

CANADA / JUDGMENT

R. v. Sanchez

2020 BCSC 1917

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Supreme Court of British Columbia

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2020 BCSC 1917 R. v. Sanchez

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Sanchez,

2020 BCSC 1917

Date: 20201204

Docket: 86790

Registry: Kelowna

Regina

v.

Larome Angelo Sanchez and Nalin Soreni

Restriction on Publication: Pursuant to s. 539 of the Criminal Code of Canada

Before: The Honourable Mr. Justice G.P. Weatherill

Reasons for Judgment on Voir Dire No. 1(Reasonable Expectation of Privacy); Voir Dire No. 2 (Touching Hood of Mr. Sanchez's Pontiac); Voir Dire No. 3 (Dynamic "Hard" Entry into Unit 2214); and Voir Dire No. 4 (s. 10(b) - Access to Counsel)

Counsel for the Crown:

J.M. Le Dressay

Counsel for the Accused, Larome Sanchez :

C. Muldoon

Counsel for the Accused, Nalin Soreni:

W. Jessop

Place and Date of Trial/Hearing:

Kelowna, B.C.

October 19 - 22, 26 - 30, 2020

Place and Date of Result Given:

Kelowna, B.C.

December 4, 2020

Place and Date of Judgment:

Kelowna, B.C.

December 4, 2020

Introduction

- [1] Mr. Sanchez and Ms. Soreni are jointly charged in a two-count indictment with possession of cocaine, fentanyl, and heroin for the purpose of trafficking. They were arrested on March 22, 2017, after Kelowna RCMP's Special Enforcement Unit ("SEU") executed a search warrant ("Search Warrant") of unit 2214 ("Unit 2214") in a condominium known as the Pinnacle Pointe Resort, located at 1873 & 1875 Country Club Drive, Kelowna, BC ("Pinnacle Pointe").
- [2] Both accused pleaded not guilty to the charges.
- [3] The trial commenced on October 19, 2020, with four partially-blended voir dires addressing similar Charter of Rights and Freedoms applications ("Charter Applications" or "Applications") brought by each accused. The voir dires ran concurrently for efficiency and the witnesses' convenience. Counsel helpfully agreed that the witnesses could testify once and that their evidence could be applied in all four voir dires, to the extent it was relevant. Neither accused testified on any of the voir dires.
- [4] The Applications are based on ss. 8 and 10(b) of the Charter. The accused seek an order excluding the evidence obtained by the SEU during the execution of the Search Warrant, which was issued on the basis of an Information To Obtain sworn by Cst. Dallas Flaman on March 21, 2017 ("ITO"). The accused seek standing to argue that the portions of the ITO that associate them with Unit 2214 were obtained illegally and ought to be excised. With those portions excised, the accused say that the Search Warrant should not have been issued, and therefore the entry into Unit 2214 and the subsequent search and seizure were warrantless. Additionally, they say that the manner in which the Search Warrant was executed--using a battering ram to smash through the front door--was excessive and unreasonable. Finally, they argue that their s. 10(b) Charter rights were breached when they were denied access to counsel following their arrest.

[5] The factual background and issues raised in the four voir dres are summarised below.

Voir Dire #1

- [6] The ITO was partially based on surveillance gathered by SEU officers in the common areas of the Pinnacle Pointe building at 1873 ("Building 1873") between March 8 and 21, 2017.
- [7] The SEU's investigation into a suspected dial-a-dope operation led them to Building 1873 as the accused's suspected base of operations and/or residence. Access to Pinnacle Pointe's common areas and parking garage is controlled by fobs and garage door openers issued to owners, tenants, and others authorized by Pinnacle Pointe's building manager to have them. The SEU needed to know which unit the accused were occupying in Building 1873 in order to request a search warrant. Coincidentally, the SEU learned that a civilian employee of the Kelowna RCMP resided in Building 1873 ("RCMP Civilian") and obtained a fob from her ("Civilian FOB") allowing them access to Pinnacle Pointe's common areas.
- [8] The SEU had spoken to Pinnacle Pointe's very cooperative building manager, who was on holidays at the time, and believed it had his implied consent to enter the common areas of Building 1873.
- [9] On March 9, 2017, prior to the building manager's return, the SEU was able to gain access to the second floor hallway where Unit 2214 is located in Building 1873 ("Hallway") by using the Civilian FOB. In doing so, the SEU were able to identify that the accused were occupying Unit 2214. The SEU later observed a white Pontiac Torrent SUV known to be registered to Mr. Sanchez ("Pontiac") parked in stall #38 ("Stall #38") in Pinnacle Pointe's parking garage ("Parking Garage").
- [10] The day before the Search Warrant was executed, the SEU confirmed that Stall #38 was assigned to Unit 2214 by speaking with the building manager. The manager also provided the SEU with access to CCTV footage of the entry to the Parking Garage and a Strata Property Act, S.B.C. 1998, c. 43 [SPA] Form K document identifying that the tenants of Unit 2214 were Ms. Soreni and Mr. Arjean Hassani ("Mr. Hassani").
- [11] All of the above information was used in the ITO as a basis for issuing the Search Warrant.
- [12] The accused apply for standing to attack the Search Warrant. They claim that they had a territorial reasonable expectation of privacy within the common areas of Building 1873 (in particular the Hallway and Parking Garage) and an informational expectation of privacy over the CCTV footage and the Form K. They say that the SEU's covert observations of the accused entering and exiting Unit 2214 on March 9, 2017, observations made in the Parking Garage, access to the CCTV footage and Form K were breaches of their s. 8 Charter rights. The accused seek a ruling that they have standing to challenge the Search Warrant ("Reasonable Expectation of Privacy Issue").

Voir Dire #2

- [13] On March 20, 2017, SEU's lead investigator, Cst. Thomson, entered the Parking Garage, saw the Pontiac parked in Stall #38, took photographs of it, and put his hand on its hood ("Hood Touching"). The hood was warm, indicating to him that it had recently been driven.
- [14] Mr. Sanchez asserts that the Hood Touching was a warrantless search violating his territorial reasonable expectation of privacy in the Parking Garage, thereby breaching his s. 8 Charter rights ("Hood Touching Issue").

Voir Dire #3

- [15] The Search Warrant was executed at 7:25 a.m. on March 22, 2017, by using a battering ram to break through Unit 2214's entry door ("Hard Entry"). Once inside, the SEU also broke down the locked door to the master bedroom where the accused were sleeping. The accused say that the SEU's forced entries were unreasonable and unjustified; a further breach of their s. 8 Charter rights ("Hard Entry Issue").

Voir Dire #4

- [16] When the Search Warrant was executed, there were four individuals, including the accused, located within Unit 2214. One-by-one all four were arrested for possession of illicit drugs for the purpose of trafficking. One-by-one they were given a police warning and advised of their s. 10(a) and (b) Charter rights--to be informed promptly of the reasons for their arrest and their right to retain and instruct legal counsel without delay. In the case of Mr. Sanchez, the total time between his arrest and the opportunity to speak to counsel was 1 hour and 41 minutes, 1 hour and 3 minutes of which was after he arrived at the detachment. In the case of Ms. Soreni, the total time between her arrest and the opportunity to speak to counsel was 1 hour and 49 minutes, of which 1 hour and 13 minutes was after she arrived at the detachment.
- [17] The accused say that the above delays violated their respective s. 10(b) Charter rights ("Delay Issue").

Background

The Players

- [18] For convenience, the persons involved in the SEU's investigation leading to the accused's arrest are:
- a) Cst. Keir Thomson ("Cst. Thomson")--former member of the SEU and lead investigator on the case. He has been a member of the RCMP for 12 years, 9 years of which involved illicit drug investigations. He joined the SEU in 2013 and left it in November 2017, when he was transferred to Edmonton.

- b) Cpl. Matt Hare ("Cpl. Hare")--member of the RCMP for 20 years and was in charge of the drug section attached to the SEU in March 2017. He was the senior officer assigned to the investigation, was on the scene during the execution of the Search Warrant and ordered the Hard Entry into Unit 2214. He was the first officer to enter Unit 2214 and he forced open the locked master bedroom door.
- c) Cst. Jared Chapman ("Cst. Chapman")--was a member of the SEU during the investigation in 2017. He participated in the surveillance of Building 1873, knew of the RCMP Civilian and suggested obtaining the Civilian FOB. He also participated in the Hard Entry and was responsible for formally arresting and Charter warning the accused, as well arranging for transport to the Kelowna Detachment. He processed all four arrestees.
- d) Cst. Brent Edwards ("Cst. Edwards")--was a uniformed member of the Kelowna RCMP and at Building 1873 on March 22, 2017. His role was to assist in transporting the arrestees to the Kelowna Detachment for processing. It is alleged that he was instructed by Cpl. Hare, his superior, to direct Cst. Thomson to delay all access to counsel until the execution of the Search Warrant was complete.
- e) Cst. Michael Celli ("Cst. Celli")--has been a member of the SEU since September 2015. He was involved in the surveillance of Building 1873 in early March 2017, and was part of the undercover SEU team that entered the common areas of Building 1873 on March 9, 2017, with the use of the Civilian FOB. He was the officer who identified Unit 2214 as being associated to the accused.
- f) Cst. Greg Barnard ("Cst. Barnard")--assisted the SEU in the execution of the Search Warrant, transported Mr. Sanchez to the Kelowna Detachment and, on arrival, advised Cst. Thomson that he was ready for processing. He first searched him and then placed him in a lawyer phone room and waited. He then escorted him into a cell waiting for Cst. Thomson to finish processing the others.
- g) Eric Weilermann ("Mr. Weilermann")--has been Pinnacle Pointe's property/building manager since 2011. His responsibilities include the day-to-day management of maintenance of the complex.
- h) Mr. Brian Pedersen ("Mr. Pedersen")--owns and rents out six of Pinnacle Pointe's condominium units. He has been the president of Pinnacle Pointe's strata council for the past eight years.
- i) Mr. Jiajun Yang ("Mr. Yang")--is the owner of Unit 2214. In November, 2016, he negotiated with Mr. Sanchez to rent the unit.

Pinnacle Pointe Resort

- [19] Pinnacle Pointe is a 165 unit condominium development consisting of two four-story buildings in the Quail Ridge community. The units within Pinnacle Pointe are mostly owned by non-residents.
- [20] As Pinnacle Pointe is very close to the University of British Columbia Okanagan campus, in most school years (including the 2017-2018 school year), 90-95% of the units are rented to university students. During the summer months, most units are rented to vacationers through Air B&B or similar sites on a short-term basis.
- [21] Access to the Pinnacle Pointe buildings is controlled by fobs and garage door openers. There are approximately 500 fobs issued at any point in time. Any fob allows access to any hallway or other common area on any floor within either building, including the Parking Garage. CCTV cameras are located in the main traffic common areas including the front entrance, lobby, elevators, and Parking Garage.
- [22] The Parking Garage can be accessed via the garage door openers issued to tenants. The Parking Garage is large and accommodates both buildings. Individual parking stalls are assigned to individual units. Anyone who has a garage door opener can access the entire garage and, once inside, can move freely about both buildings and all common areas without a fob.
- [23] Pinnacle Pointe's residents, occupants, and guests come and go regularly, thus making it difficult for management to control access to the buildings. The turnover of residents is high. Because of the number of university students residing there and the resultant party atmosphere, Pinnacle Pointe retains a security firm to keep an eye on things Thursdays through Sundays.

Background investigation and execution of the Search Warrant

- [24] As a result of a tip received from a confidential police informant, the SEU began investigating a suspected dial-a-dope drug trafficking operation ("Drug Operation"). The SEU suspected that Mr. Sanchez and an associate, Mr. Hassani, were part of a larger group engaged in trafficking cocaine, fentanyl, heroin, and other hard drugs on the streets of Kelowna. They became the targets of the SEU's investigation ("Targets").
- [25] In February 2017, the SEU received information that a brown Chevrolet Impala ("Impala") was being used in the Drug Operation. The SEU conducted surveillance of the Impala on March 2, 3, 4, 8 and 9, 2017. The Targets were observed engaging in activities consistent with drug trafficking. The SEU's surveillance of the Impala and the Targets led them to Building 1873 at Pinnacle Pointe. They suspected the Targets were either residing in one of the units or using it to stash drugs. The surveillance also disclosed that Ms. Soreni was likely Mr. Sanchez's girlfriend and was likely living with the Targets.

- [26] Before the SEU could apply for a search warrant, they needed to know the specific unit within Building 1873 that was associated with the Targets.
- [27] As it happens, one year earlier Cst. Thomson was involved in an unrelated drug trafficking investigation involving another unit at Pinnacle Pointe. During that investigation, he received full cooperation and assistance from Mr. Weilermann, who provided fob access to the building. Mr. Weilermann stated that if Cst. Thomson ever needed assistance on any other matter, to contact him.
- [28] During the evening of March 4, 2017, Cst. Thomson contacted Mr. Weilermann. Mr. Weilermann recalls it was a phone call. Cst. Thomson believes it was via text. In any event, Cst. Thomson explained that the SEU was conducting another drug trafficking investigation potentially involving Pinnacle Pointe. Mr. Weilermann indicated that while he was happy to assist Cst. Thomson, he was in Vancouver at the time and about to depart for a Mexican holiday. He was unable, therefore, to provide Cst. Thomson with fob access this time around. He told Cst. Thomson that, upon his return on March 21, 2017, he would provide whatever assistance he could. Arrangements were made for them to get together when Mr. Weilermann returned. Cst. Thomson believed Mr. Weilermann supported the SEU's investigation and would have no issue with them entering Pinnacle Pointe's common areas, assuming they had access.
- [29] By March 2017, the fentanyl overdose crisis in the province was in full swing. Given the type of drugs the Targets were suspected of trafficking, Cst. Thomson was concerned that waiting for Mr. Weilermann's return would result in more overdose deaths in Kelowna. Discussions with other members of the SEU disclosed the possibility of obtaining the Civilian FOB. The SEU was able to obtain the Civilian FOB from the RCMP Civilian, although there is no evidence on exactly how it did so.
- [30] Surveillance of the Targets continued. A plan was hatched for members of the SEU to use the Civilian FOB to enter Building 1873 when one of the Targets was about to arrive in the Impala. The members would fan out throughout the building in the hopes of observing them entering a unit. Efforts to locate the Target's unit on March 8, 2017, were unsuccessful. The SEU tried again the following day.
- [31] At approximately 3:45 p.m. on March 9, 2017, Cst. Celli and two other officers entered Building 1873 using the Civilian FOB. All were dressed in civilian attire. SEU surveillance units had followed the Impala, driven by Mr. Hassani, to Building 1873. Once Mr. Hassani entered the building, the officers fanned out throughout various hallways. Cst. Celli entered the second floor hallway from the stairwell just as Ms. Soreni (whom he recognized from prior surveillance) and a small dog exited Unit 2214. He heard Ms. Soreni call out to Mr. Sanchez who came out into the Hallway. Cst. Celli and Mr. Sanchez were close enough in the Hallway that they nearly bumped into each other. Cst. Celli apologized and Mr. Sanchez responded "no problem". Cst. Celli noted that Mr. Sanchez was holding a small Ziploc baggie containing a white powdery substance. Cst. Celli walked down the Hallway, down the far

stairwell, and exited Building 1873. It was this short observation by Cst. Celli that positively identified Unit 2214 as the unit the Targets were occupying.

- [32] On March 20, 2017, Cst. Thomson used the Civilian FOB to again gain access to Building 1873. The SEU's investigation was ramping up and he expected that a search warrant would be issued and executed shortly, probably the following day. As lead investigator, Cst. Thomson wanted to scout out the interior hallways and stairwells of Building 1873 to get a better understanding of the layout. He walked down the Hallway past the entry door to Unit 2214, breaking his stride long enough to hear what sounded like a television inside the unit. He kept walking, exited the Hallway through the far stairwell, and entered the Parking Garage. He did not need a fob or garage door opener to do so. He took photos of the Pontiac that he knew from previous surveillance was owned by Mr. Sanchez. As he was doing so, he heard a metallic noise from the Pontiac that sounded to him like the engine was cooling down. Instinctively, he touched the Pontiac's hood for two to three seconds and determined it was warm. This indicated to him that the Pontiac had recently been driven. He also noted that the Pontiac was parked in Stall #38.
- [33] Cst. Thomson testified that he did not put his mind to the issue of whether the Hood Touching was a warrantless search. Had he thought about it at the time, he would not have touched it.
- [34] On March 21, 2017, Cst. Thomson met Mr. Weilermann. Cst. Thomson explained that the SEU was investigating a suspected drug operation in Building 1873. He told Mr. Weilermann that the SEU had already been inside the building and had identified Unit 2214 as the Target's unit. Mr. Weilermann seemed pleased that the SEU was able to continue its investigation while he was away and offered to help in any way he could. Mr. Weilermann had no concerns whatsoever that the SEU was using the Civilian FOB, as he planned on giving Cst. Thomson a fob in any event.
- [35] Mr. Weilermann volunteered to show Cst. Thomson the Form K indicating the tenants for Unit 2214. He also invited Cst. Thomson to view some CCTV footage of the Parking Garage taken the day before. It showed the Pontiac entering the garage but did not show its driver. Mr. Weilermann also confirmed that Stall #38 was assigned to Unit 2214. To assist the SEU with the execution of their investigation and pending warrant, Mr. Weilermann gave Cst. Thomson a fob, a garage door opener, and a key that he thought would open Unit 2214 ("Key").
- [36] Mr. Weilermann's understanding was that Pinnacle Pointe's strata council (the "Strata Council") had delegated him the discretion to assist police investigations involving Pinnacle Pointe.
- [37] The testimony of the Strata Council's president, Mr. Pedersen, supports Mr. Weilermann's understanding of his discretion to assist the police. Mr. Pedersen testified that Mr. Weilermann's responsibility was to manage Pinnacle Pointe's day-to-day affairs and had the Strata Council's full authority to assist police investigations if he deemed it appropriate.

Pinnacle Pointe had a past history of illegal activities by its residents and therefore the Strata Council had provided this authority to Mr. Weilermann years prior to March 2017. He believed Mr. Weilermann's authority included cooperating with the police and providing Form K information and CCTV access. Nevertheless, Mr. Pedersen agreed that the police did not have a blank cheque to enter the common areas at will; his expectation was that they would ask permission from Mr. Weilermann prior to entering the premises.

The ITO, obtaining the Search Warrant, and the execution plan

[38] On March 21, 2017, Cst. Flamen swore the ITO and the Search Warrant for Unit 2214 was approved.

[39] Cst. Thomson knew that March 22, 2017, was a "welfare Wednesday"--a day of the month when welfare cheques are handed out and the demand for illicit drugs is generally high. If possible, Cst. Thomson wanted to execute the Search Warrant early on March 22, 2017, as he suspected a significant quantity of drugs would be found. He wanted to execute the search at 7:30 a.m. while the Targets were sleeping. He suspected that Mr. Sanchez and Ms. Soreni would be in the master bedroom and was concerned that they would have quick access to the master bathroom, where they could dispose of drugs if they had warning of police presence.

[40] At 6:30 a.m. on March 22, 2017, the SEU had an eight-minute briefing on the execution of the Search Warrant ("Briefing"). Seven members of the SEU would be stacked in the Hallway. Plan A was to use the Key to gain entry into Unit 2214. If for any reason Plan A did not work, Plan B was to use a battering ram to break open the entry door.

[41] As lead investigator, Cst. Thomson decided not to use a "knock and announce" protocol, whereby they would knock on the suspect's door, announce their presence, and request the suspect to exit for the execution of the Search Warrant because:

- a) His past experience in over two-dozen investigations involving search warrants related to hard drugs had taught him that drugs could easily be flushed down a toilet or otherwise disposed of while officers waited for the door to be opened;
- b) As of March 2017, six to ten of the search warrant executions he had participated in related to illicit drugs had utilized "hard" entries to avoid the destruction of evidence;
- c) Messrs. Hassani and Sanchez were known to the SEU as being associated with unsavory drug gangs in the Lower Mainland, which were suspected of being involved with gun violence;
- d) One week or so before, one of the Target's known associates, a Mr. Bhanghu, who was involved in organized crime at a mid-high level, was murdered in a very public shooting captured on security video;
- e) The get-away vehicle in the Bhanghu shooting was abandoned in Kelowna a few days later;

- f) Cst. Thomson understood that Mr. Sanchez survived a suspected gang or drug-related gunshot in 2016 and that he had been charged with drug-related offences in the Delta in 2015 that, as of March 22, 2017, were working their way through the court system;
- g) Illicit drug trafficking and guns go hand-in-hand and what dangers could have been lurking within Unit 2214 were unknown; and
- h) The element of surprise was important to officer safety and securing the drugs.

[42] Cpl. Hare echoed Cst. Thomson's concerns.

[43] The SEU expected to find three persons inside Unit 2214: Mr. Sanchez, Ms. Soreni and Mr. Hassani. Plans were made for arresting and transporting each of them separately. After their arrests and transport, Cst. Thomson, Cpl. Hare, and other SEU members would search Unit 2214 and complete the execution of the Search Warrant. Cst. Chapman was assigned the responsibility of providing the detainees with their Charter rights, having them transported to the detachment for processing, and ensuring access to counsel.

Executing the Search Warrant

[44] At 7:25 a.m. on March 22, 2017, the SEU executed the Search Warrant. Plan A was attempted; the Key did not work. Accordingly, Plan B was implemented by order of Cpl. Hare. Seven SEU officers entered the unit with Cpl. Hare in the lead. As they entered with their weapons at the "low ready" position, they loudly shouted and repeated "Police, Search Warrant". The two accused were in the master bedroom sleeping, but the door was locked. Cpl. Hare either kicked or shouldered the door open.

[45] Unbeknownst to the SEU, Ms. Soreni was five months pregnant. She appeared shocked and did not respond; she needed time to compose herself and get dressed. The accused were then escorted out of the master bedroom. Mr. Hassani and another individual were found elsewhere in the suite. All four were arrested for drug related offences and removed from the unit one-by-one.

[46] One-by-one, Cst. Chapman methodically arrested the four, read each their s. 10(a) and (b) Charter rights from a card, and gave them the standard police warning that they were not obliged to say anything.

[47] Cst. Thomson had arranged for marked police cruisers and uniformed officers to transport each accused to the Kelowna detachment for processing and, if the accused wanted, telephone access to counsel in private. The arrest plan did not include any arrangement to allow the detainees immediate access to counsel because of security concerns and issues with privacy. The Kelowna RCMP policy was to transport arrestees to the detachment to be searched and processed before allowing them telephone access to counsel. Pursuant to that policy, Cst. Thomson did not consider allowing the accused access to counsel until the accused were at the detachment and processed.

- [48] The Kelowna detachment was a 15 to 25 minute drive from Building 1873 and each arrestee was to be taken there straightaway. On arrival, each detainee was to be processed first before allowing any access to counsel, which would be accomplished by placing them in one of two functioning private telephone rooms at the detachment.
- [49] Mr. Sanchez was the first arrestee escorted out of Unit 2214 and turned over to Cst. Chapman. The time was 7:29 a.m. At 7:30 a.m., Cst. Chapman read Mr. Sanchez his s. 10(a) and (b) Charter rights and police warning. Mr. Sanchez stated that he understood what he was told and stated that he wished to speak to his lawyer. At 7:35 a.m., he was turned over to Cst. Barnard for transport to the detachment, arriving at 8:08 a.m. Cst. Barnard first placed Mr. Sanchez into the search room and then into the lawyer phone room temporarily. While Mr. Sanchez was in the lawyer phone room, Cst. Barnard was standing by. From there, and before being allowed access to counsel, Cst. Barnard placed Mr. Sanchez in a holding cell. At 8:20 a.m., Mr. Sanchez was taken to the Canadian Administrative Booking System ("CABS") Room--an administrative system for recording a detainee's name, birthdate, address, and photo--for processing and back into a holding cell. At 9:11 a.m., he was given telephone access to counsel.
- [50] Ms. Soreni was escorted out of Unit 2214 at 7:37 a.m. At 7:38 a.m., Cst. Chapman formally arrested her and gave her the same Charter and police warnings. Ms. Soreni stated that she understood and stated that she wished to speak to a lawyer. She was turned over to Cst. Cheung for transport to the detachment, arriving at 8:13 a.m.
- [51] The other two arrestees, Messrs. Bayani and Mr. Hassani were Charter warned in turn. Each indicated a desire to speak to a lawyer. Mr. Bayani was turned over to Cst. Cheung to transport with Ms. Soreni. Cst. Chapman transported Mr. Hassani in his vehicle.
- [52] Cst. Chapman left the scene at 7:49 a.m. and arrived at the detachment at 8:13 a.m. He pulled into the secure garage bay. He decided to process Ms. Soreni first because of her pregnancy. He arranged for a female member to search her for drugs and weapons. This search started at 8:18 a.m. and finished at 8:35 a.m. She was then processed at the CABS room and taken to a holding cell at 8:41 a.m.
- [53] Next up was Mr. Bayani. His processing was complete at 8:49 a.m. and he was lodged in another holding cell.
- [54] Mr. Sanchez was next. His processing was complete at 9:08 a.m., followed by Mr. Hassani at 9:11 a.m.
- [55] Access to the private telephone rooms began with Mr. Sanchez at 9:11 a.m., followed by Mr. Hassani at 9:20 a.m., followed by Ms. Soreni at 9:26 a.m., followed lastly by Mr. Bayani at 9:42 a.m. The lawyers they requested were unavailable and messages were left for them to call back. By 10:57 a.m. all four had spoken with their counsel of choice.

- [56] Cst. Barnard agreed that, if he was asked by Cst. Thomson to assist in making the lawyer call for Mr. Sanchez once he was placed in the lawyer phone room shortly after being searched, there was nothing preventing him from doing so.
- [57] There was a suggestion by the accused that Cpl. Hare had instructed Cst. Edwards to instruct Cst. Chapman that access to counsel should not be granted until the execution of the Search Warrant was complete. Cpl. Hare could not recall giving any such instructions, although he admits he may have. Cst. Edwards testified that at 8:20 a.m. he passed along a message from Cpl. Hare to Cst. Thomson that lawyer calls were to be delayed until the completion of the Search Warrant. Both Csts. Thomson and Chapman denied ever receiving instructions to delay access to counsel.

Discussion

Voir Dire # 1--Reasonable Expectation of Privacy Issue

- [58] Voir dire #1 concerns whether the accused have standing to argue the validity of the Search Warrant. The SEU entered into the Hallway and Parking Garage without a warrant. Cst. Thomson viewed the Form K and CCTV footage without a warrant. Section 8 of the Charter protects the accused against the SEU's conduct if it violated their reasonable expectation of privacy. The issue of standing, therefore, turns on whether or not a reasonable expectation of privacy existed in either the Hallway, the Parking Garage, the Form K, or the CCTV footage.
- [59] A related issue is whether, notwithstanding any reasonable expectation of privacy that may have existed, the SEU were authorized by law to be inside Building 1873's common areas. This issue turns on either of two additional considerations. First, whether Mr. Weilermann had the authority to, and did in fact, authorize the SEU's entry into Building 1873. Second, whether, by giving the SEU the Civilian FOB, the RCMP Civilian consented to the SEU entering Building 1873's common areas.
- [60] If I find that the accused had a reasonable expectation of privacy in the impugned areas but the searches of the Hallway, Parking Garage, Form K, and CCTV were done with authorized consent, then the SEU were entitled at law to conduct them. To find consent on the part of the Strata Corporation, I must find that Mr. Weilermann had authority to, and did in fact, provide consent, whether express or implied. To find consent on the part of the RCMP Civilian, I must find that consent was actually granted.

Positions of the parties

- [61] The accused say that the police cannot snoop around the common areas of condominium buildings without judicial authorization. They argue that they had a reasonable expectation of privacy within the Hallway, Parking Garage, Form K, and CCTV. Therefore, they say they have standing to argue that the warrantless searches by the SEU members were unreasonable and violated their territorial and informational privacy rights protected by s. 8 of the Charter.
- [62] The accused further contend that Mr. Weilermann had no authority to allow the SEU into the Hallway and Parking Garage, or to permit the SEU to view the Form K or CCTV footage. Even if Mr. Weilermann had such authority, that authority could not have been granted prior to his return from holidays on March 21, 2017. Therefore, the SEU had no permission to enter the common areas on March 9, 2017. The accused point to Pinnacle Pointe's by-laws, the Strata Property Act, the Personal Information Protection Act, S.B.C. 2003, c. 63 [PIPA], and regulations made pursuant to it setting out the privacy interests that exist in condominium settings. Respecting the Civilian FOB, they say that the Crown has not proven the RCMP Civilian consented to its use. All things considered, they assert that the SEU's conduct amounts to a breach of their s. 8 Charter rights to be secure from an unreasonable search. The accused rely heavily on *R. v. Latimer*, 2020 BCSC 488 [Latimer]; *R. v. Kim*, 2020 BCSC 1064 [Kim #3]; and *R. v. Kim*, 2020 BCSC 1075 [Kim #4] in support.
- [63] The Crown says that the accused had a reasonable expectation of privacy within Unit 2214, but not outside of it. The Crown points to the somewhat unique character of Pinnacle Pointe as a complex specifically designed to be rented by university students during September to April and by short-term vacationers during the summer months. As such, it is not a condominium building where owners, tenants, and their guests enjoy a reasonable expectation of privacy in its common areas. The Crown submits that the size of the complex, the sheer volume of fobs at large, the "revolving door" turnover of residents, invitees and others routine visitors, combined with the 16 CCTV cameras located in the main common areas, make it subjectively and objectively unreasonable for the accused to have any expectation of privacy in the Hallway and Parking Garage. Accordingly, the accused have no standing to challenge the SEU's entry into the Hallway and Parking Garage prior to March 22, 2017.
- [64] Relying on the B.C. Court of Appeal's ruling in *R. v. Wilson*, 2017 BCCA 327 [Wilson] and the Ontario Court of Appeal's ruling in *R. v. Yu*, 2019 ONCA 942 at para. 97 [Yu], the Crown argues that disclosure of the CCTV footage and Form K to the police would have been expected of any tenant of Pinnacle Pointe as a natural and rational occurrence in the investigation of a criminal offence within the building. Furthermore, there would have been implied consent to disclose it. The Crown says that Mr. Weilermann had authority to provide the CCTV footage and Form K to the police to assist with an investigation. The Crown says that to rule otherwise would be to place too high a burden on investigating officers. They would have to engage in a highly technical legal analysis each time they sought to view CCTV

video footage or seek Form K information. They would have to engage in interviewing strata council members about their private deliberations and decisions, review council minutes, and retain counsel to render an opinion as to whether the strata council had legally delegated "actual authority" to the property manager to cooperate with police investigations.

- [65] In specific response to the CCTV and Form K issues, and notwithstanding the extensive reasons set out in *Latimer*, the Crown does not concede that the appellate decision in *R. v. Webster*, 2015 BCCA 286, leave to appeal ref'd [2015] S.C.C.A. No. 376 [Webster] and *Wilson* have been legally overtaken. Firstly, the Crown asserts that the reliance on the provisions of PIPA in *Latimer* was completely addressed and endorsed by the Court of Appeal in *Wilson* with leave to appeal to the Supreme Court of Canada denied. The "recommendations" of the Privacy Commissioner have not changed since *Wilson* was decided and, in any event, do not have the force of statutory compulsion.
- [66] Secondly, both *Latimer* and *Kim* relied heavily on the Supreme Court of Canada's decision in *R. v. Marakah*, 2017 SCC 59 [Marakah] as altering the law regarding informational privacy interests in third-party records. However, *Marakah* involved a seizure of those records as opposed to consent provision of records to the police. Third-party consent remains a highly relevant factor in determining the reasonable expectation of privacy in such records in British Columbia. As was stated in *Webster* at para. 69, there was no reason why the police could not ask to see the CCTV footage or the Form K.
- [67] Additionally, the Crown does not concede that Mr. Sanchez had a reasonable expectation of privacy in the Form K because he was not named or mentioned on it. The Crown says that only a person named or whose private information appears in the Form K can assert an informational privacy interest.
- [68] Further, the evidence in this case is that Mr. Weilermann voluntarily showed Cst. Thomson the Form K and the CCTV footage with full authority of the Strata Council; Cst. Thomson did not ask for this information. The information on the Form K cannot possibly be considered a "search" or "seizure". Therefore, the Crown submits that there was no basis on which to suggest a breach of the accused's s. 8 rights.

Legal principles

- [69] Section 8 of the Charter guarantees that everyone in Canada will be free from unreasonable search and seizure by the state. To assert a s. 8 Charter claim, the accused must establish that he or she subjectively expected the subject matter of the search would be private and that his or her expectation is objectively reasonable: *R. v. Edwards*, [1996] 1 S.C.R. 128 [Edwards]. If such an expectation is established, the court then looks at whether the police activity in question amounts to an unreasonable search. The guarantee of security from unreasonable search and seizure only protects reasonable expectations: *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 at 159.

- [70] The determination of the accused's reasonable expectation of privacy requires a contextual assessment of the "totality of circumstances": Edwards, at paras. 31, 45. A reasonable expectation of privacy is assessed in light of the norms of conduct in society: R. v. Tessling, 2004 SCC 67 at para. 42 [Tessling]. Rather than focussing on the physical acts involved in the search or the physical space invaded, the court is to focus on the nature of the privacy interests that are potentially compromised by the police action: Tessling, at para. 44. It is not an all-or-nothing proposition: R. v. Kim, 2019 BCSC 2150 ("Kim #1") at para. 29, quoting from R. v. Jarvis, 2019 SCC 10 at para. 62. The ultimate question is: "what were the police really after": Marakah, at para. 15, citing R. v. Ward, 2012 ONCA 660 at para. 67; see also Yu, at para. 76.
- [71] Counsel have referred me to a number of leading authorities on the point including: Tessling; Yu; Wilson; R. v. White, 2015 ONCA 508 [White]; R. v. Sandhu, 2018 ABQB 112 [Sandhu]; R. v. Pipping, 2020 BCCA 104, leave to appeal ref'd [2020] S.C.C.A. No. 179 [Pipping]; and R. v. Spencer, 2014 SCC 43 [Spencer]. I have also been referred to various trial court decisions that analyzed the concept of expectation of privacy in condominium settings: Kim #1; Kim #3; Kim #4; R. v. Douale, 2016 ONSC 3912 [Douale]; R. v. Bourdeau, 2019 BCSC 1181 [Bourdeau]; and Latimer.
- [72] In determining whether, in the "totality of the circumstances", the accused had a reasonable expectation of privacy, the above authorities suggest I am to consider factors such as:
- a) The location where the search took place;
 - b) Whether the place was in public view;
 - c) Whether the police technique was intrusive in relation to the privacy interest; and/or
 - d) Whether the information gathered exposed any intimate details of the accused's lifestyle or information of a biographical nature.
- [73] In the context of police entering multi-residential buildings and gathering information, additional factors to consider can include: the nature of the building itself; the number of units in the building; whether entry into the common areas is controlled by keys or fobs; the number of people that may be present within the common areas; the building's population; the nature and extent of CCTV coverage; and the nature of persons coming and going in the hallways, garages, elevators, stairwells, and other common areas.

Analysis

- [74] The accused have the burden to prove standing on a balance of probabilities: R. v. Simpson, 2015 SCC 40 at para. 47. Respecting the Hallway and the Parking Garage, they assert a territorial expectation of privacy ("Territorial Privacy Claim"). Respecting the Form K and the CCTV footage, they assert an informational expectation of privacy ("Informational Privacy Claim").

The Territorial Privacy Claim - Hallway and Parking Garage

- [75] Each case is fact-specific and is not amendable to categorical answers. The cases referred to me are instructive, but they are not determinative. Indeed, they illustrate the point that there is no "one rule that fits all". I review the parties' authorities in chronological order below.
- [76] In *Webster*, the BC Court of Appeal held that the appellant did not have a reasonable expectation of privacy in its hallways of the common area of a multi-residential complex because it was fairly accessible to the public. As it happened, the lead investigator lived in the same complex and gathered the impugned evidence. He testified that non-residents of the building, general members of the public, tradespeople, visitors, and guests were routinely and regularly in the hallways and common areas of the building. The Court emphasised that the focus on the reasonable expectation of privacy inquiry was not on how secure the building was, but how exclusive the occupation of the common areas was.
- [77] *White* involved a small 10-unit condominium complex spread out over four floors. The police suspected the accused was selling drugs out of his unit and on three occasions, entered into the common area of the building without permission using a side door that had a faulty lock. Prior to their first entry, they were already aware of the unit in which Mr. White resided. They hid in a stairwell and observed his comings and goings. They watched his unit, listened to conversations taking place within it, and they entered into and viewed the contents of his private storage locker. The Ontario Court of Appeal concluded that the accused had a reasonable expectation of privacy based on the small size of the building, the fact that the outside doors were supposed to be locked, and the fact that he owned the unit. At paras. 47 and 48, the Court stated:
- [47] Although the respondent did not have absolute control over access to the building, it was reasonable for him to expect that the building's security system would operate to exclude strangers, including the police, from entering the common areas of his building several times without permission or invitation and investigating at their leisure. It was reasonable for him to assume that although access to the building's storage area was not regulated, it was not open to the general public. And it was reasonable for him to assume that people would not be hiding in stairwells to observe the comings and goings and overhear the conversations and actions within his unit.
- [48] In any event, the fact that a relatively large number of people may have access to a building's common areas need not operate to eliminate a reasonable expectation of privacy. It is one thing to contemplate that neighbours and their guests, all of whom may be strangers to another resident, might be present in the common areas of a building, but another to say that a resident has no reasonable expectation of privacy as a result. An expectation of privacy may be attenuated in particular circumstances without being eliminated.

- [78] Citing *Tessling*, the Court commented that the reasonable expectation of privacy is a concept that protects those interests that courts think ought to be protected having regard to the interests at stake in the particular circumstances. The police, they noted, have considerable ability to investigate crime in multi-unit buildings, "but they do not have *carte blanche*": *White*, at paras. 50-51. They held that although Mr. White did not have absolute control over access to the building, it was reasonable for him to assume that the front door's fob system would exclude strangers, including the police, from entering the building, without permission or invitation, and investigating at their leisure. He was also entitled to assume the police would neither be exploiting a defect to enter the building nor be hiding in the stairwell covertly observing what was occurring.
- [79] *Douale* involved an officer entering a condominium building without authorization or invitation. The officer went to the ninth floor where the accused's unit was and intercepted private information by listening to telephone calls occurring inside the unit. The Court held that residents in large multi-unit residential buildings have a higher expectation of privacy in the areas (such as hallways) immediately adjacent to their units than in other common areas such as gymnasiums, exercise rooms, party rooms, and the like: *Douale*, at para. 53.
- [80] In *Wilson*, the trial began in the Provincial Court of British Columbia (*R. v. Wilson*, BCPC Vancouver Reg. No. 217835-1, February 26, 2016). It involved facts similar to this case, as the police believed a unit in a fob-controlled condominium complex was being used as a drug stash house. The complex had 150 residential units spread over 22 floors. Fobs were required to access the parking floors and individual residential floors. There were 16 security cameras monitoring key entry points including the elevators, lobby, and parking gates. The complex had a concierge over-seeing security. The police requested CCTV video clips from the concierge who willingly provided a DVD containing 10 such clips for various requested dates and times. The accused argued that he had a reasonable expectation of privacy in the common areas of the building and that the video clips of him moving throughout the complex were obtained by the police in violation of his s. 8 Charter rights. In concluding that the accused's rights were not violated, the learned trial judge quoted from the Supreme Court of Canada in *R. v. Cole*, 2012 SCC 53 at paras. 34 and 35, noting that "privacy is a matter of reasonable expectations" and that "an expectation of privacy will attract Charter protection if reasonable and informed people in the position of the accused would expect privacy". After reviewing personal information protection legislation and guidelines related to strata corporations, the trial judge concluded that the video images were both territorial and informational in nature. Although Mr. Wilson may have had a subjective expectation of privacy in them, it was not objectively reasonable for him to expect that they would not be disclosed to the police for legitimate reasons. Accordingly, the judge concluded that Mr. Wilson did not have a reasonable expectation of privacy in either the common areas of the complex or the video footage. The Court of Appeal dismissed Mr. Wilson's appeal for substantially the reasons of the trial judge.

- [81] Sandhu involved a mixed-use building with retail, office, and residential floors. The residential floors were always locked and accessible only by key, fob, or by ringing a tenant or the front desk. Fobs issued to tenants allowed access to defined common areas but permitted access to only the tenant's floor. While CCTV cameras were not installed in the residential hallways, they were installed in other common areas. Though Mr. Sandhu was not a tenant in the building, his presence was captured on covert surveillance cameras installed by the police in the hallway of one of the floors. The Court concluded that he had a reasonable expectation of privacy, albeit a weak one, respecting the information captured by the surveillance videos because it included his biographical information in circumstances where it was reasonable to expect that the information would remain private: Sandhu, at para. 48.
- [82] Bourdeau involved the question of whether the police viewing of live and recorded CCTV security video in the third-floor hallway of a four-story condominium complex, without a warrant, breached the accused's s. 8 Charter rights. The complex was operated by the Cool Aid Society and housed persons with mental illness and other issues, including addictions. Access to the building was by fob. Once inside, a person could move about the building freely. The accused was suspected of selling drugs out of his third-floor unit. The police were allowed by the building manager to view CCTV videos that confirmed their suspicions. The accused applied to have the viewing of the CCTV footage declared a warrantless search and a breach of his s. 8 Charter rights. Steeves J. concluded that the third floor hallway could be used by residents and visitors to the building and did not give rise to a strong privacy protection to a tenant, owner, or visitor. He held that the accused's privacy interests began at his unit's entry door; it did not exist in the adjacent hallway.
- [83] Yu was an appeal by four accused on various grounds including whether warrantless entries into common areas and hallways of large condominium complexes with many units, large numbers of residents and guests, breached their s. 8 Charter privacy rights. The case involved a large scale, multi-jurisdictional police investigation targeting criminal gangs in Toronto engaged in high-level drug trafficking and "open warfare" against each other. Prior to search warrants being issued, the police entered the hallways, stairwells, and parking garages of three condominium buildings to make observations and install hidden hallway cameras. In some cases, they had the prior consent of management. The trial judge held that the police entries into the common areas of the buildings, including hallways and parking garages, did not constitute a "search" within the meaning of s. 8 of the Charter because the accused had no reasonable expectation of privacy in those areas. The Ontario Court of Appeal concluded the police's warrantless entry into the parking garages did not violate s. 8 because the accused did not have a reasonable expectation of privacy there. However, it held that the accused had a reasonable, albeit low, expectation of privacy in the hallways. At paras. 82-84, the Court commented:

- [82] Once inside an access-controlled condominium building, residents are entitled to expect a degree of privacy greater than what, for instance, they would expect when approaching the building from the outside. This results from the fact that anyone can view the building from the outside, but there is some level of control over who enters the building.
- [83] The level of expectation of privacy inside a condominium building will vary. The level of expectation of privacy is dependent on the likelihood that someone might enter a certain area of the building, and whether a person might reasonably expect a certain area to be subject to camera surveillance.
- [84] Some areas of condominium buildings are routinely accessed by all condominium residents, such as the parking garage or elevator lobby. The level of expectation of privacy in those areas is low, albeit remaining greater than would be expected outside of the building. The level of expectation of privacy increases the closer the area comes to a person's residence, such as the end of a particular hallway of a particular floor of the building. Even in those less-frequented areas the level of expectation of privacy is low, but not as low as in the more commonly used areas.
- [84] The Court continued that the only time residents of condominiums should expect complete privacy is when they are inside their units with the door closed. Nevertheless, there was a reasonable expectation of privacy in the hallways of the accused's respective buildings, although at the low end of the spectrum. The Court stated that the level of privacy will vary with such things as the likelihood someone might enter a certain area: Yu, at para. 83. The Court also concluded that despite the low expectation of privacy that may have existed, given the context in which the condominiums operated in that case, the accused would reasonably have expected the strata board/management would likely consent to police entry if informed of the possibility of criminal activity within the building. Accordingly, the accused's expectation of privacy was further reduced: Yu, at paras. 92-94. Further, it noted that any expectation of privacy in common areas that are routinely accessed by all condominium residents, such as parking garages or elevator lobbies, would be very low but would increase the closer the area came to a person's unit, such as the end of a particular hallway of a particular floor: Yu, at para. 84.
- [85] At para. 102, the Court stated:
- [102] The warrantless hallway entries conducted after the consent was provided did not violate s. 8 of the Charter. The appellants had a reasonable expectation of privacy in the hallways, which was attenuated by the ability of the board and property management to consent to police entry. Property management in fact consented. Accordingly, the resulting search was authorized by property management's consent. Section 8 of the Charter was not violated.
- [86] The Court concluded that condominium residents expect their strata council to reasonably cooperate with the police as part of its duty to manage common areas in the residents' collective interest. To some extent, the strata board and property management have valid authority to cooperate with the police, and to consent on behalf of the building residents to

allow police entry: Yu, at paras. 127, 131. There is a line to be drawn on where that authority ends. Allowing surreptitious video surveillance in the hallways crossed the line: Yu, at para. 132.

- [87] In Yu at para. 76, the Court held that where the subject matter of the police search was basic information, such as the accused's physical address/unit number, that would be available to the police and the public (for example, similar to the police following someone home to a detached house), that information does not attract Charter protection. It also concluded that, on the facts of that case, condominium residents could not have an objectively reasonable expectation of privacy in a parking garage shared with so many other owners and over which they had very little control: Yu, at para. 78-80.
- [88] The Court also noted that third party consent to police entries is an important aspect of the "totality of the circumstances" consideration of whether the accused have a reasonable expectation of privacy: Yu, at para. 92. Residents of condominium complexes may have valid interests in consenting to police entry if concerned about criminal activity.
- [89] Kim #1 dealt with whether the accused had standing to challenge the admissibility of evidence obtained from video recordings captured by a hidden camera installed by the police on the 12th floor of a large condominium complex in Richmond, BC. Devlin J. held that in the totality of the circumstances of the case, the accused had a reasonable expectation of privacy, and, therefore, had standing. The condominium complex comprised 458 suites, was equipped with CCTV in some areas (not including the residential hallways), a two-level secure underground parking lot accessible only by fob and was staffed by a concierge 24-hours per day. Unit 1204 (the unit of interest) was on the 12th floor, which contained 10 suites and was accessible only by fobs for the 12th floor. None of the accused were owners or tenants of Unit 1204. The condominium's property manager provided the police with fobs, rental documents, CCTV footage, fob access records, and allowed them to install a covert hallway camera, all of which assisted with their investigation. The hidden camera recorded all activity from the 12th-floor elevator to the direction of the accused unit continuously onto a hard drive which the police could access remotely from an iPad. Devlin J. concluded that the police were after inferences that could be drawn from what the covert video captured and held that the constant uninterrupted video recording produced invasive information about what happened in the hallway associated with unit 1204. In other words, the subject matter of the search was all activity by the accused in the hallway in connection with the unit: Kim #1, at para. 37. She found that the accused had a low, but objectively reasonable, territorial expectation of privacy in the 12th floor hallway. While that floor was not completely restricted, access to it was limited to those who had a fob for it or were invited up.
- [90] In Latimer, two of many accused challenged the use of CCTV images of them in common areas (parking garages, parking garage elevator lobby, elevators, and front lobby areas), fob access records, and information from Form K's from two large "high end" condominium complexes, one in Richmond, BC, and one in downtown Vancouver. The condominiums'

concierges provided the police with this information on request. The issue was whether the accused had a reasonable expectation of privacy in the information gathered from the CCTV and Form Ks. Ker J. reviewed the PIPA, the strata bylaws for the two condominiums, and the Privacy Guidelines for Strata Corporations and Strata Agents ("Privacy Guidelines").

Following the reasoning of Smith J. in *R. v. Roudiani*, 2018 BCSC 1101, she held that the permissive provisions of the PIPA did not neutralize expectations of privacy in personal information provided to the police by a third-party record holder. It is simply one factor to be considered: Latimer, at paras. 110-114. Following the majority's reasoning in *Marakah*, she held that information contained in the Form K was private and that a person who has a privacy interest in it does not lose control over it for the purpose of s. 8 of the Charter simply because the strata council or property manager possesses or can access it. She held that Form K's are private and tenants of condominium complexes and their guests have a right to be free from indiscriminate disclosure of the information contained in them to the police in the absence of a production order.

[91] Ker J. concluded at paras. 136 and 137, that the proper analysis in determining whether an objectively reasonable expectation of privacy exists in Form K's and CCTV footage is not the density and size of the strata property, such that the larger the complex the less likely an objectively reasonable expectation of privacy, but rather:

[136] that all residents of a multi-unit complex, regardless of size, retain an expectation of privacy in their personal information, be it their images or documents about their tenancy, that is objectively reasonable such that they remain protected from random and unregulated disclosure of this information to outside organizations, including law enforcement agencies.

[137] How exclusive occupation of the common areas is only informs how diminished the expectation of privacy might be, not whether it extinguishes it. . . .

[92] After considering the facts and finding in *Yu*, Ker J. commented at para. 141:

[141] In my view, there is a world of difference between fleeting physical surveillance observations and preserved CCTV footage married with fob access records that provide both play-by-play and play back capabilities from which considerably more information can be harvested. Accordingly, although *Yu* is informative, it is not determinative of whether any subjective expectation of privacy in the parking garages and common areas in the case [at] bar are objectively reasonable.

[93] And at para. 155:

- [155] . . . much like video replay at sporting events, CCTV footage permits a viewer to play back, pause, study and interpret the images captured. In that regard, CCTV footage is completely different from the brief and fleeting observations made by eye-witnesses or surveillance officers. It is reviewable, permanent and far more informative. CCTV footage memorializes the interactions and movements of individuals, transforming the passing observations stored in human memory into a permanent visual record of a person's movements.
- [94] In Pipping, the BC Court of Appeal held that an accused had a reasonable expectation of privacy in the hallway outside a unit in a four-level, 96-unit residential building requiring key access to the front door but open access while inside. Mr. Pipping was neither an owner nor a tenant of the unit. The building was not equipped with CCTV cameras. During the course of their investigation into a suspected dial-a-dope drug operation, the police followed the accused to the condominium building and watched him use a key to enter it. The police wanted to know what unit the accused was associated with and sought the information from the property manager who refused to provide it without a production order. The police obtained a general warrant and then determined the unit number. Once the unit number was known, a search warrant was obtained for that unit. Mr. Pipping successfully argued that the general warrant was technically defective, but the Court allowed the evidence to be admitted under s. 24(2) of the Charter. The Court concluded that the control of public access to the common areas of the building was the "key to the assessment of a reasonable expectation of privacy". At para. 30, the Court stated:
- [30] In my view, Edwards, Webster, White and Yu are consistent in their focus on the manner in which the control of public access to the common areas of a building is key to the assessment of a reasonable expectation of privacy. The focus is on 'the ability to regulate access, including the right to admit or exclude others from the place': Edwards at para. 45 as cited in White at para. 31. Other important factors include the exclusivity of occupation, the size of the building, whether property management or a condominium board has consented to the police presence, the breadth of the observations being made by the police, the ownership of the property, and the frequency with which a particular area is used.
- [95] The Court agreed with the trial judge that occupants of the building reasonably expected access would be limited to invitees and that other members of the public would be excluded. Accordingly, Mr. Pipping had a reasonable expectation of privacy in the hallway outside his unit.
- [96] In Kim #1, the issue related to covert camera footage of the 12th floor hallway that was found to violate the accused's reasonable expectation of privacy. In Kim #3, the issue was whether the accused had standing to challenge the admissibility of CCTV still-images of a parking garage and fob records. Following Ker J.'s reasoning in Latimer, Devlin J. found that the accused had an objectively reasonable expectation of privacy.

- [97] In Kim #4, the issue was whether various accused had standing to challenge evidence related to covert physical surveillance conducted by the police on one occasion in the secure 12th floor hallway of the condominium complex, as well as on a number of occasions in its parking garage. Prior to conducting surveillance in those areas, the police sought and obtained permission from the strata manager, who believed he had the actual authority to do so. The police were given a fob allowing access to the building and parking garage. Over the following nine days, the police drove through the parking garage and observed a vehicle belonging to one of the accused parked in a stall associated with unit 1204. Additionally, an undercover officer made covert observations of one accused using a key to open unit 1204 while in the 12th floor hallway. The Crown sought to distinguish the findings in Pipping on the basis that the officers were given permission to enter the building by the building manager. Devlin J. concluded that the building manager was acting on his own when he allowed the police to enter because he did not have actual authority to do so. In any event, she held that consent is but one factor to consider in the totality of the circumstances equation.
- [98] Respecting the parking garage, Devlin J. concluded that the accused did not have a reasonable expectation of privacy. Even though the parking garage was secure, it was large (two floors) that serviced six residential buildings, with what she concluded involved hundreds of people who would have access to the parking garage with the means of a fob. She held that while the accused would have control over the parking space, he did not have control to stop any other person in the parking garage from making observations of what was transpiring inside the garage including at their individual parking stall: Kim #4, para. 36. She held that the parking garage was accordingly more public than private. It was not reasonable for a resident to assume activities in the parking garage would be unseen. There was, therefore, no objectively reasonable expectation of privacy.
- [99] Analogizing from Pipping, Devlin J. concluded that the 12th floor hallway was more private than public and that two of the accused had an objectively reasonable expectation of privacy in it, albeit at the lower end of the spectrum. Key to her determination was that the 12th floor was itself fob controlled and unit 1204 was at the end of the hallway, resulting in less traffic and more privacy than other units on the floor; Kim #4, paras. 38 and 39.
- [100] I have found all of these cases helpful. Cases such as Yu, Latimer, Kim #1, Kim #3 and Kim #4 appear to draw a distinction between physical observations made by the police in common areas where the accused has limited control, and the police accessing information from such things as Form K's, fob records, CCTV and/or covert video surveillance. In each case, the court considered the "totality of the circumstances" and assessed whether or not the police crossed the line.
- [101] Each case is fact driven. The focus of the inquiry is an assessment of the control over public access to the area in question and the public traffic that would reasonably be expected: Kim #4, at paras. 38 and 39

- [102] In this case, I consider Mr. Weilermann's testimony to be an important factor. He gave his evidence in a straightforward and credible manner, and I accept it in its entirety. He stated that as Pinnacle Pointe's manager he was given verbal authority by the Strata Council to allow the SEU into Building 1873 to conduct covert surveillance and investigations.
- [103] Mr. Weilermann also stated that Pinnacle Pointe is "like a hotel" in the sense that there are so many people coming and going that it is virtually impossible to keep track of them. He noted that the only people besides maintenance workers, cleaners, and others that are supposed to be there, are the residents and their invited guests. Nevertheless, nothing restricts the residents giving fobs to people as it cannot be controlled or supervised.
- [104] Another important and distinctive factor in this case is that the SEU was given the Civilian FOB by a resident of Pinnacle Pointe. That such access was seemingly so easy to get adds substantial weight to Mr. Weilermann's point that access is virtually impossible to control. Anyone who knew an owner, tenant, or resident of Pinnacle Pointe could get access to any part of the complex with one of some 500 fobs issued. Here, although the evidence is weak on the point, I infer that the SEU were given permission by the RCMP Civilian to enter the building.
- [105] Other notable features in the "totality of circumstances" analysis are:
- a) Pinnacle Pointe's common areas, including the foyer, elevators, Hallway, and Parking Garage were all communal areas over which neither accused had control;
 - b) Of the 165 units in Pinnacle Pointe's two buildings, only 10 are owner occupied;
 - c) Pinnacle Pointe has very transient buildings with tenants and residents constantly changing with high turnover and influxes during the school year and summer;
 - d) A single fob allows access to the entire complex and parking garage including all hallways;
 - e) At any one time, there were over 500 fobs issued and some units have as many as seven fobs issued to it;
 - f) Pinnacle Pointe's bylaws prohibit illegal activities on the property;
 - g) The bylaws do not restrict who residents can invite into the building;
 - h) The strata employs security to help control social gatherings and "party nights" Thursdays through Sundays;
 - i) There was no control over who had access to the common areas of Building 1873--anyone with a fob, could gain access to the Hallway and Parking Garage even if they resided in Building 1875;
 - j) There were 16 CCTV cameras located throughout Pinnacle Pointe's common areas, roughly divided equally between its two buildings;

- k) The fact of the existence of the CCTV cameras was posted on the walls;
- l) There were no cameras in the hallways of either building;
- m) The strata council and building manager actively cooperate with police investigations and provide fob access, Form Ks, and CCTV video footage to assist with investigations;
- n) Unit 2214 is located in the middle of the second floor containing 21 units, and is close to an elevator and stairwell;
- o) There are a total of 165 suites in Pinnacle Pointe spread over a total of eight floors with approximately 20 units per floor on average;
- p) Mr. Weilermann confirmed that Stall #38 belonged to Unit 2214 on March 21, 2017, before the search warrant was issued;
- q) There was already a connection between Stall #38 and Unit 2214 even if there was an expectation of privacy in the Hallway; and
- r) Part of Mr. Weilermann's duties were to ensure the bylaws were not breached and if something illegal was going on and the police asked for his assistance, he had the authority to provide it;

(collectively the "Pinnacle Pointe Features").

[106] The Crown urges that with the Pinnacle Pointe Features at play, there can be no reasonable expectation of privacy in the Hallway or Parking Garage.

[107] With respect, I agree. If the focus is on the "ability to regulate access, including the right to admit or exclude others from the place" (see Pipping, at para. 30, quoting from Edwards, at para. 45, as cited in White, at para. 31) and if the issue is "not how secure the building was, but how exclusive occupation of the common areas was" (see Webster, at para. 76), then there can be no blanket rule that a reasonable expectation of privacy can exist in every case involving hallways in access-controlled condominium buildings. The "totality of the circumstances" must govern.

[108] Condominium complexes are not all equal. Some are at the exclusive, expensive, and "higher end" of the spectrum. Others are at the "lower" end of the spectrum. Many fall at various points in-between. Determining whether a particular accused in a particular circumstance has a reasonable expectation of privacy in the common areas of a particular condominium complex is fact specific. It is not a one-size-fits-all proposition. In each case, the issue boils down to where the "reasonableness" line should be drawn having regard to the "totality of the circumstances" test as laid down in Edwards.

[109] Pinnacle Pointe is unlike the condominium complexes that were the subject of such cases as Yu, Pipping, Kim, and Latimer, and cannot be compared with them. In my view, the evidence suggests that Pinnacle Pointe is more like a university dormitory or a hotel with students and their guests coming and going throughout all areas of the complex at any

time. The Pinnacle Point Features virtually eliminate any objectively realistic expectation of privacy in the Hallway or the Parking Garage. In my view, considering the totality of the circumstances in this case, Devlin J's reasoning in Kim #4 as to why there was no reasonable expectation in the parking garage in that case, applies equally to both the Hallway and Parking Garage in this case.

- [110] The SEU's search of the Hallway and Parking Garage was simply to find out which of the 82 units within Building 1873 the accused were using. Their actions did not, in my view, cross the line: Yu, at para. 76. It was simply a fleeting physical surveillance observation: Latimer, at para. 41. The SEU were not hiding in the stairwell, listening to private conversations, and did not live stream surreptitious videos. The information they obtained did not reveal intimate or other details of the accused's lifestyle. It was a brief physical surveillance observation of the accused exiting Unit 2214 and viewing the Pontiac parked in Stall 38.
- [111] The level of privacy varies depending on the likelihood someone might enter the area. Here, Unit 2214 is in the middle of the second floor hallway opposite the stairwell and near the elevator. Residents and their guests coming and going from the elevator and stairwell would be reasonably expected.
- [112] To be clear, at issue is the territorial privacy of the Hallway and Parking Garage. The line is one of "reasonableness". The SEU were seeking information about where the accused resided, not what may have been going on inside their residence. The information about what unit they resided in, on its own, was meaningless. More cogent evidence was required for the SEU to obtain a search warrant: Tessling, at para. 36. Section 8 of the Charter protects people, not places. The information gathered by Cst. Celli on March 9, 2017 and by Cst. Thomson on March 20, 2017, does not touch on a biographical core of personal information, nor does it tend to reveal intimate details of the accused's lifestyle, which is required to get the accused over the s. 8 constitutional threshold: Tessling, at para. 62.
- [113] The onus of proof is on the accused to establish that they had a reasonable expectation of privacy in the Hallway and Parking Garage. In my view, they have not proven that they had an objectively reasonable expectation of privacy in either the Hallway or the Parking Garage.

The informational privacy claim--Form K and CCTV

- [114] Section 8 of the Charter does not protect any and all information that someone may like to keep private. It protects "a biological core of personal information" that reveals intimate details about the individual and their lifestyle: Tessling, at paras. 25-26.

- [115] Section 35 of the Strata Property Act, requires a strata corporation maintain a list of owners with their strata lot addresses and list of tenants. Section 146 of the SPA requires that a strata unit owner have prospective tenants sign a Form K, listing basis information such as the tenant's name and contact information. Therefore, the tenants of Unit 2214 were statutorily required to sign the Form K.
- [116] The accused point to Justice Ker's comments in *Latimer*, that the privacy commissioner has addressed the topic of privacy with strata corporations and has provided guidelines and procedures on what strata councils ought to do to on matters of tenant privacy. They argue that these guidelines were not met and it follows that the objectively reasonable hurdle for their expectation of privacy is thereby met.
- [117] Mr. Yang owns Unit 2214. In November 2016, he negotiated with Mr. Sanchez for the rental of Unit 2214. Mr. Sanchez emailed Mr. Yang a signed copy of a standard form residential tenancy agreement and Form K naming Ms. Soreni and Mr. Hassani as the tenants. Mr. Yang was happy to have the unit rented and did not pay any attention to the names on the rental agreement or on the Form K. At all times, however, Mr. Yang understood that Mr. Sanchez was the primary tenant. He assumed Ms. Soreni was Mr. Sanchez's girlfriend and would be residing with him.
- [118] Mr. Sanchez is not named on the Form K. Nor is any of his personal information noted on it. Nevertheless, he asserts that because he was the *de facto* tenant, the reasoning in *Latimer*, at para. 180, applies to him and, therefore, he has a privacy interest in the Form K. He contends that he had control over Unit 2214 and therefore had a privacy interest in all documents related to that unit, whether they referenced his name or not. He submits that all information respecting Unit 2214 should have been kept private.
- [119] I disagree. In my view, a person cannot assert a privacy interest in something that does not contain any information about him or her because it cannot go to the core of his or her biographical information or their activities in life. Despite the fact that Mr. Sanchez negotiated the lease with Mr. Yang and despite the fact that he was a tenant, the Form K contained only information regarding Ms. Soreni and Mr. Hassani. It is therefore only they who are able to assert an informational privacy interest over the Form K.
- [120] I adopt Justice Ker's reasoning in *Latimer*, at para. 129, and conclude that Ms. Soreni had an objectively reasonable expectation of privacy over the information contained in the Form K. Respecting that privacy interest, while it is true that the Form K was kept by Mr. Weilermann and there was a risk that he could disseminate to a third party, that did not include a risk that he might disclose it to the SEU or that her right to protection under s. 8 was given up: *Marakah*, at paras. 40-41.

- [121] Respecting the CCTV footage of the Parking Garage, for the same reasons that Mr. Sanchez did not have a territorial expectation of privacy in the Parking Garage, the CCTV footage of vehicles entering and exiting the Parking Garage was not something he could reasonably expect would be private. There would be little or no difference between the CCTV footage showing vehicles entering and exiting the parking garage and what a member of the public would be able to see from outside the complex.

Consent to enter and BC's privacy law legislation

- [122] The accused point to the PIPA, which sets out how private and personal information can be kept and disclosed. The definition of "personal information" in PIPA is very broad and would include the Form K in this case. The accused also point to a set of guidelines for strata corporations that require such things as CCTV footage to comply with PIPA. The accused argue that PIPA and guidelines published for strata corporations show that the subjective reasonable expectation of privacy that the accused had in the Hallway and Parking Garage was objectively reasonable because the provincial legislators have determined it to be so.
- [123] A similar argument was made, and rejected in Wilson at trial and affirmed on appeal. The learned trial judge stated at para. 42:
- [42] In my view, neither PIPA nor the Privacy Guidelines for Strata Corporations can operate to confer upon Wilson a 'constitutionally protected' privacy interest in the common areas of a condominium complex or in any video images captured of him as he moved through those common areas. The sweeping definition of 'personal information' under the Act - 'information about an identifiable individual' - goes well beyond the type of informational privacy that is protected by s. 8 of the Charter, that being a 'biographical core of personal information' that tends to reveal intimate details about the individual. Moreover, the fact that a strata corporation or its agents may fail to abide by any of the requirements of PIPA or the Privacy Guidelines by having no bylaws or written policy dealing with the use of video security cameras and the dissemination of information collected by the cameras does not assist in the present analysis. The absence of bylaws or policies dealing with these issues does not create a positive privacy interest of the kind contemplated by s. 8 of the Charter.
- [124] While I respectfully agree with these comments, I need not decide the point in this case because I conclude that the SEU had the legal authority to enter Pinnacle Pointe as invitees in any event. Fortuitously, they were able to obtain the Civilian FOB to assist in their investigation of the accused.
- [125] The Civilian FOB was their invitation to enter and was their lawful authority to be in the common areas of Building 1873, including the Hallway and Parking Garage. The fact that the accused happened to rent a unit in the same building as the RCMP Civilian is, in my view, a risk the accused took and for which they cannot now complain. In this case, it would be reasonable for the accused to expect that other tenants would allow police officers into

the building, especially since there were no restrictions on anyone entering all common areas once inside including the Hallway. The accused would have reasonably expected from the outset of their tenancy that other tenants in Pinnacle Pointe could invite an agent of the state into its buildings for legitimate law enforcement purposes. By the same token, the accused and other tenants of Pinnacle Pointe would not reasonably expect police entry without the consent of a tenant for legitimate purposes.

[126] I am satisfied that the RCMP Civilian consented to the SEU's entry into the common areas of Building 1873 when they gave the SEU the Civilian FOB. In my view, the SEU did not go beyond the scope of the RCMP Civilian's consent in entering the Hallway or Parking Garage for the sole purpose of determining the unit number.

Conclusion on Voir Dire #1

[127] Having considered all the circumstances, I conclude that neither accused have established on a balance of probabilities that they had an objectively reasonable expectation of privacy in the Hallway, the Parking Garage, or the CCTV footage. Their application for standing to challenge the Search Warrant on those grounds is dismissed.

[128] Ms. Soreni has, however, established a reasonable expectation of privacy over the Form K and the information contained within it. Mr. Sanchez has not. Therefore, only Ms. Soreni has standing to challenge the Search Warrant to the extent that it relied on the Form K information.

Voir Dire #2--The Hood Touching

[129] The issue on voir dire #2 is whether the Hood Touching was an unreasonable search of Mr. Sanchez's Pontiac.

Positions of the parties

[130] Mr. Sanchez says that he had a reasonable expectation of privacy within the Parking Garage and the Hood Touching was a warrantless search of the Pontiac, thereby violating his s. 8 Charter rights. He argues that his informational privacy interest was breached when Cst. Thomson touched the Pontiac's hood. He notes that at that point, although Cst. Thomson knew from a prior investigation that the Pontiac was owned by Mr. Sanchez and that it was suspect in the current investigation, there had been no confirmation that the Pontiac had been used in the alleged dial-a-dope operation. Further, he contends that Cst. Thomson had no information about whether the Pontiac had recently been driven. The Hood Touching, Mr. Sanchez submits, confirmed Cst. Thomson's suspicions that it had and thus enhanced SEU's investigation. Mr. Sanchez refers to *R. v. Wise*, [1992] 1 S.C.R. 527, to support the proposition that a reasonable expectation of privacy exists in automobile travel and the movement of vehicles. There, the Court stated at page 534:

Society then requires and expects protection from drunken drivers, speeding drivers and dangerous drivers. A reasonable level of surveillance of each and every motor vehicle is readily accepted, indeed demanded, by society to obtain this protection. All this is set out to emphasize that, although there remains an expectation of privacy in automobile travel, it is markedly decreased relative to the expectation of privacy in one's home or office.

[131] Mr. Sanchez also refers to *R. v. Zielinski*, 2014 BCPC 243 [Zielinski], as an example of where an officer touching a vehicle's hood to see if it had recently been driven was found to be an unlawful warrantless search.

[132] The Crown says that no territorial privacy exists in the Parking Garage and that in any event, the Hood Touching provides no biographical information about Mr. Sanchez that is capable of attracting any privacy interest. The only information the Hand Touching provided was about the car itself. It provided no information about who drove the Pontiac or anything else about the accused.

Analysis

[133] The comments of the Supreme Court of Canada at paras. 27 and 62 in *Tessling* are helpful in the analysis. *Tessling* involved the use of an airplane equipped with heat-sensing FLIR technology to fly over the accused's home to assist in determining whether it housed a marihuana grow operation. The Court stated:

[27] The distinction between informational and territorial privacy is of some assistance in drawing the 'reasonableness' line in the factual situation before the Court. Whereas *Abella J.A.* treated the FLIR imaging as equivalent to a search of the home, and thus 'worthy of the state's highest respect' (para. 33), I think it is more accurately characterized as an external search for information about the home which may or may not be capable of giving rise to an inference about what was actually going on inside, depending on what other information is available.

...

[62] ... I do not regard the use of current FLIR technology as the functional equivalent of placing the police inside the home. Having regard to its purpose, I do not accept that s. 8 is triggered by a FLIR image that discloses that heat sources of some unknown description are present inside the structure, or that the heat distribution is uneven. Certainly FLIR imaging generates information about the home but s. 8 protects people, not places. The information generated by FLIR imaging about the respondent does not touch on 'a biographical core of personal information', nor does it 'ten[d] to reveal intimate details of [his] lifestyle' (*Plant*, at p. 293). It shows that some of the activities in the house generate heat. That is not enough to get the respondent over the constitutional threshold.

- [134] This logic applies to this case as well. I have already concluded that Mr. Sanchez did not have a reasonable expectation of privacy in the Parking Garage. In effect, Mr. Sanchez seeks to have me declare that he has a privacy interest in the hood of the Pontiac when it is parked in an area where he has no reasonable expectation of privacy. In these circumstances, it would be no different than if Mr. Sanchez parked the Pontiac on the street.
- [135] In order for constitutional protection to be extended, the information seized by the police must be of a "personal and confidential" nature and be a "biographical core of personal information which individuals. . . would wish to maintain and control from dissemination to the state", including information that "tends to reveal intimate details of the lifestyle and personal choices of the individual": *R. v. Plant*, [1993] 3 S.C.R. 281 at 293.
- [136] The information obtained by Cst. Thomson by the Hood Touching did not meet any of these requirements. Further, the Hood Touching did not tread "on a biographical core of personal information" about Mr. Sanchez. It told Cst. Thomson nothing about who drove the Pontiac or where it had come from. All it did was provide information about the Pontiac itself, namely that the engine was warm. The heat emanating from the hood of the Pontiac, on its own, was meaningless. Heat signatures are simply that. The information may have inspired Cst. Thomson to take further steps in the investigation, such as asking to see the CCTV footage for the time period immediately before the Hood Touching, but in and of itself, it did not amount to an illegal search.
- [137] In my view, *Zielinski* is distinguishable on its facts. *Zielinski* involved a suspected highly intoxicated impaired driver who was observed leaving a casino, driving through a red light at a high speed on his way home. The vehicle's licence plate was noted and phoned in to the police who dispatched an officer to the address of the vehicle's registered owner. The officer arrived at that address and saw a vehicle matching the description of the suspect vehicle in the driveway with the interior light illuminated. The officer also heard an engine ticking noise suggesting it was cooling down and touched the hood. That touching was ruled by the learned Provincial Court judge to be an illegal search.
- [138] Here, the Hood Touching occurred in the Parking Garage not in the driveway of the accused's private property. In my view, the Parking Garage was akin to parking on a street. There is no privacy interest in the hood of a car. At the time of the Hood Touching, Cst. Thomson had no idea who drove the Pontiac or where it had been.
- [139] Mr. Sanchez had no territorial privacy interest in the Parking Garage. Even if he did, any information gleaned from the Hood Touching was effectively meaningless without further investigative steps.
- [140] Mr. Sanchez's application that the Hood Touching breached his s. 8 Charter rights is dismissed.

Voir Dire #3--Hard Entry

[141] At issue in voir dire #3 is the reasonableness of the SEU's entry into Unit 2214 with the use of a battering ram, followed by the breaking down of the door to the master bedroom.

Positions of the parties

[142] Both accused say that the Hard Entry was unreasonable, unjustifiable, and thus violated their s. 8 Charter rights. They say that the SEU was legally required to follow the "knock and announce" protocol as directed by the Supreme Court of Canada in *R. v. Cornell*, 2010 SCC 31 [Cornell]. They submit that there were no exigent circumstances in this case justifying any deviation from the "knock and announce" procedure.

[143] In contrast, the Crown says that the Hard Entry was reasonable in the circumstances. The SEU were faced with the unknown. The intelligence that had been gathered about the Targets and their gang associates including RCMP data base searches put together a reasonable picture of risk to officer safety and risk of drugs being destroyed if the Search Warrant was executed with the "knock and announce" protocol. All things considered, the Crown says that the Hard Entry was reasonable and justified.

Legal principles and analysis

[144] To be reasonable under s. 8 of the Charter, a search must be conducted in a reasonable manner. The onus is on the accused to prove that the search was unreasonable.

[145] The Supreme Court of Canada discussed the use of hard entries into residential premises in *Cornell*. The Court determined that except in exigent circumstances, the police must use the "knock and announce" protocol before forcing entry into a dwelling. This means that they should: 1) give notice of their presence by knocking or ringing the door bell; 2) identify themselves as police officers; and 3) state a lawful reason for entry, such as a search warrant (see *Cornell*, at para. 18).

[146] Where the police depart from this protocol and execute a hard entry, the Crown has the onus of satisfactorily explaining why the police considered it necessary to do so. It must provide evidence that supports the conclusion that the police had reasonable grounds to be concerned about officer safety or the destruction of evidence. The greater the departure from the principles of the "knock and announce" entry, the heavier the onus on the police to justify their approach: *Cornell*, at para. 20.

[147] After the fact justifications for a hard entry are unacceptable. The decision to make a hard entry must be judged by what was, or should reasonably have been, known to the police at the time prior to entry: *Cornell*, at para. 23. In short, hard entries are the exception, not the rule.

- [148] Before the SEU decided to employ a hard entry into Unit 2214, it had a duty to assess the situation and reasonably arrive at that decision: *R. v. Ruiz*, 2018 ONSC 5452 at paras. 50, 52. What was known to the SEU before the Hard Entry on March 22, 2017, was that Unit 2214 likely housed at least two suspected drug dealers, Mr. Sanchez and Mr. Hassani, who had ties to gangs in the Lower Mainland. One of Mr. Sanchez's known associates was recently murdered. Mr. Sanchez himself had survived a shooting. Drug charges against him were pending. Earlier surveillance had disclosed that both Mr. Sanchez and Mr. Hassani were using sophisticated methods of trafficking and were not amateurs. They knew that Ms. Soreni and Mr. Hassani were listed as Unit 2214's tenants. They knew that Mr. Sanchez's Pontiac arrived on March 20, 2017, two days before and had not been seen previously. They knew that all three were likely to be in the unit in the early morning of March 22, 2017. They knew from the floor plan that the master bedroom had an ensuite that was at the furthest point away from the main door. Easily disposable drugs, such as cocaine and fentanyl, were suspected to be inside. They knew that those involved in the illicit drug trade typically equip themselves with guns. They knew that rival gangs have posed as police officers in "knock and announce" rouses and that there was a possibility that those inside Unit 2214 might suspect the SEU were a rival gang and be prepared to defend themselves.
- [149] I accept Cst. Thomson's evidence that using the Key was Plan A and the use of a battering ram was Plan B. I accept that the SEU first attempted to enter Unit 2214 using the Key and that the Key did not work.
- [150] I accept that, given what Cst. Thomson knew or suspected about the accused and his associates, knocking at the door and waiting was not a realistic option. They needed an element of surprise and a Hard Entry was the only reasonable option once the Key failed. In my view, it was completely reasonable for the SEU officers to be especially concerned about the destruction of evidence and their own safety.
- [151] In the circumstances, the SEU fairly drew inferences from the knowledge it had and ruled out the "knock and announce" protocol as an appropriate or reasonable entry.
- [152] Despite the lack of evidence that the Targets might be in possession of firearms, I conclude that the execution of the Search Warrant was a high-risk situation and the destruction of evidence was a realistic concern. In my view, officers are entitled in each case to rely on internal intelligence respecting targets in considering whether the preferred "knock and announce" approach to executing search warrants is appropriate or whether a hard entry is required.
- [153] In my view, the SEU were completely justified in executing the Hard Entry into Unit 2214 and its master bedroom. They did not know, and had no way of knowing, if there were guns, weapons, or other protections on the other side of Unit 2214's front door. Section 8 of the Charter does not require the police to put their lives or safety on the line if there is even a low risk of weapons being present: *Cornell*, at para. 20. It was also reasonable for the SEU to suspect that drugs would be flushed if they followed the "knock and announce" protocol

and waited for the occupants to open the door.

[154] I conclude that the Hard Entry was reasonable and thus did not breach the accused's s. 8 Charter rights. Accordingly, the accused's application in voir dire #3 is dismissed.

Voir Dire #4--Delayed Access to Counsel

[155] The question here is whether the Crown has discharged its burden of showing that, in all the circumstances of this case, the delay in providing the accused access to counsel was reasonable.

Positions of the parties

[156] Both accused argue that, contrary to s. 10(b) of the Charter, the SEU failed to provide them access to counsel without delay following their arrest. Ms. Soreni says that she was denied access to counsel for one hour and forty-nine minutes following her arrest (one hour and thirteen minutes from arriving at the detachment). Mr. Sanchez says that he was denied access to counsel for one hour and forty-one minutes from the time of his arrest (one hour and three minutes from arriving at the detachment). Both say that the delay in the circumstances was unreasonable and cannot be justified. The accused suggest that instead of waiting to transport the accused to the Kelowna detachment and process them, the plan should have included arrangements to provide them cell phone access to counsel at the scene.

[157] The Crown says that access to counsel was provided to the accused as soon as reasonably possible in the circumstances. The SEU had planned on arresting three individuals, not four, and all had to be properly searched, processed through CABS, and placed in cells prior to telephone access to counsel being granted. Cst. Chapman was responsible for the processing and handling of the detainees and did so as efficiently and promptly as the circumstances and resources permitted. Any delay in the accused being placed in the telephone rooms and provided access to counsel was due to the necessity of Cst. Chapman methodically performing his duties and dealing with the accused one-by-one.

[158] The Crown further submits that providing the accused with cellphones on the scene would not have been reasonable in the circumstances because:

- a) there is no obligation on officers to allow the accused use of their personal or police-issued cell phones;
- b) there was no realistic way of providing the accused with a private conversation with their legal counsel; and

- c) the circumstances were that they had just executed a search warrant in a significant Drug Operation and there were police and other security concerns mandating the necessity of individually processing the accused, including searching them for drugs or weapons before those concerns could be quelled.

Legal principles and analysis

[159] Section 10(b) of the Charter imposes a duty upon the police on arresting or detaining a person:

- a) to inform the detainee of his or her right to retain and instruct counsel;
- b) if a detainee has indicated a desire to exercise this right, to provide the detainee with a reasonable opportunity to exercise the right (except in urgent and dangerous circumstances); and
- c) to refrain from eliciting evidence from the detainee until he or she has had that reasonable opportunity (again, except in cases of urgency or danger). See *R. v. Taylor*, 2014 SCC 50 at para. 23 [Taylor].

[160] Cst. Chapman properly advised both accused of the reasons for their respective arrests immediately. Accordingly, their s. 10(a) Charter rights were not violated and the accused do not challenge the point.

[161] I accept that, at the same time, Cst. Chapman also properly informed both accused of their respective s. 10(b) rights. When asked if they understood, both accused stated that they did and that they wished to exercise their right to speak to counsel.

[162] Immediately following their arrests, the accused were transported separately to the Kelowna RCMP detachment for processing; a drive of about 15-25 minutes.

[163] The arrest plan did not include a plan to allow anyone arrested within Unit 2214 access to counsel at the scene.

[164] Given the circumstances, I conclude it was reasonable for the SEU to transport the accused to the Kelowna detachment, process them, and then make arrangements to provide them with access to counsel. Indeed, the accused do not strenuously argue that taking them to the detachment prior to giving them access to counsel was unreasonable. Their main complaint is that making them wait for one hour and three minutes, in the case of Mr. Sanchez, and one hour and forty-nine minutes, in the case of Ms. Sanchez, after they arrived at the detachment was an inexcusable and an unreasonable delay.

[165] It is clear that the police's constitutional duty to provide detainees access to counsel without delay in s. 10(b) means at the first reasonably available opportunity. The burden is on the Crown to show that a given delay was reasonable in the circumstances. Whether a particular delay in facilitating access to counsel is reasonable depends on each case's facts: *R. v. Suberu*, 2009 SCC 33; *Taylor*, at para. 24.

[166] I conclude that the Crown has not met the burden of adequately explaining Ms. Soreni's and Mr. Sanchez's delay from the time of their respective arrivals at the detachment until they were given access to counsel. This conclusion is based on the following:

- a) The Crown did not lead evidence to explain why it took 23 minutes to complete the secondary search of Ms. Soreni when the secondary search of the other detainees only took a matter of minutes; this passage of time is inconsistent with the stated purpose of the search.
- b) The further delay from 8:41 to 9:27 before Ms. Soreni was given telephone access to counsel was inadequately explained. The suggestion that Cst. Chapman was the one charged with facilitating access to counsel and that he was busy processing the four detainees, without more, is unsatisfactory. Other officers, such as Cst. Barnard were standing by and available to assist. There was no valid explanation for why these officers could not have arranged for access to counsel.
- c) There were two functioning lawyer telephone rooms available at the detachment that could have been used simultaneously.
- d) The execution of the Search Warrants and the arrests of the accused were planned and there was no reason why Cst. Chapman needed to deal with managing access to counsel on his own. Concerns regarding officer safety and/or preservation of evidence that may have existed at the scene had long since past. The SEU officers cannot rely the lack of adequate planning or resources available at the detachment to justify the delay in allowing the accused access to counsel. There was a myriad of options available to the SEU including ensuring Cst. Chapman had assistance processing the accused at the detachment;
- e) Cst. Barnard's evidence was clear that he was instructed by Cpl. Hare to tell Cst. Chapman to delay or suspend access to counsel until the search warrant was completed. Both Cst. Chapman and Cpl. Hare were equivocal when the proposition was put to them stating simply that they didn't recall that instruction being given. Cpl. Hare stated that he had given that instruction in other cases. I conclude that he did so in this case as well.

[167] The accused's s. 10(b) rights are not just the right to counsel, but the right to counsel at the earliest practical opportunity. That opportunity arose immediately after the secondary searches of them were complete at the detachment.

[168] While I appreciate that each case turns on its facts and taking a stopwatch approach to access to counsel is not appropriate, it is incumbent on the Crown to explain the delay. Similar to the finding in *R. v. Bentley*, 2019 BCSC 2407, no reason has been given why, as part of the planned arrest, plans could not have been made to facilitate access to counsel within minutes of the accused's arrival at the detachment.

[169] In my view, the Crown has failed to discharge its burden to explain the significant delay in allowing the accused access to counsel once arriving at the detachment.

[170] Accordingly, I find that both of the accused's s. 10(b) right to access counsel without delay were breached.

Summary

[171] With the exception of Ms. Soreni's application respecting her informational privacy expectation on the Form K, which is allowed, the accused's applications respecting the Reasonable Expectation of Privacy Issue, the Hood Touching Issue, and the Hard Entry Issue are dismissed.

[172] The accused's applications respecting the Delay issue are allowed.

"G.P. Weatherill J."

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