

CANADA / JUDGMENT

R. v. Latimer

2020 BCSC 488

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2020 BCSC 488 R. v. Latimer

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Latimer,

2020 BCSC 488

Date: 20200401

Docket: 27798

Registry: Vancouver

Regina

v.

Kyle Latimer, Craig Latimer, Jacob Pereira,

Anduele Pikientio, and Csongor Szucs

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Before: The Honourable Madam Justice Ker

Reasons for Judgment on Voir Dire #1 (Brighthouse Way) and Voir Dire #3 (Pacific Rim Estates)

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Introduction

- [1] The accused, Kyle Latimer, Craig Latimer, Jacob Pereira, Anduele Pikientio and Csongor Szucs, are charged with several offences under the Controlled Drugs and Substances Act, S.C. 1996 c. 19 [CDSA], as well as criminal organization, conspiracy and weapons offences under the Criminal Code, R.S.C., 1985, c. C-46 [Code].
- [2] The charges arise as a result of Project Territory, an investigation that was spawned from "Task Force Tourniquet" in the spring of 2017. Task Force Tourniquet was a proactive task force that the Vancouver Police Department (the "VPD") and other neighbouring police agencies commenced in the spring of 2017 to investigate a number of alleged criminal groups operating in the Lower Mainland of B.C. that were believed to be in conflict with one another and responsible for numerous acts of violence across the Lower Mainland. Project Territory is the investigation of the alleged drug trafficking activities of two different groups - the Kang group and the Latimer group.
- [3] Three different direct indictments charging a total of 12 individuals have been preferred in respect of Project Territory. A brief background overview to the investigation can be found in my reasons on another application, *R. v. Kang et. al.*, 2019 BCSC 2109, at paras. 19-32, which I incorporate into this set of reasons by reference hereto.
- [4] Kyle Latimer and Csongor Szucs have filed applications challenging the obtaining of their images from CCTV video surveillance footage ("CCTV footage") of the common areas (parking garage, parking garage elevator lobby, elevators and front lobby areas) from two different residential locations - the River Green complex at Brighthouse Way in Richmond, B.C. ("Brighthouse Way") and the Pacific Rim Estates on West Cordova St. in Vancouver, B.C. Jacob Pereira adopts the position advanced by Kyle Latimer, although he did not file a separate application. Jacob Pereira's images were also caught on CCTV footage in both locations.
- [5] The applicants also challenge the obtaining of key fob access records ("fob access records") for certain condominium units from these two locations. When the fob access records were correlated with the CCTV footage, investigators were able to either directly follow the movements of these three individuals and others within the common areas of the two residential complexes or were able to infer where they moved based on the data cross-referenced through review of the two sets of materials.
- [6] The materials were obtained by two officers with the VPD involved in the Project Territory investigations who requested the information from the concierges at the two locations. No judicial authorizations in the form of production orders were sought for these materials from these two locations. Production orders were obtained for other residential locations of interest to the investigation. While there is little direct evidence as to why production orders were sought for some residential complexes and not others, in the totality of the circumstances it would not be unreasonable to infer that the strata management companies for the other locations required a production order before they would provide the

information to the investigating authorities.

- [7] Csongor Szucs' challenge to the CCTV footage and fob access records is limited to only the Pacific Rim location. However, he also challenges the obtaining of the information contained in, and then a copy of, the Form K Notice of Tenants Responsibilities (the "Form K") from the concierge at the Brighthouse Way location. Mr. Szucs is listed as the registered tenant for unit 1204-5177 Brighthouse Way, part of a large multi-tower condominium complex known as River Green.
- [8] The Crown does not intend to adduce into evidence the CCTV footage or the fob access records from either location or the Form K at the trial of the accused. However, the information obtained from these items forms part of the information included in several information to obtain ("ITO") affidavits sworn in support of various judicial authorizations obtained during the course of the Project Territory investigation.
- [9] Two separate voir dires were conducted, one for each location. However, counsel agreed that one ruling could cover both locations as the analytical framework is the same for each.
- [10] The issue before me on these applications is whether the applicants have established that they had a reasonable expectation of privacy in the information obtained from the concierges at the two locations such that prior judicial authorization in the form of a production order should have been sought. The applicants argue that they had a reasonable expectation of privacy such that the state conduct in obtaining the information amounts to a search and seizure which engages their s. 8 Charter rights. As the information was obtained in the absence of prior judicial authorization, they contend that the searches and seizures were warrantless and therefore presumptively unreasonable.
- [11] The parties agree that the applicants bear the burden of proof to establish on a balance of probabilities that they had a reasonable expectation of privacy in the materials obtained by the VPD investigators.
- [12] The Crown takes the position that the applicants do not have a reasonable expectation of privacy in the materials obtained and, as such, no search or seizure occurred that engaged s. 8 of the Charter. It says that if the applicants succeed in establishing a reasonable expectation of privacy, it will not seek to justify the search and seizures, and acknowledges that s. 8 will have been infringed.
- [13] On January 13, 2020, I advised counsel of the result of these applications stating that that I was satisfied that the applicants had established a reasonable expectation of privacy in the materials obtained from the concierges, with reasons to follow. These are my reasons.

Factual Background

- [14] My summary of the facts is drawn from the information contained in the written submissions from counsel as well as the evidence adduced on the voir dres. I will address the items by location.

Brighthouse Way Attendances and Materials Obtained - May 4-11, 2017

- [15] On May 4, 2017, Manveer Braich, a target of the Project Territory investigation, was under surveillance by members of the VPD Strike Force Surveillance Team ("SFST"). The investigative theory at the time was that Mr. Braich was believed to be a drug trafficker associated with the Kang group, one of the alleged criminal organizations under investigation by the VPD in Project Territory. Mr. Braich, who was driving a rented red Mazda 3 vehicle, was followed from his home in Surrey, B.C. to 1221 Bidwell St. in Vancouver, B.C. Mr. Braich spent a short period of time at the Bidwell St. location and then was followed by the SFST to a secure underground parkade for the River Green complex located at 5199 Brighthouse Way in Richmond, B.C. It is a multi-tower high-end residential complex located next to the Richmond Olympic Oval. At approximately 1:30 p.m., Mr. Braich was observed to drive the red Mazda into the secure underground parkade of 5199 Brighthouse Way. Approximately 15 minutes later, Mr. Braich left the secure underground parkade in the red Mazda.

Cst. Matthew Nielsen

- [16] In May 2017, Cst. Matthew Nielson, a five year member of the VPD, was an investigator with Project Territory. He later became one of the affiants for various ITOs prepared in support of numerous types of prior judicial authorization applications. On May 5, 2017, he was acting as an investigator and was tasked with attending 5199 Brighthouse Way to look for CCTV footage in respect of the building that Mr. Braich was observed to attend on May 4, 2017. He wanted to determine what occurred when Mr. Braich entered the underground parkade.
- [17] On May 5, 2017, Cst. Nielson attended at the Brighthouse Way address and met with the on-duty concierge for the residential complex, Marc Villeneuve. Cst. Nielson introduced himself to Mr. Villeneuve, and explained the purpose of his visit. Mr. Villeneuve took Cst. Nielson to the concierge office. Cst. Nielson could not recall whether or, if he did, what he showed Mr. Villeneuve as his credentials, either his badge or a business card. He did recall telling him he was a police officer conducting a criminal investigation but provided no further details.
- [18] Cst. Nielson explained that he was seeking access to the building video from May 4, 2017, and in particular was interested in the arrival of the red Mazda 3 in the underground parkade. He wanted to know where the Mazda had gone, who met with the driver of the vehicle, and what might have occurred in the parkade.

- [19] Mr. Villeneuve was familiar with the vehicle in question as there had been a complaint the previous day that it had accessed the parkade without a key fob when the parkade gate had opened for an exiting vehicle.
- [20] As a result of this request, Mr. Villeneuve found the video that Cst. Nielsen was looking for and played it for him in the concierge office. Cst. Nielsen asked Mr. Villeneuve to play additional CCTV footage from May 4, 2017, and also requested access to the fob records so he could determine where the individuals captured in the video came from. Mr. Villeneuve played CCTV footage for Cst. Nielsen that showed where the red Mazda went and what parking stall it pulled into. He also provided Cst. Nielsen with the unit to which the parking stall was associated: suite 1204-5177 Brighthouse Way.
- [21] In addition, Mr. Villeneuve showed Cst. Nielsen a copy of the Form K associated to the suite and parking stall. Cst. Nielsen copied the tenant information from the Form K and learned that the listed tenant was Csongor Szucs. Cst. Nielsen also learned from Mr. Villeneuve that the building had concerns with the number of people using the key fob assigned to unit 1204 and offered to forward to him emails in that regard.
- [22] After Cst. Nielsen completed his attendance at the Brighthouse Way complex on May 5, 2017, he sent an email to Mr. Villeneuve at 12:36 p.m., thus providing Mr. Villeneuve with his email for communications purposes. At 2:42 p.m. that same day, Mr. Villeneuve emailed Cst. Nielsen and attached five different emails with various strings of communications between the concierge services desk and a rental company managing the rental of unit 1204-5177 Brighthouse Way. The content of the emails can be summarized as communications between January 31, 2017 and May 2, 2017, relating to unauthorized use of key fobs associated with unit 1204 as well as violations of the strata policy on exiting and entering the underground parking garage. Included in the emails provided to Cst. Nielsen on May 5, 2017, were a series of photographs of individuals in various areas of the complex (lobby, parkade and elevator lobby in the parkade) as well as a screenshot of fob access records, including for unit 1204.
- [23] Cst. Nielsen could not recall if, on his May 5, 2017 attendance, he received a copy of any of the CCTV footage he viewed with Mr. Villeneuve but conceded he may have received some footage. On May 9, 2017, he returned to the River Green complex and obtained a more complete package of information, including eight video clips of the CCTV footage he had previously viewed (Ex. #8), as well as copies of the Form K and fob access records associated to unit 1204-5177 Brighthouse Way. These materials were sought generally to advance the Project Territory investigation.
- [24] After reviewing the materials, which provided a more complete picture, Cst. Nielsen felt there was some footage missing and so sent an email to Mr. Villeneuve on May 9, 2017 at 6:05 p.m. (Ex. #10) seeking further video footage from three different CCTV cameras for the time frame of 13:00 to 14:25 hrs on May 4, 2017 and also footage from an earlier incident on May 2, 2017. On the evidence adduced, this appears to have been the only official request for materials that Cst. Nielsen submitted to the River Green complex.

- [25] Mr. Villeneuve responded on May 10, 2017 at 9:43 a.m. advising Cst. Nielsen that he had forwarded the request to the strata manager to "make sure we are compliant with the strata property act when we release the surveillance." Further emails were exchanged between the two and on May 11, 2017 at 9:56 a.m. Mr. Villeneuve advised that the strata manager had approved the request. Cst. Nielsen advised Mr. Villeneuve that a colleague, Det. Cst ("DC") Unheim, would attend to collect the materials. She did so that day.
- [26] Cst. Nielson made copies of the CCTV footage as well as stills from the footage and shared them with DC Scott Hyde, the lead investigator for Project Territory, other investigators involved with Project Territory and also Cst. Gwyneth Vaughan-Smith of the Delta Police Department. The purpose for sharing the images was to see if investigators and Cst. Vaughan-Smith could identify any of the individuals.
- [27] On May 11, 2017 at 2:11 p.m. Cst. Nielsen emailed Cst. Vaughan-Smith five of the still images from the CCTV footage at Brighthouse Way, seeking assistance on identification, if possible. Some of the images that Cst. Nielsen forwarded to Cst. Vaughan-Smith were from outside the time frame of when Mr. Braich attended the underground parkade on May 4, 2017; this included images with time stamps of 6:55 p.m., 9:11 p.m. and 11:07 p.m., outside the time frame that Cst. Nielsen had requested in his May 9, 2017 email to Mr. Villeneuve. Cst. Nielsen advised Cst. Vaughan-Smith that her assistance on identification was appreciated as he was in the midst of drafting a time sensitive ITO in support of an application for a production order for CCTV footage and fob records for 1221 Bidwell St.
- [28] Cst. Nielsen acknowledged that in addition to seeking a production order for the Bidwell St. location, he obtained production orders for CCTV footage, fob access records and Form K information for strata buildings located on Smithe St. and Seymour St. in Vancouver as well as Tomicki Ave. in Richmond, B.C. The purpose of obtaining this information was to advance the investigation by determining the identity of unknown persons of interest to the investigation and to determine the times and frequency of when individuals attended at certain locations.
- [29] Cst. Nielsen reviewed the various clips of CCTV footage, including the Brighthouse clips, numerous times to assist in the drafting of ITOs and to draw inferences about the condition of the bags and the activities around them as depicted in the CCTV footage as well as the behaviours observed.
- [30] Cst. Nielsen acknowledged that his attendance at Brighthouse Way was the first time he had approached a strata building to seek CCTV footage. He approached it the same way he approached other commercial spaces such as a restaurant or bar but acknowledged it was different in the sense that it was a residential space. He was not aware of the strata bylaws addressing privacy issues. Nor did Cst. Nielsen ask Mr. Villeneuve about his authority to provide him access to the CCTV footage and other information. He assumed that Mr. Villeneuve was an employee of the strata corporation and in control of the records.

- [31] The video clips (Ex. #8) were played on this voir dire and provide revealing information about the movements and interactions of Kyle Latimer, Jacob Pereira and Manveer Braich within the underground parkade and the elevator lobby attached to the parkade of Brighthouse Way - both common areas within the complex.
- [32] Mr. Braich did not exit his vehicle. At approximately 1:34 p.m. he parked in stall #353. Mr. Latimer and Mr. Pereira attended at the parking stall for a short period of time carrying a dark cloth shopping bag. Observations were made about the weight and perceived contents of the bag both before and after the meeting with Mr. Braich. At 1:42 p.m. Mr. Latimer and Mr. Pereira left the parking stall, returned to the elevator lobby and Mr. Pereira "fobbed" Mr. Latimer up to unit 1204. Mr. Pereira returned to parking stall #353, got into the front passenger seat of Mr. Braich's vehicle and the two left the parkade at approximately 1:44 p.m. At 2:18 p.m. Mr. Braich's red Mazda 3 returned to the parking garage gate and fobbed into the secure underground parkade. One minute later Mr. Pereira entered the parkade in a black Mercedes and then Mr. Braich left the parkade a second time, still driving the red Mazda 3. Mr. Pereira returned to the elevator lobby in the parking garage and at 2:21 p.m. used his key fob to access the elevator. The black Mercedes left the parkade approximately an hour later at 3:23 p.m. and it is believed that Mr. Pereira was driving it.
- [33] The CCTV footage also contains images of other individuals in the parkade and elevator lobby who are unassociated to the investigation.

Marc Villeneuve - Head Concierge at River Green on Brighthouse Way

- [34] In May 2017, Marc Villeneuve was the head concierge for the River Green community, a complex of six high-end multi-unit residential towers with approximately 454 units in total. Mr. Villeneuve described the configuration of the complex and explained that access to the buildings, common areas, elevators, secure underground parking garage, as well as the residential floors of the towers and the units themselves was controlled by electronic key fob.
- [35] The River Green complex has approximately 100 security cameras throughout the community including in the common areas such as at the gate to the secure underground parking area, throughout the parkade, in the elevator lobby area in the parkade, the club houses and gym. The cameras were domed digital cameras, readily visible, and were described as similar to the cameras inside courtroom #67 at the Vancouver Law Courts where Mr. Villeneuve testified. He explained that the purpose of the CCTV cameras was for the safety and security of the community and for building security.
- [36] Mr. Villeneuve was not an employee of the strata corporation but rather an employee of a residential services company that contracted with the strata corporation to provide concierge services to it.

- [37] Mr. Villeneuve explained that before he could provide anything to the police in terms of information or video related to the complex he would have to receive something in writing or a business card with a file number which he would forward to the strata property manager and the strata council president for authorization to release the information.
- [38] Mr. Villeneuve said he would not have shown CCTV footage at the first meeting with the police, not until after there had been an official request and he was authorized to release the materials.
- [39] Mr. Villeneuve reviewed the CCTV footage in Ex. #8 and explained that the red Mazda came to the attention of the concierge services because of a complaint about how the vehicle had managed to access the parkade on May 4, 2017. Mr. Villeneuve understood the police to have a different interest in the red Mazda and he assisted the police in reconstructing its path in the parkade by pulling the CCTV footage as well as the fob access records data.
- [40] Mr. Villeneuve believed he had obtained authorization from the strata property manager, John Poon, and at least the strata council president, to provide this information that the police sought. He acknowledged that he could not release information to law enforcement in the absence of an official request from the police and the authorization from the strata property manager to release the information.
- [41] When shown the May 9, 2017 email (Ex. #10) from Cst. Nielsen, Mr. Villeneuve said it looked to be an official request but was uncertain if it was the first request. Mr. Villeneuve testified he would not have shown or given information to the police prior to obtaining approval to do so as that would be a breach of strata policy. Mr. Villeneuve did not remember showing anything to the officer prior to obtaining the approval to do so but could not recall the circumstances of the May 5 and 9, 2017 interactions. He conceded it was possible he had provided the information but reiterated it would not have been in line with the strata bylaws and policies at the time.
- [42] Mr. Villeneuve agreed that the May 9 to 11, 2017 email chain between himself and Cst. Nielsen did not contain a request for a copy of the fob access records or the Form K. He could not explain how on May 9, 2017, Cst. Nielsen could have received the fob access records, the CCTV video footage and the Form K for unit #1204-5177 Brighthouse Way prior to the approval being granted by the strata property manager on May 11, 2017 (Ex. #10).
- [43] On May 9, 2017, sometime prior to 5:25 p.m. Mr. Villeneuve emailed a series of photographs to Cst. Nielsen (again prior to authorization being given to do so). At page 7 of the email chain (Ex. #11) is an image of Kyle Latimer, from May 4, 2017 at 9:11 p.m. Mr. Villeneuve advised Cst. Nielsen that this was the person he knew to be Csongor Szucs who had moved into the building. Mr. Villeneuve also agreed that the images contained in Ex. #11, which he had provided to Cst. Nielsen, were outside the time frame requested by Cst. Nielsen in his later email of 6:05 p.m. and conceded that if he provided materials outside the scope of the materials requested and in the absence of authorization to do so, that too would have been in breach of the strata bylaws and policies.

[44] In August 2017, Mr. Villeneuve met with Cst. Cessford of the Delta Police Department in relation to another investigation into the tenants affiliated with unit 1204-5177 Brighthouse Way. At that time, he pointed out to Cst. Cessford that the male depicted in a still photograph (Ex. #12) from CCTV footage from the elevator lobby in the underground parkade was the man he knew to be Mr. Szucs. The man depicted in Ex. #12 is not Mr. Szucs but in fact is said to be Kyle Latimer.

Form K Notice of Tenant's Responsibilities 1204-5177 Brighthouse Way

[45] The Form K for unit 1204-5177 Brighthouse Way that Cst. Nielsen saw on May 5, 2017, a copy of which he received from Mr. Villeneuve on May 9, 2017, shows Csongor Szucs as the listed tenant (Ex. #1 Tab A). It includes a driver's licence number, an email address and a telephone number. The Form K is a pre-printed form that includes the following descriptor at the bottom of the form:

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

[46] The Form K is a document prescribed by s. 146 of the Strata Property Act, S.B.C. 1998, c. 43 [SPA]. A landlord must provide the strata corporation with a copy of the notice signed by the tenant.

Strata Bylaws for the River Green Community (Ex. #1 Tab D)

[47] The River Green strata council enacted bylaws which applied to 5177 Brighthouse Way. The strata bylaws, revised March 28, 2017, outline the duties of owners, tenants, occupants and visitors; the powers and duties of the strata corporation; the strata council; the enforcement of bylaws and rules; and general matters such as noise control, rental and other accommodations, common areas, the use of common area video surveillance and fob access records; and other matters incidental to regulating the running of the multi-unit residential community. Section 40 of the strata bylaws allow for CCTV monitoring throughout the common areas of the building including all levels of the parkade, the elevator lobbies and select corridors on levels two and three of the building.

[48] The bylaws provide that the strata corporation will collect the data obtained from both the CCTV surveillance system (s. 40(1)) and the usage of each security key fob (s. 40(3)).

[49] Section 40(4) of the strata bylaws also permits video files and/or fob access records to be used by the strata corporation for enumerated purposes, as follows:

- (4) The video files and/or security fob usage records will be used by the Strata Corporation for the following purposes:
 - (a) being alerted to the presence of trespassers on the strata plan;

- (b) preventing, recording, investigating, and obtaining evidence of any theft, vandalism, nuisance, or damage caused by any person on the strata plan;
 - (c) ensuring the safety of the owners, tenants, occupants, and visitors and the security of the strata plan; and
 - (d) enforcing Strata Corporation bylaws and rules which relate to theft, vandalism, nuisance or damage caused by any person on the strata plan.
- [50] Video files are stored for a period of up to one month but can be extended for security purposes as required by law enforcement (s. 40(5)) and fob access records are stored for a period of up to five years from the date of the recording (s. 40(6)).
- [51] In so far as law enforcement reviewing these materials is concerned, s. 40(7) of the bylaws provides:
- (7) The personal information of owners, tenants, or occupants will only be reviewed or disclosed as follows:
 - (a) to law enforcement in accordance with subsection (4);

Conclusion on Brighthouse Way Materials

- [52] It is clear from the totality of the evidence adduced on this voir dire that, notwithstanding Mr. Villeneuve's belief that he adhered to the strata bylaws and policies in providing information to Cst. Nielsen, he clearly did not. Cst. Nielsen attended Brighthouse Way on May 5, 2017 and viewed CCTV footage and the Form K in the concierge office. He copied the information on the Form K into his notebook at that time. He obtained copies of emails between the concierge service and the company that was the rental manager for unit 1204-5177 Brighthouse Way. He also received CCTV footage in the form of eight video clips, a copy of the Form K and photographs from Mr. Villeneuve on May 9, 2017. No official request had been made for these materials and clearly no approval to release such information had been provided by the strata property manager.
- [53] Indeed, no official request for information was provided until May 9, 2017 in the form of Cst. Nielsen's email at 6:05 p.m. Moreover, the strata property manager did not provide any sort of approval to release any information prior to May 11, 2017 at 9:56 a.m.
- [54] Thus, prior to obtaining any sort of approval, on May 5, 2017, Mr. Villeneuve had shown Cst. Nielsen CCTV footage from Brighthouse Way, he had shown the officer the Form K for unit 1204-5177 Brighthouse Way and had allowed him to copy that information, and he had provided information about the unit to which the parking space that Mr. Braich's vehicle occupied on May 4, 2017, was affiliated. He also emailed Cst. Nielsen five emails that related to communications between the concierge services and the rental managers who controlled the rental of unit #1204 as well as photographs of individuals believed to be associated with the unit.

- [55] And, on May 9, 2017, again prior to any approval from the strata property manager, Mr. Villeneuve provided Cst. Nielsen with photographs, a copy of the Form K and eight video clips from the CCTV footage of May 4, 2017 that pertained to Cst. Nielsen's May 5 queries about the red Mazda's attendance on May 4, 2017. Later in the day of May 9, 2017, but prior to Cst. Nielsen's official request and prior to any approvals, he emailed photographs to Cst. Nielsen that pertained to images outside the times of the attendance of the red Mazda 3 in the afternoon hours of May 4, 2017.
- [56] All of the materials that Mr. Villeneuve provided to Cst. Nielsen on May 5 and 9, 2017, were provided contrary to and in clear breach of the strata plan's bylaws and policies.

Pacific Rim Estates - 1011 West Cordova Street - June 2017 - July 2018

- [57] On June 19, 2017, members of the SFST were targeting Gurvinder Rhandawa who was believed to be a drug courier associated to the Kang group. SFST members observed what appeared, and was believed, to be a drug transaction between Mr. Rhandawa and Jacob Pereira. The SFST followed Mr. Pereira to the Pacific Rim Hotel and Estates. One surveillance member followed Mr. Pereira from the hotel lobby into the private residential side of the Pacific Rim and onto the elevator. Mr. Pereira was observed to travel to the 42nd floor. He was then seen 10 minutes later exiting the lobby of the Pacific Rim Hotel in the company of Csongor Szucs.

Det. Cst. Annemarie Unheim

- [58] On June 28, 2017, DC Annemarie Unheim, a member of the VPD and an investigator with Project Territory, attended at the Pacific Rim Hotel with the intention of looking at CCTV footage of the interactions observed by the SFST on June 19, 2017. This was the first of a number of attendances at the Pacific Rim Hotel and Estates. DC Unheim attended the location for two purposes on June 28, 2017:
- The primary purpose was to obtain information about the identity of the individuals who attended the Pacific Rim on June 19, 2017 and to try to confirm that Kyle Latimer lived on the 42nd floor by viewing the Form K - investigators had information from June 24, 2017 that lead them to believe this was Mr. Latimer's residence at the time.
 - The secondary purpose was to try to determine if Randy Kang had attended the Pacific Rim on June 28, 2017 to visit Kyle Latimer. His cell phone had been tracked to the Pacific Rim so her goal was to see if she could determine if Mr. Kang had attended Mr. Latimer's residence.
- [59] DC Unheim attended at the hotel first. There she watched and obtained CCTV footage from June 19, 2017 that showed an unknown male (later identified as Mr. Pereira) arriving at the hotel breezeway in a Mercedes, obtaining a backpack from the vehicle, entering the hotel lobby and walking across the lobby at 2:02 p.m. Further CCTV footage from the hotel lobby showed that at 2:11 p.m. that same day, Mr. Pereira and another unknown male (later identified as Mr. Szucs) left the hotel lobby. DC Unheim described Mr. Pereira as wearing the

same backpack but it appeared fuller. DC Unheim obtained clips of this footage from the hotel.

- [60] DC Unheim observed from the June 28, 2017, CCTV footage, that Gary Kang was in the body of the hotel and then he exited the hotel, but she could not see him in the lobby area.
- [61] As a result of conversations with hotel staff, DC Unheim learned that there was a separate entry for the residential portion of the Pacific Rim complex with a concierge service and its own CCTV surveillance system. She attended the entry to the residential portion of the complex - the Pacific Rim Estates - at 1011 West Cordova St. and spoke with the head concierge for the residences, Mr. Alex Sandu. DC Unheim explained that she was there to obtain video and tenant information in respect of suite 4203 of the residences. Mr. Sandu was unable to provide her with the information in the absence of a written request. He advised DC Unheim that if she emailed him the details of what she was looking for he would consult with the strata council and if they approved, she could come back and he would assist her in locating what she was seeking.
- [62] DC Unheim left and later sent Mr. Sandu an email outlining what she was seeking. In her Task Action Report ("TAR") for this task, DC Unheim noted that she emailed Mr. Sandu seeking permission to review the CCTV footage for June 18 and 19, 2017 and other information. Although she attached Mr. Sandu's email of June 30, 2017 that provided the Form K for suite 4203 to her TAR, DC Unheim appears not to have kept the email of the authorization request she sent Mr. Sandu. On June 30, 2017 DC Unheim spoke with Mr. Sandu and was advised he had met with the strata council and they had no issue in providing her with the CCTV footage and the other information she sought.
- [63] DC Unheim reattended the Pacific Rim Estates and met with Mr. Sandu in the early afternoon of June 30, 2017. At that time she reviewed the Form K for suite 4203 and learned that Pamela Cadrain and Mashinchi Investments were the listed tenants for the suite. She also obtained a copy of the CCTV footage and fob access records for suite 4203 for June 19, 2017. The CCTV footage showed Mr. Pereira and Mr. Szucs using the elevator in the residences to and from the 42nd floor. Mr. Sandu then emailed her the Form K for unit 4203 at 1:39 p.m. indicating that AWM Alliance (the strata property management company) had approved the release.
- [64] DC Unheim also received a Badge Events Report (Ex #1, Tab 3) from Mr. Sandu that provided the fob access records for two fobs associated to suite 4203. The report outlined the activity of the two fobs accessing specified areas of the residences between May 25, 2017 and June 30, 2017. By cross-referencing the CCTV footage and the fob access records, investigators were able to determine that Mr. Pereira used a key fob to access the elevator and suite 4203 on June 19, 2017. Observations from a member of the SFST established that Mr. Pereira had travelled in the elevator to the 42nd floor on that date.

- [65] Between June 28, 2017 and July 13, 2018, DC Unheim or other investigators with Project Territory attended at the Pacific Rim on approximately 17 different occasions to review and obtain CCTV footage and Form K information in respect of the residences and the hotel areas. DC Unheim testified that she was of the view that the initial permission she sought and obtained from Mr. Sandu on June 28, 2017 was a continuous authorization and that no further permissions were needed for materials from the Estates. None were sought or obtained.
- [66] At no time was a production order sought for the information related to the Pacific Rim Estates. DC Unheim acknowledged that productions orders were sought for the same materials at other locations, such as residences of interest to the investigation located on Smithe St., Seymour St., and Bidwell St. in Vancouver and Tomicki Ave. in Richmond.
- [67] The other CCTV footage either watched and/or seized by Project Territory investigators from the concierge at the Pacific Rim Estates included:
- November 1, 2017 footage of Mr. Pereira, Mr. Szucs, Mr. Braich and Mr. Gary Kang;
 - December 21, 2017 footage of Mr. Latimer, Mr. Pereira, Mr. Szucs, Mr. Braich and Mr. Kang;
 - December 22, 2017 footage of Mr. Latimer, Mr. Pereira, Mr. Szucs, Mr. Kang and Mr. Ghuman;
 - January 20, 22 and 24, 2018 footage of Mr. Latimer, Mr. Pereira, Mr. Szucs and others;
 - February 17 and 18, 2018 footage of Mr. Latimer, Mr. Szucs and others;
 - March 14 and 16, 2018 footage of Mr. Latimer and Mr. Pereira; and
 - July 16, 2018 footage of Mr. Latimer, Mr. Szucs and others.
- [68] By cross-referencing the fob access records with the CCTV footage, Project Territory investigators were able to piece together who attended at the Pacific Rim Estates and went to suite 4203. The dates of the CCTV footage were of significance to the ongoing Project Territory and other related investigations being conducted by the VPD. In particular, the information from January 2018 was used, in part, to confirm that Mr. Latimer continued to reside in suite 4203 for the purposes of the anticipated Part VI wiretap authorization that Project Territory intended to apply for and did obtain in mid-February 2018.
- [69] After the wiretap authorization was obtained, investigators attended to obtain CCTV footage to confirm who attended the residence. For example, on March 14, 2018, as a result of conversation overheard on the wiretap between Mr. Latimer and someone else, an investigator attended and watched CCTV footage. By cross-referencing the information gained from Mr. Latimer's conversation with CCTV footage, investigators were able to see Mr. Pereira attending at the residence.

- [70] Investigators were also able to cross-reference telephone numbers with the overheard conversations and, by viewing the CCTV footage, they were able to infer who was associated with a particular telephone number, e.g. Mr. Pereira on March 14, 2018.
- [71] In total, approximately 93 video clips of CCTV footage were obtained from the Pacific Rim Estates and the hotel. Most clips were less than a minute in length, although one was approximately seven to eight minutes long. Fob access records were obtained for most attendances as well and included activity reports for December 21 and 22, 2017, dates of significance to the Project Territory investigators as they related to the investigation of the murder of Gurvinder Grewal, a known rival of the Kang group, that occurred sometime between December 21 and 22, 2017.
- [72] DC Unheim acknowledged that included within the various clips of CCTV footage were images of third parties who had nothing to do with the investigation.
- [73] DC Unheim explained that after her initial attendance at a residential property on Bidwell St. on May 5, 2017, to view various excerpts of CCTV footage, she was advised she needed to have a production order for any further excerpts. In so far as the CCTV footage from the Pacific Rim Estates was concerned, she was never advised by anyone from the hotel or the residences that a production order was required for the materials she obtained from those locations.
- [74] DC Unheim agreed that by reviewing the CCTV footage and cross-referencing it with fob access records, the Project Territory investigators were able to draw inferences about certain individuals; where they were going, who they were meeting with, what they were doing and other investigative conclusions. While investigators were not able to see what was going on inside suite 4203, through the CCTV footage and the fob access records they were able to draw inferences and conclusions about the activities of various targets of interest to the investigation.
- [75] DC Unheim was asked about "lifestyle surveillance" and agreed that it was used in an effort to identify the routines of various targets and associates and that it occurred in this investigation in relation to Mr. Latimer and his associates. She agreed that various clips of CCTV footage provided a fuller circumstantial picture of individuals, including gestures, clothing, tattoos, activities and associations. Having the CCTV footage allowed for the careful study of the images obtained.
- [76] An example of how Project Territory used the CCTV footage obtained from the Pacific Rim Estates was the TAR prepared by Cst. Bemister who attended the Pacific Rim Estates on January 26, 2018 (Ex. #5 TAR 343-2). Cst. Bemister was assigned by DC Unheim to attend the Pacific Rim Estates and pick up a USB stick that contained 52 clips of CCTV footage from the elevator of the Estates between January 20 and 24, 2018. The TAR produced by Cst. Bemister contains 52 still images extracted from the CCTV footage along with interpretations and inferences drawn from what was observed in the images. DC Unheim agreed that what made the materials so powerful for investigators was that they were not just fleeting observations

but, rather, materials that could be carefully analyzed. Reviewing the CCTV footage was an interpretative exercise often informed by other investigative knowledge. Reviewed together, the CCTV footage and fob activity records provided the investigators with meaningful information about the activities of various targets.

- [77] DC Unheim explained that on July 5, 2018, she tasked Cst. Moawad with attending at the Pacific Rim Estates to view CCTV footage and fob access records associated with suite 4203 to determine if Mr. Latimer still lived in the Pacific Rim Estates as the investigators were about to apply for search warrants. The TAR prepared by Cst. Moawad was an exhibit on this voir dire (Ex. #6). Cst. Moawad attended the location on July 9, 2018, reviewed CCTV footage and fob access records and asked the concierge to show her the parking stall associated to suite 4203. The secure gate to the two parking stalls for suite 4203 was open, a vehicle was parked in one stall and numerous personal possessions, including furniture, were stored in the other parking stall area. Cst. Moawad took photographs of the area, including the vehicle and personal possessions, and later determined through queries that the vehicle belonged to a person recently identified as Mr. Latimer's girlfriend.
- [78] According to the TAR prepared by Cst. Moawad and reviewed by DC Unheim, Cst. Moawad returned to the Pacific Rim Estates on July 16, 2018 to review more CCTV footage in an attempt to obtain more footage of Mr. Latimer's associates. Cst. Moawad obtained some footage and included still photographs from the footage in the TAR. And, on July 17, 2018, Cst. Moawad reviewed surveillance notes that corroborated the still photograph obtained from the CCTV footage of the day before.
- [79] DC Unheim agreed that the purposes of obtaining all of this information from the Pacific Rim Estates included building profiles on targets and confirming the occupancy of suite 4203, all in aid of advancing the investigation.

Alexandru Sandu - Head Concierge at Pacific Rim Estates

- [80] Alexandru Sandu was the head concierge at the Pacific Rim Estates from October 3, 2016 to March 14, 2018, during the course of the Project Territory investigation. He was an employee of a company that provided concierge services to various buildings. Mr. Sandu did not report directly to the strata council; rather, he reported to the property management company, AWM Alliance, and two property managers employed by AWM. Mr. Sandu described the residential portion of the Pacific Rim as a high-end property with approximately 175 units located on floors 23 through 46. The hotel occupied the ground floor through the 22nd floor. The hotel and the residential portion of the property did not share a lobby, although residents could access the residences from the hotel. Access to the residential portion of the Pacific Rim was gained through electronic key fobs associated to a specific suite and which permitted the user to access the parkade, lobby, elevators, common areas such as the pool, and the floor for the suite that the key fob related to.

- [81] Mr. Sandu advised that there were approximately 49 CCTV surveillance cameras in the Pacific Rim Residences, with four in the main lobby area, and others located at the main gate to the parkade, the elevator lobby, the elevators and a few emergency stairway doors. The cameras were visible and their main purpose was for the security of the building.
- [82] In so far as the key fobs were concerned, Mr. Sandu said that every time they were used at a card reader, the serial number, suite number associated to the device, date, time and point of access were all recorded.
- [83] Mr. Sandu explained that when police attended to request CCTV footage and fob access records from the concierge desk at the Pacific Rim Residences, he would submit a formal request to property management to facilitate access.
- [84] Mr. Sandu recalled a request for information about suite 4203 relating to access by the residents. He forwarded the request to the property management company. Mr. Sandu recalled receiving approval from the property management company to assist the police with all their requirements; that is, to provide them with the CCTV recordings and fob access records sought, and to provide them with two master access devices that allowed access to all common areas, all floors, the parkade and mechanical rooms.
- [85] Mr. Sandu had little recollection of the specifics of the attendances by DC Unheim and others or of what they sought. It was clear from his evidence that he was simply the conduit for the information request from the police and the approval process by the property management company. Once approval was obtained he simply complied with any requests by the police for information and assisted in locating the CCTV footage they wanted and the related fob access records. He was not aware of the privacy policy for the strata plan and he did not know what requirements the police had to establish in order to obtain approval of their request for information from the strata property management company.
- [86] Mr. Sandu indicated that the stairs could not be used to access floors, as the doors were locked with access from the floor to the stairwell only through an emergency exit. All other access required the use of the key fob.

Strata Bylaws for the Pacific Rim Estates

- [87] The strata bylaws for the Pacific Rim Estates strata corporation were marked as part of Ex. #1 in this voir dire.[1] The first set of bylaws were enacted on June 2, 2016. This set of bylaws had no privacy policy and no bylaws governing common area video surveillance and fob access records.
- [88] The second set of bylaws were enacted on October 3, 2018 (the "2018 bylaws") and contain a detailed privacy policy in s. 38.[2] These bylaws incorporate parts of the Privacy Guidelines for Strata Corporations and Strata Agents ("Privacy Guidelines") published in June 2015 by the Office of the Information and Privacy Commissioner ("OIPC"). The 2018 bylaws for the Pacific Rim Estates refer to the Privacy Guidelines in the preamble to its privacy policy

within the bylaws and also adopt the definition of "personal information" from that document.[3]

- [89] In so far as video surveillance is concerned, the 2018 bylaws acknowledge that such surveillance contains personal information and that its use is to ensure the safety of owners, tenants and guests to the strata corporation property (s. A3(g), p. 31). The 2018 bylaws go on to provide direction on how personal information can be used or disclosed. Sections C6 and C7 of these bylaws are a verbatim excerpt from the OIPC's Privacy Guidelines document (p. 35) in respect of disclosure of personal information to law enforcement agencies.

OIPC's Privacy Guidelines for Strata Corporations and Strata Agents

- [90] The OIPC's June 2015 Privacy Guidelines were marked as Ex. #2 on the Pacific Rim voir dire. Although not filed as an exhibit in the Brighthouse voir dire, they were referred to in submissions generally.
- [91] The Privacy Guidelines provide detailed guidance to strata corporations and strata agents to assist them in discharging their duties under the SPA in a manner that respects the privacy of owners and tenants under the B.C. Personal Information Protection Act, S.B.C. 2003, c. 63 [PIPA] and promotes transparency in the operation of strata corporations.
- [92] The document is comprehensive in explaining what personal information PIPA allows organizations such as strata corporations to collect without consent and when strata corporations may disclose personal information to others. In so far as requests for personal information from law enforcement agencies is concerned, the Privacy Guideline document advises (at p. 10):

Strata corporations may receive requests for personal information from law enforcement agencies such as the police. If a strata corporation is asked to disclose personal information to a law enforcement agency without a warrant, subpoena or court order, it must satisfy itself that the request is a bona fide request in aid of an investigation in considering whether to disclose the information. The strata corporation needs to confirm that the disclosure is to a law enforcement agency in Canada, which concerns an offence under Canadian laws, and which would assist in their investigation or making a decision whether or not to undertake an investigation. The disclosure of personal information should assist the public bodies in determining whether the offence has taken place or whether charges should be laid or the offence should be prosecuted.

If a law enforcement agency makes an oral request to a strata corporation for an owner or tenant's personal information, it is advisable that the strata corporation request that the agency put its demand in writing, set out its statutory authority for making the request, and provide the agency's internal file number. For example, the police may request access to video surveillance or access records for their investigation into a criminal act.

- [93] The Privacy Guidelines also contain a section entitled "Privacy Issues Relating to Audio or Video Surveillance and Monitoring Systems" (at pp. 19-20). This section outlines:

The recording of voices, the capture of images of people entering a strata corporation building, or the capture of owners' movements through a strata corporation building may result in the collection of personal information about an identifiable individual within the meaning of PIPA. Any audio or video surveillance systems or access control and monitoring systems, such as a key fob system, in strata corporation buildings must comply with PIPA. Key fob systems monitor the access by owners to the common areas throughout the strata corporation building. This section sets out some considerations for strata corporations in relation to surveillance and/or access control systems.

Strata owners, tenants and guests have the right to feel and be secure in their daily lives, but they also have the right to be free from excessive and unwarranted intrusion. PIPA does not prohibit the use of video surveillance by strata corporations, but because of their inherent intrusiveness, video surveillance systems should only be used after other less privacy-intrusive measures have failed to address a serious problem.

Before installing or operating either a video surveillance or an access control system, the strata corporation should pass a bylaw authorizing its installation and operation. In the alternative, if the strata corporation does not pass such a registered bylaw, then it should ensure that all owners consent to its use. In all cases, a strata corporation should have a comprehensive written privacy policy in place that governs the use of such systems and the personal information they collect.

PIPA also permits the reasonable collection, use and/or disclosure of personal information for the purpose of an "investigation" or "proceeding" (ss. 12(1)(c), 15(1)(c), and 18(1)(c)) as defined in PIPA. For example, the use of video surveillance footage to catch strata lot owners dumping waste into the wrong waste bin would not be a permitted use of such a privacy invasive system because such improper dumping would likely be considered a minor bylaw infraction.

Before installing video equipment or activating a surveillance system that was installed by the original developer, the strata corporation should be prepared to justify the use of a surveillance system on the basis of verifiable, specific concerns about the personal safety of people living in a strata corporation, or in order to protect personal and common property that other measures have failed to address.

The access control system should only monitor access to public parts of the strata corporation property and be required for the security of the owners. If the identities of the owners or tenants can be anonymized, such as issuing the same key fob to everyone on the same floor, then the system may be less potentially invasive to the privacy of individuals living in [sic] the strata corporation while providing a secure method of accessing the building.

[94] The above directions in the Privacy Guidelines clearly establish that the OIPC has significant concerns with respect to how the personal information of owners, tenants and guests in strata corporation buildings is collected, stored and disclosed through the use of video surveillance and fob access records within residential settings, with the attendant impacts on their privacy interests. It is a clarion call to strata corporations and strata agents that they must take steps to implement policies and bylaws that protect the collected personal

information and the privacy of owners, tenants and their guests and to safeguard against indiscriminate disclosure of same to outside organizations, including law enforcement agencies. The suggested approach for disclosure of personal information to law enforcement agencies as set out in the Privacy Guidelines strikes a careful balance with a transparent process that ensures law enforcement agencies are able to conduct investigations but at the same time preserves a zone of protection for the privacy interests of owners, tenants and their guests. In other words, strata corporations and strata agents are counselled and advised by the OIPC to have a process in place to deal with requests by law enforcement agencies for the disclosure of information contained in CCTV footage and fob access records.

Conclusion on Pacific Rim Materials

- [95] Between June 2017 and July 2018 - the time period covered by this investigation - the strata corporation for the Pacific Rim Estates had no privacy policy in its bylaws and a somewhat haphazard approach to the disclosure of personal information, including CCTV surveillance and fob access records of owners, tenants and guests, to law enforcement agencies. The strata corporation appears to have realized there were privacy concerns in simply handing out the information so they required a written request from the police. However, there is no evidence as to what the request needed to include to satisfy the provisions of s. 18(1)(j) of PIPA.
- [96] In respect of the materials obtained from the Pacific Rim Estates, a significant body of information was obtained over a prolonged period of time. It appears that DC Unheim did not keep the actual request that she made for the materials back on June 28, 2017 by means of an email to Mr. Sandu. In my view, if the police intend to rely upon a 'lawful authority request' for such materials and the authorizations received from strata corporations or strata management companies as justification for their obtaining such materials in the absence of a production order, it behooves them to retain and produce the document that contains the purported lawful authority request that they proceeded under at the time the materials were requested and produced.

The Governing Legal Principles

Section 8: The Reasonable Expectation of Privacy Analytical Framework

- [97] Section 8 of the Charter provides that everyone has the right to be secure against unreasonable search or seizure.
- [98] The legal principles that govern my analysis in these two rulings are not in dispute. Where the parties part company is with respect to the emphasis to be placed on the various factors in the contextual assessment necessary to determine whether the applicants have established a reasonable expectation of privacy in regards the two searches.

- [99] Counsel have referred me to the leading authorities from the Supreme Court of Canada, including: *R. v. Edwards*, [1996] 1 S.C.R. 128; *R. v. Tessling*, 2004 SCC 67; *R. v. Patrick*, 2009 SCC 17; *R. v. Cole*, 2012 SCC 53; *R. v. Spencer*, 2014 SCC 43; *R. v. Marakah*, 2017 SCC 59; and *R. v. Jones*, 2017 SCC 60.
- [100] Counsel also rely on numerous other decisions, including *R. v. Yu*, 2019 ONCA 942; *R. v. Kim*, 2019 BCSC 2150; *R. v. Webster*, 2015 BCCA 286; *R. v. Law*, 2017 BCSC 1241; *R. v. Wilson*, 2017 BCCA 327 [Wilson BCCA], aff'g *R. v. Wilson* (April 12, 2016) Unreported Judgment, Vancouver No. 217835 (B.C.P.C.) [Wilson BCPC]; and *R. v. Sandhu*, 2018 ABQB 112.
- [101] As discussed in these cases and many others, the Supreme Court has identified three broad privacy interests protected by s. 8: personal, territorial and informational privacy. The applicants argue that both their territorial and informational privacy interests were engaged at both locations.
- [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.
- [104] I adopt the following from *Kim* as an accurate statement of the governing principles:
- [22] To assert a s. 8 claim, a claimant must establish a reasonable expectation of privacy in the subject matter of the search. As set out in *Edwards*, a person must establish that they subjectively expected the subject matter of the search would be private and this expectation was objectively reasonable: *Edwards* at para. 45; *Spencer* at para. 17; *Tessling* at para. 18.
- [23] If the claimant establishes a reasonable expectation of privacy, the second inquiry assesses whether the police activity in question amounts to an unreasonable search. As established in *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 at 159, "the guarantee of security from unreasonable search and seizure only protects the reasonable expectation."
- [24] The determination of a claimant's reasonable expectation of privacy requires a contextual assessment of the "totality of circumstances" (*Edwards* at paras. 31, 45; *Spencer* at paras. 16-18). In *Edwards*, the Supreme Court of Canada set out some factors which may inform a finding of a claimant's reasonable expectation in the subject matter of the search. These factors include: the claimant's presence at the time of the search; ownership, possession or control of the place searched, which includes the ability to admit or exclude others, and the historical use of the property (at paras. 45, 46). No factor alone is dispositive.

- [25] The Court in *Tessling*, recognized that the query of whether a person reasonably expects privacy is necessarily normative. Reasonable expectations of privacy are assessed in light of the norms of conduct of society (*Tessling* at para. 42). Where the subject matter of a search is informational, the nature and quality of that information is relevant (*Tessling* at paras. 59-62). In *Tessling*, the investigative technique used by the police revealed patterns of heat distribution on the external surfaces of a house. The Court found that these heat images did not reveal information in which a person would have a reasonable expectation of privacy. The heat images disclosed that there were some activities in the house that generated heat. However, the heat distribution offered no insight into the claimant's private life and revealed nothing of the individual's "biographical core of personal information" (*Tessling* at para. 63). As Sandhu recognized, the Supreme Court in *Tessling* tailored the Edwards factors in response to technological advancements in police investigative techniques (*Sandhu* at para. 27).
- [26] *Patrick*, *Tessling* and *Spencer* establish that a court must not narrowly approach the determination of the subject matter of an alleged search. Rather than focusing on the physical acts involved or the physical space invaded, the court must consider the nature of the privacy interests which are potentially compromised by the state action. For example, in *Patrick*, the target of the search was not the contents of the garbage bags per se but the personal information that could be gleaned from an examination of the contents of the garbage bags. In *Tessling*, the focus was not on the heat emitted from the surface of a residence, but on the information captured in those heat images that could potentially reveal the kinds of activities occurring inside the residence. Similarly, the subject matter of the search in *Spencer* was not simply the name and address of the internet subscriber, but the identity of an internet subscriber corresponding with particular internet usage. (See also: *R. v. Ward*, 2012 ONCA 660 [*Ward*].)
- [27] Further, in *R. v. Marakah*, 2017 SCC 59 [*Marakah*] the Supreme Court recognized that control is not an absolute indicator of a reasonable expectation of privacy, nor is the lack of control fatal to the existence of a privacy interest (at para. 38).
- [28] In *Spencer*, the Court set out four lines of inquiry to assist in the analysis in the context of an informational privacy claim. These considerations were summarized in *Jones* at para. 13 as follows:
- 1) an examination of the subject matter of the alleged search;
 - 2) a determination as to whether the claimant had a direct interest in the subject matter;
 - 3) an inquiry into whether the claimant had a subjective expectation of privacy in the subject matter; and
 - 4) an assessment as to whether this subjective expectation of privacy was objectively reasonable, having regard to the totality of the circumstances.

[29] The concept of privacy in a s. 8 analysis is not an all-or-nothing proposition: see *R. v. Duarte*, [1990] 1 S.C.R. 30 and *R. v. Wong*, [1990] 3 S.C.R. 36 [Wong]. This concept was recently discussed by the Supreme Court in *R. v. Jarvis*, 2019 SCC 10 [Jarvis] at para. 62:

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

[See also: *R. v. Wise*, [1992] 1 S.C.R. 527 at para. 80]

[105] Before applying this analysis to the searches in question on the present applications, I propose to first address several of the Crown's other arguments as to why, in its view, the applicants do not have a reasonable expectation of privacy in either the Form K for the Brighthouse Way location or the CCTV footage and fob access records for both locations.

Section 18(1)(j) of the Personal Information Protection Act

[106] The Crown submits that s. 18(1)(j) of PIPA provides the requisite authority for strata corporations to provide the materials in issue to the police. Section 18(1)(j) of PIPA states:

- s. 18(1) An organization may only disclose personal information about an individual without the consent of the individual, if
 - (j) the disclosure is to a public body or a law enforcement agency in Canada, concerning an offence under the laws of Canada or a province, to assist in an investigation, or in the making of a decision to undertake an investigation,
 - (i) to determine whether the offence has taken place, or
 - (ii) to prepare for the laying of a charge or the prosecution of the offence,

[107] The provision on its face authorizes non-consensual disclosure of personal information to law enforcement agencies but only in prescribed circumstances: where it is to assist in an investigation to determine if an offence has taken place or to lay charges or prosecute an offence. Accordingly, s. 18(1)(j) is directed to obtaining information in relation to a specific offence or the making of a decision to undertake an investigation.

[108] The Crown urges that *Spencer* at para. 70 supports its position that PIPA is much more permissive than PIPEDA[4] and therefore does permit what occurred in this case. In *Spencer*, Mr. Justice Cromwell reviewed the provisions of PIPEDA and the police request for subscriber information from an Internet Service Provider (ISP) in respect of a particular IP

address that appeared to be accessing and storing child pornography through an Internet file sharing program. The police submitted a "law enforcement request" pursuant to s. 7(3)(c.1)(ii) of PIPEDA to Shaw for the subscriber information and advised it was being sought as part of an ongoing investigation. When the terms of Shaw's privacy policy and the provisions of PIPEDA were examined, it was clear that PIPEDA did not authorize the simple handing over of personal information to law enforcement agencies upon request. Justice Cromwell concluded that there was a reasonable expectation of privacy in the circumstances of Spencer, that the request by the police for the information from the ISP amounted to a search, that the combination of a declaratory provision in then s. 487.014(1) of the Criminal Code and PIPEDA did not create a new search power and that a production order was necessary to obtain the information (paras. 65-73).

- [109] The Crown here asserts that PIPA creates a regime, not of compulsion, but of requests and the volunteering of information. However, PIPA does not contain a regime of open-ended requests for information for any law enforcement purpose, such as general intelligence gathering or building profiles of targets. Rather, disclosure is limited to the purposes outlined in s. 18(1)(j): assisting in an investigation (or making the decision to undertake an investigation) to determine whether an offence has taken place or to lay charges or pursue a prosecution of an offence. Clearly, retention of the law enforcement agency's request and the accompanying authorization would be a necessary prerequisite to determining whether the request satisfied the limited parameters of the provision.
- [110] More significantly, however, in *R. v. Roudiani*, 2018 BCSC 1101, Mr. Justice Smith examined the interplay between ss. 18(i) and (j) of PIPA and the provision to the police of personal information collected pursuant to the BarWatch program.
- [111] In *Roudiani*, the police were investigating an aggravated assault on Granville St. near the Studio Nightclub. The police obtained video evidence from neighbouring businesses as well as the data that the nightclub obtained from the accused - a photograph and scan of identification - upon his entry to the premises. The ability to connect the name with otherwise anonymous video surveillance was of concern to Smith J.
- [112] In addressing the provisions of s. 18 of PIPA and the disclosure of personal information to the police without the consent of the individual in question, Smith J. noted:
- [44] The fact that provincial legislation does or does not authorize the holder of the information to release it to the police is not directly relevant to the question of whether the police, in obtaining that information, have conducted a search within the meaning of s. 8 of the Charter. The existence of the provincial legislation is simply one consideration in determining whether there was a reasonable expectation of privacy.
- [113] Mr. Justice Smith determined in *Roudiani* that there was a sufficient reasonable expectation of privacy in the materials the police obtained from a public venue that the police were conducting a search that should have been the subject of prior judicial authorization. Accordingly, while PIPA may have permitted the handing over of the information, it did not

neutralize the expectation of privacy in the materials. In obtaining the information from the Studio Nightclub, the police were conducting a search and as it was done in the absence of prior authorization it was a warrantless search that amounted to a breach of s. 8 of the Charter in that case.

- [114] I adopt the reasoning of Smith J. in Roudiani. The permissive provisions of PIPA do nothing to neutralize expectations of privacy in personal information provided to the police by a third-party record holder. Legislative provisions are not determinative of a Charter challenge. They are but one factor to be considered in the analysis and must be weighed in the totality of the circumstances. In the specific case of PIPA, while it may be relevant respecting the ability of the police to request information from third parties, it is not dispositive of a Charter challenge: Spencer, para. 54; R. v. Baldovi, 2016 MBQB 221, para. 47.
- [115] Additionally, in the circumstances extant in this case, I would not interpret s. 18(j) of PIPA as broadly as the Crown urges. In my view, the provision cannot be employed to remediate a clear violation of the strata bylaws that govern how the River Green strata corporation has decided to handle and disclose personal information to outside organizations, including law enforcement. Moreover, it is entirely unclear on the evidence what the details were of the initial verbal request by Cst. Nielsen on May 5, 2017, it not having been committed to writing. I am not prepared to assume Cst. Nielsen's request even met the threshold required by s. 18(1)(j) of PIPA.
- [116] In so far as the materials for the Pacific Rim Estates are concerned, I acknowledge there was no privacy policy in the bylaws for the strata plan in place at the time. Nevertheless, the concerns about privacy and protecting privacy interests in such materials had been identified by the OIPC in the Privacy Guidelines more than two years prior to the June 28, 2017 request. In my view, the strata plan's failure to have a proper privacy policy in place at the time cannot override the privacy interests that the owners, residents and guests had in their personal information at that time. Moreover, where the Crown seeks to rely upon the ostensible permission to disclose granted by s. 18(1)(j) of PIPA, the police should retain and produce the lawful authority request submitted to the strata corporation and any subsequent authorization obtained in order to demonstrate compliance with PIPA.
- [117] Accordingly, in these circumstances I am unable to find that the requests for the disclosure of the materials from either location conformed to the provisions of s. 18(1)(j) of PIPA. More importantly, the provisions of PIPA do not create a Charter-free zone in which the police can operate and conduct what amounts to a warrantless search to obtain personal information impressed with an expectation of privacy in so far as state actors are concerned: Roudiani.

Form K Information: Webster and Law

- [118] The Crown relies upon the decisions in Webster and Law to assert that I am bound to conclude there is no reasonable expectation of privacy in a Form K and the personal information it contains.
- [119] In Webster, Mr. Justice Chiasson succinctly described the Form K in the following manner:
- [64] A strata corporation is required by s. 35 of the Strata Property Act, S.B.C. 1998, c. 43, to have a list of owners with their strata lot addresses and list of tenants. Section 146 obliges an owner to give a prospective tenant a Notice of Tenant's Responsibilities, and to give a copy of the Notice signed by the tenant to the strata corporation. That Notice is Form K in the regulations to the Act. Section 36 of the Act obliges the strata corporation to provide copies of records referred to in s. 35 to an owner or tenant who has been assigned the right to look at records.
- [120] One of the distinguishing features in Webster, which arose out of a drug investigation in Kelowna, was the fact that the lead investigator lived in the same complex as the condominium of interest to his investigation. He asked the building manager for a copy of, or to see, the Form K related to the residence of interest. By virtue of s. 36 of the SPA, the investigator qua owner or tenant was entitled to a copy of the Form K.
- [121] The Court accepted the Crown's argument that the tenancy records were in the control of the strata corporation and did not contain any information that would reveal intimate or core biographical details of the accused's lifestyle. There was no evidence of any contractual or legal obligation on the part of the owner or the strata corporation to keep the tenancy information confidential and it was reasonably foreseeable that tenancy information could be disclosed for any number of reasons associated with the strata corporation's functions.
- [122] Given the lead investigator's status as either an owner or tenant of the building, Chiasson J.A. stated:
- [69] Objectively, the appellant had, at best, a limited expectation of privacy. The document was in the hands of a third party. By statute some people were entitled to the information. I see no reason why the police could not ask for it. The building manager was quite free to refuse the request, although the lead investigator ostensibly may have had a right to the information.
- [70] It is surmised that the building manager knew the lead investigator was a police officer and that he was investigating the appellant, but we do not know what was in the mind of the building manager. In my view, merely complying with a request for the provision of information in his possession does not make the building manager a state agent.
- [71] The appellant contends that the police should have obtained a production order pursuant to the Criminal Code. Without deciding the point, it seems to me that such orders are directed more at providing protection and a measure of comfort to the holder of records than at limiting the ability of police to ask for information in the hands of third parties.

[Emphasis added.]

[123] The timeline for the events in Webster was that the investigation occurred in 2008, the trial in 2013 and the appeal in 2015.

[124] In Law (at para. 98), Madam Justice Duncan applied Webster and found that the information contained in a Form K was not personal information, the dissemination of which would violate Mr. Law's reasonable expectation of privacy in the objective sense.

[125] While the decisions in Webster and Law could be treated as binding on a strict application of the principles of stare decisis, I am of the view that it would be wrong to adopt such an approach in the particular circumstances of this case.

[126] Noticeably absent from the decisions in Webster and Law is any consideration of the provisions of PIPA or the OIPC's Privacy Guidelines, a document that was created to assist strata corporations and strata agents, as well as the public, in interpreting, applying and conforming to the requirements of PIPA in the context of residential strata complexes and the handling of personal information.

[127] PIPA defines "personal information" as information about an identifiable individual and includes employee personal information but does not include contact information. The Privacy Guidelines are more expansive in defining "personal information", describing PIPA's term "identifiable individual" as including such things as:

Name, age, weight, height, home address, home phone number, race, ethnic origin, sexual orientation, medical information, marital status, religion, finances, education and employment

Some of the common types of personal information that strata corporations manage include:

- Name, address and phone number

[128] Significantly, the Form K in issue here includes a qualifier or limitation in the footer of the document that contains a statement of its purpose: providing the personal information contained in the Form K is "for communicating with tenants and owners, ensuring the orderly management of the Strata Corporation and complying with legal requirements." By virtue of s. 146 of the SPA a landlord and their tenant must provide this information to the strata corporation. Sections 35 and 36 of the SPA delineate the circumstances in which a Form K can be disclosed. It does not include provision to law enforcement agencies upon request.

[129] Finally, the jurisprudence on privacy has evolved considerably, most notably with the Supreme Court's 2017 decision in Marakah, which post-dated both Webster and Law and concluded that an individual does not lose control over information for the purposes of s. 8 of the Charter simply because another individual (or organization) possesses or can access it. In my view, while Webster and Law are informative, they are distinguishable and I decline to follow them in the circumstances of this case for the reasons provided above.

CCTV Surveillance Footage: Wilson and Yu

- [130] The Crown relies upon Wilson BCCA, upholding the decision of Howard P.C.J. in Wilson BCPC, to assert that I am bound to conclude there is no reasonable expectation of privacy in the CCTV footage from the common areas of the strata complexes or the fob access records from either Brighthouse Way or the Pacific Rim Estates.
- [131] In Wilson BCCA, Madam Justice Fenlon, speaking for the division, upheld the decision of Howard P.C.J. in a brief endorsement-style judgment. The Court of Appeal did not engage in its own analysis of the issues raised by this application. Moreover, Wilson BCCA also pre-dates the Supreme Court's decision in Marakah.
- [132] In Wilson BCPC, Howard P.C.J. found that the accused's subjective expectation of privacy in his images captured in CCTV footage as he moved through the common areas of the strata property was not objectively reasonable and that the images did not capture or expose intimate details about the accused's lifestyle or information of a biographical nature.
- [133] In March 2012, the accused Wilson rented a suite in a 150-unit strata complex in downtown Vancouver. Observations of Mr. Wilson and his co-accused lead the police to believe that the pair were using the unit as a "stash house" for their drug trafficking activities. Images of the accused Wilson moving through the common areas of the complex were captured by the strata corporation's CCTV surveillance system. In April and May 2012, a Surrey RCMP officer attended at the complex and asked to see the video footage from a specified time. The building manager/concierge willingly prepared a DVD containing video clips for the dates, times and areas of surveillance sought by the officer.
- [134] Judge Howard considered the 2009 version of the Privacy Guidelines in her decision but was dismissive of the accused's reliance upon PIPA and the OIPC's Privacy Guidelines, stating:
- [42] In my view, neither PIPA nor the Privacy Guidelines for Strata Corporations can operate to confer upon WILSON a "constitutionally protected" privacy interest in the common areas of a condominium complex or in any video images of him as he moved through those common areas. The sweeping definition of "personal information" under the Act - "information about an identifiable individual" - goes well beyond the type of informational privacy that is protected by s. 8 of the Charter, that being a "biographical core of personal information" that tends to reveal intimate details about the individual. Moreover, the fact that a strata corporation or its agents may fail to abide by any of the requirements of PIPA or the Privacy Guidelines by having no bylaws or written policy dealing with the use of video security cameras and the dissemination of information collected by the cameras does not assist in the present analysis. The absence of bylaws or policies dealing with these issues does not create a positive privacy interest of the kind contemplated by s. 8 of the Charter.

- [135] Judge Howard applied the comments of Chiasson J.A. in Webster (at para. 76) to conclude that while the presence of security measures in the building was not determinative of the issue of an expectation of privacy in common areas, the relative lack of exclusive occupation of the common areas in a 150-residential unit complex militated against a finding that any subjective expectation of privacy was objectively reasonable (at paras. 52-54).
- [136] In my view, respectfully, this is not the appropriate way to approach common area property in the context of objective expectations of privacy. The density of any particular strata property should not create a diminishing scale for objective reasonableness such that the larger the complex the less likely it is that there can be any objectively reasonable expectation of privacy: White at paras. 48 and 51. Rather, the analysis should be conducted from the perspective that all residents of a multi-unit complex, regardless of size, retain an expectation of privacy in their personal information, be it their images or documents about their tenancy, that is objectively reasonable such that they remain protected from random and unregulated disclosure of this information to outside organizations, including law enforcement agencies.
- [137] How exclusive occupation of the common areas is only informs how diminished the expectation of privacy might be, not whether it extinguishes it. In many respects, the CCTV footage and fob access record information that strata corporations seem to hand over to the police in the absence of some sort of prior judicial authorization is analogous to the subscriber information that law enforcement agencies used to obtain from ISPs in the absence of a production order prior to Spencer.
- [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.

The Role of Jarvis and Other Cases in the Reasonable Expectation of Privacy Analysis

[142] Counsel for the applicants relies upon Jarvis for its delineation of the factors involved in the assessment of a reasonable expectation of privacy. As set out at para. 29 of the decision, they are as follows:

- a) The location where the person was observed or recorded;
- b) The nature of the impugned conduct, that is, whether it consisted of observation or recording;
- c) Awareness of or consent to potential observation or recording;
- d) The manner in which the observation or recording was done;
- e) The subject matter or content of the observation or recording;
- f) Any rules, regulations or policies that governed the observation or recording in question;
- g) The relationship between the person who was observed or recorded and the person who did the observing or recording;
- h) The purpose for which the observation or recording was done; and
- i) The personal attributes of the person who was observed or recorded.

[143] In Kim, Devlin J. dismissed the same argument, stating:

[31] Counsel for the accused also referred to Jarvis and its exposition of the factors for a reasonable expectation of privacy. The issue in Jarvis was expressly stated to be whether persons in the situation of the students who were the subject of the accused's surveillance activity with a pen camera, could reasonably expect not to be so monitored within the meaning of s. 162(1) of the Code. The Court borrowed from the s. 8 jurisprudence to inform the factors involved in the s. 162(1) analysis in Jarvis. That cross-pollination of principles met with disagreement in Rowe J.'s concurring judgment. In part, Rowe J. remarked that: "[r]easonable expectation of privacy in the two contexts is based on divergent considerations; they are not to be guided by the same analytical framework" (at para. 95). I echo those sentiments in the converse situation involving the application Jarvis to the s. 8 principles.

[32] Firstly, there is well-settled jurisprudence in the s. 8 context that identifies the substance of an individual's reasonable expectation of privacy. That identification in turn delineates the scope of the reasonableness of that expectation as objectively assessed with reference to the normative values of Canadian society. Secondly, Jarvis borrowed s. 8 concepts to guide its way through a novel interpretation of s. 162(1). That decision, in one way or another, acknowledged the differences between constitutional and statutory interpretation. While the factors enumerated in Jarvis are illustrative, I am mindful that the Court was dealing with a statutory provision designed to protect individual's privacy interests from intrusions by other individuals. By contrast, the fundamental purpose of s. 8 is to protect an individual's privacy interests from state intrusion (Jarvis at para. 57). I do not interpret Jarvis to mean that the factors used to divine a reasonable expectation of privacy under s. 162(1) of the Code are now intended to inform the s.8 analysis in the Charter context. [Emphasis added]

[144] I agree with Devlin J. and adopt her assessment of the inapplicability of Jarvis to the interpretative task at hand. Judge Tam of the Provincial Court of British Columbia reached a similar conclusion in *R. v. Chau*, 2019 BCPC 201 at para. 20.

[145] Similarly, the decisions in *Aubrey v. Éditions Vice-Versa Inc.*, [1998] 1 S.C.R. 591, *Heckert v. 5470 Investments Ltd.*, 2008 BCSC 1298, *Peck v. United Kingdom* (2003, 36 E.H.R.R. 41, and *Campbell v. MGN Ltd.*, [2004] 2 A.C. 457 (H.L.) referred to by the applicants are of no assistance in applying the totality of the circumstances analysis of state actions.

The Applicable Analytical Framework

[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 dieres. 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.

Analysis

[150] The issue before me on these two voir dieres is whether the applicants have established on a balance of probabilities that they had a reasonable expectation of privacy in the CCTV footage that captured them in the common areas of Brighthouse Way in Richmond and the Pacific Rim Estates in Vancouver, as well as in the fob access records from those two locations and the Form K from Brighthouse Way. All of the items were obtained by investigators with the VPD's Project Territory investigation without prior judicial authorization. Essentially, they asked the concierges for the materials and they were provided to them, albeit at slightly different rates of response.

[151] It is the Crown's position that there is no reasonable expectation of privacy in any of the information the investigators obtained from the two concierges and therefore no search or seizure that attracts s. 8 Charter scrutiny.

Further Context Relevant to the Analytical Framework

[152] While the information obtained by the police in this case may, at first blush, appear fairly innocuous, in my view it would be erroneous to proceed on that assumption. It is beyond dispute that we are going through a technological and digital revolution where changes in how we communicate, do business, live and play are exponential. Indeed, with the numerous advances in digital technology it would be fair to say that our society is rapidly evolving into a digital surveillance state where our movements, associations and activities are constantly watched, recorded and preserved through a proliferation of smart phones, CCTV surveillance cameras and the resort to the modern convenience of electronic key fobs both at work and in the residential context.

[153] The information obtained in this case is a result of the larger societal shift to life in multi-unit buildings under the watchful eye of CCTV surveillance cameras that record all movements into, out of and within a complex. Additionally, many modern residential complexes require owners and tenants to use electronic key fobs to access most areas of such buildings. In the present case, for example, without a key fob, the applicants could not gain access to the building lobby, underground parkade and elevators of their residential complexes.

[154] The key fobs record the movements of the fob associated to an owner or tenant of the complex. The fob access records contain data regarding the time, date and area accessed by a registered fob, and thus capture a significant amount of information about a fob user's

movements. That information is even more powerful when cross-referenced with CCTV footage of the areas accessed, and collectively they can establish a comprehensive record of lifestyle choices within the residential complex - who went where when, with whom, and what they were carrying, wearing, and doing.

- [155] Moreover, much like video replay at sporting events, CCTV footage permits a viewer to play back, pause, study and interpret the images captured. In that regard, CCTV footage is completely different from the brief and fleeting observations made by eye-witnesses or surveillance officers. It is reviewable, permanent and far more informative. CCTV footage memorializes the interactions and movements of individuals, transforming the passing observations stored in human memory into a permanent visual record of a person's movements.
- [156] When the nature of these materials and the wealth of information that they provide are considered in this way, the content of the OIPC Privacy Guidelines becomes more compelling. While the Privacy Guidelines are not statutory directions that carry the force of law, they do establish that significant concerns about privacy and disclosure of personal information exist in the context of residential living in strata properties. Collection of personal information through the use of CCTV surveillance footage and fob access records should be carefully monitored, controlled and not randomly or easily disclosed. As the Privacy Guidelines note (at p. 19), video surveillance is inherently intrusive and strata owners, tenants and their guests have a right to be free from excessive and unwarranted intrusion in this area.
- [157] In my view, a corollary to the concerns enumerated in the Privacy Guidelines must be that strata owners, tenants and their guests have a right to be free from indiscriminate disclosure of their collected personal information to outside agencies in the absence of an articulable reason for such disclosure or some form of judicial oversight such as a production order. Concerns about privacy and the use of such information ought not to be contingent on whether a strata corporation has adopted a privacy policy or is adhering to the directive of the OIPC or even the bare minimum required by s. 18(1)(j) of PIPA.
- [158] Law enforcement agencies are able to cross-reference CCTV footage and fob access records with other information in the investigative file to advance their investigations. Such materials are, no doubt, of formidable assistance to law enforcement in fighting crime and protecting society. So, too, are general warrants, search warrants and wiretap authorizations. But those investigative techniques require prior judicial authorization before they can be employed to gather information. Similarly, law enforcement's access to cell phone records, computer IP addresses and activities, banking records and numerous other types of records - all of which can provide compelling circumstantial evidence in investigations and prosecutions - usually requires prior judicial authorization through a production order.

- [159] While CCTV cameras and key fobs enhance the security and safety of those living and working within a residential complex, they do not, in my view, extinguish the residual expectation of privacy - the right to be left alone by the state - such that the information they record is there for the taking by state agents upon a simple request. Indeed, given the seeming mandatory nature of these devices in multi-unit residential settings, passive acquiescence or resignation by the occupants or their guests to the inevitable and ubiquitous private surveillance ought not to mean that they have entirely relinquished their expectation of privacy in the images and information contained therein, especially where the state is concerned.
- [160] The notion that common areas in multi-residential units are "privacy free zones" is inconsistent with the broad conceptions of the right to privacy. As the Ontario Court of Appeal noted in *White*:
- [48] the fact that a relatively large number of people may have access to a building's common areas need not operate to eliminate a reasonable expectation of privacy. It is one thing to contemplate that neighbours and their guests, all of whom may be strangers to another resident, might be present in the common areas of a building, but another to say that a resident has no reasonable expectation of privacy as a result. An expectation of privacy may be attenuated in particular circumstances without being eliminated.
- [51] 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*.
- [161] Certainly, individuals can continue to make choices about whether they will enter truly public spaces such as shopping malls, bars, hotels, airports, train stations and the like notwithstanding the presence of CCTV surveillance cameras. However, owners and tenants of multi-unit residential buildings, and their guests visiting them, have no choice but to travel through common areas - crossing lobbies, using elevators, accessing hallways and parking their vehicles in secure parking lots. Although they may implicitly consent, or acquiesce, to the surveillance of their movements for the sake of the security of the building and the other occupants, it does not mean that they have consented to or waived their residual privacy interest in their movements, images and information vis-à-vis the state. In an era when the trend in residential living is rapidly moving away from detached family homes and towards multi-unit residences, the legal concept of privacy must be flexible and adaptive in order to ensure that it is not being "videoed" out of existence.

[162] I will now examine whether the applicants have established on a balance of probabilities that they have a reasonable expectation of privacy in the common areas of their multi-unit dwellings. The existence of a reasonable expectation of privacy is determined by assessing the totality of the circumstances. The jurisprudence from the Supreme Court of Canada mandates that the factors relevant to this contextual analysis can be grouped into four lines of inquiry:

- i. The subject matter of the alleged search;
- ii. The applicant's interest in the subject matter;
- iii. Whether the applicant had a subjective expectation of privacy in the subject matter; and
- iv. Whether the subjective expectation of privacy was objectively reasonable.

What is the subject matter of the alleged searches?

[163] Brighthouse Way - The Crown says the subject matter of the search was video images of the common areas in the parkade and its elevator lobby at River Green, and the Form K. It asserts that the territorial and informational privacy interests engaged in these materials are so limited as to be inconsequential.

[164] The Crown argues in respect of the Form K that the name, address, phone number and email of the person associated to the suite and, in turn, the red Mazda that was of interest to the police, reveal nothing about Mr. Szucs that the police were not prohibited from obtaining. What the police were really after, submits the Crown, was simply the name and contact information of the tenant associated with the parking stall that the red Mazda was observed to park in, nothing further. While the subject matter extended slightly beyond name and contact information to associations, it nevertheless did not trench on personal information.

[165] In so far as the CCTV footage and fob access records are concerned, the Crown asserts that the decision in Wilson BCCA upholding Wilson BCPC is dispositive of the issue.

[166] The applicants argue the subject matter of the search was much more than the video images from the common area of the parkade and the name and address information on the Form K. Through the obtaining of this information the police were able to identify people previously unknown to them or were able to make associations and connections of unknowns to previously known targets. In this respect, argue the applicants, the information falls more into the category of lifestyle information than simple images and tombstone data.

[167] Pacific Rim Estates - The Crown says the subject matter of the search was video images of the common areas of the parkade, the lobby and the elevator of the Pacific Rim Estates, and that the fob access records reveal nothing about the identity of the accused in the absence of the CCTV footage. Moreover, some of the areas covered by the CCTV footage were in public view, such as the lobby of the Estates, the entry to the parking garage, the breezeway

entrance to the hotel and the lobby of the hotel. In addition, argues the Crown, observations by members of the surveillance team place some of the accused in the lobby and in the elevator of the Residences and so the fob access records add little by way of association and identifying information. Accordingly, argues the Crown, the police did not require prior authorization to obtain this information from the building management.

- [168] The applicants argue the subject matter of the search was much more than just the video images obtained from the CCTV footage. When the fob access records for Mr. Latimer's suite - #4203 - are cross-referenced with the CCTV footage from the lobby and elevators, a far more detailed and intimate picture is provided as to the activities of Mr. Latimer and various individuals affiliated with and visiting him. Through the obtaining of this information the police were able to identify people previously unknown to them or were able to make associations and connections of unknowns to previously known targets. Moreover, they were able to review the CCTV footage and draw inferences as to what was occurring - such as who was carrying what, when they were attending, and who they were in the company of - clearly something they were unable to do through the physical surveillance in place. In this respect, argue the applicants, the information falls more into the category of lifestyle information than simple images and tombstone data.
- [169] The analytical assessment is, in my view, the same for both locations and for all the materials in issue. With respect, the Crown takes a fairly circumscribed view of the nature of the physical space and of the information provided by the materials. This view was rejected in cases such as Patrick as outlined in Kim at paras. 26 and 35; see also Yu at paras. 76-77.
- [170] In Yu at para. 76, the Court reiterated that the question to be answered in addressing the first line of inquiry - the subject matter of the search - is "what were the police really after"; see also Marakah at para. 25, and Kim at para. 36.
- [171] In my view, in so far as the Brighthouse materials are concerned, if the subject matter was as circumscribed as the Crown advances, the police would not have sought to obtain anything beyond a brief view of where the red Mazda parked and the Form K information. There would have been no need to obtain any of the CCTV footage or fob access records.
- [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.

- [173] I reach a similar conclusion in respect of the materials obtained from the Pacific Rim Estates by DC Unheim and other VPD officers. These materials were not restricted to attendances on one date (June 19, 2017) but expanded to cover various dates throughout the course of the Project Territory investigation[5] with numerous video clips and pages of fob access records devoted to the movements, associations and activities of Mr. Latimer and his guests in the Pacific Rim Estates. Indeed, the scope of these searches was even more sweeping, capturing as it did, months of attendances, activities and movements of the occupants and guests of suite 4203.
- [174] The materials in Ex. #5 vividly demonstrate the broad use to which the images from January 20 through 24, 2018 was put by Project Territory. The 52 screen capture photographs obtained from the 52 CCTV surveillance footage clips are included in TAR 343-2 completed by Cst. Bemister on January 30, 2018. The TAR contains much more than the simple identification of occupants in an elevator; it contains opinions on the interactions between various occupants, what they are carrying and the like.
- [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.

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

[178] The Crown acknowledges that the applicants do have a direct interest in their images captured by means of the CCTV footage, as well as the Form K information about Csongor Szucs.

[179] Little was said by the parties about the fob access records. However, I am prepared to accept that when the fob access records are cross-referenced to the tenancies and correlated with the CCTV footage, they provide further corroborative information about the activities of the accused.

[180] On the state of the evidence in respect of the Form K from the River Green complex, it is fair to conclude that both Mr. Szucs and Mr. Latimer have a direct interest in the subject matter of the Form K. Mr. Szucs is listed as the tenant. It is unclear whether the BC Driver's Licence number is his or Mr. Latimer's. The same can be said for the telephone number and email contained in the Form K. Mr. Latimer also has a direct interest in the Form K as the evidence of Mr. Villeneuve makes clear that Mr. Latimer was the person that River Green understood to be "Johnny Szucs", which he pointed out to both VPD and Delta police officers involved in the investigations around unit 1204-5177 Brighthouse Way.

[181] Accordingly, I am satisfied the applicants had a direct interest in the subject matter of all the information that Project Territory investigators seized from the two strata corporations.

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

[182] As outlined in Kim (at para. 39) the subjective expectation of privacy line of inquiry 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; Tessling at para. 42; Patrick at para. 35; and Kim at para. 39.

[183] In the case at bar, there was no direct evidence from the accused.

[184] In so far as the Form K from Brighthouse Way is concerned, the document itself sets out a limitation as to its use, as do ss. 35 and 36 of the SPA. The Privacy Guidelines further inform the assessment and confirm that individuals would have a subjective expectation of privacy in respect of this information. Moreover, the evidence of Mr. Villeneuve as to the practices of the River Green strata corporation requiring authorization from the property management group and someone from the strata council before providing personal information, including the Form K details, demonstrates that owners and tenants would have a subjective expectation of privacy in this information. It was not to be handed over to anybody on request, including law enforcement.

- [185] The same can be said in respect of the CCTV footage for both locations. In respect of Brighthouse Way, the strata plan bylaws (s. 40) specified the purposes for which the CCTV footage and fob access records could be used by the strata corporation (s. 40(4)) and when they could be reviewed or disclosed to law enforcement (s. 40(4) & (7)(a)). There was no evidence that Cst. Nielsen was provided the CCTV footage and fob access records for one of the purposes listed in s. 40(4)(a)-(d) of the bylaws.
- [186] Even if the applicants were aware that they were subject to video surveillance throughout the common areas of the River Green complex and were aware of the strata bylaws about when such materials could be provided to law enforcement, that does not negate a subjective expectation of privacy in the circumstances. As in *Kim* (at para. 41), an individual's awareness of the potential for being monitored and the resulting diminished expectation of privacy does not support the conclusion that the individual did not have a subjective expectation of privacy in the circumstances, particularly vis-à-vis the state. The jurisprudence eschews a categorical "all-or-nothing" approach to the reasonable expectation of privacy in respect of both the subjective and objective assessments.
- [187] Like *Devlin J.* in *Kim*, I decline to find that merely because the accused were aware that there were CCTV surveillance cameras throughout the common areas and that fob access records were compiled, they did not enjoy a subjective expectation of privacy in the information. To do otherwise "would not comport with the proper approach to s. 8": *Kim* at para. 41.
- [188] In respect of the CCTV footage and fob access records for the Pacific Rim Estates, the same reasoning largely applies notwithstanding the absence of strata bylaws governing the use of such information or a privacy policy at the material time. The Privacy Guidelines make clear the obligations and expectations placed upon strata corporations and strata agents by PIPA when dealing with the personal information of owners, tenants and their guests, including CCTV footage and fob access records. The failure of the Pacific Rim Estates strata corporation to have a privacy policy and relevant bylaws in place cannot negate the subjective expectation of privacy in the information and images provided to the police in the circumstances of this case. To find otherwise would render any subjective expectation of privacy illusory and meaningless in buildings that have failed to fulfill their statutory obligations to safeguard such information and to disclose the information only in accordance with authorized purposes.
- [189] And, as outlined earlier, on the state of the evidence in this case, I am unable to conclude that s. 18(1)(j) of PIPA was complied with as there is nothing to substantiate the proposition that the requests made by the police here conformed to the requirements of that section of PIPA.
- [190] I find that both the territorial and informational privacy interests of the applicants are engaged in all the materials obtained by Project Territory in respect of both residential complexes. While it is reasonable to infer the applicants may well have expected to be

subjected to video surveillance in these places, it is also reasonable to infer that they would not have expected that their movements and activities would be committed to a permanent record to be handed over to law enforcement agencies in the absence of compliance with the governing bylaws, statutory directions and best practices set out by the OIPC.

[191] I acknowledge that the CCTV footage in question captured common areas to which many more people have access than the limited access to specific floors. To that end, the circumstances are distinguishable from those in *Kim and Sandhu*. Nevertheless, as I discussed earlier, the reality is that owners, tenants and guests, including the applicants, have no choice but to submit to surveillance as they transit through these areas to access their suites and secure parking spaces. Similarly, they have no option but to use key fobs for access to the various areas of the buildings. The absence of choice in this regard does not militate in favour of finding that they have no subjective expectation of privacy in relation to state agencies.

[192] I find that the applicants had a reasonable subjective expectation of privacy in the CCTV footage from the common areas, secure parking garages and elevators for both Brighthouse Way and the Pacific Rim Residences; the fob access records for both complexes; and, the Form K for Brighthouse Way. While the expectation of privacy may well be attenuated when compared to the level of privacy within a suite, it most certainly is not extinguished.

Was the subjective expectation of privacy objectively reasonable in the totality of the circumstances

[193] In my view, this is the factor where real issue is joined in this case. Indeed, the Crown's submissions, although not conceding the other factors, largely focused on the argument that any subjective expectation of privacy was not objectively reasonable in the totality of the circumstances.

[194] In relation to this final line of inquiry, the "totality of the circumstances" assessment mandates consideration of the following factors:

- a. The place where the alleged "search" occurred; in particular, did the police trespass on the applicant's property and, if so, what is the impact of such a finding on the privacy analysis?
- b. Whether the informational content of the subject matter was in public view.
- c. Whether the informational content had been abandoned.
- d. Whether such 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 this evidence gathering technique was itself objectively unreasonable.

- g. Whether the informational content exposed details of the claimant's lifestyle, or information of a biographical nature: Tessling at para. 32; Marakah at para. 24.
- [195] Of course, as the assessment is contextual, some factors will have more significance than others, depending on the circumstances. Indeed, some factors may appear to either have no application at all depending on the materials in issue and where they are held or to be of such limited application that little weight is given to them: *R. v. Siniscalchi*, 2010 BCCA 354 at paras. 67-69.
- [196] In *Marakah*, the three factors that were of most significance in the Supreme Court's analysis were: (1) the place of the search (paras. 24-30); (2) the private nature of the subject matter (paras. 24, 31-37); and, (3) control of the subject matter (paras. 24, 38-45). Policy considerations were an additional factor, including the impact on law enforcement and whether finding a reasonable expectation of privacy in sent text messages would hamper the ability of law enforcement to investigate offences. Chief Justice McLachlin, writing for the majority, concluded that the fruits of the search cannot be used to justify an unreasonable privacy violation, noting that prior judicial authorization has been relied on to preserve privacy rights under s. 8: *Marakah* at paras. 46-53.
- [197] As *Marakah* makes clear in respect of the place of the search, since s. 8 of the Charter protects people, not places, the question always comes back to what the individual, in all of the circumstances, should reasonably have expected (para. 30).
- [198] The Crown argues that when the totality of the circumstances is properly assessed and balanced in this case, the conclusion is that any subjective expectation of privacy was not objectively reasonable and that the investigators were not required to obtain prior judicial authorization to gather the materials from the strata corporations. Accordingly, s. 8 of the Charter is not engaged for either *Brighthouse Way* or the *Pacific Rim Estates*.
- [199] Not surprisingly, the applicants assert that the weighing of these factors militates in favour of a conclusion that they have established that their subjective expectation of privacy in respect of the materials obtained by the police was objectively reasonable and that the manner in which the materials were obtained breached their s. 8 Charter rights.
- [200] The CCTV footage and the fob access records engage a blend of both territorial and informational privacy interests. However, like the circumstances in *Kim*, the territorial privacy interest is not the primary consideration and certainly is not determinative of the privacy analysis (paras. 45-47). In my view, the *Form K* for *Brighthouse Way* only engages informational privacy interests.
- [201] In so far as the territorial privacy interests are concerned, only Mr. Latimer's territorial privacy interest are engaged as he appears to have resided at both the *Brighthouse Way* and *Pacific Rim Estates*. Mr. Pereria has no territorial privacy interest as his attendances at both locations appears to be solely as an invited guest. The same can be said for Mr. Szucs in respect of his attendances at the *Pacific Rim Estates*. There are no recorded attendances of

Mr. Szucs at Brighthouse Way apart from the Form K that was submitted, but I would not characterize the document as engaging a territorial privacy interest in these circumstances.

[202] I turn now to an assessment of the objective reasonableness of the subjective expectation of privacy with respect to the informational privacy interests engaged by these applications.

Brighthouse Way Materials

[203] The Brighthouse Way materials are the Form K containing Mr. Szucs' personal information as well as the CCTV footage of Mr. Latimer and Mr. Pereira moving through the common areas of the River Green complex, specifically the secure underground parking garage and its elevator lobby, as well as the accompanying fob access records for unit 1204. The information contained in the materials provided a significant amount of lifestyle information that the police were able to harvest repeatedly in advancing their investigation.

[204] The building bylaws and the evidence of Mr. Villeneuve establish that property management, the strata corporation and the strata council were sensitive to the privacy interests of persons within the building, even in respect of the common areas.

[205] The Crown asserts that the CCTV surveillance footage and fob access records captured nothing more than the movements of the applicants in the common areas of Brighthouse Way, which were areas to which many residents had access. Moreover, the materials did not provide revealing or intimate details about the applicants. Given the number of people who could potentially see them moving about, the readily visible nature of the surveillance cameras and the fact that bylaws authorized the recording of movements in these areas and the disclosure of this information to law enforcement in certain circumstances, the Crown argues that any subjective expectation of privacy cannot be objectively reasonable in the circumstances.

[206] I cannot agree with position advanced by the Crown.

[207] The place where the alleged search occurred was a residential premise where Mr. Latimer resided, albeit perhaps not continuously, and where Mr. Szucs appears to have said he was a tenant. Mr. Pereira was an invited guest. Certainly, the police did not "trespass" on the property. Cst. Nielson gained entry by his attendance and meeting with Mr. Villeneuve and remained in the common area of the River Green complex.

[208] The informational content of the materials was not in full public view. Rather, it was secured within the strata corporation's computer server and its records. Moreover, the images captured in the CCTV footage, while from the common areas of the property, were nevertheless from a secured area through which the public at large was not permitted to travel.

- [209] As the earlier jurisprudence from the Supreme Court of Canada recognized, being the subject of fleeting observations by others, on the one hand, and the state making a permanent electronic record of our activities, on the other, are two very different things: *R. v. Wong*, [1990] 3 S.C.R. 36 (cited in *Kim* at para. 58). I acknowledge that it was not the state that made the permanent electronic record of the activities here, but almost more insidiously, the state accessed private records in the absence of any sort of prior judicial authorization. I see little difference between the state surreptitiously recording the activities as they did in *Kim* and a private corporation making recordings for one purpose and then simply handing them over to the state when asked. Either way, the state has obtained a permanent record of an individual's activities in the absence of any prior judicial authorization; indeed, in the case of the Brighthouse Way materials, in the absence of any authorization by the record holder, the strata corporation.
- [210] Notwithstanding that the strata bylaws authorized the recording and monitoring of activities and movements in the common areas, including the secure underground parking lot and the elevator areas, the bylaws and the informal policy of the Brighthouse Way strata corporation did not authorize the concierge to hand over that information to law enforcement agencies in the absence of prior approval by the property management company and a member of strata council. And yet, that is exactly what Mr. Villeneuve did in this case. The same reasoning applies to the Form K as is evident from the limiting language on the Form K in this case and the provisions of the SPA that delineate how and when the information may be disclosed.
- [211] If an individual's privacy in their own personal details and information is to be given any significance, particularly from the state, it cannot be waived by a third party simply because the police ask for it. The fact that the property manager eventually provided his approval to provide the information does not remediate the fact that the information was handed over contrary to the bylaws and policies of the strata corporation at Brighthouse Way by Mr. Villeneuve on May 5 and 9, 2017. Moreover, the materials do not appear to have been obtained in conformity with the provisions of s. 18(1)(j) of PIPA.
- [212] To that end, the fact that the information was in the hands of third parties and not subject to an obligation of confidentiality does not mean that any expectation of privacy is somehow objectively unreasonable. Confidentiality and control over the information is but one factor to assess: *Marakah* at para. 38.
- [213] Significantly, the materials were nevertheless subject to non-disclosure to other parties, including law enforcement agencies, save for the limited purposes articulated in the bylaws and subject to prior approval by the property manager and a member of strata council. This state of affairs militates in favour of a finding that the expectation of privacy was objectively reasonable.

- [214] While the police technique employed in this case was not intrusive in relation to the privacy interest, in that the police did not install their own security camera as in Kim and Sandhu, in my view this is a neutral factor in the assessment of the totality of the circumstances. Similarly, the use of this evidence gathering technique - a request for and permission to obtain - was not itself objectively unreasonable but again this factor is, in my view, neutral in the assessment of the totality of the circumstances.
- [215] In so far as the informational content exposing details of the applicants' lifestyle or information of a biographical nature is concerned, as noted earlier in the subject matter of the search component of the analysis, the materials obtained provided the police with the ability to draw inferences and conclusions from extensive and prolonged review - and play backs - of the information captured by the video recordings, including: who was meeting with the vehicle, what they were carrying to and from the vehicle, who was affiliated with suite 1204, the identity of the individuals and so on. All of this is lifestyle information, albeit not core biographical information of religious beliefs, sexual preferences or more intimate details.
- [216] Nevertheless, 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. Similar to the concerns expressed in Sandhu (at para. 45) and Kim (at para. 54), access to and repeated review of the CCTV footage and fob access records was far more powerful and invasive than a fleeting observation of a passer-by in the common areas. The police had the ability to review the footage, catalogue their observations, draw inferences about the associations, patterns, descriptions and activity of the applicants within the secure residential areas of Brighthouse Way. And the police had the ability to return to repeatedly for further review and to cross-reference it with other information gleaned through other investigative techniques.
- [217] Balancing the various factors that the objective reasonableness of the expectation of privacy analytical framework requires leads me to conclude that in respect of the Brighthouse Way materials obtained by the Project Territory investigators in May 2017, the applicants' subjective expectation of privacy was objectively reasonable in the circumstances.

Pacific Rim Estates Materials

- [218] The Pacific Rim Estates materials relate to the voluminous CCTV footage and fob access records that Project Territory investigators obtained from Mr. Sandu and other concierge staff between June 30, 2017 and July 17, 2018.
- [219] The same analysis as applied to the Brighthouse Way materials above applies in respect of the Pacific Rim Estates materials and leads me to the same conclusion.
- [220] There are, however, two distinguishing features. First, the strata plan for the Pacific Rim Estates did not have any privacy policy in their bylaws at the time the Project Territory investigators made their initial request for the materials on June 28, 2017. Nor did they have

any bylaws governing the use and disclosure of such materials. However, that is not something that inures to the benefit of the Project Territory investigators. The strata corporation's failure to address the issue does not give it carte blanche to hand over materials to the police when they ask for it. Indeed, the OIPC's Privacy Guidelines from 2015 recommending that strata corporations and strata agents adopt privacy policies is a factor that militates in favour of finding that the subjective expectation of privacy was objectively reasonable.

- [221] The second distinguishing feature is that DC Unheim did email Mr. Sandu on June 28, 2017 to request authorization to obtain the materials for the periods in June 2017 that she was specifically interested in. However, as noted previously, that email was not retained or produced on this voir dire, which makes it impossible to determine whether what was provided by Mr. Sandu on June 30, 2017, accorded with what was requested. It also makes it impossible to determine whether the authorization sought and obtained in June 2017 was as wide as DC Unheim believed it to be, that is, to cover all subsequent requests for records through July 2018.
- [222] The repeated police attendances at the Pacific Rim Estates with no further authorizations sought or obtained is emblematic of the general concern expressed earlier in these reasons that law enforcement agencies sometimes appear to treat the fob access records and the footage obtained from CCTV surveillance cameras in multi-unit residential buildings as "self-contained evidence preservation units" that they can access without the need to establish the minimal grounds for prior judicial authorization that a production order requires.
- [223] In so far as the informational content of these materials exposing details of the applicants' lifestyles is concerned, it is apparent that unlike physical surveillance observations which are generally fleeting, the use of the materials obtained from the Pacific Rim Estates provided the investigators with a wealth of information as to significant details of the applicants' lifestyles, associations and activities. One need only review Cst. Bemister's January 30, 2018 TAR or the information they were able to cross-reference from CCTV footage and the wiretap intercepts in respect of identifying Mr. Pereira's cellphone number and his attendance at the Pacific Rim Estates on March 14, 2018 (paras. 67, 69 and 70, supra) to appreciate the extent of the information about lifestyle activities and associations that the Project Territory investigators were able to draw upon to advance their investigation.
- [224] Balancing the various factors relevant to the objective reasonableness of the expectation of privacy leads me to conclude that in respect of the Pacific Rim Estates materials obtained by the Project Territory investigators between June 30, 2017 and July 17, 2018, the applicants' subjective expectation of privacy was objectively reasonable.

CONCLUSION

- [225] Having considered the totality of the circumstances, I find the applicants have established on a balance of probabilities that they each had a reasonable expectation of privacy in the subject matter of the materials obtained by the Project Territory investigators from Brighthouse Way and the Pacific Rim Estates. They have standing to challenge the searches.
- [226] As I have found a reasonable expectation of privacy in respect of all the items in issue on these two applications, it follows that the manner in which the items were obtained by the police - without prior judicial authorization in the form of a production order - means that the items were obtained by means of a warrantless search and seizure.
- [227] During the argument on these voir dires the Crown advised that it would not seek to justify the warrantless search and seizures of the information in issue on these two applications should that be the outcome. Accordingly, the applications are allowed. I am satisfied on a balance of probabilities that the applicants have established they had a reasonable expectation of privacy in the materials seized from the two locations. As these were warrantless searches, I find that the CCTV footage, fob access records and the Form K from Brighthouse Way and the CCTV footage and fob access records from the Pacific Rim Estates were obtained contrary to s. 8 of the Charter.

"Ker J."

- [1] Ex. #1 Tab 1 contains the Strata Plan BCS 3699 Bylaws approved June 2, 2016 at the AGM.
- [2] Ex. #1 Tab 2 contains the Strata Plan BCS 3699 Bylaws approved at an AGM or Special General Meeting on October 3, 2018.
- [3] Ibid, p. 27.
- [4] Personal Information and Protection and Electronic Documents Act, S.C. 2000, c. 5.
- [5] CCTV surveillance footage was either seized or reviewed by various members of the Project Territory team for the following dates: 2017 - June 19; November 1; December 21 & 22; 2018 - January 20 through 24; February 17, 18, 28; March 3, 16, 27 & 28; July 9 & 16.

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