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R v. Kang

2020 BCSC 1474

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2020 BCSC 1474 R. v. Kang

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Kang,

2020 BCSC 1474

Date: 20201005

Docket: 27786

Registry: Vancouver

Regina

v.

Sameet Kang, Gary Kang, Manveer Braich, Kristoffer Ghuman and Jitesh Vagh

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Corrected Judgment: The first page of the judgment was corrected on October 6, 2020.

Before: The Honourable Justice Winteringham

Ruling - Voir Dire #2 -

Reasonable Expectation of Privacy -- Standing

(May 23, 2017 Production Order)

Counsel for Federal Crown:

A. Chan

M. Wiancko

Counsel for the accused, Gary Kang:

Simon Buck

Counsel for the accused, Manveer Braich:

J. Desbarats

Counsel for the accused, Kristopher Ghuman:

S. Mahmood

Counsel for the accused, Jitesh Vagh:

T. Anderson

A. Dorin

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October 5, 2020

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I. OVERVIEW

- [1] In the spring of 2017, the Vancouver Police Department ("VPD") began investigating a number of rival criminal groups operating in the Lower Mainland. Task Force Tourniquet, a proactive task force including members from the VPD and other police agencies in the Lower Mainland, was the policing response to the conflict. Because of the breadth of the investigation, Task Force Tourniquet spawned a number of other police investigations, including Project Territory, an investigation into the alleged drug trafficking activities of two different groups - the Kang group and the Latimer group.[1]
- [2] During the investigation, the police applied for and obtained a number of judicial authorizations.
- [3] This ruling deals exclusively with the issue of standing to challenge one of the production orders obtained during the investigation. Specifically, the applicants[2] seek standing to challenge the production order obtained by the police on May 23, 2017 for CCTV security camera footage ("CCTV footage") and fob access records from the Alexandra, a multi-unit residential building at 1221 Bidwell Street, Vancouver ("Bidwell") ("May 23, 2017 Production Order"). The police believed members of the Kang group were using suite 907 at Bidwell as a drug stash house.
- [4] The police obtained several production orders from May 2017 through October 2017. The Crown concedes that each applicant has standing to challenge the production order if their image was captured. In other words, the Crown concedes that Jitesh Vagh has standing to challenge the May 23, 2017 Production Order because his image was captured during the time specified in that production order. The Crown contends that the other applicants do not have standing to challenge the May 23, 2017 Production Order, because their images were not captured nor did they have any connection to the fob access records during the specified time period. In essence, the Crown submits that the applicants do not have a reasonable expectation of privacy in the material unless their image was captured during the relevancy

of the production order.

- [5] The applicants submit the Crown has taken an unduly narrow approach to reasonable expectation of privacy because the Crown has grounded its submission exclusively on territorial privacy. The applicants take the position that informational privacy (as well as territorial privacy) is the basis for their standing to challenge the May 23, 2017 Production Order. And when framed as a violation of informational privacy rights, the applicants submit that the Crown's position must fail. Generally, the applicants say they have standing because the material seized pursuant to the May 23, 2017 Production Order engaged their reasonable expectation of privacy. That is because even though the police may not have seized their image or fob usage, there was sufficient connection of each (by virtue of their alleged membership in a gang and/or because of inferences the police were able to draw from the material they did obtain) to the material such that they had a reasonable expectation of privacy in it.
- [6] The parties agree that the Court is bound to follow *R v. Latimer*, 2020 BCSC 488 and *R v. Kim*, 2020 BCSC 1064 [Kim (Brighthouse Material)] though they disagree as to how those decisions govern the analysis in the circumstances presented here. The Crown says that the applicants may have a reasonable expectation of privacy in common areas of Bidwell but only to the extent of the CCTV capturing their image.
- [7] I bear in mind that this is a standing application. That is, in the words of Chief Justice McLachlin at para. 51 of *R v. Marakah*, 2017 SCC 59, the applicants merely seek the opportunity to argue one's case.[3]
- [8] These reasons will proceed in four parts. First, I will briefly set out the position of the parties. Second, I will detail the evidence on the application. Third, I will analyze the evidence and summarize the Court's findings based on that evidence. Fourth, I will explain the governing legal principles and apply them to the Court's findings.
- [9] At the outset, however, I wish to address a procedural issue that arose on the third day of the voir dire. The voir dire to challenge the May 23, 2017 orders commenced with an application by Mr. Braich and Mr. Vagh to cross-examine the affiant of the Information to Obtain ("ITO") filed in support of the May 23, 2017 applications for the orders sought, the Crown having conceded limited standing to these two applicants (Braich, tracking devices; Vagh, CCTV footage). At the outset of the voir dire, Mr. Ghuman and Gary Kang did not seek a ruling about their standing to challenge the May 23, 2017 Production Order. Therefore, the voir dire proceeded on the basis of Mr. Vagh and Mr. Braich's (albeit limited) standing.
- [10] I granted leave to Mr. Braich and Mr. Vagh to cross-examine the affiant on certain areas identified by counsel and the cross-examination occurred thereafter.

- [11] Counsel then determined that the issue of standing needed to be resolved before proceeding further. At that point, the Crown sought to move into a third voir dire so that the Court could resolve the standing issue for all of the Bidwell production orders. The applicants resisted stating that the issue could be properly determined on the second voir dire, being the applicants' reasonable expectation of privacy for material seized pursuant to the May 23, 2017 Production Order.
- [12] I agreed with the procedure proposed by the applicants. That is, the Court would determine standing for the four applicants on the May 23, 2017 Production Order in the context of the second voir dire.
- [13] As for the cross-examination that occurred, Cst. Nielsen's testimony was not addressed on the issue of standing and I have not referred to it.

II. POSITION OF THE PARTIES

- [14] The parties urge very different findings regarding the applicants' reasonable expectation of privacy in the CCTV footage and fob access records for Bidwell. The applicants say that they each had a reasonable expectation of privacy in the material seized, regardless of whether their image appeared during the time specified in each production order. That is because, the applicants submit, informational privacy is what is principally engaged in this application though territorial privacy interests also play a role. Following the Latimer and Kim decisions, and jurisprudence dealing with reasonable expectation of privacy, particularly the more recent s. 8 Charter cases, the applicants contend the court must ask "what were the police really after?" Here, the applicants submit, the police were "really after" the following:
- a) To determine where the applicants were going and what they were doing;
 - b) To confirm the information from a confidential informer that Mr. Braich was a drug courier for the Kang group and that he stored drugs at a stash house;
 - c) To determine whether Bidwell was a stash house;
 - d) To learn who the applicants were meeting, who their associates were or to confirm that they were members of the Kang group; and
 - e) To identify the other members of the Kang group and detail their activities at Bidwell.
- [15] Each applicant submitted they had a reasonable expectation of privacy in the Bidwell material and, as set out in the paragraphs that follow, described the basis for their submission. I will then set out the position of the Crown.
- [16] Gary Kang's image was captured by CCTV on September 11, 2017. Gary Kang submits that is sufficient to grant him standing to challenge the May 23, 2017 Production Order, relying on informational privacy rights and, to a lesser extent, territorial privacy rights. Gary Kang contends that the voir dire evidence establishes that the police were seeking much more

than CCTV footage and fob records when they applied for the May 23, 2017 production order. Rather, the police were seeking to establish the identities of individuals, their associates, their movements, their clothing, whether they spent the night, whether they used cell phones, and the vehicles they were driving at any given time. The police intended to use the evidence of the CCTV footage and fob records to reveal information about the Kang Group and its individual members. Gary Kang, as an alleged member of the organization, has a reasonable expectation of privacy as connected to the activities of the Kang Group. He says that his informational privacy is revealed through the evidence obtained about the activity of the group. Though to a lesser extent, Gary Kang submits that the police were interested in the activities occurring inside suite 907 at Bidwell and thus territorial privacy is also engaged. In other words, he says territorial and informational privacy overlap because the information obtained by the police allowed the police to reach conclusions about suite 907.

- [17] Manveer Braich asserts a privacy interest in the CCTV footage, fob records and Form K materials obtained from Bidwell from the first time the applicants were observed at Bidwell on May 4, 2017 until the last time on October 22, 2017. For all but two of the Bidwell production orders, the Crown concedes Mr. Braich's standing. Mr. Braich asserts a right to challenge the two Bidwell production orders where the crown opposes standing, the May 23, 2017 production order and the July 18, 2017 production order.
- [18] Kristoffer Ghuman advances a similar position to the other applicants. He submits that the police obtained images and fob access records that suggest he was at Bidwell six times. Despite the Crown's concession that he can challenge the production orders relevant to the seizure of that material, Mr. Ghuman submits that he has a reasonable expectation of privacy in all of the CCTV footage and fob records obtained by the police from May 4, 2017 through October 22, 2017.
- [19] Finally, Jitesh Vagh, asserts that he has a reasonable expectation of privacy with respect to all of the CCTV footage and fob access records obtained from Bidwell. That is, despite the Crown's concession that he has standing to challenge only the May 23, 2017.
- [20] The Crown, on the other hand, says this application is really about territorial privacy rights. But for a limited concession for Mr. Vagh, the other applicants do not have a reasonable expectation of privacy in the material obtained pursuant to the May 23, 2017 Production Order because their images were not seized in the CCTV footage during the time frame specified.
- [21] Though the Crown disagrees with the ruling in *Latimer*, they have taken the position that the applicants have standing to challenge the production orders where their images were seized. The Crown does not agree that the applicants have a reasonable expectation of privacy in additional records such as CCTV footage and fob records for others accessing suite 907 at Bidwell.

- [22] The Crown submits that neither Mr. Braich, Mr. Ghuman nor Mr. Vagh have established standing after engaging in the reasonable expectation of privacy analysis in *R. v. Edwards*, [1996] 1 S.C.R. 128 (territorial privacy) and *R. v. Spencer*, 2014 SCC 43 (informational privacy).
- [23] The Crown raises five additional arguments in support of its position.
- [24] First, the Crown relies on *R. v. White*, 2015 ONCA 508, and *R. v. Yu*, 2019 ONCA 942, to demonstrate that standing to challenge images of others depends on the accused's connection to the unit. The Crown submits, "when the accused is an owner or resident of the unit, he may have standing to challenge information of others attending his unit. If the accused is not a resident or occupier of the unit, standing to challenge others attending depends on his level of control over the unit and if the accused was inside the unit at the time of the attendances. None of these situations assist the accused in this case."
- [25] Second, the Crown contends that the ruling in *Latimer* does not expand privacy to images of others. In particular, the Crown submits that "the ruling in *Latimer* did not address directly the question before this Court: does an accused have a reasonable expectation of privacy over images of others, including co-accused and third parties. Ker J. was never asked that question, as it was clear the body of material included images of all three accused (*Latimer*, *Pereira* and *Szucs*). The court was not asked to make any distinctions. There is no clear finding in *Latimer* that an accused's whose own image was not obtained pursuant to that production order ought to have standing to challenge that production order."
- [26] Third, the Crown relies on *R v. Kang*, 2020 BCSC 1151 to support its contention that the court has already ruled that an accused has no right to excision of evidence obtained in breach of co-accused's rights.
- [27] Fourth, the Crown submits that the rulings in *R v. Kim*, 2019 BCSC 2150 [*Kim (Standing)*] and *Kim (Brighthouse Material)*, though dealing with common areas, do not address the specific issue before this Court. The Crown states that the court in the *Kim* decisions did not have to address the question of whether someone who was not captured in security camera footage ought to be granted standing to challenge a production order for that video.
- [28] Finally, the Crown submits that standing is not expanded by (1) the Crown's theory (that all applicants accessed the common areas of Bidwell using fobs associated to suite 907 on various dates) or (2) by the nature of the conspiracy and criminal organization charges (being part of a criminal group does not imbue the accused with more rights). That is because, the Crown submits, Charter rights are personal rights. In that vein, the Crown contends that the applicants need to demonstrate a connection to the unit before they can challenge the video recordings of others attending at the unit.

III. EVIDENCE ON THE APPLICATION

[29] On the issue of standing, the parties tendered a body of evidence consisting of an Agreed Statement of Facts (including later production orders for Bidwell), the testimony of Det/Cst. Unheim, and the ITO of Cst. Nielsen filed in support of the various orders[4] sought on May 23, 2017.

A. Agreed Statement of Facts

[30] I note that most of the evidence on the voir dire is not in dispute. I start with the Agreed Statement of Facts (Bidwell).

1) Building description

[31] Bidwell is a 21 level high-end condominium strata building in the West End of Vancouver. Bidwell has a penthouse on the 21st floor and two "sub-penthouses" on the 20th floor; a gym, communal room and residential units on the 3rd floor; and eight residential units on each of the remaining floors. Bidwell is a secure building requiring access by an electronic key fob. A full time concierge is present in the lobby of Bidwell, days, evenings and weekends. At the material time, Angela Mueller was Bidwell's head concierge and Paul Kral of Pacific Quorum Properties Inc. was the property manager for Bidwell.

[32] Bidwell could be accessed in the following manner:

- a) Through an entrance located at the front requiring fob access;
- b) Through the parking garage entrance in the south lane of Davie St., the first level of the parking garage being open to the public and operated by Westpark;
- c) A fob is required to access the resident parking through the main and secondary gate and each unit has individual parking stalls assigned;
- d) A fob is required to access the elevator lobby area on each level[5] of the underground parking garage;
- e) Each floor requires fob access and the occupants have access only to their floor, the parking garage and common areas (third floor gym, fifth floor lounge and garbage room); and
- f) The two elevators in Bidwell require fob access.

[33] In 2017, the security cameras at Bidwell operated as follows:

- a) The security cameras captured various angles of common spaces including the parking garage, lobbies, and elevators;
- b) On P1 of the parking garage (visitors' parking), the security cameras captured images of:
 - i. vehicles as they entered the resident parking garage gate; and
 - ii. a view of a main door entry gate to the P1 elevator lobby;

- c) On P2 of the parking garage (resident parking), the security cameras captured the resident parking area and entrance to the P2 elevator lobby;
 - d) For each of the parking garage levels, the security cameras captured the elevator lobby entrance;
 - e) The security camera in the parking garage captured parking stall #76, associated to suite 907; and
 - f) In the elevators, the security cameras captured the interior of the elevator, including the fob user and the landing area of each floor as the elevator doors opened.
- [34] Additionally, there were security cameras at the main floor lobby and main floor entrance doors as well as a security camera capturing a view of the garbage room.
- 2) Initial Investigation of Bidwell - Events of May 4 and 5, 2017
- [35] Early in Project Territory's investigation, Bidwell was identified by the police as a point of interest. On May 4, 2017, members of the surveillance team saw Mr. Braich leaving the parking garage of Bidwell at 1:09 p.m. driving a red Mazda 5. On May 5, 2017, Det/Cst. Unheim went to Bidwell, met with Ms. Mueller, viewed footage from the security camera from May 4 and 5, 2017 and obtained a video clip of the footage.
- [36] Additionally, Det/Cst. Unheim asked Ms. Mueller to locate video footage for the time on May 4, 2017 when the surveillance team had observed Mr. Braich leaving the parkade. She observed the following from the May 4, 2017 CCTV footage:
- a) At 12:46 p.m., Mr. Braich drove the Mazda 5 into the parking garage, used a fob to enter the resident parking area and parked in stall #76 (P2);
 - b) At 12:47 p.m., Mr. Braich used the fob to enter the P2 elevator lobby and then used a fob to access the 9th floor;
 - c) Mr. Braich was wearing a navy blue windbreaker jacket, light grey sweat pants, white runners, and had a full turban with a full long beard. He was wearing a dark backpack, either black or grey, with a horizontal stripe in the middle;
 - d) At 12:55 p.m., Mr. Braich entered the elevator on the 9th floor carrying the same backpack and used the fob to take the elevator to P2; and
 - e) Mr. Braich sat in the Mazda 5 for a number of minutes while on P2 and was observed laying down on the ground and looking up at the underside of the Mazda.
- [37] Det/Cst. Unheim requested further information from Ms. Mueller and received information pursuant to those requests as follows:

- a) Det/Cst. Unheim wanted to know which suite was associated to the fob and parking stall used by Mr. Braich on May 4, 2017 and was told that the fob (#201608) and parking stall (#76) were associated to suite 907;
 - b) Det/Cst. Unheim asked Ms. Mueller to run the fob activity for suite 907 and learned that the records were only saved for ten days. Ms. Mueller pulled up the records from April 27 through May 5, 2017 and told Det/Cst. Unheim that fob #201608 was last activated on May 5, 2017 at 1:16 a.m.; and
 - c) Ms. Mueller provided Det/Cst. Unheim with the Form K for suite 907 showing:
 - i. David Webb was listed as the tenant with a one year lease commencing on January 15, 2017; and
 - ii. Peter Malek was listed as the agent for the landlord.
- [38] Det/Cst. Unheim viewed the May 5th, 2017 CCTV footage and observed Mr. Braich enter the building with another male at approximately 12:36 a.m., ride the elevator to the 9th floor and leave Bidwell approximately one hour later.
- [39] On May 5, 2017, Ms. Mueller provided the following additional information to Det/Cst. Unheim regarding suite 907:
- a) There were two fobs associated to suite 907: #201608 and #104043;
 - b) The owner of suite 907 was Sharam Malekyazdi, part of the Millenium developer group that built Bidwell; and
 - c) Omid Machinsi, agent for suite 907 and 1701, had called and wanted to confirm parking stall #76 was for suite 907.
- [40] Between May 3, 2017 and October 22, 2017, investigators reviewed 114 days of Bidwell CCTV footage as it related to fob activity.
- [41] The police did not have a production order when Det/Cst. Unheim viewed the May 4 and 5, 2017 footage.
- 3) Bidwell Production Orders
- [42] The police went to Bidwell a number of times between May and October 2017 to obtain fob records and security video associated to suite 907 from Ms. Mueller and other Bidwell representatives.
- [43] The first production order for Bidwell was obtained on May 18, 2017 and served the next day.
- [44] The police obtained nine production orders for the security video footage and fob records on the following dates:

- a) Production order obtained on May 23, 2017 for electronic key fob records for suite 907 for April 1, 2017 to May 23, 2017 and building security camera footage from May 1, 2017 to May 23, 2017;
- b) Production order obtained on June 14, 2017 for electronic key fob records and building security camera footage for May 24, 2017 to June 14, 2017;
- c) Production order obtained on July 7, 2017 for electronic key fob records for suite 907 and building security camera footage for June 15, 2017 to July 7, 2017;
- d) Production order obtained on July 18, 2017 for Form K occupancy information for all occupants of the 9th floor of Bidwell; electronic key fob records for all occupants of the 9th floor at Bidwell and building security video footage associated to the electronic key fobs assigned to the occupants of the 9th floor at Bidwell for July 8, 2017 to July 18, 2017;
- e) Production order obtained on August 11, 2017 for electronic key fob records associated to suite 907 and building security video footage, associated to the electronic key fobs assigned to suite 907 for July 19, 2017 to August 11, 2017;
- f) Production order obtained on September 6, 2017 for electronic key fob records of persons associated to suite 907 and 1701 and building security video footage of persons associated to 907 and 1701 for August 12, 2017 to September 6, 2017;
- g) Production order obtained on October 6, 2017 for electronic key fob records of persons associated to suite 907 and 1701 and building security video footage of persons associated to suite 907 and 1701 for September 17, 2017 to October 6, 2017; and
- h) Production order obtained on November 1, 2017 for electronic key fob records of persons associated to suite 907 and building security footage of persons associated to suite 907 for October 7, 2017 to November 1, 2017.

[45] The parties provided an example of the sort of information obtained from the fob record log. The example shows the use of fob #201608 on May 19, 2017.[6]

[46] The parties agreed that the fob records for the two fobs associated with suite 907 and the corresponding video showed the following:

- a) Mr. Vagh was observed three times: May 18, 2017 with Randy Kang, and August 3, 2017 and September 1, 2017 with Mr. Braich;
- b) Gary Kang was observed one time on September 11, 2017 with Mr. Braich and Mr. Ghuman;
- c) Mr. Ghuman was observed six times: July 21, 2017 with Mr. Braich; August 5 and 9, 2017 with Mr. Braich; September 11, 2017 with Mr. Braich and Gary Kang; and October 5 and 6, 2017 with Mr. Braich;
- d) Mr. Braich was observed 62 times over 53 days from May 3, 2017 through October 13, 2017.[7]

- [47] The camera in the elevator would capture individuals exiting the elevator on the 9th floor and would show the area in front of the elevator door. This camera did not capture a view of the front door to suite 907. There were not any cameras located on the 9th floor of Bidwell. The CCTV footage never captured any of the applicants entering suite 907.
- [48] The security video and fob records showed others attending at Bidwell and using the fobs associated to suite 907 from May 3, 2017 through October 22, 2017 as follows:
- a) Gurvinder Randhawa attended approximately 51 times over 37 days. Mr. Randhawa attended alone 46 times, with someone other than the accused three times and two times with one of the accused;
 - b) Jasondeep Uppal attended approximately 31 times over 26 days. Mr. Uppal attended alone 26 times, with someone other than the accused one time and four times with one of the accused;
 - c) Ranjeev Augla attended six times over six days with Mr. Braich;
 - d) Randy Kang attended nine times over nine days. Randy Kang attended alone two times, with someone other than any of the accused three times and four times with one of the accused.
- [49] Mr. Uppal and Mr. Randhawa used both of the fobs associated to suite 907 (#104043 and #201608). Randy Kang used one of the fobs associated to suite 907 (#104043)

B. Testimony of Det/Cst. Unheim

- [50] I turn then to the testimony of Det/Cst. Unheim.
- [51] Much of Det/Cst. Unheim's direct examination formed a part of the Agreed Statement of Facts so I will not repeat that aspect of her testimony here. In July 2017, she became the file coordinator for Project Territory. Before her appointment as file coordinator and relevant to the standing issue on this voir dire, she was responsible for gathering the Bidwell CCTV footage and fob access records from the beginning of May to July 21, 2017.
- [52] Before May 19, 2017, Det/Cst. Unheim agreed that the VPD never made a formal request for Bidwell's CCTV footage, fob records or Form K. As described more fully below, Det/Cst. Unheim spoke with Ms. Mueller in person and "she was willing to provide what she did" to Det/Cst. Unheim.
- [53] To that end, Det/Cst. Unheim went to Bidwell on May 5 and again on May 9, 2017. On both occasions, she reviewed the CCTV footage and fob records and did so without a production order.

- [54] Det/Cst. Unheim testified that the CCTV footage showed where the person parked and movements in and out of the elevator. The fob records would show the fob used to enter the parking garage and the elevator and access to the 9th floor. She stated the individuals would generally remain on the 9th floor for a short time and, at the most, four hours. She testified that no one (believed to be associated to suite 907) stayed overnight after accessing the 9th floor.
- [55] Det/Cst. Unheim described the view the CCTV captured once the person departed the elevator on the 9th floor. She testified that you could see the individual turn to the right or the left after the elevator door opened. She testified that the camera did not capture the door of any of the suites - no apartment doors were visible from the elevator camera. If an individual was going to suite 907, they would turn right once off the elevator.
- [56] It seems individuals believed to be associated to suite 907 occasionally turned left instead of right after they got off the elevator. Because this had occurred a few times, the police obtained a production order for the Form Ks associated with all of the tenants on the 9th floor as well as the fob activity and CCTV footage for the 9th floor.[8]
- [57] After "looking at all of the information", Det/Cst. Unheim testified that the police concluded no other suites on the 9th floor were being used by the targets of Project Territory.
- [58] Det/Cst. Unheim testified about fob usage specific to the applicants. In particular, she testified that based on her knowledge of the investigation and with respect to the applicants only, it appeared that Mr. Braich, Mr. Vagh and Mr. Ghuman had used one or the other fob associated to suite 907 after the May 23, 2017 production order. The police believed that Gary Kang did not use either fob.
- [59] Mr. Randhawa used fob #201608 and Mr. Uppal used fob #104043. They switched the fobs at some point in June 2017 and thereafter used the other fob. Det/Cst. Unheim testified that on July 17, 2017, Mr. Uppal was arrested because the police believed he was transporting illegal drugs from British Columbia to Alberta. At the time of Mr. Uppal's arrest, he was found in possession of fob #201608. It was believed that Mr. Uppal did not return to Bidwell after his arrest.
- [60] The police next observed fob #201608 being used by Mr. Braich on July 21, 2017. From that date until October 2017, Mr. Braich was believed to be using fob #201608 when he accessed Bidwell. However, Det/Cst. Unheim testified that Mr. Braich was not believed to have used any fob from May 5, 2017 through July 21, 2017. During that time period, Mr. Braich was observed at Bidwell in the company of either Mr. Uppal or Mr. Randhawa and the police observed those two, not Mr. Braich, using the fob.
- [61] Det/Cst. Unheim testified that the Project Territory investigators believed that no one was living at suite 907. Rather, they believed that suite 907 was a drug stash house used by the accused until mid-October 2017.

- [62] Det/Cst. Unheim was cross-examined about the police theory with respect to the Kang group, including who they believed were its members and details about its operations as a criminal organization. She agreed that the police connected Mr. Braich and Randy Kang to Bidwell after the police first observed Mr. Braich attending at Bidwell on May 4, 2017 while conducting surveillance. Det/Cst. Unheim agreed that Mr. Braich and Randy Kang were believed to be members of the Kang group.
- [63] The surveillance team's observations of Mr. Braich on May 4, 2017 culminated in Det/Cst. Unheim attending Bidwell the following day, without a production order, to view (and in part, seize) the CCTV footage. She agreed that the police were interested in Mr. Braich's attendance the previous day and that ultimately the investigative team came to believe that Bidwell was a stash site used by the Kang group. Det/Cst. Unheim agreed that the police were interested in Mr. Braich's attendance as well as who else may be attending at Bidwell.
- [64] To be clear, the police never observed anyone go inside of suite 907. Rather, the linkage to suite 907 was CCTV footage and corresponding fob records.
- [65] To that point, Det/Cst. Unheim agreed (during cross-examination by Ms. Dorin) that the investigators assumed "these people accessing units who have fobs and people with them were potentially members of Kang group" . . . and "were likely involved in drug trafficking."
- [66] Det/Cst. Unheim testified that the police "were interested in whoever happened to come and go from suite 907 and what they were doing is what we were looking at." Additionally, Det/Cst. Unheim agreed that the information obtained on May 5 (and on May 9, 2017) provided the police:
- a) With respect to the fob records, an ability to look at trends to see how long people stayed at suite 907 and subsequently that information was used to help formulate a theory about what was occurring at the suite;
 - b) By correlating the fob records with the video footage, the ability to identify who was attending at the 9th floor; and
 - c) The ability to connect Mr. Machinski to suite 907, someone who was believed to assist the Kang group in locating stash sites.
- [67] On May 10, 2017, Det/Cst. Unheim emailed Ms. Mueller requesting that Bidwell maintain the video footage and fob records (because Bidwell had a policy of overwriting the information every 10 days). In her email, Det/Cst. Unheim asked for the following pieces of information from Bidwell relating to suite 907 and the activities connected to that suite:

I wanted to see if either of our friends (the bearded man or the very large man) were seen at 907 yesterday or so far today?

I'm not sure if it's possible for you to give me any updates if they show up each day? If it's too much work don't worry about it.

[68] Ms. Mueller responded the same day stating:

I was thinking the same when I checked this morning but wasn't sure if you want me to send updates. I am checking anyway so I might as well send it to you. There was activity yesterday. The large man came with another guy. No bags in but a small bag out. They stayed from 11:19 a.m. until 12:57 p.m. See video and photo. No activity for today so far. Will keep you updated.

[69] A few moments later, Det/Cst. Unheim wrote:

Going forward, if you are able to grab these quick video clips and maybe keep them in your desktop folder? I don't want to take too much more until we are sure about where we are going with the investigations.

Perhaps once every day or two you could just send me an email saying if there has been activity and who it was. That would be really helpful.

[70] Det/Cst. Unheim's cross-examination revealed that the police had a theory about Bidwell and its use by the Kang group as a stash site. She agreed that the following paragraph, taken from the ITO prepared in support of a wiretap authorization in 2018, accurately reflected the views of Project Territory investigators at the time:

Unit 907 of 1221 Bidwell Street was identified by investigators as a stash site location in May 2017. I believe that this condominium was used exclusively as a stash site location for drugs and other offence related property by the Kang group from May 2017 until October 22, 2017 when the contents were moved to Unit 2401 of 833 Seymour Street. During this time period, members of the Kang group including Randy Kang, Gary Kang, Braich, Vagh, Jasondeep Uppal, Randhawa, and Ghuman were observed attending the stash site. Randy Kang, Braich, Jasondeep Uppal and Randhawa appeared to control access to this stash site as they were seen using the assigned key fobs.

[71] Det/Cst. Unheim testified that Project Territory investigators were able to draw inferences from some of the applicants' attendance at Bidwell.

[72] Regarding the accuracy of the information found in excerpts from the ITO for the wiretap authorization in 2018, Det/Cst. Unheim agreed that the following paragraph was true:

Between [May] 3rd, 2017 and October 22nd, 2017 investigators reviewed 114 days of building security camera footage for 1221 Bidwell Street [an address I believe was used as a stash site for drugs until the stash site was moved to another location] obtained pursuant to Production Orders . . . The building security camera footage in conjunction with the electronic key fob records allowed investigators to determine that Randhawa, Randy Kang, Jasondeep Uppal and Braich attended the 9th floor of that building using a fob associated to unit 907. Investigators also observed them coming and going with bags consistent with drugs being taken to and from unit 907. The review of the building security camera footage in conjunction with the electronic key fob records also allowed investigators to determine where and what Randhawa, Randy Kang, Jasondeep Uppal and Braich did before and after attending the 9th floor of 1221 Bidwell Street to

identify the vehicles they were driving and to identify the persons with whom they met. The building security camera footage allowed investigators to determine what phones Randhawa, Randy Kang, Jasondeep Uppal and Braich were using. Finally, reviewing the building security camera footage allowed investigators to determine that Braich and Randhawa moved the drug stash site location from unit 907 of 1221 Bidwell Street to another location on October 22, 2017 and were no longer using this location after that date.

- [73] Additionally, Det/Cst. Unheim agreed that the information contained in the above paragraph demonstrated the uses the investigators were able to make of the material seized from Bidwell. She agreed that the Bidwell material permitted the investigators to draw inferences from the information, permitted the police to study the images captured, and in that way, the police were "able to obtain more information about targets of the investigation", albeit, she testified "we could only use it in so far as the point of time they were at Bidwell - we could only use what we could see on the video." However, she agreed that the Bidwell material allowed the police to identify routines, targets and associates.
- [74] In re-examination, Det/Cst. Unheim noted that the police learned, during the course of the investigation, that membership in the Kang group changed stating, "it seemed to be a constantly fluid and evolving group for us to follow."
- [75] As for Mr. Vagh, Det/Cst. Unheim agreed that his image was captured on May 18, 2017 and Cst. Jaswal identified him on May 19, 2017.
- [76] Det/Cst. Unheim was cross-examined about her early knowledge of Mr. Braich and his connection to the Kang group. She agreed that she was generally aware that the police had received information about him from a confidential informer indicating that he was a member of the Kang group, was a drug courier for the Kang group, and that he was storing drugs at stash sites. Det/Cst Unheim did not agree that the sole purpose of her first attendance at Bidwell was to corroborate the confidential informer's information. Rather, she testified that she

"was assigned to go to Bidwell to see what was occurring there . . . I was conducting a general investigation to see if we needed to investigate that location further."

Based on the early observations, Det/Cst. Unheim suspected that suite 907 of Bidwell was being used as a stash site and based on their further observations, it became apparent that Bidwell was being used as a stash house. She agreed that one of the things she was able to confirm was "an association" to a particular suite.

- [77] Det/Cst. Unheim testified that the police were, by virtue of the fob records, able to confirm Mr. Braich's fob usage. After confirming that Mr. Braich was using a key fob associated to suite 907, the police looked at the number of key fobs for suite 907 and then looked at the records for those key fobs and corresponding video footage. Det/Cst. Unheim agreed that the police were able to identify one of the males in the video as Randy Kang (from CCTV footage dated May 15, 2017), who they believed to be a leader of the Kang group. From there, Cst.

Jaswal (an investigator familiar with the identities of members of the Kang group) identified another individual, Mr. Randhawa, from video footage and stills dated May 15, 2017.

- [78] Det/Cst. Unheim agreed that her observations on May 5, 2017 helped to identify those connected to suite 907.
- [79] Det/Cst. Unheim confirmed that the police were able to pull stills (from the May 4, 2017 CCTV footage) to positively identify Mr. Braich (and Mr. Randhawa) with a passport photo. Det/Cst. Unheim was "able to see clothing worn, whether he was using a cell phone, gestures, and things like that."
- [80] With respect to her initial attendance at Bidwell, Det/Cst. Unheim was cross-examined about her observations from video footage taken from earlier that day (May 5, 2017 CCTV footage). She agreed that, through this review, she was able to determine that:
- a) Mr. Braich and an unknown male entered P1 of Bidwell at 12:36 a.m.;
 - b) Mr. Braich was wearing the same outfit as that observed earlier in the day;
 - c) The two males got off the elevator on the 9th floor; and
 - d) At 1:14 a.m., the males went from the 9th floor to P2 and got into a dark coloured sedan.
- [81] Det/Cst. Unheim testified that this footage connected Mr. Braich to the 9th floor and the fob records connected him to suite 907. She was questioned as well about earlier video footage depicting Mr. Braich in the parkade and looking at the undercarriage of his vehicle. She agreed that it appeared to her as if Mr. Braich was looking for a tracking device on his vehicle.

IV. FINDINGS OF FACT

- [82] As stated above, the parties did not take issue with the evidence presented on the voir dire and my determination regarding reasonable expectation of privacy is based on the totality of the evidence described above. What follows is simply a summary of my findings:
1. Bidwell is a multi-unit residential building which the police believed the Kang group was using as a drug stash site;
 2. Bidwell's head concierge was Andrea Mueller. The police contacted Bidwell after the surveillance team observed Mr. Braich at Bidwell on May 4, 2017;
 3. The May 23, 2017 Production Order authorized the seizure of electronic key fob records for suite 907 for April 1, 2017 to May 23, 2017 and CCTV footage from May 1, 2017 to May 23, 2017;
 4. Bidwell has CCTV cameras placed in the parking garages, some common areas and in the elevators;

5. The applicants were observed by the police at Bidwell at various times (and their images were captured on CCTV footage) from May 2017 through October 2017 but only the images of Mr. Vagh and Mr. Braich were captured during the time specified in the May 23, 2017 Production Order;
6. In early May 2017 and without judicial authorization, the police seized CCTV footage of Mr. Braich, the Form K for suite 907 and fob records;
7. There was not a camera on the 9th floor and the elevator CCTV camera captured only the hallway where the door opened. The police did not observe any of the applicants enter suite 907 and the applicants were not the registered owner or tenant of suite 907;
8. The fob records for the two fobs associated with suite 907 and the corresponding video showed the following:
 - a. Mr. Vagh was observed three times: May 18, 2017 with Randy Kang, and August 3, 2017 and September 1, 2017 with Mr. Braich ;
 - b. Gary Kang was observed one time on September 11, 2017 with Mr. Braich and Mr. Ghuman;
 - c. Mr. Ghuman was observed six times: July 21, 2017 with Mr. Braich; August 5 and 9, 2017 with Mr. Braich; September 11, 2017 with Mr. Braich and Gary Kang; and October 5 and 6, 2017 with Mr. Braich; and
 - d. Mr. Braich was observed 62 times over 53 days from May 4, 2017 through October 13, 2017.
9. The Bidwell material allowed the police to identify the applicants' routines, targets and associates. The early May CCTV footage connected Mr. Braich to the 9th floor and the fob records connected him to suite 907.

V. LAW - REASONABLE EXPECTATION OF PRIVACY

[83] I will start with an overview of the Supreme Court of Canada's s. 8 Charter jurisprudence focusing on reasonable expectation of privacy. I will then turn to the authorities addressing s. 8 of the Charter in the context of common areas in multi-unit buildings.

A. Supreme Court of Canada s. 8 Charter jurisprudence

- [84] Everyone has the right to be secure against unreasonable search or seizure: s. 8 of the Charter. It is well established that s. 8 protects a person's reasonable expectation of privacy but no more than that.
- [85] From the very early days of the Charter, a body of jurisprudence has emerged about s. 8 rights and what (and who) is protected from state intrusion. From the outset, the Supreme Court of Canada adopted a normative approach to privacy protection. As is evident from the jurisprudence and academic writings, there is an aspirational quality to the normative approach to privacy protection. For example, Renee Pomerance writes:[9]

The normative approach] focuses, not just on what privacy is, but on what it should be. It views individual cases through the broader lens of how we want to live as a society. It transcends the factual minutiae of a given case. It reminds us that just as there is a societal interest in effective law enforcement, so too is there a societal interest in the right to be left alone. It tells us that we must recognize the importance of privacy despite, or perhaps, because of the ubiquity of technology.

[86] As I have just stated, the normative approach to privacy rights finds its roots in early s. 8 jurisprudence. Justice La Forest in *R v. Wong*, [1990] 3 S.C.R. 36, made this much clear when he explained the Court's approach to privacy protection, stating, at paras. 47 and 48:

I am firmly of the view that if a free and open society cannot brook the prospect that the agents of the state should, in the absence of judicial authorization, enjoy the right to record the words of whomever they choose, it is equally inconceivable that the state should have unrestricted discretion to target whomever it wishes for surreptitious video surveillance. George Orwell in his classic dystopian novel *1984* paints a grim picture of a society whose citizens had every reason to expect that their every movement was subject to electronic video surveillance. The contrast with the expectations of privacy in a free society such as our own could not be more striking. The notion that the agencies of the state should be at liberty to train hidden cameras on members of society wherever and whenever they wish is fundamentally irreconcilable with what we perceive to be acceptable behaviour on the part of government. As in the case of audio surveillance, to permit unrestricted video surveillance by agents of the state would seriously diminish the degree of privacy we can reasonably expect to enjoy in a free society. There are, as *R. v. Dyment*, [1988] 2 S.C.R. 417, at pp. 428-29, tells us, situations and places which invite special sensitivity to the need for human privacy. Moreover, as Duarte indicates, we must always be alert to the fact that modern methods of electronic surveillance have the potential, if uncontrolled, to annihilate privacy.

R. v. Duarte was predicated on the notion that there exists a crucial distinction between exposing ourselves to the risk that others will overhear our words, and the much more pernicious risk that a permanent electronic recording will be made of our words at the sole discretion of the state. Transposing to the technology in question here, it must follow that there is an important difference between the risk that our activities may be observed by other persons, and the risk that agents of the state, in the absence of prior authorization, will permanently record those activities on videotape, a distinction that may in certain circumstances have constitutional implications. To fail to recognize this distinction is to blind oneself to the fact that the threat to privacy inherent in subjecting ourselves to the ordinary observations of others pales by comparison with the threat to privacy posed by allowing the state to make permanent electronic records of our words or activities. It is thus an important factor in considering whether there has been a breach of a reasonable expectation of privacy in given circumstances.

- [87] Over a decade later, we were again reminded that reasonable expectation of privacy demands a normative rather than a descriptive standard in *R. v. Tessling*, 2004 SCC 67. Justice Binnie, writing for the Court, described reasonable expectations of privacy this way:
- [19] Accordingly, the Court early on established a purposive approach to s. 8 in which privacy became the dominant organizing principle. "The guarantee of security from unreasonable search and seizure only protects a reasonable expectation": *Hunter v. Southam*, supra, at p. 159 (emphasis in original). Given the bewildering array of different techniques available to the police (either existing or under development), the alternative approach of a judicial "catalogue" of what is or is not permitted by s. 8 is scarcely feasible. The principled approach was carried forward in *R. v. Edwards*, [1996] 1 S.C.R. 128, at para. 45, where Cory J., referring to the need to consider "the totality of the circumstances", laid particular emphasis on (1) the existence of a subjective expectation of privacy; and (2) the objective reasonableness of the expectation.
- [20] Within the general principle thus stated, the cases have come to distinguish among a number of privacy interests protected by s. 8. These include personal privacy, territorial privacy and informational privacy.
- [21] Privacy of the person perhaps has the strongest claim to constitutional shelter because it protects bodily integrity, and in particular the right not to have our bodies touched or explored to disclose objects or matters we wish to conceal. The state cannot conduct warrantless strip searches unless they are incident to a lawful arrest and performed in a reasonable manner (*R. v. Golden*, [2001] 3 S.C.R. 679, 2001 SCC 83, at paras. 90-92) in circumstances where the police have reasonable and probable grounds for concluding that a strip search is necessary in the particular circumstances of the arrest (para. 98). Nor may the police take bodily samples without authorization: *R. v. Stillman*, [1997] 1 S.C.R. 607.
- [22] The original notion of territorial privacy ("the house of everyone is to him as his castle and fortress": *Semayne's Case*, [1558-1774] All E.R. Rep. 62 (1604), at p. 63) developed into a more nuanced hierarchy protecting privacy in the home, being the place where our most intimate and private activities are most likely to take place (*Evans*, supra, at para. 42; *R. v. Silveira*, [1995] 2 S.C.R. 297, at para. 140, per Cory J.: "[t]here is no place on earth where persons can have a greater expectation of privacy than within their 'dwelling-house'"; *R. v. Feeney*, [1997] 2 S.C.R. 13, at para. 43), in diluted measure, in the perimeter space around the home (*R. v. Kokesch*, [1990] 3 S.C.R. 3; *R. v. Grant*, [1993] 3 S.C.R. 223, at pp. 237 and 241; *R. v. Wiley*, [1993] 3 S.C.R. 263, at p. 273), in commercial space (*Thomson Newspapers Ltd. v. Canada* (Director of Investigation and Research, Restrictive Trade Practices Commission), [1990] 1 S.C.R. 425, at pp. 517-19; *R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627, at pp. 641 et seq.), in private cars (*Wise*, supra, at p. 533; *R. v. Mellenthin*, [1992] 3 S.C.R. 615), in a school (*R. v. M. (M.R.)*, [1998] 3 S.C.R. 393, at para. 32), and even, at the bottom of the spectrum, a prison (*Weatherall v. Canada* (Attorney General), [1993] 2 S.C.R. 872, at p. 877). Such a hierarchy of places does not contradict the underlying principle that s. 8 protects "people, not places", but uses the notion of place as an analytical tool to evaluate the reasonableness of a person's

expectation of privacy.

[23] Beyond our bodies and the places where we live and work, however, lies the thorny question of how much information about ourselves and activities we are entitled to shield from the curious eyes of the state (*R. v. S.A.B.*, [2003] 2 S.C.R. 678, 2003 SCC 60). This includes commercial information locked in a safe kept in a restaurant owned by the accused (*R. v. Law*, [2002] 1 S.C.R. 227, 2002 SCC 10, at para. 16). Informational privacy has been defined as "the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others": A. F. Westin, *Privacy and Freedom* (1970), at p. 7. Its protection is predicated on

the assumption that all information about a person is in a fundamental way his own, for him to communicate or retain ... as he sees fit.

(Report of a Task Force established jointly by Department of Communications/Department of Justice, *Privacy and Computers* (1972), at p. 13)

[24] The distinction between personal, territorial and informational privacy provides useful analytical tools, but of course in a given case, the privacy interest may overlap the categories. Here, for example, the privacy interest is essentially informational (i.e., about the respondent's activities) but it also implicates his territorial privacy because although the police did not actually enter his house, that is where the activities of interest to them took place.

[88] In *Tessling*, Binnie J. described the totality of the circumstances test (as articulated in *Edwards*) as follows:

[31] I proceed on the basis of the "totality of the circumstances" test set out by Cory J. in *Edwards* and the questions listed therein, at para. 45, but the questions need to be tailored to the circumstances of the present case.

(1) Did the Respondent Have a Reasonable Expectation of Privacy?

[32] On the facts of this case, we need to address:

1. What was the subject matter of the FLIR image?
2. Did the respondent have a direct interest in the subject matter of the FLIR image?
3. Did the respondent have a subjective expectation of privacy in the subject matter of the FLIR image?
4. If so, was the expectation objectively reasonable? In this respect, regard must be had to:
 - a. the place where the alleged "search" occurred;
 - b. whether the subject matter was in public view;
 - c. whether the subject matter had been abandoned;

- d. whether the information was already in the hands of third parties; if so, was it subject to an obligation of confidentiality?
- e. whether the police technique was intrusive in relation to the privacy interest;
- f. whether the use of surveillance technology was itself objectively unreasonable;
- g. whether the FLIR heat profile exposed any intimate details of the respondent's lifestyle, or information of a biographical nature.

[89] This approach to privacy remains some twenty-five years after the Wong decision. The Supreme Court of Canada in *R. v. Spencer*, 2014 SCC 43, emphasized yet again that in defining privacy, we must not ask overly narrow questions particularly in our efforts to define the subject matter of the search. At para. 26, the Court put it this way: "While, in many cases, defining the subject matter of the search will be uncontroversial, in cases in which it is more difficult, the Court has taken a broad and functional approach to the question, examining the connection between the police investigative technique and the privacy interest at stake. The Court has looked at not only the nature of the precise information sought, but also at the nature of the information that it reveals."

[90] Justice Cromwell, in *Spencer*, described the purposive approach and the requisite analysis in determining one's reasonable expectation of privacy in circumstances where the police identified the internet protocol address of a computer that someone had been using to access and store child pornography through an internet file-sharing program. His discussion as to whether s. 8 of the Charter was engaged commenced with an analysis of reasonable expectations of privacy:

[15] Under s. 8 of the Charter, "[e]veryone has the right to be secure against unreasonable search or seizure." This Court has long emphasized the need for a purposive approach to s. 8 that emphasizes the protection of privacy as a prerequisite to individual security, self-fulfilment and autonomy as well as to the maintenance of a thriving democratic society: *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at pp. 156-57; *R. v. Dyment*, [1988] 2 S.C.R. 417, at pp. 427-28; *R. v. Plant*, [1993] 3 S.C.R. 281, at pp. 292-93; *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432, at paras. 12-16; *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, 2013 SCC 62, [2013] 3 S.C.R. 733, at para. 22.

[16] The first issue is whether this protection against unreasonable searches and seizures was engaged here. That depends on whether what the police did to obtain the subscriber information matching the IP address was a search or seizure within the meaning of s. 8 of the Charter. The answer to this question turns on whether, in the totality of the circumstances, Mr. Spencer had a reasonable expectation of privacy in the information provided to the police by Shaw. If he did, then obtaining that information was a search.

[17] We assess whether there is a reasonable expectation of privacy in the totality of the circumstances by considering and weighing a large number of interrelated factors. These include both factors related to the nature of the privacy interests implicated by the state

action and factors more directly concerned with the expectation of privacy, both subjectively and objectively viewed, in relation to those interests: see, e.g., Tessling, at para. 38; Ward, at para. 65. The fact that these considerations must be looked at in the "totality of the circumstances" underlines the point that they are often interrelated, that they must be adapted to the circumstances of the particular case and that they must be looked at as a whole.

- [18] The wide variety and number of factors that may be considered in assessing the reasonable expectation of privacy can be grouped under four main headings for analytical convenience: (1) the subject matter of the alleged search; (2) the claimant's interest in the subject matter; (3) the claimant's subjective expectation of privacy in the subject matter; and (4) whether this subjective expectation of privacy was objectively reasonable, having regard to the totality of the circumstances: Tessling, at para. 32; R. v. Patrick, 2009 SCC 17, [2009] 1 S.C.R. 579, at para. 27; R. v. Cole, 2012 SCC 53, [2012] 3 S.C.R. 34, at para. 40. However, this is not a purely factual inquiry. The reasonable expectation of privacy standard is normative rather than simply descriptive: Tessling, at para. 42. Thus, while the analysis is sensitive to the factual context, it is inevitably "laden with value judgments which are made from the independent perspective of the reasonable and informed person who is concerned about the long-term consequences of government action for the protection of privacy": Patrick, at para. 14; see also R. v. Gomboc, 2010 SCC 55, [2010] 3 S.C.R. 211, at para. 34, and Ward, at paras. 81-85.

[Underlining added]

- [91] At the very outset of s. 8 Charter litigation, Justice La Forest in Wong foreshadowed the risk to privacy in a world where citizens' moves could be captured by recording devices. He issued the warning that we be alert to the implications to privacy that could be caused by modern methods of electronic surveillance, if not controlled.
- [92] Under the normative analysis, the jurisprudence requires the court "to assess whether there is a reasonable expectation of privacy in the totality of the circumstances by considering and weighing a large number of interrelated factors. These include both factors related to the nature of the privacy interests implicated by the state action and factors more directly concerned with the expectation of privacy, both subjectively and objectively viewed, in relation to those interests:" Spencer at para. 17.

B. Reasonable Expectation of Privacy in common areas of multi-unit buildings

- [93] I turn to the context presented here. That is whether the applicants had a reasonable expectation of privacy in common areas of a multi-unit building in circumstances where their images were not captured by CCTV. To answer this inquiry, the Crown says particular attention should be paid to R. v. White, 2015 ONCA 508, and R. v. Yu, 2019 ONCA 942. I turn to each now.

[94] In *White*, the Ontario Court of Appeal examined the reasonable expectation of privacy in common areas (stairways, hallways, storage rooms) of an owner/occupier of a condominium unit in a small, 10-unit building. The police suspected Mr. White was dealing drugs and they made three surreptitious entries into common areas of his building. The police walked through the hallways, entered the storage area and viewed the contents of Mr. White's storage locker. They also hid in the stairwell, watched his unit and listened to what was occurring inside of the unit. Relying on the information learned from the surreptitious surveillance, the police obtained a warrant. Finding the surreptitious gathering of information constituted a breach of s. 8 of the Charter, the trial judge refused to admit the evidence gathered pursuant to the warrant. The Crown appealed against the acquittals contending Mr. White did not have a reasonable expectation of privacy in the common areas of his multi-unit building.

[95] On the issue of privacy expectations, Huscroft J.A. agreed with the trial judge that Mr. White had a reasonable expectation of privacy in the common areas of his condominium building stating at para. 50:

... The reasonable expectation of privacy does not establish a zone for the protection of criminal activity in the common areas of multi-unit buildings, but neither does it permit the police to enter common areas of those buildings at any time and for any reason. The reasonable expectation of privacy is a concept which protects those interests that courts think ought to be protected having regard to the interests at stake in particular circumstances: *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432, at para. 42. Some limits on police activity are necessary if privacy is to be protected.

There is nothing "perverse" about providing a measure of privacy protection to the many Canadians who live in multi-unit dwellings. They, no less than those who live in detached homes, are entitled to the protection against unreasonable search and seizure the Charter provides. In any event, it is not an all or nothing choice. A balance must be struck between law enforcement objectives and privacy in modern urban life. Cases such as *Laurin and Thomsen* demonstrate that the police have considerable ability to investigate crime in multi-unit buildings. But they do not have *carte blanche*.

[96] *White* establishes that an owner or occupier of a unit in a multi-unit dwelling may have a reasonable expectation of privacy in the common areas of the multi-unit dwelling "having regard to the interests at stake in particular circumstances."

[97] I turn to *Yu*.

[98] *Yu* was an appeal by four individuals targeted in a large police investigation of criminal gang activity in Toronto. The police obtained wiretap authorizations authorizing them to intercept the communications of certain targets. The initial wiretap authorized interception of the communications of 144 known persons. A general warrant was issued authorizing the police, among other things, to enter common areas of multi-unit buildings, to enter the private units of some of the accused and their associates, and to install hidden cameras in

the hallways outside the condominium units of some of the targets of the investigation. The police investigation led to the arrest of some 112 individuals on a variety of charges including murder, drugs and firearms and human trafficking, possession of firearms, and possession of drugs for the purpose of trafficking. In a pretrial application, Mr. Yu and other accused sought to exclude evidence obtained through the wiretaps and general warrants on the basis that the authorization and execution of the wiretaps and general warrants violated their rights under s. 8 of the Charter. The application was dismissed.

[99] On the issue of standing, Tulloch J.A. stated:

[64] As a preliminary matter, the Crown argues that even if condominium residents in general have a reasonable expectation of privacy in the common areas of their buildings, the appellants cannot all have a reasonable expectation of privacy in both of the relevant addresses - Joe Shuster Way and Western Battery Road - because some of the appellants are unconnected with one or both of these addresses. If the appellants cannot have a reasonable expectation of privacy in these addresses at all, let alone in the common areas, they would not have standing to challenge the warrantless entries at addresses with which they are unconnected. For example, the Crown submits that Mr. Tang has no standing to challenge the warrantless entries at either address, because (1) Mr. Tang did not have any connection with Joe Shuster Way, and (2) although Mr. Tang resided at the Western Battery Road address, the surveillance at that address did not target him, nor did it yield any information relating to him.

[65] I agree with the Crown that Mr. Tang does not have standing in relation to Joe Shuster Way. Mr. Yu, who did not have any connection with that address, also does not have standing. Neither had any reasonable expectation of privacy at that address. Similarly, Mr. Saccoccia did not have any connection with the Western Battery Road address. The Crown accepts that Mr. Mai has standing in relation to both addresses.

[66] I disagree with the Crown's position that Mr. Tang does not have standing in relation to Western Battery Road - where he resided - because the surveillance in the common areas of that building did not target him and yielded no information relating to him. Assuming condominium residents have a reasonable expectation of privacy in the common areas of their residence (discussed below), I am not prepared to say that Mr. Tang lacked such an expectation of privacy in his own residence simply because the surveillance was not directed at him. Further, the fact that the surveillance yielded no information about him is more relevant to the issues that arise under s. 24(2), should a breach of s. 8 be found, than to the question of standing.

[100] In Yu, standing was determined subject to the applicants' connection to the addresses at issue. Where the applicant was not connected to the address, the court decided they did not have a reasonable expectation of privacy in the common areas of that location.

[101] Yu was considered by Justice Ker in Latimer. Justice Ker wrote as follows:

- [138] Recently in Yu, the Ontario Court of Appeal determined that the appellants in that case did have a reasonable expectation of privacy in the hallways of their buildings and even in the elevator lobby, albeit at the low end of the spectrum.
- [139] In so far as the parking garages were concerned, the Court held that any subjective expectation of privacy was not objectively reasonable on the facts of the case (at paras. 69 and 78-80). In Yu, the observations in the parking garage were the result of physical surveillance by investigators, not CCTV footage. Moreover, the police obtained consent to enter from the property management company and, in respect of one garage, made their observations from the visitors parking area, a space that was accessible to the general public (at paras. 32 and 78-80).
- [140] Similarly, the hallway and other common area observations in Yu were confined to physical surveillance, not the seizure of CCTV footage.
- [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 bar are objectively reasonable.
- [102] The applicants rely on Latimer and Kim (Standing), to support their claim for standing. I start with Kim (Standing), where Justice Devlin determined whether the applicants had standing to challenge the admissibility of video recordings obtained from a police-installed hallway camera in a residential building. Devlin J.'s ruling was usefully summarized by Ker J. in Latimer:
- [102] In my view, Madam Justice Devlin has provided a succinct and accurate encapsulation of the governing legal principles and analytical framework in her recent decision in Kim. Her summary of the governing legal principles is especially relevant as Kim involved two of the three present applicants at one of the same locations, Brighthouse Way.
- [103] Kim arose out of a companion investigation, "Project Green Planet", carried out by the Delta Police Department. I acknowledge the factual circumstances of Kim are distinguishable in that the issue there was whether the applicants had a reasonable expectation of privacy in information captured in CCTV footage from a police installed camera that recorded their movements in the corridor on the floor where one of the applicants resided. Nevertheless, the governing legal principles remain the same.
- [103] See para. 104 of Ker J.'s decision in Latimer where she adopts Devlin J.'s summary of the principles governing the reasonable expectation of privacy analysis.
- [104] In Kim (Standing), the Crown submitted that the subject matter of the search was a communal hallway on the 12th floor of a residential building over which the accused had no authority or control to regulate access. Additionally, the accused were neither owners

nor tenants of the subject suite and hence had a tenuous connection to the hallway. Devlin J. concluded that the three applicants had established on a balance of probabilities that they each had a reasonable expectation of privacy in the video recordings. In response to the Crown's submission Devlin J. stated:

- [37] The subject matter of the search was not simply the activity in the hallway. Framing the issue as a matter of territorial privacy alone ignores the fundamental purpose of the installation of the hallway camera. The police were really after the inferences that may be drawn from review of the information captured by the video recordings. Given the constant uninterrupted video recording of the accused's activity in the hallway, the video camera produced more "invasive information" about what happened in the hallway associated to unit 1204 (Yu at para. 77). The value of that captured activity to the police was potential circumstantial evidence of illicit activity conducted in connection with unit 1204. It was not simply any activity or movement in the hallway. In Sandhu, the unit connection with the monitored hallway was only identified as a potential stash location. The Court found that the subject matter was "all activity in the hallway". The subject matter of the instant case involved a localized, targeted area of the hallway area leading to unit 1204 pursuant to the GVW. The purpose for seeking the GVW was to target suspicious activity, not to monitor hallway activity for its sake. I find the subject matter of the search to have been all activity by the accused in the hallway in connection to unit 1204.
- [105] In my view, the Latimer and Kim decisions decide that a Charter claimant may have a reasonable expectation of privacy in common areas of multi-unit buildings. The analysis is contextual and demands a purposive and normative approach to privacy having regard to the totality of the circumstances. Whether they are residents of the building or control access within the building may be relevant factors but they are not necessarily determinative in the overall analysis.
- [106] I agree with the Crown's submission that Latimer and Kim do not answer the inquiry it has posed in the case before me. However, I will say more about the framing of the inquiry later in these reasons.

VI. ANALYSIS

- [107] As a starting point for the analysis, the Crown does not seek to distinguish the case at bar from Latimer where Ker J. found that there was a reasonable expectation of privacy in security camera footage in common areas of the multi-unit buildings in question, as well as in the electronic fob records. However, the Crown says the decision does not go so far as to ground standing to the applicants in circumstances where their images were not captured by the security camera in the common areas of Bidwell.

- [108] The Crown concedes that the applicants have standing to challenge any Bidwell production order where their image was captured. Consistent with that concession, the Crown agrees that Mr. Vagh has standing to challenge the May 23, 2017 Production Order, but maintains its position that the others do not.
- [109] The concession regarding Mr. Vagh dispenses with the need to analyse his standing any further[10].
- [110] The issue therefore on this voir dire is whether the remaining applicants have established on a balance of probabilities that they had a reasonable expectation of privacy in the CCTV footage and fob records seized pursuant to the May 23, 2017 Production Order.
- [111] I agree that both territorial and informational privacy is in play on this application. Accordingly, I have followed the analytical framework as set out in Latimer where, following her careful review of the s. 8 authorities, Ker J. provided the following roadmap:
- [146] In my view, Tessling, Patrick, Spencer, Cole, Marakah and Jones all demonstrate a steadfast approach to the governing analytical framework applicable to this case.
- [147] There is, however, one facet of the fourth and final line of inquiry from these decisions that appears to have evolved over the last 15 years of Supreme Court jurisprudence. In assessing whether a claimant's subjective expectation of privacy was objectively reasonable, having regard to the totality of the circumstances, the earlier decisions of Tessling (at para. 32) and Patrick (at para. 27) in particular, as well as the numerous cases that interpreted them, framed the seventh factor as "whether the informational content exposed any intimate details of the claimant's lifestyle, or information of a biographic nature".
- [148] In Marakah, the Supreme Court appears to have expanded the scope of the private nature of the subject matter being assessed - there, an electronic conversation between two people in the form of sent text messages - such that the question was whether the informational content in issue revealed details of the claimant's lifestyle or information of a biographic nature (at para. 24).
- [149] Counsel referred to numerous other cases which applied the analytical framework from Tessling, Patrick, Spencer and Jones during the course of their submissions on both voir dires. While these cases demonstrate the application of the principles, the resolution of each case depends on an assessment of the totality of the circumstances within the Tessling analytical framework.
- [112] I turn then to the four lines of inquiry. I will begin with my analysis of Mr. Braich's claim and return to Mr. Ghuman and Gary Kang's claim later.

A. What is the subject matter of the "search"?

- [113] The Crown contends that the subject matter of the search is the video images and the corresponding fob records of the attendances at common areas of Bidwell by the co-accused and third parties when the accused was not present.
- [114] In answering this line of the inquiry, I am guided by Ker J.'s findings in *Latimer* where she concludes at paras. 172 and 175 - 177:
- [172] What the police were really after was the information captured by the video recordings, including who was meeting at the vehicle, what they were carrying to and from the vehicle, who was affiliated with suite 1204, the identity of the individuals and other investigative inferences and conclusions they could draw from extensive review - and play backs - of the video recordings. The value of the captured movements and associations was potential circumstantial evidence of illicit activity conducted in connection with the occupants and guests of suite 1204 and the activities at the parking stall connected to that suite. It was not simply any activity or movement in the parking lots or the elevators that the police were interested in obtaining but, rather, the specific movements and associations of individuals affiliated with suite 1204: *Yu* at para. 77. Thus, I find the subject matter of the search in respect of the *Brighthouse* materials to be information about the identities, associations, and activities of the accused as well as their movements in the elevator lobby and secure underground parking area in relation to suite 1204 and its designated parking stall #353.
- ...
- [175] Similar to the materials from *Brighthouse Way*, the police were interested in obtaining information about the applicants' comings and goings from the *Pacific Rim Estates* - who was visiting whom and when, what they were carrying, and how long the visits lasted. It was not just the CCTV footage and the fob access records for any one occasion that was of interest to the *Project Territory* investigation but rather the footage and records over time that produced more invasive lifestyle information about what happened in and around Mr. *Latimer's* residence.
- [176] Thus, it was the cumulative value of the information considered in its totality that the police were really after. They were able to take all the data obtained from these two locations and stitch it together with other investigative information to create a virtual picture of what was going on inside the suites and, from that, draw inferences and conclusions to advance the investigation. To that end, then, the information obtained was far more "invasive" than simply name and address information or images from lobbies, secure parking garages and elevators.
- [177] In my view, the Crown's construction of what constitutes the subject matter of the search is unduly restrictive and inconsistent with what the jurisprudence directs should be the appropriate assessment. As *Devlin J.* noted in *Kim*, framing the issue as a matter of the physical space invaded or as territorial privacy alone ignores the fundamental purpose of gathering the data from *Brighthouse Way* and the *Pacific Rim Estates*. Instead, it is the nature of the privacy interests potentially compromised by the state action that are integral to the

finding of a reasonable expectation of privacy.

- [115] Taking into account that the court must take a broad, purposive approach, I am of the view that the Crown's submission regarding subject matter is unduly narrow. An applicant's image may well open the door to establish standing. However, I am not satisfied that the converse is true; that is, that an applicant whose image was not captured at the material time does not have standing. There may very well be evidence establishing that an applicant's privacy interests are otherwise engaged.
- [116] I agree with the applicants' submission that the subject matter should be defined in response to the question, what were the police really after. Det/Cst. Unheim in part answered this question during cross-examination when she agreed that the police were looking for information about the identities, associations and activities of the applicants and other individuals associated to suite 907 at Bidwell, including the movements of the applicants and their associates in the elevator, lobby and secure underground parking area and as analyzed in conjunction with information provided by the fob access records for suite 907.
- [117] When I pose the question "what were the police able to determine about the applicants from the material they reviewed?" the evidence presented at the voir dire clearly establishes that the police were able to glean significant information from Det/Cst Unheim's initial and then subsequent reviews of the CCTV footage and fob records.
- [118] I pause to note that the Crown says it will not seek to rely on the warrantless searches from early May 2017. However, in considering the totality of the circumstances analysis, I do not agree that I can ignore the police observations of Mr. Braich at Bidwell during the time particularized in the May 23, 2017 Production Order. It seems to me, based on the evidence presented, that those warrantless searches provided information that ought to be included in the analysis. Because of Det/Cst. Unheim's review of the CCTV footage and fob records on May 5, 2017, the police learned that Mr. Braich appeared to be accessing suite 907 and had done so on two occasions, May 4 and 5, 2017. It was during that warrantless review that Det/Cst. Unheim noted that Mr. Braich attended the building with another unidentified male and observed Mr. Braich laying underneath his vehicle as if he was looking for a tracking device. Det/Cst. Unheim agreed that Mr. Braich had used a fob, in the presence of another individual, that was connected to suite 907. In addition, Det/Cst. Unheim agreed that one of the things she learned during her first attendances at Bidwell was that Mr. Braich was connected to suite 907; he was observed by the surveillance team at Bidwell; his image was captured by CCTV footage from May 4, 2017; he had use of the fob connected to suite 907; and he had use of the parking stall associated to suite 907.
- [119] These observations, in part, formed the basis for Det/Cst Unheim's request for the fob records for suite 907 to see who else was associated to the suite. Her gathering of the CCTV footage and correlating fob records for suite 907 enabled the police, at the early stage to identify others including Mr. Vagh, Randy Kang, and Mr. Randhawa.

- [120] The value of the information that can be inferred from CCTV footage and fob records was underscored by both Ker J. at para 76 of Latimer and Devlin J. in Kim (Brighthouse Materials) at para. 61.
- [121] Det/Cst. Unheim agreed that the information obtained pursuant to the May 23, 2017 Production Order provided the police with evidence of a connection between various individuals, including Mr. Braich, accessing suite 907, a suite the police suspected was a stash house. Additionally, the information obtained from Det/Cst. Unheim's attendance at Bidwell helped the police in their attempts to corroborate the information from the confidential informer (that is whether Mr. Braich was a drug trafficker and whether he was a member of the Kang group). As submitted by Mr. Braich, creating these associations was critical to moving the investigation forward.
- [122] Taking into account the subject matter and what the police were really after, the fob records provided more than just the identity of the person using the fob. The question then is what the fob usage revealed about the applicants. By virtue of the applicants' connection to suite 907 and purported membership in the Kang group, did the fob access records reveal something about the applicants' lifestyle? Relevant to the May 23, 2017 Production Order, the police could very surely draw inferences from the fob records about Mr. Braich including that he appeared to be working together with others trafficking drugs and that he was involved in organized drug trafficking activity on the part of the Kang group.
- [123] I will say more about Gary Kang and Mr. Ghuman's claim shortly.

B. Did the applicants have a direct interest in the subject matter?

- [124] The Crown submits that none of the applicants have a direct interest in the CCTV footage or the corresponding fob records of other people moving inside the common areas at Bidwell. That is because, the Crown submits, the accused were not present and no information about the accused can be gleaned from images of other people attending Bidwell.
- [125] Mr. Braich submits that he has a direct interest in the information contained in the CCTV footage, fob records and Form K information relating to suite 907. That is because he attended Bidwell on dozens of occasions and had access to Bidwell by way of a key fob assigned to suite 907. His image was captured on the CCTV footage (during the relevant time) and the fob records revealed details of how he spent his time inside Bidwell.
- [126] As I review Det/Cst. Unheim's testimony and the Agreed Statement of Facts regarding Mr. Braich's attendance at Bidwell, including his attendance in early May 2017, I am satisfied that Mr. Braich has clearly established a direct interest in the subject matter of the search. Though he was not the owner or occupier of suite 907, he was someone with access to the fob associated with suite 907 and indeed was observed on the CCTV footage from May 4, 2017 as someone accessing the 9th floor and someone behaving in a suspicious manner. In my view, the evidence overall satisfies me that Mr. Braich had a direct interest in the subject matter.

[127] I will say more about Gary Kang and Mr. Ghuman's claim under this line of inquiry later.

C. Did the applicants have a subjective expectation of privacy in the subject matter?

[128] Despite the low hurdle, the Crown submits that the applicants have not established their subjective expectation of privacy in this case taking the position that the images of the co-accused and others attending Bidwell do not provide "evidence of any of the [applicants] having a connection with suite 907 other than as guests themselves. . . there is no evidence from which this court can infer there was a subjective expectation of privacy by any of the accused over the attendances to suite 907 by others."

[129] In this case, there is not any direct evidence from the applicants about their individual expectations of privacy. As set out in *Kim (Standing)* at para. 39, a subjective expectation of privacy can be presumed or inferred in the circumstances in the absence of direct evidence from the accused (*R. v. Jones*, 2017 SCC 60 at paras. 20 and 21. See also: *Tessling* at para. 38; *R. v. Patrick*, 2009 SCC 17 at para. 37).

[130] Based on the totality of the evidence presented, I am satisfied that Mr. Braich has established a subjective expectation of privacy in the details of his lifestyle, including his appearance, his associations and his activities as revealed by the CCTV footage and fob records from Bidwell. This is particularly so when I consider that the subject matter of the search must be precisely defined. And as found by Ker J., and summarized at para. 42 in *Kim (Brighthouse Materials)*, "the information ultimately gleaned from the images captured lifestyle information, activities and patterns of the individuals. Whether the information is gleaned through the review of video footage or still clips, when examined in conjunction with the fob access records . . . , details of the accused's activities including their associations, patterns, descriptions and activity are evident."

[131] Framed as such, Mr. Braich has established his subjective expectation of privacy in the subject matter.

[132] Again, I will address shortly Gary Kang and Mr. Ghuman's subjective expectations of privacy in the CCTV footage and fob records.

D. Was the subjective expectation of privacy objectively reasonable in the totality of the circumstances?

[133] The Crown submits that the applicants' subjective expectations of privacy were not objectively reasonable when considered in the totality of the circumstances. Taking into account the Edwards factors, the Crown stated their position under this line of inquiry as follows:

n None of the applicants were the listed tenant or owner for suite 907. Their relationship to the listed tenant, David Webb, is unknown as is their relationship to the owner.

n The applicants did not reside at suite 907.

n Others accessed suite 907.

n None of the applicants had any control over the use of the fobs for suite 907 when they were not present at Bidwell.

n There is no evidence the accused had possession or control of the key fob used to gain access, or the key to suite 907, at the time of the alleged search when others attended; on the contrary, the evidence supports the key fobs and the key to the suite were in the possession of those who attended at Bidwell.

n There is no evidence that any of the accused entered suite 907 or had personal belongings in suite 907.

n No evidence that any personal information of each of the applicants is revealed by video images of others attending at Bidwell. What is revealed is information about the individuals that actually attended, not the accused who were not there. What is revealed are the times those individuals attended, what they were carrying to and from the suite, how long the attendances were inside the suite, whether they attended alone or with someone else. None of this is personal information about the accused.

n The applicants were not present at the time of the alleged search.

n Historically, the applicants did not have an extensive relationship to Bidwell - over the course of six months, Gary Kang was only there once; Vagh was there three times; Mr. Ghuman was there five times; and Mr. Braich was there 56 times. No one was there on a daily basis.

n Information about other occasions when other people attended Bidwell does not reveal any details of the applicants' lifestyle or information of a biographical nature of the accused. Rather, what is revealed may be details of the individuals who actually attended Bidwell.

[134] The Crown relies on White and Yu as authoritatively deciding the issue of standing in the case before me. The Crown says those cases should be interpreted to stand for the proposition that an accused does not have a reasonable expectation of privacy over images of others, including co-accused and third parties.

[135] I am not satisfied the Crown poses the correct question. The Crown submits "these cases support the Crown's position that standing to challenge images of others depends on the accused's connection to the unit. When the accused is an owner or resident of the unit, he may have standing to challenge information of others attending his unit. If the accused is not a resident or occupier of the unit, standing to challenge others attending depends on his level of control over the unit and if the accused was inside the unit at the time of the attendance."

[136] In my view, this narrow articulation of the issue avoids the necessary analysis. The question properly framed, in accordance with the jurisprudence and based on the subject matter as precisely defined, is "did the applicants in the case before me have a reasonable expectation of privacy in the subject matter of the "search"?" I may very well consider residency,

tenancy and control of suite 907 as factors in that analysis. But the authorities are clear that the analysis should not preclude consideration of other factors that may give rise to an individual's reasonable expectation of privacy. In the circumstances presented here, ownership, tenancy, and control of suite 907 cannot be considered in isolation.

[137] I start with Mr. Braich.

[138] In my view, both territorial and informational privacy are at play with respect to Mr. Braich's application for standing.

[139] I deal first with territorial privacy and the Crown's invitation to find that "there is no evidence Mr. Braich had control of either of the fobs associated to suite 907 for the time period covered by the May 23, 2017 production order."

[140] I am not satisfied that the court can ignore the events of May 5, 2017 and the warrantless examination (and warrantless seizure of some of the CCTV footage) of Mr. Braich's activities at Bidwell in early May.

[141] The May 23, 2017 Production Order authorizes a seizure of the CCTV footage from May 1 to May 23, 2017 and fob records from April 1 to May 23, 2017. As I understand the position, the Crown submits that there had already been a seizure of Mr. Braich's image such that it is not included in the subject matter of the material obtained pursuant to the May 23, 2017 Production Order.

[142] I agree with Mr. Braich that the fact that a warrantless seizure of the May 4th clip does not isolate from review the events that occurred during the time period particularized in the May 23, 2017 Production Order, including the May 5, 2017 observations and Det/Cst. Unheim's investigative steps taken thereafter. In other words, the Crown's position that it is not relying on the warrantless search does not extinguish Mr. Braich's reasonable expectation of privacy in the subject matter because the Crown chooses to extract the information.

[143] The police learned about Mr. Braich from a confidential informer in April 2017. In particular, the police had information that Mr. Braich was a drug courier for the Kang Group and was storing drugs in a stash house.

[144] Det/Cst. Unheim received fob records for #201608, a fob used by Mr. Braich, from April 27 through May 5, 2017 and she reviewed those records to determine whether there was a pattern of activity. In particular, Det/Cst. Unheim testified that Mr. Braich was connected to fob #201608 multiple times between April 27 through May 5, 2017.

[145] Further information about Mr. Braich's fob usage was gathered by Det/Cst. Unheim when she asked Ms. Mueller to review the May 3, 2017 fob records to ascertain who had been using fob #201608 regularly. Based on the fob records at 6:54 p.m. on May 3, 2017, Ms. Mueller showed Det/Cst. Unheim the corresponding video. Det/Cst. Unheim saw Mr. Braich entering the lobby using a fob and then getting on the elevator.

- [146] In accordance with the Latimer and Kim decisions, the Crown concedes that the applicant may have an expectation of privacy in common areas. However, for Mr. Braich, he is said to have relinquished any such control or connection to the suite after May 5, 2017. Because Det/Cst. Unheim had already seized the pre-May 5th material, Mr. Braich does not have standing to challenge what remains of the May 23, 2017 Production Order.
- [147] Again, I am of the view that the events pre-May 5, 2017 cannot be so easily discarded from the analysis. Particularly in the circumstances where, as here, the Crown's theory[11] is that Mr. Braich had ongoing and continuous access to suite 907 along with Randeep Kang during the time material to the May 23, 2017 Production Order.
- [148] I turn to examine informational privacy and whether Mr. Braich has a reasonable expectation of privacy in the subject matter.
- [149] In the evidence presented on this application, I accept that Mr. Braich has established on a balance of probabilities that what the police were really after was the following:
- a) To determine where Mr. Braich was going and what he was doing;
 - b) To confirm the informer information about Mr. Braich that he was a drug courier working for the Kang group and that he stored drugs at a stash house;
 - c) To determine whether Bidwell was a stash house and to identify other members of the Kang group and detail their activities at Bidwell; and
 - d) To learn who was associated to Mr. Braich and to confirm whether those associates were members of the Kang group.
- [150] To that end, I have analyzed reasonable expectation of privacy with the subject matter defined as "information about the identities, associations and activities of the accused as well as their movements in the elevator lobby and secure underground parking area in relation to suite 907 and its designated parking stall." Viewed in this light, the information gathered about Mr. Braich during the currency of the May 23, 2017 Production Order revealed details relating to Mr. Braich's biographical core and lifestyle choices. The police were able to establish connections between Mr. Braich and others and obtain information about activities associated to Bidwell. I agree that but for the initial warrantless review of the fob records for suite 907, the police may not have been able to establish any connection between Mr. Braich and the others at Bidwell. The fob records with the corresponding CCTV footage enabled the police to learn associations of those connected to suite 907 at Bidwell. Mr. Braich is correct in his submission that the initial warrantless search enabled the police to connect Mr. Braich to Randy Kang and that the information regarding Mr. Braich's activities at Bidwell can be directly tied to the activities of Randy Kang and others.

- [151] Examined from either territorial or informational privacy, I find that Mr. Braich's subjective expectation of privacy was reasonable considering the totality of the circumstances. Those circumstances include his historical connection to Bidwell and hence the CCTV footage and fob records recording his movements in the common areas of Bidwell.
- [152] In summary, I have found that the fact that Mr. Braich's image was not captured beyond the warrantless seizure is only part of the question. It cannot be said there was no search. The Agreed Statement of Facts and the ITO confirm that Mr. Braich, based on his earlier attendance at Bidwell, was targeted during the currency of the May 23, 2017 Production Order. Though his image was not captured after his attendance on May 5, information obtained was nonetheless available for the Project Territory investigators to draw inferences about Mr. Braich's association to Bidwell. Det/Cst. Unheim's May 10th email to Ms. Mueller specifically asks about the "bearded man" (believed to be Mr. Braich) and if it's not too much trouble, to give Det/Cst. Unheim updates if they show up each day." In other words, Det/Cst. Unheim is asking for assistance in tracking those associated to suite 907, including Mr. Braich. In my view, the question of Mr. Braich's standing is similar to the circumstances presented in Marakah, where the appellant had standing to challenge the search of text messages on someone else's phone because he had a privacy interest in the content of the messages. The information gathered over time allowed the Project Territory investigators to build a profile of Mr. Braich, his contacts and attendance patterns thereby enabling the police to draw reasoned inferences about his core biographical information.
- [153] I turn to the position of Gary Kang and Mr. Ghuman.
- [154] As I have stated, I do not accept the Crown's position that the applicants only had a reasonable expectation of privacy if their image was captured during the time specified in a particular production order. In my view, the Latimer and Kim decisions require a purposive and functional approach. One's expectation of privacy is not so circumscribed.
- [155] That said, based on the evidence tendered on the voir dire I am not satisfied that Gary Kang or Mr. Ghuman have established on a balance of probabilities that they had a reasonable expectation of privacy regarding the CCTV footage or fob records seized under the May 23, 2017 Production Order. That is because there is virtually no reference (again, based on the evidence presented) to either applicant until a few months later in the investigation.
- [156] I deal first with Gary Kang.
- [157] The parties agreed that Gary Kang attended at Bidwell one time and that occurred on September 11, 2017 with Mr. Ghuman and Mr. Braich.
- [158] Gary Kang grounds his standing on the basis of the Crown's theory that Gary Kang is a member of the Kang group. Under the Crown's theory, the Kang group consisted of a number of individuals including Mr. Braich, Mr. Vagh and Omid Maschinchi, a Vancouver realtor believed to be used by the Kang group to secure rental units to be used as drug stash houses. One of the stash houses was Bidwell.

[159] In his submission, Gary Kang stated "it is apparent from Spencer that the determination of whether an individual has a reasonable expectation of privacy is complex and multi-layered." Applying a broad and functional approach, Gary Kang contends the evidence on the voir dire proved that the investigators were seeking much more than CCTV footage and fob records. Rather, "the police were seeking to establish the identities of individuals, who they associated with, their movements, the clothes they wore, the things they carried, whether they stayed overnight at a particular place, whether they used cell phones, the vehicles they drove, and the times that they were in the community. This web of evidence was intended to establish a connection between individuals working together as members of an alleged criminal organization."

[160] Likening a criminal organization to a company, Gary Kang submits that Spencer recognized the claim of "groups" to "determine for themselves when, how and to what extent information about them is communicated to others." The submission was advanced in this way:

"This is not to say that the Kang group, per se, has its own legal expectation in privacy. The quote from Spencer and Tessling underscores the point that a group may invoke Charter protection, as was done in cases like Hunter and Southam where a company invoked s. 8 of the Charter to challenge legislation used to search company offices."

[161] Gary Kang properly recognizes that Hunter was a s. 52 case where the Charter claimant challenged the constitutionality of the legislation. I am not persuaded that Hunter allows for the broad interpretation as suggested. As made clear in Edwards, s. 8 is a personal right. It protects people and not places: Hunter at 159. The right to challenge the legality of a search depends upon the accused establishing that his personal rights to privacy have been violated: see R. v. Pugliese, (1992), 8 O.R. (3d) 259 (C.A.); Edwards at para. 45 per Cory J.

[162] I agree with Gary Kang's submission that his reasonable expectation of privacy is not based solely on the fact that his image was captured at Bidwell on September 11, 2017. I agree that there may be circumstances where he has a reasonable expectation of privacy even though he is not present, but where information is otherwise garnered about him (such as information about his associations and movements that may be revealed from CCTV footage and/or fob records). Without deciding the issue, it may be that certain group activity sufficiently connects Gary Kang to Bidwell to ground a reasonable expectation of privacy particularly taking into account Gary Kang's early identification by the police as a target and as a member of the Kang group.

[163] However, based on the authorities presented on this application and the evidence tendered on the voir dire, I am not satisfied that Gary Kang has established a reasonable expectation of privacy based on his known connection to the Kang group at the material time. In part, I make this finding on the basis that the CCTV footage and fob records (the Bidwell material) simply do not reveal enough about him and his association to Bidwell for the court to make that determination.

[164] In my view, Mr. Ghuman is in a similar position as Gary Kang. There is simply not a body of evidence before me to draw the inferences that the applicant seeks to ground a reasonable expectation of privacy. The evidence reveals that Mr. Ghuman attended Bidwell six times in 2017, the first being on July 21, 2017 and the evidence indicates he used the fob for suite 907 in October 2017. In my view, those circumstances alone, based on the authorities, do not permit the court to reach back to the May 23, 2017 Production Order to establish Mr. Ghuman's reasonable expectation of privacy.

[165] In the body of evidence before me and considering I am dealing solely with the May 23, 2017 Production Order, Mr. Ghuman has not established a reasonable expectation of privacy in the subject matter.

VII. CONCLUSION

[166] Based on the reasons set out above, I find that Jitesh Vagh (by agreement) and Manveer Braich have established on a balance of probabilities that they each had a reasonable expectation of privacy in the subject matter of the search. As such, I make the following orders:

- a) By agreement, Jitesh Vagh's application for standing to challenge the May 23, 2017 Production Order is granted;
- b) Manveer Braich's application for standing to challenge the May 23, 2017 Production Order is granted; and
- c) Gary Kang and Kristoffer Ghuman's application for standing to challenge the May 23, 2017 Production Order is dismissed.

"Winteringham J."

[1] Three separate indictments charging 12 individuals were preferred in Project Territory: (1) the Kang Indictment charging Sameet Kang, Gary Kang, Manveer Braich, Kristoffer Ghuman and Jitesh Vagh; (2) the Second Kang Indictment charging Sameet and Gary Kang's parents with the facilitation of a criminal organization; and (3) the Latimer Indictment charging Kyle Latimer, Criag Latimer, Jacob Pereira, Anduele Pikientio, and Csongor Szucs with criminal organization, drug-trafficking and firearms offences.

[2] Gary Kang, Manveer Braich, Kristoffer Ghuman and Jitesh Vagh.

[3] At para. 51, McLachlin C.J.C. put the standing point this way:

". . . standing is merely the opportunity to argue one's case. It does not follow that the accused's argument will succeed, or that the search of the [Bidwell material] will be found to violate s. 8."

- [4] The ITO was filed in support of the application for the following orders: (1) Production order for Bidwell key fob records from Apr 1, 2017 to May 23, 2017 and Bidwell security camera footage from May 1 to May 23, 2017; (2) Sealing order; (3) Transmission data recorder warrant (604-367-8317); (4) Warrant for tracking device (604-367-8317); (5) Non-disclosure order; (6) Transmission data recorder warrant (778-896-4259); (6) Warrant for tracking device (778-896-4259).
- [5] There are four levels in the parking garage: P1 (Westpark), P2, P3 and P4.
- [6] See Agreed Statement of Facts, Appendix "A" showing the May 19th, 2017 fob log search results.
- [7] The dates are specified in Appendix E of the Agreed Statement of Facts.
- [8] July 18, 2017 production order.
- [9] Renee Pomerance, "Flirting with Frankenstein: The Battle between Privacy and Our Technological Monsters" (2016) 20 Cdn Criminal L.R. 149.
- [10] The parties oscillated about the scope of the ruling sought on this voir dire and this was reflected in their written submissions. In my view, it is unnecessary to analyze Mr. Vagh's application for standing in any greater detail than what is set out here.
- [11] See ITO para. 109: "(109.1) Braich and Randeep Kang are associated to each other as they each have been observed, via building security video and fob records, using two assigned electronic key fobs for suite 907 . . . ; (109.2) Braich and Randeep Kang are involved in criminal activity together, specifically trafficking in controlled substances and that each are aware of the others involvement. (109.3) Braich and Randeep Kang are utilizing suite 907 . . . as a stash house to store illegal drugs."

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