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R. v. Kim

2020 BCSC 1054

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Supreme Court of British Columbia

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2020 BCSC 1054 R. v. Kim

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Kim,

2020 BCSC 1054

Date: 20200707

Docket: 27841

Registry: Vancouver

Regina

v.

Billie Onare Kim,

Kyle Stephen Latimer

and Jacob Angelo Pereira

Before: The Honourable Madam Justice Devlin

Oral Reasons for Judgment re:

Standing to Challenge Search of Unit 1204, Brighthouse Way

Counsel for the Crown:

A. Rice and

T.J. Lattimer

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Place and Date of Hearing:

Vancouver, B.C.

July 6, 2020

Place and Date of Judgment:

Vancouver, B.C.

July 7, 2020

[1] THE COURT: This decision was delivered in the form of Oral Reasons. The Reasons have since been edited for publication.

Introduction

- [2] The accused, Billie Onare Kim, Kyle Stephen Latimer and Jacob Angelo Pereira, are charged with several offences under the Controlled Drugs and Substances Act, S.C. 1996 c. 19 [CDSA], as well as several weapons offences under the Criminal Code, R.S.C. 1985, c. C-46 [Code]. The charges arise as a result of a search of unit 1204, 5177 Brighouse Way, Richmond BC (the "unit") on September 14, 2017.
- [3] The issue is whether the applicants have established that they had a reasonable expectation of privacy over the unit.
- [4] The Crown takes the position that none of the accused have standing to challenge the search as they did not possess a reasonable expectation of privacy over the unit. In particular, the Crown takes the position there is no evidence to demonstrate the accused had an ability to control the access to the unit, which is a critical factor in the standing analysis. The Crown's theory is that the unit was a stash house used by several individuals, including the applicants, in connection with their drug trafficking network. The Crown submits the applicants have failed to meet the onus of establishing on a balance of probabilities that they had a reasonable expectation of privacy. The Crown relies on several cases including *R. v. Edwardsen*, 2019 BCCA 259 [Edwardsen] and *R. v. Flintroy*, 2018 BCSC 1521 [Flintroy], in support of their position.

- [5] The applicants submit that they have established a reasonable expectation of privacy over the unit, relying on the Crown's theory in addition to other factors. Further, they submit both their territorial and informational privacy interests are engaged as discussed in *R. v. Tessling*, 2004 SCC 67 [Tessling]. Accordingly, they submit they have standing to challenge the seizure of evidence from the unit.
- [6] These reasons should be read with reference to my earlier ruling indexed at *R. v. Kim*, 2019 BCSC 2150 [Kim #1], in which I found that all three applicants had standing to challenge the admissibility of the evidence obtained from video recordings of their activity on the 12th floor hallway.

Factual Background

- [7] The parties rely on the Agreed Statement of Facts ("ASF") and the binder of exhibits filed on the Kim #1 voir dire in this application. In addition, they rely on the contents of the Information to Obtain filed in support of the search warrant application. The parties agree that the factual background set out in Kim #1 applies in this application. Therefore, I will only set out the background facts that are particularly relevant to my analysis on this application.

Unit 1204

- [8] Unit 1204 is located on the 12th floor of the building. There are nine other units on the 12th floor. An individual, whose identity is still unknown, was associated with unit 1204 and given two fobs which accessed the 12th floor, the underground parking lot and the common areas. Parking stall 353 was assigned to unit 1204 which is located in the underground parking lot. It is a two-car parking stall.
- [9] The damage deposit for unit 1204 was paid in cash by a woman, Ms. Pamela Cadrain. The police believed she was a girlfriend of Mr. Latimer. There was no evidence as to who paid the rent for unit 1204.
- [10] With the assistance of the property manager, the police were able to obtain access fobs, rental documents, CCTV footage, and fob access records. CCTV footage between April 30 and August 23, 2017 captured images of the three accused at different times using the fob associated with unit 1204. The ASF does not contain details of all the footage obtained by the CCTV. Rather, it is a random selection of a day in April, two days in May and several days in August 2017.
- [11] On August 9, 2017 police installed a tracking device on Mr. Kim's BMW 328i. The tracking device was replaced on August 30, 2017 and removed on September 15, 2017. Between August 9 and 14, 2017 the tracking device identified Mr. Kim's vehicle in the vicinity of Brighthouse Way on several occasions.

- [12] The police conducted physical surveillance over fourteen days between August 2 and September 13, 2017, in the underground parking lot and outside the building. On certain occasions, the police observed one of the three accused either entering or leaving the parking lot, or present inside the parking lot. Vehicles associated with the accused were parked in the unit 1204 parking stall. The accused were observed speaking with each other or other targets of the investigation.

The Covert Hallway Camera

- [13] On August 25, 2017, the police installed a covert camera in the hallway outside of the 12th floor elevator. The camera captured who was coming and going from the hallway associated to Unit 1204. The camera did not capture the front door of unit 1204 or any of the units on that floor.
- [14] The camera recorded continuously, in real time, onto a hard drive which police could access remotely from an iPad. There was no audio component to the camera.
- [15] The police made observations of the 12th floor hallway using the covert camera on August 25, 29, 30; and September 1-4, 7, 8, 11 and 13. Between September 1 and 13, before the execution of the search warrant for unit 1204, the police accessed the camera footage in real-time more regularly.

Camera Recording Logs

- [16] The police recorded their observations in a 15-page log, a copy of which was included in Exhibit #3, Tab 6. In October 2018, the police reviewed the hard drive containing all the footage obtained from the covert camera between August 25 and September 14, 2017. The police recorded their observations in a 37-page log, a copy of which was included in Exhibit #3, Tab 7. The log recorded when the accused and other individuals arrived on the floor, who they were with, items they carried in and out, the duration of their stay on the floor and their behaviour in the hallway. As will be discussed in more detail later in these reasons, Mr. Kim and Mr. Pereira were observed attending the unit using a fob and keys, individually, and in the presence of others. Mr. Latimer never attended the unit on his own. Nor did he have a fob or key for the unit.

Arrest of Accused

- [17] On September 14, 2017, police executed a search warrant for the unit, during which they arrested all three accused within the unit.

Governing Legal Principles

- [18] Section 8 of the Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c.11 [Charter] guarantees the right of everyone in Canada to be secure against unreasonable search or seizure.

- [19] The legal principles that govern my analysis in this application are not in dispute. Counsel have referred me to the leading authorities from the Supreme Court of Canada, including: *R. v. Edwards*, [1996] 1 S.C.R. 128 [Edwards]; *Tessling*; *R. v. Patrick*, 2009 SCC 17 [Patrick]; *R. v. Jones*, 2017 SCC 60 [Jones] and *R. v. Marakah*, 2017 SCC 59 [Marakah]. Counsel also rely on several other cases including *R. v. Pipping*, 2020 BCCA 104 [Pipping]; *Edwardsen*; *R. v. Sandhu*, 2018 ABQB 112 [Sandhu]; *Flintroy*; *R. v. Ha*, 2018 BCSC 713 [Ha]; and *R. v. Veranski and Bellotti*, 2012 BCSC 221 [Veranski].
- [20] To assert a s. 8 claim, a claimant must establish a reasonable expectation of privacy in the subject matter of the search. As set out in *Edwards*, a person must establish that they subjectively expected the subject matter of the search would be private and this expectation was objectively reasonable: *Edwards* at para. 45; *Tessling* at para. 19.
- [21] If the claimant establishes a reasonable expectation of privacy, the second inquiry assesses whether the police activity in question amounts to an unreasonable search. As established in *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 at 159, "the guarantee of security from unreasonable search and seizure only protects the reasonable expectation."
- [22] The determination of a claimant's reasonable expectation of privacy requires a contextual assessment of the "totality of circumstances" (*Edwards* at paras. 31, 45; *R. v. Spencer*, 2014 SCC 43, at paras. 16-18). In *Edwards*, at para. 45, the Supreme Court of Canada set out a non-exhaustive list factors which may inform a finding of a claimant's reasonable expectation in the subject matter of the search. The assessment is largely fact-driven and must be determined on the basis of the totality of circumstances, including the following factors:
- (i) presence at the time of the search;
 - (ii) possession or control of the property or place searched;
 - (iii) ownership of the property or place;
 - (iv) historical use of the property or item;
 - (v) the ability to regulate access, including the right to admit or exclude others from the place;
 - (vi) the existence of a subjective expectation of privacy; and
 - (vii) the objective reasonableness of the expectation.
- [23] In *Edwards* and more recently reaffirmed in *Jones*, control and access factors are key considerations in the assessment of a territorial privacy claim although they are not determinative of the issue: *Edwards* at para. 47; *Jones* at para. 40. In *Edwards*, the subject of the search was an apartment which the accused's girlfriend rented. Although they had been in a relationship for three years and the accused stayed at the apartment from time to time, and he possessed a key and kept some personal items there, the Court found he did not have a reasonable expectation of privacy. Justice Cory described the accused as "no more than an especially privileged guest" who had no authority to regulate access to the apartment.

- [24] The Court in *Tessling*, recognized that the query of whether a person reasonably expects privacy is necessarily normative. Reasonable expectations of privacy are assessed in light of the norms of conduct of society (*Tessling* at para. 42). In *Tessling*, the Court also recognized at para. 24 that "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 Court found the privacy interest was essentially informational when considered in light of the respondent's activities, however, the Court noted that the search also engaged his territorial privacy interest because his activities were conducted inside his house, although the police did not physically enter his house.
- [25] In *Marakah*, the Supreme Court recognized that control is not an absolute indicator of a reasonable expectation of privacy, nor is the lack of control fatal to the existence of a privacy interest (at para. 38).
- [26] The concept of the ability to regulate access is central to my analysis in this case. As Mr. Justice Williams did in *Flintroy*, I find the following passage from *Jones* to be instructive:

40 In the totality of the circumstances analysis, a s. 8 claimant's direct control over the subject matter of the privacy claim and his or her ability to directly regulate access thereto have figured prominently in the analysis (*Edwards*, at para. 31; *Patrick*, at para. 27; *Tessling*, at para. 32; *Cole*, at paras. 45-58). For example, relinquishing control over physical subject matter by putting it out for garbage collection, or by discarding it into a garbage can, may reasonably reflect a meaningful choice to abandon one's privacy interest in that subject matter (see, e.g., *Patrick*; *R. v. Stillman*, [1997] 1 S.C.R. 607 (S.C.C.)). On the other hand, keeping financial documents in a locked safe may reflect a choice to keep the information private (*R. c. Law*, 2002 SCC 10, [2002] 1 S.C.R. 227 (S.C.C.)). The control and access factors have also been particularly salient in territorial privacy cases. As suggested above, land owners and tenants have a practical ability to exclude visitors from their territory and maintain a choice to be left alone by controlling access to their domicile (*Patrick*; *Edwards*; *R. v. Pugliese* (1992), 71 C.C.C. (3d) 295 (Ont. C.A.)). In these traditional circumstances, it is meaningful to speak of direct control, access and choice in the same breath, since relinquishing control and giving others access to the subject matter of a privacy claim may indicate that it is unreasonable to expect privacy in that subject matter.

[Emphasis added.]

- [27] Crown counsel have referred to several cases dealing with the application of the *Edwards* principles and general statements regarding privacy interests. I do not intend to review all of those cases, however they do factor into my analysis. As stated in *R. v. Perkins*, 2018 BCSC 231, "the cases establish that determining the issue of reasonable expectation of privacy are necessarily case specific and no two cases will be exactly alike" (at para. 34). Further, there are varying degrees of an expectation of privacy, and therefore a liberal approach is necessary to an assessment of an expectation of privacy. As stated by Madam Justice Ker at para. 35 of *Veranski*:

Thus, a liberal approach to the protection of privacy is what the jurisprudence supports. The protection extends beyond our homes and personal items and includes information we choose to keep confidential. It also includes personal items which we choose to keep safe from the interference of others by storing and locking them in a space rented for that purpose.

[28] With these legal principles in mind, I will now turn to consideration of the factors identified in Edwards.

ANALYSIS

Were the applicants present at the time of the search?

[29] As stated earlier, all three applicants were present at the time of the execution of the search warrant. This factor alone establishes they have access to the unit but is not determinative of the issue.

Did the applicants have possession or control of the property or place searched?

[30] All three accused were observed to have attended the premises on several occasions, which demonstrates they had access to the unit. But they did not have equal control over the unit.

[31] Both Mr. Kim and Mr. Pereira had fobs and keys to the unit. Both were observed attending unit 1204 on their own and in the company of others. Indeed, between August 25, 2017, and September 14, 2017, they were observed accessing the unit with a fob and keys. From time to time they were accompanied by others including Mr. Latimer. I find that neither Mr. Kim nor Mr. Pereira relinquished their control to the unit by facilitating access to others.

[32] In contrast, Mr. Latimer had neither a key nor a fob and only attended the unit with either Mr. Kim, Mr. Pereira or both. Mr. Latimer's access to the unit was dependent on Mr. Kim or Mr. Pereira.

Did the applicants have a proprietary interest in the unit?

[33] Although, Mr. Kim and Mr. Pereira attended the property on multiple occasions, sometimes several times throughout a day, there is no further evidence that either Mr. Kim or Mr. Pereira had any ownership or tenancy interest in the property.

[34] Mr. Latimer invites me to draw an inference that he has a proprietary interest in the unit because Ms. Cadrain, a woman described as his girlfriend, paid the damage deposit and is listed on a Form K as a tenant of unit 1204. He says it is open for me to infer that Ms. Cadrain took these steps on behalf of Mr. Latimer. I decline to draw this inference. There is no further evidentiary basis for me to infer that Ms. Cadrain was acting as agent for, or in association with Mr. Latimer in being listed as a tenant, or paying the deposit. Based on the evidence before me it would be purely speculative to conclude Ms. Cadrain's actions were in any way related to Mr. Latimer and his interest in the unit. Effectively, on this factor, Mr. Latimer is in the same position as the appellant in Edwards. There is no evidence that he contributed to rent, or to any expenses in connection with the unit.

Is there evidence the accused had historical use of the property?

- [35] There is a body of evidence that demonstrates all three applicants had historical use of the property. The CCTV footage obtained from the building concierge, detailed at paras. 20 -22 of the ASF, is a sample of some of the images recorded by the building's CCTV system. I note the reference to observations on April 30, May 1 and 4 do not include either Mr. Kim or Mr. Pereira. Mr. Latimer is observed in the parkade elevator area on one day accompanied by another male. In contrast, the observations made over eight days between August 8 and 17 include both Mr. Kim and Mr. Pereira, either alone or with others. Mr. Latimer is observed on August 13 together with two other males. As previously stated, this information is not a complete list of all footage recorded in connection with the use of the fob for the unit.
- [36] The tracking device installed on Mr. Kim's vehicle and the physical surveillance conducted provides some further evidence of the applicant's association with the property. The subject of most of these observations was either Mr. Kim or Mr. Pereira.
- [37] In my view the most compelling evidence demonstrating the applicants' historical use of the unit is generated from the covert hallway camera. As noted earlier, the investigators' log contains a record of the police observations from August 25 to September 14, 2017 (Exhibit 3, Tab 7). As will be discussed, there is a significant difference between Mr. Latimer's connections to the unit and that of Mr. Kim's or Mr. Pereira's. Nevertheless, I am satisfied that all three applicants have established on a balance of probabilities that they had historical use of the property. Indeed, this aligns with the Crown's theory that the applicants and others used the unit as a stash site to engage in activities related to their drug trafficking network.

Did the accused have an ability to regulate access including the right to admit or exclude other from the unit?

- [38] The Crown argues none of the applicants can demonstrate an ability to regulate access to the unit. The fact that Mr. Kim and Mr. Pereira possess a fob and keys does not establish their ability to regulate access to the unit. I do not agree.
- [39] A careful review of the covert camera log demonstrates that either Mr. Kim or Mr. Pereira or sometimes both regulated who entered the unit. While there is no evidence before me to explain why it was Mr. Kim and Mr. Pereira who were responsible for regulating the attendance at the unit, that does not detract from the body of evidence supporting the inference that they had an ability to regulate access. Mr. Kim and Mr. Pereira's status is easily distinguishable from those in Edwards, Edwardsen and Flintroy. In each of those cases, the evidence failed to establish that the accused had an ability to regulate the access of others. While Mr. Edwards had a key to his girlfriend's apartment, he had no authority to regulate who else could come and go. Mr. Edwards' status was that of a "privileged guest". Similarly, while Mr. Edwardsen had key access to the marihuana production operation on the property he did not have an ability to regulate who else might attend. In Flintroy, with respect to Ms. Flintroy and Mr. Mak's status, Williams J. concluded "anyone that had a key

would have the right to access themselves, but there is no basis to conclude that any of the applicants had the ability beyond that in terms of regulating or contracting the attendance of others" (at para. 38).

- [40] As stated earlier, I have carefully reviewed the log prepared from the live feed camera located on the 12th floor hallway and marked as Exhibit 3, Tab 7. The log details the activity on the 12th floor hallway between August 25, 2017 at 14:46 hours to September 14, 2017 at 15:30 hours. The log demonstrates that none of the other individuals observed coming and going from the unit, including Mr. Latimer, can do so without first obtaining access by either Mr. Kim or Mr. Pereira. I will review the log for August 25, 2017 to illustrate the point.
- [41] At 14:46 Mr. Pereira exits the elevator and walks towards the unit with keys in hand. At 14:51 Mr. Pereira walks back to the elevator and departs. At 15:40 Mr. Kim exits the elevator along with Mr. Coddett and they walk towards the unit. At 16:21 Mr. Coddett walks back to the elevator and departs. At 16:25, Mr. Coddett along with Mr. Pikientio exit the elevator and walk towards the unit where Mr. Kim has remained. I infer from this sequence that Mr. Coddett went to let Mr. Pikientio into the unit where Mr. Kim already was. Mr. Kim is in the unit with Mr. Coddett and Pikientio. At 16:35 Mr. Coddett and Mr. Pikientio walk back toward the elevator, but only Mr. Pikientio departs. Mr. Coddett returns to the unit to join Mr. Kim. At 17:13 Mr. Coddett and Mr. Kim walk from the unit and into the elevator. Mr. Kim is the last person out of the unit. At 19:26 hours Mr. Kim, and an unknown male and Mr. Coddett exit the elevator carrying beer and pizza and walk towards the unit. Thus, Mr. Kim is now back in the unit along with Mr. Coddett and an unknown male. At 19:54 Mr. Pereira and Mr. Latimer exit the elevator and walk toward the unit joining Mr. Kim, Mr. Coddett and the unknown male inside the unit. A few minutes later at 20:00 Mr. Pereira with keys in hand and eating pizza, walks from the unit and departs in the elevator. I infer from this sequence that Mr. Pereira attended the unit to escort Mr. Latimer inside where the others including Mr. Kim were. At this point, Mr. Kim, Mr. Coddett, Mr. Latimer and the unknown male remain inside the unit. At 20:28 Mr. Pereira returns to the unit. At 20:31 Mr. Latimer, Mr. Kim and Mr. Pereira walk from the unit and depart in the elevator. Remaining in the unit are Mr. Coddett, Mr. Pikientio and the unknown male. At 21:19 Mr. Kim returns to the unit with Mr. Latimer. At 22:37 Mr. Coddett, Mr. Latimer, Mr. Pikientio and Mr. Kim walk from the unit to the elevator and depart.
- [42] The Crown points to events on September 1 to demonstrate that there was a "parade of intermittent visits of multiple individuals in various combinations going in and out of the unit with fobs and or keys." I note that there are gaps in the sequence of events because the camera failed to record between 13:41 to 14:23 and 14:24 to 14:29. Nonetheless, a careful review of the log demonstrates that at 14:30 Mr. Kim departs the unit and at 16:09 Mr. Coddett departs, returning at 16:14 alone, departing again at 16:20 alone and returning at 16:23 alone. This would suggest Mr. Coddett has the key and fob, for this period of time. At 17:25 Mr. Pereira and Mr. Latimer arrive and a few moment later Mr. Pereira departs. Then, at 17:49 Mr. Kim and Mr. Coddett depart leaving Mr. Latimer in the unit. This would suggest

that Mr. Kim returned to the unit at sometime after leaving at 14:30 but it is not recorded in the log. Therefore, I am not prepared to conclude that Mr. Coddett was in possession of his own fob and keys. Rather, he was using Mr. Kim's as he has done on several occasions. At 18:01 Mr. Kim returns with Mr. Coddett and Mr. Pikientio. At 18:28 Mr. Pikientio departs the unit where Mr. Kim remains. At 18:33 Mr. Pikientio returns with the unknown male with high and tight hair. At this stage Mr. Kim, Mr. Coddett, Mr. Pikientio, the male with the high and tight hair and Mr. Latimer are all inside the unit. Between 20:19 and 21:16 Mr. Pikientio is observed departing and returning to the unit on his own where Mr. Kim and the others remained. At 21:26 Mr. Pereira returns and at 21:43 Mr. Latimer, Mr. Coddett and Mr. Pereira depart. At 21:45 Mr. Kim and Mr. Pikientio depart.

- [43] Having reviewed the entire log I find that the evidence demonstrates that only Mr. Kim and Mr. Pereira possessed a fob and key to the unit. They controlled who used the fob and key. While others came and went from the unit, their movements were dependent on the access Mr. Kim or Mr. Pereira granted them. The fact that there is no evidence to establish how or why Mr. Kim or Mr. Pereira acquired possession of the fob and key is irrelevant. What is pertinent to my analysis is the evidence which demonstrates that Mr. Kim and Mr. Pereira regulated access to the unit. As my review illustrates, there are occasions when others such Mr. Coddett and Mr. Pikientio used the fob or key but this was always during the time they had access to the unit, which either Mr. Kim or Mr. Pereira facilitated. At its core, Mr. Kim and Mr. Pereira had the authority singularly, or jointly, to regulate access to the unit.
- [44] I find that Mr. Kim and Mr. Pereira are in a situation similar to the accused in *Ha*. In *Ha*, only Mr. *Ha* had control over who entered the garage even though he had a partner who was the actual owner of the property. Mr. Kim and Mr. Pereira had many associates including Mr. Latimer but only Mr. Kim or Mr. Pereira could regulate access.
- [45] Mr. Latimer's status is significantly different from that of Mr. Kim and Mr. Pereira. There is no evidence to establish that Mr. Latimer had access to the unit except when escorted by Mr. Kim or Mr. Pereira. He had neither a fob nor a key. Indeed, on the evidence, Mr. Latimer's access to the unit was even more tenuous than that of Mr. Edwards. Beyond his own occasional attendance at the unit, there is no evidence that Mr. Latimer had authority to facilitate access to the unit for any other individual.
- [46] Therefore, I am satisfied on a balance of probabilities that Mr. Kim and Mr. Pereira have established they had an ability to regulate access to the unit. Mr. Latimer did not.

Do the claimants have a subjective expectation of privacy in the unit?

- [47] The subjective expectation requirement has never been a "high hurdle". A subjective expectation of privacy can be presumed or inferred in the circumstances in the absence of direct evidence from the accused (*Jones* at paras. 20, 21. See also: *Tessling* at para. 42; *Patrick* at para. 37).

- [48] There was no direct evidence from the accused. The Crown argues I cannot infer or presume the existence of a subjective expectation of privacy in these circumstances. The Crown submits the accused were neither owners nor tenants of unit and none of them stored any personal items at the unit. Further, the unit was a communal stash site for a large drug operation and was frequented by a parade of individuals throughout the day.
- [49] The concept of privacy in a s. 8 analysis is not an all-or-nothing proposition. An expectation of privacy may be attenuated in particular circumstances without being eliminated. Considering the Crown's theory that the unit is being used as a place of business does not detract from the subjective belief by the applicants that they have an expectation of privacy, particularly given there is limited access to the building and to each floor of the building. I previously found that the hallway outside of the unit was itself characterizable as more private than public. It follows that the activities within the unit in that hallway attract greater privacy expectations than a shared hallway. While the activities inside the unit may involve an illegal business enterprise it was not a business open to the public. In any event, the illegality of the activity conducted in a place is not the question - the issue of reasonable expectation of privacy must be framed neutrally and broadly (see *R. v. Wong*, [1990] 3 S.C.R. 36). Indeed, it is reasonable to infer that the applicants considered the location of the stash site - in a secure building with limited access to various areas including the floor of the unit - as a particularly secure and private location to conduct their criminal activity. Given the nature of the business, it is reasonable to infer those involved had an interest in keeping the activity within the unit private. Considering the totality of circumstances I have discussed above, I am satisfied that all three applicants (leaving aside my findings on the other Edwards factors) had a subjective expectation of privacy.

Is the subjective expectation of privacy objectively reasonable?

- [50] The Crown argues that the unit was a busy, commercial venue that served as a drug stash-site which was continually accessed throughout the day by a "parade of individuals" involved in a large drug operation. As such, a reasonable person could not expect privacy in a communal drug stash site.
- [51] In *Flintroy*, Williams J. found that the accused did not have a reasonable expectation of privacy in the unit being used as a stash site. They had no tenancy, occupancy or connection to the property other than having key access. Otherwise, they had no control over who attended the premises. As Williams J. noted, in cases involving territorial privacy, the issues of direct control and access are integral in determining whether there is a reasonable expectation of privacy. While this case shares factors similar to those in *Flintroy*, one important distinguishing factor is Mr. Kim and Mr. Pereira's ability to regulate who attended the unit. Like Mr. Ha, it was they who regulated access notwithstanding the presence of others including Mr. Latimer, who were associated with them in their illegal activity. There is no evidence they relinquished that control, or authority to regulate to anyone else.

- [52] Having conducted a detailed review of all of the Edwards factors and considering the totality of the circumstances I am satisfied that Mr. Kim and Mr. Pereira's subjective expectation of privacy is objectively reasonable.
- [53] I do not reach the same conclusion for Mr. Latimer. As stated earlier, I cannot infer that Mr. Latimer had a proprietary interest in the property because Ms. Cadrain is listed as a tenant and paid the damage deposit. Unlike the circumstances in Edwards, Edwardsen or Flintroy, Mr. Latimer did not have any means to access the unit except through Mr. Kim or Mr. Pereira. I acknowledge that some of the Edwards factors are present - historical use of the property and presence at the time of the search - but they alone are not determinative. Mr. Latimer's reliance on the Crown theory does not advance his claim. The theory is Mr. Latimer is involved in the drug business, and through his participation in that business, also uses the unit as a stash site. Without more, that does not equate with a privacy interest over the property. Use alone does not account for a broad consideration of the circumstances that militate against a finding of Mr. Latimer's reasonable expectation of privacy. As was the case in Edwards, I find that Mr. Latimer's subjective expectation of privacy was not objectively reasonable in the totality of these circumstances.

Conclusion

- [54] I find Mr. Kim and Mr. Pereira have established on a balance of probabilities that they have a reasonable expectation of privacy in the unit and therefore have met the threshold to establish standing to challenge the validity of the search of the residence.
- [55] Mr. Latimer's application for standing is dismissed.

"Devlin J."

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