as an expert in price, packaging, distribution and use of cocaine, heroin and methamphetamine.
- [159] Certain features of his evidence relevant to this matter are as follows.
- [160] A Pyrex type dish can be used for producing crack cocaine.
- [161] The person at the "high level" of an enterprise (the boss so to speak) will generally avoid detection by never going to the place where the trafficking is occurring. Also, he or she will not keep the drugs at their normal place of residence but will keep it off-site, at a so-called "stash site".
- [162] A stash site is a physical site only known to a few trusted individuals in the organization -- one or two, perhaps as many as four. The expert confirmed, that in terms of stash sites and production sites, "very very limited people go there".
- [163] The expert did testify that it was typical in the context of a drug organization for there to be scales, sandwich bags as well as certain weapons like bear spray and bulletproof vests.
- [164] In the event there is this kind of paraphernalia in a residence, it is common to keep it out of sight when people might be visiting.
- [165] In some drug trafficking circumstances there is also what is known as a crack shack. This is a location, often a building, where customers can go to purchase the drugs.
- [166] It is unusual, according to Sgt. Furac, to have the crack shack and the stash site in the same location for the simple reason that you want as few people to know about the stash site as possible. The expert testified, "You wouldn't want that".
- [167] Finally, the expert witness testified that one way that drug traffickers launder the money they receive is to have someone else make legitimate purchases and then pay them back in cash such as, for instance, a vehicle. The expert conceded that in this event, it would be the height of stupidity to have the person doing the purchasing also a person involved in the organization.

Aiding and Abetting

- [168] The case for the Crown rests on the theory that the accused aided and abetted the trafficking activity that forms the framework of the indictment.
- [169] Liability for aiding or abetting is found in the definition of "parties" to an offence under s. 21(1) of the Criminal Code:

Parties to offence

21 (1) Every one is a party to an offence who

- (a) actually commits it;
- (b) does or omits to do anything for the purpose of aiding any person to commit it; or
- (c) abets any person in committing it.

[170] The Criminal Code makes no distinction between principal offenders (s. 21(1)(a)) and those who aid or abet under ss. 21(1)(b) and (c) in determining criminal liability: *R. v. Briscoe*, 2010 SCC 33 [Briscoe]. However, the actus reus and mens rea for aiding and abetting are different than the principal offence.

[171] The actus reus of aiding and abetting is "doing (or, in some circumstances, omitting to do) something that assists or encourages the perpetrator to commit the offence.": *Briscoe* at para. 14. Although aiding and abetting are commonly spoken of together, they are distinct concepts and criminal liability may follow from one, or both. Generally speaking, aiding within the meaning of s. 21(1)(b) consists of helping the actor to commit the principle offence. Abetting means "encouraging, instigating, promoting or procuring the crime to be committed": *Briscoe* at para. 14, citing *R. v. Greyeyes*, [1997] 2 S.C.R. 825 at para. 26.

[172] To satisfy the actus reus, the Crown must show a connection between the offence and the acts of aiding and abetting, though the connection need not be causative: *R. v. Dooley*, 2009 ONCA 910 at para. 123.

[173] Further, liability for aiders and abettors is broader than liability for principal offenders. It is unnecessary for the Crown to point to an instance of aiding and abetting a specific transaction. It is sufficient that the Crown demonstrate that the accused assisted or encouraged the trafficking operation as a whole: *R. v. Rai*, 2019 BCCA 377 at paras. 85-87; *R. v. Alcantara*, 2015 ABCA at paras. 13-15.

[174] The mens rea of aiding or abetting follows from the language under s.21(1)(b) that the person must have rendered assistance "for the purpose of" aiding the principal offender: *Briscoe* at para. 15. This leads to two components: both intent and knowledge. For intent, the Crown must prove that the accused intended to assist or encourage the principal offender: *Briscoe* at paras. 16-17. Under the knowledge element, the Crown must prove that the accused knew the principal offender would commit the offence. The accused need not know precisely how the principal will commit the offence: *Briscoe* at para. 17. Wilful blindness on the accused's part is sufficient to establish knowledge (*Briscoe* at paras. 21-22), though recklessness is not: *R. v. Roach* (2004), 192 C.C.C. (3d) 557 at para. 29 (Ont. CA).

[175] Mere presence at the scene of a crime and knowledge that a crime is occurring is not enough to demonstrate that the accused aided or abetted the principal offence: *R. v. Dunlop*, [1979] 2 S.C.R. 881 at 891 [Dunlop]. There must be something more to ground liability - the accused must act (or fail to act) in a way that encourages commission of the offence: *Dunlop* at 891; *R. v. Nyuon*, 2014 ABCA 130; *R. v. C.P.*, 2014 BCSC 2570.

Analysis

- [176] The Crown's position on the evidence is that it establishes, beyond a reasonable doubt, that the accused aided and abetted the trafficking operation that was occurring between Randhawa and Datt, or Randhawa, Hendy, and Datt. Its view is that the totality of the evidence allows for no other rational inference except that the accused is guilty of the offences with which he stands charged.
- [177] It is the whole of the evidence that must be assessed, although the Crown has focused on what it views as certain critical pieces of circumstantial and direct evidence.
- [178] There is no dispute Randhawa was operating essentially a version of a dial-a-dope drug trafficking scheme from the two towers. There is also no question Hendy and Datt facilitated the particular transactions with UO that are the subject matter of the indictment. It is also clear that 1804 and 1509 (along with the residence of Randhawa) formed a part of his business model. This model clearly involved, for one purpose or another, the use of the residence of Datt and others at 1804; and the use of the apparent residence of a person or persons unknown, at 1509.
- [179] It is against this backdrop that the evidence of association, and the evidence of the accused attending these units during the relevant period of time, takes on potential significance because, the Crown asserts, 1804 and 1509 are stash sites used by Randhawa for his trafficking business.
- [180] It is common ground that over the course of the investigation the accused was seen in or about the towers on 7 or 8 occasions, and, on occasion, entering 1804 and 1509.
- [181] Certainly, from the Crown's perspective, these circumstances are consistent with the submission the accused knew of, and somehow participated in, the drug trafficking activity of Randhawa and Datt.
- [182] The accused however is not observed participating in any transactions. It is also conceded by the Crown, as it must, that there is no direct evidence as to what activity was occurring in the units when the accused was present. Nor is there any direct evidence of course as to what was, or could be observed, in the units during the visits that might tie the observer to knowledge of illicit activity that might be taking place in the units. The only direct evidence concerning the units in this regard is as observed upon entry by the police on May 16, 2012.
- [183] This general area of evidence, particularly as it relates to the accused, and what inferences can properly be drawn in relation to the accused, becomes somewhat more unclear when viewed in the context of the surveillance evidence and the expert opinion evidence of Sgt. Furac.
- [184] The theory of the Crown is that the accused was essentially the leader of the activity of Randhawa and others; and that Randhawa would have drugs available for sale, at least from time to time, in 1804 and 1509 i.e. the stash sites.

- [185] It will be recalled Sergeant Furac testified a leader will generally avoid going to the place where the trafficking is taking place, and that a so-called "stash site" is generally only to be known to a few trusted individuals; one or two, perhaps as many as four. A stash site is a place, at least in the expert opinion of Sgt. Furac, where "very very limited people go".
- [186] The evidence led by the Crown in relation to 1804 was that not only was it the residence of Datt and two others; but that the surveillance revealed many people, mostly unknown, were constantly coming and going from the 18th floor and 1804; including of course, on occasion, the accused. Indeed, on one occasion Datt invited UO into the apartment to conclude a transaction.
- [187] There was also a Crown focus relating to 1509 and the inferences to be taken from the fact that the accused attended 1509 on occasion over these months.
- [188] Again, the surveillance evidence is plain that over the course of the investigation literally dozens of different persons were seen coming and going from 1509. In addition, clearly many of these persons had a key to 1509. Exactly why this was occurring, whether it be for innocent or sinister purposes, would be speculation; but the fact is, these units resembled more Grand Central Station than the described stash site of Sgt. Furac.
- [189] In addition of course the accused knew Datt, perhaps the other residents of 1804, and as well knew Randhawa. They all had a history.
- [190] The Crown further submits the alleged inculpatory statements of the accused form another fundamental focus in support of the case for the Crown.
- [191] These statements, at least the statements potentially implicating the accused from the Crown's perspective, are the statements that took place on March 14 and of course the recorded discussions of April 12, 2012.
- [192] In relation to the discussion of March 14, 2012, in my view, there is no question the accused is a reluctant participant in the face of the complaints of UO about Hendy. There is little to suggest the accused actually intended to do anything, at this point, about the complaints UO had made.
- [193] That said, in the context of all of the evidence, the discussion of March 14, 2012 is some evidence the accused was prepared to assist UO concerning his complaint about Hendy.
- [194] It also must be observed that it could be taken from this exchange the accused was ignorant of the fact UO was already doing business with Randhawa.
- [195] Nevertheless, further context is provided some weeks later, as a result of the statements and exchanges of April 12, 2012.
- [196] Naturally, the Crown focused a good deal on the recordings. These recordings are, in the submission of the Crown, important evidence linking the accused to participating in the drug trafficking of Randhawa, Datt, and presumably Ray.

- [197] In essence, the Crown submits two conclusions emerge from the evidence that will admit of no other interpretation when placed in the context of all the evidence. Firstly, the accused directed Datt to proceed to take UO to "hook up" with Randhawa and, second, the accused suggested the price to be given to UO. This is precisely, submits the Crown, what occurred earlier in the day with Ray.
- [198] That said, there is no evidence the accused was at the recovery house when Datt indicated he could, and then did, arrange the transaction on this day between UO and Randhawa. There is no evidence that Datt spoke to the accused, by phone or otherwise. It is unknown whether Datt spoke to any person about the arrangements, including Ray, although Ray did urge UO to speak to Datt (not the accused) about pursuing the matter that day. I also find the evidence unclear and uncertain as to the person or persons that might have been privy to the initial discussions between the accused, Ray and UO earlier in the day.
- [199] In any event, whatever the source of Datt's information; it did not apparently include the suggestion that UO be actually introduced to "Money", as had been the suggestion to Ray.
- [200] In addition, in relation to the particular transaction of April 12, 2012, it should be noted that upon completion, UO sent a text to the accused thanking him for the hookup. The accused responded indicating that he does not know what he's talking about and did not set up anything.
- [201] The Crown submits that the court should find this statement, and in fact all the statements that could be viewed as exculpatory, to be disingenuous. It should be rejected submits the Crown.
- [202] I will deal more broadly with this submission momentarily, but concerning this particular exchange, regarding this particular transaction, it must be said, if taken at face value, it is a statement certainly entirely consistent with the accused knowing that Ray had abandoned any thoughts of assisting UO; and it is also consistent with the accused not having any knowledge about the subsequent arrangements that Datt had made with UO.
- [203] I find it is not at all clear how, if at all, the accused took up the request of UO with Datt. On the totality of the evidence, I do not find the accused directed Datt to Randhawa and passed on the price UO was requesting.
- [204] Another feature of the circumstantial case the Crown emphasizes is the evidence in relation to the search of the recovery house and the items seized. It is the submission of the Crown that this is again an important building block linking the accused to the activity of Randhawa; in particular the finding of the so-called "buy money".
- [205] The initial issue that must be addressed however is whether or not it can be found the accused possessed the items viewed, and seized, in what has been referred to as the master bedroom at the recovery house.

[206] The law in relation to possession is to be found in s. 4(3) of the Criminal Code and reads as follows:

4

(3) For the purposes of this Act,

(a) a person has anything in possession when he has it in his personal possession or knowingly

(i) has it in the actual possession or custody of another person, or

(ii) has it in any place, whether or not that place belongs to or is occupied by him, for the use or benefit of himself or of another person; and

(b) where one of two or more persons, with the knowledge and consent of the rest, has anything in his custody or possession, it shall be deemed to be in the custody and possession of each and all of them.

[207] Section 4(3) thus establishes three forms of culpable possession: personal possession, constructive possession, and joint possession. Constructive possession is relevant here. To establish that the accused constructively possessed the items, both a knowledge and control element must be satisfied: *R. v. Morelli*, 2010 SCC 8 at para. 15 [Morelli].

[208] In *Morelli*, the Supreme Court set out the elements of knowledge and control as they relate to constructive possession at para. 17, as follows:

Constructive possession is thus complete where the accused: (1) has knowledge of the character of the object, (2) knowingly puts or keeps the object in a particular place, whether or not that place belongs to him, and (3) intends to have the object in the particular place for his "use or benefit" or that of another person.

[209] Both knowledge and control are relevant here.

[210] Our Court of Appeal considered the knowledge element in *R. v. Tahirsylaj*, 2015 BCCA 7 at para. 26, citing with approval *R. v. Pham* (2005), 77 O.R. (3d) 401 at 406-407 as follows:

[26] In *R. v. Pham* (2005), 77 O.R. (3d) 401 at 406-407 (C.A.), 203 C.C.C. (3d) 326, aff'd 2006 SCC 26, [2006] 1 S.C.R. 940, the majority referred to the basic principles that govern the law of constructive possession:

In order to constitute constructive possession, which is sometimes referred to as attributed possession, there must be knowledge which extends beyond mere quiescent knowledge and discloses some measure of control over the item to be possessed. See *R. v. Caldwell* (1972), 7 C.C.C. (2d) 285, [1972] 5 W.W.R. 150 (Alta. S.C. (A.D.)); *R. v. Grey* (1996), 28 O.R. (3d) 417, [1996] O.J. No. 1106 (C.A.) [emphasis added].

The onus is on the Crown to prove beyond a reasonable doubt, all of the essential elements of the offence of possession. This can be accomplished by direct evidence or may be inferred from circumstantial evidence. In *R. v. Chambers*, supra, at p. 448 C.C.C., Martin J.A. noted that the court may draw "appropriate inferences from evidence that a prohibited drug is found in a room under the control of an accused and where there is also evidence from which an inference may properly be drawn that the accused was aware of the presence of the drug".

[211] In addition, an accused may be found in possession as a party by virtue of s. 21.

[212] In my view, the evidence is vague about how the business was operated at the recovery house; what role the accused occupied on a day-to-day basis, or otherwise; and where he actually normally resided; and if he resided from time to time at the recovery house, where he slept.

[213] There is some circumstantial evidence in this regard.

[214] The accused appears to be associated with at least two residential addresses. The address of the recovery house; and the residence at 12371 91A Avenue, Surrey. This latter address is a residence associated with the accused as revealed by the surveillance evidence.

[215] The evidence before me at least suggests the accused has some care and control of the business of this particular recovery house. In this regard, a list of recovery houses was seized that was entitled "freedom for life/house addresses". There was some evidence, although this too is somewhat unclear, that the accused was involved in the business of five recovery houses. In any event, the above referenced document characterized the recovery house as "freedom's house". In addition, a business card entitled "Freedom 4 Life" was introduced as an exhibit. It does not contain a particular address, but it has the name and phone number of the accused on its face. The accused's name is below the name and phone number of Ray. It is unknown if the Ray listed on the business card of these operations is the same Ray as present on April 12, 2012.

[216] The vehicle driven by the accused is registered to "Freedom 4 Life Recovery House Reg'd Society" with the address of 14688 106 Avenue, Surrey.

[217] Certain income tax returns for the accused were placed before the court and the address for those returns is 14688 106 Avenue, Surrey; although the returns are for the taxation years of 2010 and 2011.

[218] There are documents before the court linking the accused during the relevant period of time (February - May 2012) to both the above addresses.

[219] There is another piece of circumstantial evidence introduced by the Crown that, in the Crown submission, connects the accused with the master bedroom. A week or so after the attendance of the police at the recovery house, a police officer apparently attended the recovery house to check on the welfare of Randhawa. Apparently he was having health issues. The police officer came across the accused at the recovery house and the police

officer engaged the accused in a discussion. In this regard, the accused invited the police officer into the house and the two retired to the master bedroom where the accused closed the door for privacy. It was during this discussion that the accused, as well, expressed his concern about the health of Randhawa.

- [220] There is evidence that at the time of the search of the recovery house the persons that were in the complex at this time were identified, allowed to retrieve certain belongings, and then released. None of the persons that were identified at this time were observed going to the master bedroom; although the so called master bedroom contained two mattresses.
- [221] The direct evidence however in support of a finding the accused had knowledge or control, or otherwise possessed, the items in the master bedroom either for his own use or benefit, or the use or benefit of another person, is almost non-existent.
- [222] There is no direct evidence of the usual presence of the accused at the recovery house, nor any direct evidence concerning the habits of the accused while present. There is no direct evidence from any witness testifying to the living arrangements of the accused, if any, when at the recovery house.
- [223] There is no forensic evidence, DNA or fingerprints, linking the accused to the bedroom or any items found in the bedroom.
- [224] There were documents viewed by the police in the bedroom during the search. The only document before me in this regard appears to be a list of clients at various recovery houses and a reference to payments. The document does not appear to be dated although it may be historic in that it lists the accused as a client at Freedom House. It lists Datt as a client at Freedom House. There is handwriting next to Datt's name what appears to be the word "paid". There is no evidence as to whose handwriting this is.
- [225] There were a number of electronic devices seized from the bedroom. There is no evidence, forensic or otherwise, linking these devices to the accused.
- [226] There was clothing hanging in the closet. Indeed, certain of the buy money was in an article of clothing. There is no evidence linking the accused to any of the clothing, much less the article of clothing housing some of the funds.
- [227] There was evidence before the court that was the subject of submissions of counsel relating to an explanation as to why the particular buy money may well have been in the possession of the accused. It related to the purchase of the Harley Davidson motorcycle. While I find these submissions are grounded in some evidence, I do not need to address this.
- [228] In my view, the evidence, in its totality, does not provide a sufficient foundation to conclude the accused had both the requisite knowledge and intent to be in possession of the items found in this room, in accordance with the requirements of s. 4(3) of the Criminal Code.

[229] Another feature of the case is the alleged incriminating nature of the text messages on May 16, 2012, as previously referenced.

[230] This exchange has been set out in full but I will repeat it here for convenience:

May 16

20:15

To Rai's Phone

Buddy wanted 16 side askn he we do 1100 I told him that's low but I'll get back to him

May 16

20:25

From Rai's Phone

K. 1400 hun for hard

May 16

20.26

To Rai's Phone

K bro

[231] The Crown submits the text sent to the phone of the accused at 20:15 on May 16, 2012 relates to the potential transaction that was being discussed between Datt and UO on May 15, 2012 as previously referenced. There is no response from the accused's phone, but nevertheless it is some evidence, submits the Crown, that connects the accused to the exchanges between Datt and UO on May 15, 2012. This is probative linkage, says the Crown, in relation to the charges before the court.

[232] The Crown submits the second text exchange is in fact an exchange between the two phones that clearly engages the accused in the discussions that were under way between Randhawa, Datt and UO for the sale of cocaine at \$1,650 an ounce. It is the Crown's submission of course that Datt is receiving the information on the availability and price of the cocaine from Randhawa; and the exchange at 20:25/20:26 demonstrates the accused's participation in those discussions.

[233] The accused submits this evidence is inadmissible. The defence submits that to the extent the exchanges can lead to a finding the accused was participating in an exchange of information relating to the transactions between UO and Datt; these matters are outside the period of the indictment and unconnected to the allegations before the court. Consequently, the defence submits, it amounts to simply bad character evidence that ought to be excluded

- [234] The context of the text message to the accused concerning the methamphetamine is found initially in the events of May 15, 2012.
- [235] It is to be recalled that at 13:53 on May 15, 2012 UO and Datt engaged in a transaction concerning heroin and cocaine. In addition, UO asked Datt what the price per ounce would be for 16 ounces of methamphetamine. Later that evening, at 20:04, Datt communicated with UO and told him that the price would be \$1,350 per ounce.
- [236] There is no other evidence of any communication concerning the issue of methamphetamine between Datt and UO. In particular no evidence that the issue of methamphetamine and its cost was raised between Datt and UO on May 16, 2012.
- [237] In my view, the submission of the Crown that the text message sent at 20:15 relates to the exchange between Datt and UO does not square with the facts.
- [238] The text message indicated that Randhawa "will get back to him". The issue of pricing between Datt and Randhawa is completed; in fact, it was completed the night before. In addition, \$1,100 per ounce does not appear to have been discussed in any event.
- [239] It is equally unclear to me how the exchange between Randhawa's phone and the accused's phone is linked to the discussion UO and Datt were having concerning the potential sale of cocaine on May 16, 2012. It will be recalled that at approximately 19:00 UO asked that if there was "any word" as to the availability of cocaine. At 20:29, Datt told UO that the price was \$1,650 an ounce and at 20:38 UO ordered five ounces at \$1,650 an ounce.
- [240] In so far as communications are concerned, there is evidence that Datt sent a text message to Randhawa at 19:46 asking Randhawa if he had any "hard". There is also evidence that there was a voice call from Randhawa's phone to Datt's phone at 20:03 on May 16, 2012. There is no further evidence of any other exchanges by phone or text messages between Randhawa and Datt until 21:17.
- [241] In the event one is to assume that Datt received the price of \$1,650 from Randhawa, which in turn he passed on to UO, the evidence is that the communication between Randhawa and Datt in this regard, to pass on the price, appears to be the voice call at 20:03; that is, before the text exchange between the accused and Randhawa at 20:25.
- [242] In addition, it is difficult to conclude that the exchange at 20:25 referring to "\$1,400 for hard" is linked to the transaction being discussed between UO and Datt at \$1,650 (for hard).
- [243] To the defence point, clearly it is impermissible to reason on the basis of post-offence conduct that the accused is more likely to have committed the offences with which he is charged because he was involved in other illegal activities or talk; *R v. Grewall, et al.*, 2000 BCSC 784, *aff'd* 2003 BCCA 441 (leave to appeal to SCC *ref'd*) [*Grewall*]. The evidence of course may be admissible in the event the evidence is relevant to an issue in the case other than demonstrating propensity of the accused to commit crimes or disreputable acts.

- [244] I am not satisfied that the May 16, 2012 text messages demonstrate evidence linked to the transactions pointed to by the Crown.
- [245] That said, in my view the evidence has some probative value in assessing the accused's credibility when viewed in light of his previous exculpatory statements. Impugning the accused's credibility is a permissible use for post-offence evidence: *R. v. Feil*, 2012 BCCA 110; *R. v. Jaw*, 2009 SCC 42.
- [246] The evidence has no direct independent relevance to the discussions at issue between Datt and Hendy; nor to other transactions that occurred during the indictment. Certainly the text messages may be interpreted as disclosing the accused's propensity to engage in drug related activities. The exchange may also allow for an inference the accused may be a consumer of drugs, or perhaps somehow involved drugs. The evidence has some relevance and, in this context is not unduly prejudicial. I admit the evidence for the purpose of assessing the credibility of the accused.
- [247] The Crown also seeks to lead two statements made by Datt to UO in support of the theory of the Crown.
- [248] This engages the so-called Carter test in relation to the admissibility of these statements.
- [249] The Carter test of course was developed in the context of a conspiracy allegation being before the court.
- [250] The jurisprudence has remained intact for many years and the analysis is to proceed as follows:
- 1) On the whole of the Crown's case has the existence of the conspiracy charge been proved beyond a reasonable doubt?
 - 2) If so, is there evidence directly admissible against each accused that demonstrates his or her probable membership in the conspiracy?
 - 3) If so, all of the evidence may be considered in determining guilt, including the acts and statements of all co-conspirators in furtherance of the conspiracy.
- [251] The Carter test is not restricted to the existence of a conspiracy allegation before the court. It is an assessment that applies to all situations where the Crown seeks to establish the accused's participation in a "design" or "joint enterprise" for the purpose of the admissibility of certain evidence: *R. v. Tran*, 2014 BCCA 343 at para. 87.

Analysis of the Statements: step one

- [252] The evidence is overwhelming that a conspiracy existed between Hendy, Datt and Randhawa. This has not been seriously contested.

Probable Membership

- [253] In this regard, the evidentiary focus must remain on the accused's particular acts and declarations and other evidence directly admissible against him. The "probable membership determination" is also to be assessed with the other available evidence, admissible against the accused, including "the picture provided by the acts and declarations of the alleged co-conspirators": Tran at para. 118.
- [254] Indeed, the court may consider statements made by other members of the conspiracy at this stage of the analysis when it is satisfied that such statements have circumstantial rather than testimonial value: R. v. Lees, 2009 BCCA 240 at para. 21. In other words, the court may consider such statements when the existence of the statement, rather than its contents, tends to prove something that is relevant to the accused's probable membership: Lees at para. 21.
- [255] I cannot say, based on the whole of the evidence, it is more likely than not the accused was a participant in the common design as suggested by the Crown. The evidence is simply too vague and uncertain to come to that conclusion.
- [256] The circumstances as a whole raise the prospect the accused has some knowledge concerning the activity of Randhawa, Hendy and Datt.
- [257] The accused freely associated with current drug traffickers, and made no bones about the fact that he had a history, whereby at some point in his past he apparently "was in the business".
- [258] I am not prepared to conclude the circumstances of the accused's association, and attendance at the towers, reflected participation or probable participation in drug trafficking. Frankly, it is equally consistent with innocent association, or perhaps even, the conduct of a consumer of drugs.
- [259] In addition, while I take into account the inculpatory nature of some of the accused's statements, I must, in assessing the whole of the evidence, weigh the exculpatory nature of other evidence led by the Crown. I cannot say I believe these exculpatory statements of the accused. I do say however that I do not reject the evidence and consequently it raises a significant impediment to any finding that the accused was a probable member of a conspiracy.
- [260] In addition, for the reasons I have articulated, I am not prepared to find the accused orchestrated the transaction on April 12, 2012.
- [261] On all the evidence, is it probable the accused was a member of the common design or enterprise?. The evidence, in my view, simply does not support that finding.
- [262] Given my conclusion, I find there is no need to address whether the statements were made in furtherance of the conspiracy.

[263] I will say this however. It will be apparent that the evidence of Datt played a role in this case. I conclude that even in the event the statements of Datt proffered by the Crown for the truth of their contents were found to be admissible, as I briefly referenced earlier in these reasons, I would afford the statements of Datt no weight.

[264] On balance, I cannot place reliance on the statements of Datt; as recorded or otherwise. I have grave doubts concerning his veracity and in my view, it would be dangerous to rely on his statements. It is true, the utterances incriminating the accused made by Datt on April 12, 2012, viewed in isolation, support the theory of the Crown. The statements however, viewed in the context of his entire conduct, and all of his exchanges with UO, render the reliability of those isolated statements highly suspect.

[265] The evidence of Datt relating to the accused is internally inconsistent and originating from someone who was then either actively addicted to illicit drugs or in recovery, and, in addition, purposely self dealing and manipulative.

[266] The discussion between UO and Datt began:

RD: I might do something for you.

[UO]: You fuckin' guys are killin' me. \

UM: No, no ...

[267] As previously referenced, Datt says the following:

[UO]: So what the fuck's goin'on?

RD: What, what d'you need, two?

[UO]: Well, did Freedom explain what I'm lookin' for, though?

RD: Yeah, two, for two.

[UO]: Yeah, but not, not Ernie's prices.

RD: No, twenty-six hundred.

[268] Almost in the same breath however Datt states that he just needs two minutes "because he has everything arranged already". I do not find this statement necessarily completely inconsistent with the proffered statement, but it creates an immediate discomfort accepting the incriminating statement at face value.

[269] In addition, as previously referenced, Datt made it immediately clear to UO that he was not going to be introducing UO to "his guy" as a "new hookup" as the accused, Ray and UO had apparently contemplated in the earlier discussion.

[270] This is apparent from the following exchange:

[UO]: I mean, if, if you can fuckin' hook me up so this guy'll fuckin' deal with me straight up-

RD: Yeah.

[UO]: -so I can just come over and fuckin' get what I need to get-

[271] And further:

Rd: That's it, no, I'll give you my number you just come down to my place, stay at my high-rise. I'll call the guy.

[272] In addition, on the general issue of whether the accused is involved in the April 12 transaction, Datt soon expresses a somewhat different position as follows:

Rd: Dude, right now I'm just doing a favour, you know what Freedom said he don't want d-, you know he's running a recovery house, what the fuck is going on. I say no.

[UO]: He what?

Rd: That's why I moved out from this house. 'Cause I'm, I'm not a clean person. I'm not gonna be clean ...

[UO]: Well, that's fine, dude, I-

RD: So you know what? I said, buddy, I'm going to the high-rise now. He said okay, so he called me and he say, wonder what's going on. He said, this is recovery house and I have nothing. He doesn't know nothing about it now. So I say, okay.

[273] There are two troubling features to this exchange. Firstly, it might be interpreted that Datt is suggesting, that far from the accused "setting this up", the accused has generally divorced himself from the activity of Datt et al.

[274] In fact, UO, in his evidence, stated that the tone and demeanour of this exchange brought him to the understanding that Datt was indicating the accused did not know anything about the transaction.

[275] Secondly, these discussions reveal a somewhat disturbing irrationality on the part of Datt.

[276] Indeed, UO responds to the above exchange as follows: "I don't know what you're talking about, dude". There is no suggestion in the evidence that the bewilderment of UO was feigned.

[277] Somewhat further on in the discussion Datt states as follows:

RD: No, about the stuff. He, he's ... ask me. You talk to him already.

[UO]: Who, Free.

RD: No, yeah, Free. He's good now. He doesn't touch anything. He doesn't carry anything.

[UO]: No, no, I get- Yeah.

RD: Buddy, I get that. I told him.

[278] And later:

RD: So just phone me ahead of time, y'know, I'll get everything ready. Um, you know what just phone me, just come up ... my apartment, I'll take you upstairs, sit there. Y'know it's safest way to do business.

[279] Finally, Datt states as follows:

RD: Beat around the bush, yeah-yeah-yeah. that's what Freedom say, I'm a part of the recovery house and he, he say, you know what? You come in the high-rise don't to it around me. But he's still part of the recovery house. And he told go anyway. Left here. You can park on the street, hmmm?

[280] In addition, as previously referenced, UO sent a text to the accused on April 12 thanking the accused for the "hookup". UO received a response from the accused's phone stating "I don't know what you are talking about, I did not hook you up".

[281] I simply have no confidence in relying on the evidence of Datt. For the reasons stated, I cannot rely on Datt as a witness of truth. In my view, it would be unsafe to rely on his evidence in this regard.

[282] In summary, even if I admitted the statements, I would afford them no weight.

Proof Beyond a Reasonable Doubt

[283] The case for the Crown consists largely, although not exclusively, on circumstantial evidence.

[284] When assessing circumstantial evidence the leading authority remains *R. v. Villaroman*, 2016 SCC 33.

[285] The Court has helpfully set out the guidelines and parameters of this assessment as follows:

[37] When assessing circumstantial evidence, the trier of fact should consider "other plausible theor[ies]" and "other reasonable possibilities" which are inconsistent with guilt: *R. v. Comba*, [1938] O.R. 200 (C.A.), at pp. 205 and 211, per Middleton J.A., *aff'd* [1938] S.C.R. 396; *R. v. Baigent*, 2013 BCCA 28, 335 B.C.A.C. 11, at para. 20; *R. v. Mitchell*, [2008] QCA 394 (AustLII), at para. 35. I agree with the appellant that the Crown thus may need to negative these reasonable possibilities, but certainly does not need to "negative every possible conjecture, no matter how irrational or fanciful, which might be consistent with the innocence of the accused": *R. v. Bagshaw*, [1972] S.C.R. 2, at p. 8. "Other plausible theories" or "other reasonable possibilities" must be based on logic and experience applied to the evidence or the absence of evidence, not on speculation.

[38] Of course, the line between a "plausible theory" and "speculation" is not always easy to draw. But the basic question is whether the circumstantial evidence, viewed logically and in light of human experience, is reasonably capable of supporting an inference other than that the accused is guilty.

[39] I have found two particularly useful statements of this principle.

[40] The first is from an old Australian case, *Martin v. Osborne* (1936), 55 C.L.R. 367 (H.C.), at p. 375:

In the inculcation of an accused person the evidentiary circumstances must bear no other reasonable explanation. This means that, according to the common course of human affairs, the degree of probability that the occurrence of the facts proved would be accompanied by the occurrence of the fact to be proved is so high that the contrary cannot reasonably be supposed. [Emphasis added.]

[41] While this language is not appropriate for a jury instruction, I find the idea expressed in this passage -- that to justify a conviction, the circumstantial evidence, assessed in light of human experience, should be such that it excludes any other reasonable alternative -- a helpful way of describing the line between plausible theories and speculation.

[42] The second is from *R. v. Dipnarine*, 2014 ABCA 328, 584 A.R. 138, at paras. 22 and 24-25. The court stated that "[c]ircumstantial evidence does not have to totally exclude other conceivable inferences"; that the trier of fact should not act on alternative interpretations of the circumstances that it considers to be unreasonable; and that alternative inferences must be reasonable, not just possible.

[43] Where the line is to be drawn between speculation and reasonable inferences in a particular case cannot be described with greater clarity than it is in these passages.

[286] I will not review again the assessment of the evidence I have undertaken and the findings I have made. There is no doubt the accused walked a fine line in this case. On his own evidence, he used to "be in the business". The details of that are not before me.

[287] In those months in 2012, he continued to associate, to one degree or another, with his ex-clients; some of whom remained obviously "in the business".

[288] The accused became a somewhat reluctant participant in organizing Ray to introduce UO to Randhawa.

[289] There is no doubt there was nothing subtle or clandestine about the accused's visits to the towers. It is apparent, based on all of the evidence, and in particular, the surveillance evidence, that Randhawa and Datt were utilizing the units at the two towers for their drug activities to facilitate sales to consumers outside the towers; and or perhaps to facilitate sales to consumers in the apartments (for instance, the transaction of April 12, 2012). The expert evidence, as I have outlined, does not add clarity or assist with inferences. In fact, it amplifies the uncertainty of just what precise findings in this regard can be made with any

confidence.

- [290] I find it more conjecture than rational inference concerning any conclusion as to the reason or reasons the accused, and the array of visitors for that matter, attended the units from time to time; and what he observed and what he did when he attended.
- [291] The accused consistently resisted any suggestion he was participating in drug trafficking activity. I reviewed carefully the discussions as recorded, on their own, and in the context of all the evidence.
- [292] As I have previously referenced, I cannot say I accept the theme of the exculpatory nature of the evidence. Certainly I have lurking concern on the basis of all the evidence; including the text messages of May 16, 2012. There are pockets of suspicious conduct. I do not however reject the exculpatory evidence. I find on all the evidence there is a good deal of doubt and uncertainty as to the guilt of the accused on these charges; well short of proof beyond a reasonable doubt.
- [293] In my view, the whole of the evidence, viewed logically and in light of human experience, is reasonably capable of supporting an inference other than the guilt of the accused. In fact, on the admissible evidence before me, I cannot conclude the evidence supports an inference of guilt.
- [294] I find the accused not guilty on all counts.

"Crossin J."

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