

CANADA / JUDGMENT

## R. v. Saed

2024 BCSC 1027

### COURT

Supreme Court of British Columbia

### DECIDED

13 June 2024

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2024 BCSC 1027 R. v. Saed

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Saed,

2024 BCSC 1027

Date: 20240613

Docket: 34399

Registry: Vancouver

Rex

v.

Howjeen Saed, Hemen Hewa Saed, Diego Maradona Saed,

Vinod Kanna Aruldevarajan and Roger Alfredo Bardales Medina

Before: The Honourable Mr. Justice Crossin

Reasons for Judgment Re: Voir Dire #4 -

Standing 833 Seymour Street

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No other appearances.

Place and Dates of Hearing:

Vancouver, B.C.

May 8-10 & 13-15 2024

Place and Date of Judgment with Reasons to Follow:

Nanaimo, B.C.

June 12, 2024

Place and Date of Reasons for Judgment:

Vancouver, B.C.

June 13, 2024

## Introduction

- [1] The accused, along with others, are alleged to have been part of a group pursuing the business of drug trafficking in and around the City of Vancouver.
- [2] The investigation by the police; and the alleged conduct of the accused, traverse the period of time between the summer of 2020 through to the spring of 2021; culminating in the arrest of the accused on May 31, 2021.
- [3] The investigation utilized a number of usual techniques associated with these types of investigations. The use of informants; police surveillance relating to the movements and activities of various targets; tracking devices; and searches and seizures pursuant to a variety of judicial authorizations at various locations, at various times, throughout the investigation.

- [4] It is the theory of the Crown, and was the theory of the police, that a number of hotels and high-rise apartment buildings throughout the City were used by the accused, and others, for drug trafficking purposes. The police came to the view certain suites or units in various buildings were used as stash sites or stash houses for the gathering and distribution of the drugs. During the relevant period of time the police made not only physical observations of various persons and places, but noted certain places had installed CCTV cameras at various locations around the buildings. In addition it was observed fobs were used by certain individuals to gain entry to the buildings, and areas within the buildings, as persons came and went.
- [5] The particular locations will be referenced momentarily.
- [6] In early May 2021 the Associate Chief Justice granted a Part VI authorization. Pursuant to the authorization the police installed audio and video probes in one of the alleged sites; namely unit 3408 located at 833 Seymour Street. This location was one of many stash sites allegedly used for the drug trafficking activities.
- [7] The accused were ultimately arrested on May 31, 2021. The accused Mr. Aruldevarajan is no longer before the court. Mr. Diego Saed is at large.
- [8] The three remaining accused have brought a series of applications challenging the lawfulness of a variety of judicial authorizations that resulted in the gathering of evidence. The challenges engage s. 8 of the Charter of Rights and Freedoms.
- [9] Two of the accused on this application shared the same surname and I will refer to them throughout these reasons by their first name only. This is in accordance with the manner of the submissions of counsel.
- [10] Generally, the authorizations related to a number of different stash sites.
- [11] In this context the Crown has raised the issue of standing.
- [12] The application before the court relates to 833 Seymour Street. The accused seek to challenge the lawfulness of the gathering of evidence relating to this location. The Crown says one or more of the accused do not have standing to launch such challenges; primarily based on the proposition that one or more of the accused have no reasonable expectation of privacy in the subject matter of the search. Consequently there is no standing to seek a remedy pursuant to an alleged breach of s. 8 of the Charter.
- [13] The applications of the accused seek declaratory relief on behalf of all accused. The application seeks three declarations concerning the gathering of evidence on three occasions relating to 833 Seymour Street.
- [14] Namely:

- (a) A declaration that the applicants have a reasonable expectation of privacy in the information provided to Detective Philip Toews by Mr. Greyson Owen, the building manager for 833 Seymour Street, Vancouver, BC, on January 8, 2021 (the "information").
- (b) A declaration that the applicants have a reasonable expectation of privacy in the CCTV video footage from 833 Seymour Street obtained pursuant to a production order issued January 29, 2021.
- (c) A declaration that the applicants have a reasonable expectation of privacy in the CCTV video footage and fob records from 833 Seymour Street obtained pursuant to a production order issued April 13, 2021.

[15] Briefly the Crown takes the following positions:

- (a) That none of the applicants have standing to advance this application.
- (b) That Howjeen and Hemen have standing to advance this application in the sense that it is conceded by the Crown Howjeen and Hemen have a reasonable expectation of privacy in the information contained in the CCTV footage. The Crown however takes the position that Mr. Bardales Medina has no such expectation of privacy and as such no standing to pursue the application.
- (c) That none of the accused have standing to advance this application as none of the accused have a reasonable expectation of privacy in the subject matter of this production order.

[16] The court previously issued reasons for judgment in this matter concerning the accuseds' standing to pursue applications concerning another alleged stash site, namely at 1221 Homer Street in Vancouver. These reasons are indexed at R. v. Saed, 2024 BCSC 565 ("Saed #1"). In that regard I will borrow liberally from the outline of the factual context as recited in Saed #1.

## Factual Overview of the Investigation

- [17] The applicants are three of four accused. The Crown alleges that they were associates in a drug trafficking organization comprised of fifteen individuals. It is the Crown's theory that: Howjeen was the head of the organization and provided direction to the other accused; Hemen was a senior member of the organization; Mr. Diego Saed was a courier and transport person; Mr. Aruldevarajan was a cook who processed the drugs; and Mr. Roger Alfredo Bardalaes Medina was responsible for managing the inventory and accounting related to the group's activities.
- [18] In the summer of 2020 the police suspected a person named Mohammed was heading an organization operating a drug trafficking regime in and around the City of Vancouver. I am advised Mohammed was in fact murdered part way through the investigation, in January 2021. It is the theory of the Crown Howjeen stepped into Mohammed's shoes.

- [19] In any event it appears based upon the information provided to the court, the police began surveillance concerning drug trafficking, in the summer of 2020. The observations, over many weeks, included Mohammed and various individuals conducting meetings the police viewed as consistent with drug trafficking. In addition the police observed the individuals attending a variety of hotels and high-rise apartment buildings throughout the City. These individuals were seen entering and exiting these places; often carrying bags of one sort or another. The police came to the view these were drug trafficking activities and the units within the buildings were being used as stash sites.
- [20] Between August 2020 and May 2021 the police continued to undertake surveillance and ultimately obtained a number of general warrants and/or production orders, and/or search warrants, on a number of buildings in downtown Vancouver.
- [21] These authorizations, generally, sequentially, authorized entry to the buildings and authorized observations at various locations in the buildings; seizure of CCTV footage; seizure of fobs; and ultimately entry to particular units in the buildings.
- [22] The evidence gathered provided the foundation for a successful application for a Part VI authorization; allowing the police to install audio and video probes in two of the stash sites (not Homer Street). The Part VI authorization was granted on May 5, 2021. The evidence apparently captures at least four of the accused mixing and weighing drugs, counting money, and generally discussing the activities of the drug trafficking organization.
- [23] On May 31, 2021 the police arrested the accused, and as well, carried out searches of certain residences, vehicles, and persons.
- [24] The charges against the applicants stem from an investigation by the Combined Forces Special Enforcement Unit BC ("CFSEU-BC") into Anees Shah Mohammed and his alleged drug trafficking network called the "Wolf Pack". The Vancouver Police Department ("VPD") was originally investigating Mr. Mohammed for drug trafficking activities. The VPD discovered that Mr. Mohammed may have been conspiring to commit murder against another individual. Thereafter, the VPD and CFSEU-BC determined that CFSEU-BC would commence a drug trafficking investigation and the VPD would focus its attention on the conspiracy to murder investigation.
- [25] As previously referenced, Mr. Mohammed was killed in the course of the investigation, in or around January 2021. It is the Crown's theory that Howjeen thereafter assumed the leadership role in the organization.
- [26] On July 28, 2020, police initiated surveillance of Mr. Mohammed and his network, including one Charles Pronteau, Devinder Dhillon, Jesse Spencer, Simbarashe Kamzimbi, Jose Joseph, Joseph Lowley and Jaden Sangha.

- [27] The police did not observe any of the applicants until September 2, 2020, when Howjeen was seen with Mr. Pronteau and Mr. Spencer. Howjeen was next observed on November 2, 2020, when Mr. Spencer picked him up from 6996 Culloden Street, known by police to be the Saed family residence (the "Saed Residence").
- [28] Police observed the applicants and their associates conducting short duration meetings and exchanges at a number of hotels and apartment buildings throughout Vancouver and Burnaby that they say are consistent with drug trafficking. They also observed members of the group entering these buildings carrying reusable shopping bags or gift bags, engaging in suspected exchanges that often occurred in the buildings' parking garages. The police say these activities are consistent with drug trafficking.
- [29] In particular, police observed Mr. Mohammed, the applicants, and their other associates frequently attending at residential high-rise apartment buildings. They came to believe the group was using suites within the residential buildings as stash sites. The stash sites were used to store drugs, firearms, and money, as well as to prepare and repackage drugs. Police believed that the group would use each stash site for some weeks before moving and that the group moved stash sites at least eight times between July 2020 and May 2021. Investigators ultimately identified eleven units that they believed to be stash sites used intermittently by the group between August 2020 and May 2021.
- [30] The British Columbia Provincial Court granted a number of authorizations during the initial months of the investigation, including production orders, tracking warrants and transmission data recorder warrants. The police sought and obtained production orders for condominium CCTV and fob records, which allowed them to identify specific condominium units frequented by the applicants and their associates. As of the time police sought warrants to search the alleged stash sites in May 2021, there had been over 130 warrants and orders issued for the investigation. Not all are relevant to the various Charter applications at issue.
- [31] Between December 2020 and May 2021, police conducted nine searches of four alleged stash sites at the following locations:
- (a) #1005 - 1221 Homer Street on December 21, 2020 ("Homer Street");
  - (b) #3201 - 1308 Hornby Street on May 21, 2021 ("Hornby Street");
  - (c) #2107 - 1111 Alberni Street on May 12, 15, 26 and 31, 2021 ("The Shangri-La"); and
  - (d) #3408 - 833 Seymour Street on May 12, 18, and 31, 2021 ("Seymour Street").
- [32] Police identified Seymour Street and The Shangri-La as potential stash sites early in the investigation, prior to first observing Howjeen on September 2, 2020.

[33] On May 30, 2021, police obtained judicial authorizations for eleven "takedown warrants" at a number of locations. Those relevant to the various applications before the Court are as follows:

- (a) Seymour Street ("Site 46A");
- (b) The Shangri-La ("Site 46C");
- (c) Richards Street ("Site 46D");
- (d) Trump Tower ("Site 46E"); and
- (e) Saed Residence ("Site 46F").

[34] On May 31, 2021 the police executed the takedown warrants. Police located kilogram-level quantities of fentanyl and other drugs at the alleged stash sites and gram-level quantities at Howjeen and Hemen's respective residences.

[35] The police arrested Howjeen, Hemen, Diego Saed and Mr. Aruldevarajan on May 31, 2021. Mr. Aruldevarajan was arrested with a key fob to Seymour Street in his possession while Diego Saed had a key fob associated with The Shangri-La.

#### 833 Seymour Street

[36] This is a 42-story tower in Vancouver. There are 376 units. It is a strata owned building. The front door or main entrance of the building is located on Seymour Street, between Robson Street and Smithe Street. Underneath the building is a parking garage with eight levels of underground parking.

[37] The lobby of the building is equipped with floor to ceiling windows that result in the entire lobby being visible to anyone on Seymour Street. In other words, when standing on Seymour Street, one can see the elevator lobby through the doors and windows of the building.

[38] The building utilizes fob access. Fob access to each floor is limited to the occupants of that floor and their guests. The building is also equipped with 36 CCTV cameras located throughout the building. These locations include the entrance, the lobby, the elevators, the stairwell, the parkade and each parkade elevator bay. The CCTV cameras are clearly visible.

[39] Levels P1 and P2 parking are accessible from the street and open to the public between 6:00 a.m. and midnight. There is a gate separating levels P1 and P2 from level P3-P8. A gate to enter P3 is accessible via a building fob. Levels P3-P8 contain 256 residential parking stalls for residents of the building. In relation to the public parking at P1 and P2, there are only four visitor parking stalls. The remainder of the stalls are designated for various enterprises.

[40] There are elevator bays on each level of the parking lot. Access to the building from the parking area via the elevator requires fob access. Alternatively, an occupant of the building could provide remote access to a guest from the parking area and/or the entrance to the building via fob access.

[41] The elevators themselves are accessible to all occupants of the building as well as their guests with the use of fobs.

[42] Finally, the ground level of the building houses two businesses, one of which is the Vancouver Symphony Orchestra School.

The Investigative Context re: 833 Seymour Street

[43] An agreed statement of facts generally sets out the circumstances surrounding the investigative efforts relating to Seymour Street.

[44] As stated the applications before the court relate to the statement obtained from Mr. Owen on January 8, 2021; the subsequent production order authorized on January 29, 2021; and finally, to a production order for all fob records and CCTV footage for a six-day period in April 2021, which production order was obtained on April 13, 2021.

[45] These authorizations however were not the first authorizations obtained in relation to 833 Seymour Street. On October 17, 2020 police executed a search warrant at suite 2705, 833 Seymour Street and recovered a firearm and a quantity of drugs believed to be for personal use. Evidence contained in the ITO reveal that from the commencement of the investigation in the summer of 2020 through to the observations up to April 13, 2021 the applicants' connection to Seymour Street was somewhat marginal.

[46] Mr. Bardales Medina was seen attending 833 Seymour Street on only two occasions. Those occasions being August 17 and August 20, 2020. On August 17 Mr. Bardales Medina was seen in the underground parkade meeting with Mr. Pronteau; and again, on August 20, entering the parkade with Mr. Pronteau and taking the elevator together to the 34th floor.

[47] Howjeen's attendance at 833 Seymour Street was somewhat more appreciable.

[48] The agreed statement of facts sets out the following:

- (1) On December 2, 2020 the police observed an unknown male drive a Jeep Wrangler into the underground parkade at 833 Seymour Street. Mr. Dhillon was identified as the passenger in the vehicle. The unknown male driver was said to somewhat match the description of Howjeen but the identification was not confirmed and, in any event, the vehicle was in the underground parking for four minutes before it was driven away to 999 Seymour Street.
- (2) On January 6, 2021 police observed Mr. Mohammed in the passenger seat of a Toyota Highlander enter the parkade at 833 Seymour Street. Approximately 10 minutes later a BMW 335i, that was leased to Howjeen was seen parked in front of 833 Seymour Street; however it was then unoccupied. About 10 minutes later the police observed Howjeen walking from the area of 833 Seymour and depart in the BMW.
- (3) The next day, January 7, 2021 based on a review of the CCTV footage, Howjeen and a Ms. Cepeda were seen entering the elevator of 833 Seymour Street at the public parking level of P2, where Howjeen was observed using a fob as they travelled in the elevator to the 36th

floor. Howjeen and Ms. Cepeda were observed approximately 10 minutes later entering the elevator from the 34th floor. At this time Howjeen had a black and white Lululemon shopping bag and a floral backpack both of which appeared full. Howjeen also carried a red and black GoodLife Fitness duffel bag over his shoulder. Ms. Cepeda was observed using a fob and they both travelled in the elevator down to the P1 parking level and again walked through the public area to parking level P2.

- (4) Approximately 20 minutes later, at 23:20 on January 7, 2021 Howjeen and Ms. Cepeda entered the front doors of the main entrance of 833 Seymour Street where Ms. Cepeda used a fob to open the doors. The two then entered the elevator, and Ms. Cepeda again used a fob to travel to the 36th floor where they exited the elevator.

[49] The only observation in relation to Hemen at 833 Seymour Street was the evening of January 7, 2021; the evening Mr. Mohammed was murdered. On January 7, 2021, based on a review of CCTV footage, Hemen and Mr. Spencer exited the elevator on the 36th floor at approximately 6:45 p.m. Mr. Spencer used a fob to activate the elevator but did not stay on the elevator. Hemen then rode by himself to the 34th floor. On the 34th floor Mr. Kamzimbi entered the elevator, high-fived Hemen, and the two then took the elevator to P2 and entered the parkade. Some hours later, Mr. Spencer met with Hemen and an unknown male at the door to the P2 elevator lobby. Mr. Spencer used the fob in the elevator and the group travelled in the elevator to the 34th floor where they got off.

## A. The Grayson Owen Information

- [50] On January 8, 2021 Mr. Grayson Owen met with Det. Cst. Phil Toews and Cst. Stewart Hay and provided a statement concerning various observations he had made of the activity in the building. Mr. Owen was at that time the concierge of 833 Seymour Street. One of Mr. Owen's employment responsibilities related to security issues in the building and, to that end, he would access and review CCTV footage often in real time. The interview was taped and a transcript is before the court. The interview is approximately 30 minutes in length. The information provided by Mr. Owen included observations he had made by reviewing CCTV footage, and perhaps fob information.
- [51] The applicants seek a declaration that they have a reasonable expectation of privacy in the information provided by Mr. Owen, and, as such, submit the utterances of Mr. Owen, in the absence of a judicial authorization to so provide the information to police, amounts to a warrantless seizure by the police, and a breach of the applicants' rights under s. 8 of the Charter. The applicants have cast this proposition as an issue of standing.
- [52] The Crown says the entire point is misconceived. The requirement of judicial authorization as a prerequisite before the police may speak to a witness is legally and practically unsupportable and untenable; and the exercise of receiving a witness statement cannot logically be characterized as a search or seizure in the context of Charter jurisprudence. The Crown says the application in this regard 'should begin and end here'.

- [53] Alternatively the Crown says the nature of the information provided by Mr. Owen militates against a finding the applicants had a reasonable expectation of privacy in the information provided by the witness.

### Some Context

- [54] As previously stated, Mr. Owen is the concierge at 833 Seymour Street. His shift is 4:00 p.m. to midnight; Monday to Friday. His duties include maintaining security on behalf of the owners and tenants of the building. He began working in this position at 833 Seymour in November 2019.
- [55] Mr. Owen provided a statement to the police on an earlier occasion concerning the comings and goings at 833 Seymour Street. This statement was provided on October 15, 2020 (the "October statement"). It is common ground the police had been conducting surveillance concerning 833 Seymour Street leading up to October 2020; with particular interest in suite 2705. In fact the police had earlier obtained a production order for CCTV footage from 833 Seymour Street for the timeframe August 5, 2020 through to September 14, 2020.
- [56] The October statement reveals Mr. Owen contacted the police concerning suspicious activity he has observed at 833 Seymour Street, and thereafter provided the statement. Mr. Owen indicated that he also understood that his supervisor had been asked by the VPD to keep an eye on suite 3408. The information provided included activity associated with suite 3408 and a number of other suites including 2705. Mr. Owen expressed the view in his statement that a cohort of individuals had moved activity from suite 3408 to suite 2705.
- [57] Mr. Owen advised that one of the persons he had observed had threatened him, and he was fearful. Mr. Owen also indicated that he had screenshots of some CCTV footage, however he was advised by the police that the receiving of those screenshots would have to be the subject of a production order in due course.
- [58] On January 8, 2021 the police conducted another interview of Mr. Owen. It is this statement that is the subject matter of the application.
- [59] It is, again, a statement consisting of the observations of Mr. Owen; including his recollection of viewing CCTV footage in real time.
- [60] It emerges from the statement that Mr. Owen had contacted the police 'a couple of days before' about certain activity in the building. The information provided by Mr. Owen traversed the time period December 31, 2020 to January 7, 2021.
- [61] Mr. Owen indicated that certain suites in the building, and the activity surrounding those suites was causing concern to Mr. Owen and his staff. These were suites 3408, 3602, and 2603. The units were leased to Omid Mashinchi; however the registered tenant for all three units was one Jemina Ortega.

- [62] Mr. Owen indicated that a group of individuals that he did not know and who are not registered tenants seemed to be in 'cahoots' with Mr. Mashinchi.
- [63] Mr. Owen described the nature of the activity and gave a description of the various people involving "constant coming and going with bags, little bags, and duffel bags".
- [64] Mr. Owen was asked by the police why he was making these various observations. Mr. Owen expressed the view that he thought these individuals were connected to organized crime. In addition, he reiterated that one or more of these individuals had threatened him before. He felt the building was at risk and he felt generally uncomfortable and was very anxious about this activity. Mr. Owen referenced a bylaw of the building that prohibited any illegal activity in the building.

## Analysis

- [65] In my view, the answer to this aspect of the application is found within the most fundamental principles of the Charter.
- [66] Mr. Owen, in the course of his employment, made observations of activity within the building, including activity he observed as a result of viewing CCTV in real time, which activity he believed was unusual, if not suspicious.
- [67] He also knew the police were generally interested in the activity. Mr. Owen described his observations to the police.
- [68] I have concluded there is no authority for the proposition that judicial authorization is required before Mr. Owen, in these circumstances, may cooperate with an investigation and provide a statement to the police. I have also concluded that police may receive information in these circumstances without the requirement of a judicial authorization. Justice Doherty in *R. v. Orlandis-Habsburgo*, 2017 ONCA 649 comments on the policy considerations at play in these circumstances:
- [34] I have considerable difficulty with the submission that s. 8 is engaged if the police look at information in which an accused has a legitimate privacy interest, even if that information is brought to the police by an independent third party acting on its own initiative. On that approach, s. 8 would be engaged if a "whistleblower" took confidential documents belonging to her employer to the police to demonstrate the employer's criminal activity. Must the police refuse to look at the documents to avoid violating the employer's s. 8 rights? As Duarte teaches, it is one thing to say that Canadian values dictate that the state's power to decide when and how it will intrude upon personal privacy must be carefully circumscribed, and quite another to say that an individual's private information is cloaked in the protection of s. 8 no matter how that information comes to the police.

- [69] These observations are consistent with applying a normative approach in balancing privacy interests and societal interests. The memory of what Mr. Owen observed is not something that can, or should be received, only if judicially authorized. There can be no reasonable expectation of privacy in these recollections.
- [70] I adopt the suggestion of the Crown that this aspect of the application begins and ends upon this finding. It is unnecessary to proceed to analyze the nature of the information provided by Mr. Owen; at least in the context of this application.

#### B. Site 24F: Mr. Bardales Medina and the CCTV Footage Captured January 7, 2021

##### The Context

- [71] The circumstances of the investigation at bar has been previously fully set out in Saed #1; and earlier in these reasons.
- [72] The investigation, initially, had at its core issue, the investigation and tracking of Mr. Mohammed, believed to be leading a group in the trafficking of drugs in and around Vancouver.
- [73] It was quite near the beginning of the investigation, in late-July and early-August 2020 that The Shangri-La Hotel and 833 Seymour Street were identified as potential stash sites concerning the group activities.
- [74] Certain observations were made concerning the movement of various individuals believed to be associated with Mr. Mohammed. These individuals were Pronteau, Dhillon, Spencer, Kamzimbi, Joseph, Lowley, and Sangha.
- [75] Consequently, on September 21, 2020 the police obtained a production order for CCTV footage at 833 Seymour Street for specific dates between August 5, 2020 and September 14, 2020. Subsequently there was another production order authorized, and, as previously referenced, on October 17, 2020 the police obtained a search warrant for suite 2705, 833 Seymour Street.
- [76] It was not until early December 2020 that the next relevant observations were made at 833 Seymour Street. These observations in December were brief. Howjeen was seen entering and leaving the parking lot at 833 Seymour Street. Mr. Mohammed was observed entering 833 Seymour Street.
- [77] The next observation of the police at 833 Seymour Street was January 6, 2021. Both Mr. Mohammed and Howjeen were identified. Mr. Mohammed was seen entering the parkade. Howjeen was seen coming from the direction of 833 Seymour Street and then entering a parked vehicle and leaving in the vehicle. The vehicle, a BMW 335i, was leased to Howjeen.
- [78] On January 7, 2021 certain observations of the police, coupled with a tracking device, confirmed Mr. Mohammed in the area of 833 Seymour Street. Mr. Mohammed was in fact murdered later in the day of January 7, 2021.

- [79] The police interview of Mr. Owen, previously referenced, was then conducted on January 8, 2021. The information provided by Mr. Owen included:
- (1) He had noticed in the context of a New Years Eve party on December 31, 2020 a number of persons that he believed connected with suite 2705 also attending suites 3408, 3602, and 2603.
  - (2) Subsequent to execution of the October warrant in suite 2705 the tenant of suite 2705 had introduced himself to Mr. Owen as Simba and it appeared Simba was using or at least attending suites 3408 and 3602. Mr. Owen noted that Simba and others were coming and going with bags.
  - (3) In and around January 5, 2021 Mr. Owen noticed various individuals were using the P2 parking level as a parking lot for themselves.
  - (4) On January 7, 2021 Mr. Owen related his observation of Simba leaving 3408 and entering the elevator where he met an individual who had exited suite 3602. The elevator then went to P2 where a blue bag was picked up and taken back to suite 3408. Two or three hours later a large male in a puffy jacket (later identified as Howjeen) and an unknown female left suite 3408 carrying duffel bags. Those same two individuals returned somewhat later without the duffel bags. A few minutes later, Mr. Pronteau (identified by Mr. Owen) left suite 3408 and went to P2 where he let a black Infinite, later determined to be registered to Hemen into the parkade and then went back up to suite 3408.
  - (5) Suites 3408 and 3602 were leased by Mashinchi and the tenant was Ortega. Mr. Owen advised two females lived in suite 2603.
  - (6) Finally Mr. Owen related the fact that Simba was often seen leaving 833 Seymour Street empty-handed and coming back with various bags.
- [80] The production order in issue was then issued January 29, 2021 for CCTV footage of January 7, 2021.
- [81] The purpose of the authorization, at least as expressed by the affiant, was particularly directed at appreciating the activity on January 7, 2021 preceding and following the murder of Mr. Mohammed.
- [82] It was put this way in the ITO:

By obtaining the 833 Seymour Street building security video, investigators will be able to determine what activities occurred prior to and after the homicide of Mohammed. Specifically, the 833 Seymour Street building security video will assist investigators in identifying the unknown persons who departed with the two duffel bags. I am aware that duffel bags were located at 1005-1221 Homer Street, Vancouver, which contained drugs. By identifying the persons who removed the duffel bags, investigators will be able to link this to other observations made since then in order to identify new locations being used by this group for the purpose of drug trafficking. Further, it will assist investigators in identifying other associates in vehicles involved

in the activities that occurred at 833 Seymour Street the night of the homicide of Mohammed. The production order was narrow in scope; authorizing the production of CCTV footage for January 7, 2021 between 18:30 and 23:30.

[83] Generally, the footage produced included observations of Mohammed, Spencer, Kamzimbi, Pronteau, Florencia Cepeda, Howjeen and Hemen. There were no observations of Mr. Bardales Medina.

[84] It is relevant however to set out with some particularity the observations of Hemen and Howjeen on January 7, 2021 as it is these observations that anchor the submissions of Mr. Bardales Medina in seeking a finding that the observations, generally, created an expectation of privacy on the part of Mr. Bardales Medina.

[85] These observations of Hemen and Howjeen included the following:

- (1) From 18:44-18:46 Spencer and Hemen entered the elevator on the 36th floor. Spencer fobbed the elevator and exited. Hemen stayed on the elevator and ultimately the elevator stopped on the 34th floor and Kamzimbi entered. Kamzimbi high-fived Hemen and the two of them then took the elevator down to P2 and entered the parkade;
- (2) At 22:49-22:51 Howjeen, wearing a camo coloured puffy jacket, and Cepeda entered the elevator from P2 and Howjeen used a fob to access the 36th floor. During the observation Howjeen and Cepeda appeared to be consoling one another in the elevator and in the P2 lobby;
- (3) 23:01-23:02 Howjeen and Cepeda entered the elevator on the 34th floor and Howjeen is observed carrying a black and white Lululemon shopping bag that appeared to be full and a floral backpack that appeared to be full. Howjeen also had a red and black GoodLife Fitness duffel bag over his shoulder. Howjeen spoke with an unknown male prior to the elevator door closing. It was Cepeda that fobbed the elevator for P1 where both got off and entered the parkade. Howjeen and Cepeda then walked through the parkade;
- (4) At 23:07-23:11 Spencer and an unknown male entered the elevator on the 34th floor that ultimately stopped at the lobby. Spencer and the unknown male high-fived and the unknown male got off the elevator and exited through the front doors of the building; Spencer carried on and took the elevator to P1 where he exited and walked to P2. There he met with Hemen and another unknown male at the doors to the P2 elevator lobby and then fobbed the elevator to the 34th floor where they all exited.

### **The Position of Mr. Bardales Medina**

[86] Mr. Bardales Medina asserts a reasonable expectation of both informational and territorial privacy in the CCTV footage obtained on January 29, 2021.

- [87] The Crown concedes standing to Howjeen and Hemen to challenge the authorization of January 29, 2021. The material reveals that Mr. Bardales Medina was first observed at 833 Seymour Street in August 2020. He was not next seen attending 833 Seymour Street until approximately nine months later in May 2021. This was a few days before his arrest.
- [88] Mr. Bardales Medina submits that notwithstanding his image was not captured in or about 833 Seymour Street during the relevant time period; the intentions of the police were more expansive than articulated by the affiant. Mr. Bardales Medina says the obvious fruits of the information obtained from that day would further enhance the identities of the associates of Mr. Mohammed; and the movements of those associates within the context of the overall theory of the Crown concerning the trafficking of drugs. This, submits Mr. Bardales Medina, in turn, would further cement a case against Mr. Bardales Medina alleged to be part of the group or gang activity.
- [89] This then, submits Mr. Bardales Medina, gives rise to both a territorial and informational privacy interest in the CCTV footage.
- [90] The Crown submits the fact that the image of Mr. Bardales Medina was not captured at 833 Seymour Street at the relevant time; nor at any time near the relevant time; forecloses any legal basis to suggest his privacy interests were; or could be engaged. The Crown says the state of the law in this regard is clear and the route Mr. Bardales Medina seeks to carve through the authorities is not available as a matter of law.

## Analysis

- [91] The genesis of the legal foundation in support of the submission of Mr. Bardales Medina to be found in certain obiter dicta of Justice Winteringham (as she then was) in *R. v. Kang*, 2020 BCSC 1474 [Braich Standing]; and, in this Court's treatment of those remarks in *Saed* #1.
- [92] It is captured in *Saed* #1 beginning at para. 209:
- [209] In consideration of the above, I find *R. v. Kang*, 2020 BCSC 1474 [Kang Production Order Standing] to be instructive as to the proper approach to be taken in to the reasonable expectation of privacy analysis in this case. The Court considered an application by four accused--Gary Kang, Manveer Braich, Kristoffer Ghuman and Jitesh Vagh, who were parties to Kang Legal Framework for Excision--to challenge one production order obtained during the investigation. The production order was for CCTV footage and fob access records from a multi-unit residential building ("Bidwell Order") between April 1, 2017 and May 23, 2017. The Crown conceded that each applicant had standing to challenge the Bidwell Order if their image was captured during the relevant period, meaning one applicant, Mr. Vagh, had standing to do so. The applicants argued that the Crown took an unduly narrow approach to standing, premising their position exclusively on territorial standing. Each applicant argued the application on informational and territorial privacy interests, suggesting that the police intended to use the evidence of the CCTV footage and fob records to reveal information about the Kang Group and its individual members.

- [210] Among other arguments, the Crown submitted that standing was not expanded by the Crown's theory that all applicants accessed the common areas of Bidwell using fobs associated to a particular suite. Crown counsel also argued that the law on standing was not expanded by the nature of the conspiracy and criminal organization charges to suggest that being part of a criminal group imbues the applicant with a group right.
- [211] The Court, in applying the reasonable expectation of privacy analysis, determined that only Mr. Braich had a reasonable expectation of privacy in the CCTV and fob records. She determined that each individual's reasonable expectation of privacy needed to be evaluated separately: para. 107-112.
- [212] Mr. Kang grounded his application on the basis of the Crown's theory that he was a member of the Kang Group and that the evidence showed that investigators were seeking to establish individuals' identities, who they were associated with, their movements, the clothes they wore, etc.: para. 159. Noting first that s. 8 is solely a personal right, Winteringham J. wrote as follows with regards to his and Mr. Ghuman's assertion of a reasonable expectation of privacy:
- [162] I agree with Gary Kang's submission that his reasonable expectation of privacy is not based solely on the fact that his image was captured at Bidwell on September 11, 2017. I agree that there may be circumstances where he has a reasonable expectation of privacy even though he is not present, but where information is otherwise garnered about him (such as information about his associations and movements that may be revealed from CCTV footage and/or fob records). Without deciding the issue, it may be that certain group activity sufficiently connects Gary Kang to Bidwell to ground a reasonable expectation of privacy particularly taking into account Gary Kang's early identification by the police as a target and as a member of the Kang group.
- [163] However, based on the authorities presented on this application and the evidence tendered on the voir dire, I am not satisfied that Gary Kang has established a reasonable expectation of privacy based on his known connection to the Kang group at the material time. In part, I make this finding on the basis that the CCTV footage and fob records (the Bidwell material) simply do not reveal enough about him and his association to Bidwell for the court to make that determination.
- [164] In my view, Mr. Ghuman is in a similar position as Gary Kang. There is simply not a body of evidence before me to draw the inferences that the applicant seeks to ground a reasonable expectation of privacy. The evidence reveals that Mr. Ghuman attended Bidwell six times in 2017, the first being on July 21, 2017 and the evidence indicates he used the fob for suite 907 in October 2017. In my view, those circumstances alone, based on the authorities, do not permit the court to reach back to the May 23, 2017 Production Order to establish Mr. Ghuman's reasonable expectation of privacy.

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

[Emphasis in original.]

[213] I take Winteringham J.'s reasoning in Kang Production Order Standing as consistent with the proposition that an applicant cannot rely on the Crown's theory that an individual is part of a criminal organization as the basis to escape the jurisprudential reality that s. 8 rights under the Charter are personal rights, ascribed to the individual. However, Winteringham J. did not foreclose the possibility that group activity could connect an individual to the subject matter of a search so as to ground a reasonable expectation of privacy: para. 162. However, the proper approach is to consider each individual in relation to the group activity and the search in question to determine if it could establish a reasonable expectation of privacy in the subject matter of the search at the relevant time.

[93] On this point - really arising from para. 162 of Kang as referenced above - the Crown submits that a subsequent decision of Justice Winteringham has, at least implicitly, clawed back the view that there is a viable route to establishing a privacy interest absent one's image being captured at the relevant time in these kinds of circumstances.

[94] I am not entirely convinced of this analysis, but I need not grapple with the proposition; at least in relation to Site 24F and Mr. Bardales Medina.

[95] The circumstances of Mr. Bardales Medina in any event are not so different from the circumstances in Kang; and in particular how those circumstances related to Mr. Kang and Mr. Ghuman; such that any difference drives the court to a different conclusion in the case at bar.

[96] As previously referenced, Mr. Bardales Medina was not captured at 833 Seymour Street during the relevant time. In fact, Mr. Bardales Medina was last seen at 833 Seymour Street in August 2020. He was not seen again at 833 Seymour Street until the end of May 2021.

[97] The police had identified Mr. Bardales Medina early on as a target and a member of the group. However, the interplay between targets and places remained at this point uncertain.

[98] In my view, on the material before the court, the investigation had not developed to the point where the image and information of others at this place revealed a connection to Mr. Bardales Medina to either the place, or the individuals, in order to found an expectation of privacy in the CCTV footage.

[99] The circumstances simply had not matured to the point where expectation of privacy interests were engaged in someone virtually unconnected to the place and the particular activity of others that were being observed. In these circumstances it cannot be said the CCTV footage really generated the kind of insight into Mr. Bardales Medina that would attract the legal consequences suggested by counsel.

- [100] In addition there is no evidence of Mr. Bardales Medina meeting with other alleged members around this time. It is difficult to conclude Mr. Bardales Medina had a subjective expectation of privacy concerning the subject matter of the search. As stated, his dealings and ties to 833 Seymour Street on this date were virtually non-existent: see *R. v. Latimer*, 2020 BCSC 1695.
- [101] As well, with deference, I cannot accept the notion that these circumstances, in light of *R. v. Tessling*, 2004 SCC 67, fit, at all comfortably, in any way, into the factors to be taken into account in assessing whether it can be said there existed an objectively based expectation of informational privacy.
- [102] Many areas of the CCTV were in areas that were accessible to the general public. Even at that, as stated, Mr. Bardales Medina was unconnected to the space. While the elevators were not accessible to the general public - it is common ground they were accessible on a daily basis to hundreds of tenants of the building and their guests.
- [103] Finally, it is not contested that there existed no express or implied understanding that the CCTV footage was subject to an understanding of confidentiality relating to Mr. Bardales Medina.
- [104] In my view, it has not been established Mr. Bardales Medina had an informational expectation of privacy in the footage.
- [105] Nor in my view does Mr. Bardales Medina have a territorial expectation of privacy. He was not connected to the building at that time; either as an owner, tenant or visitor. It certainly cannot be said Mr. Bardales Medina had an historic connection to the building.
- [106] I cannot conclude he had a constitutionally protected privacy interest that was impacted by this particular authorization. This aspect of the application is dismissed.

C. Site 44D

## Analysis

- [107] The applicants also seek standing in relation to Site 44D, the production order relating to CCTV footage captured between April 7 and April 12, 2021, with referable fob records. The footage shows Mr. Aruldevarajan attending at 833 Seymour Street on those dates and using a fob associated with suite 3408. Analysis of the CCTV footage and fob data showed that on April 7, 2021 in particular, Mr. Aruldevarajan used a fob associated to suite 3408 and that he moved several suitcases, boxes and bags to the 34th floor of 833 Seymour Street.
- [108] The Crown submits the application for standing must fail. In its submission, none of the applicants had any territorial connection to the building at the relevant time and none of the applicants were captured in the footage. The Crown states the applicants cannot demonstrate any basis upon which to distinguish previous privacy claims--as considered in *R. v. Latimer*, 2020 BCSC 1958 [Latimer Excision Decision] and *R. v. Braich*, 2021 BCSC 114

[Braich Excision]--in connection with the CCTV footage capturing the images of the applicant's associates.

## The Context of Saed #1

- [109] The submissions in the current application necessarily revisited the leading cases in this area that had, as well, been canvassed in Saed #1. The analysis of this jurisprudence as well provided, to a degree, the foundation for the submissions in the matter currently at bar. In Saed #1, generally, I agreed with the Crown that R. v. Kang, 2020 BCSC 1151 [Kang Legal Framework for Excision], Latimer Excision Decision, and Braich Excision stand for the proposition that a s. 8 right is personal to the accused.
- [110] In this regard, in Kang Legal Framework for Excision, Justice Ker considered a discrete legal issue: what is the applicable legal framework to be applied when excising information from an ITO when such information is obtained in the violation of the Charter rights of one or some accused and not others. In response, Ker J. determined that the proper approach was "excision for one" over "excision for all". In Saed #1, I found this case to be a helpful analogy for the notion that the fact that a third party is a co-accused does not circumvent or attenuate the proposition that one cannot litigate or rely upon another's Charter rights. The Latimer Excision Decision and Braich Excision are to similar effect.
- [111] In the circumstances of Saed #1, these decisions assisted in considering whether participation in an alleged criminal organization alone could provide the basis for 'global standing' for each member to challenge the pertinent authorizations.
- [112] Again I find these decisions, particularly the factual matrix, helpful, for the purposes of the current analysis.
- [113] In Braich Standing, Winteringham J. considered a production order that authorized police to seize CCTV records from May 1 to May 23, 2017 and fob records for a period of April 1 to May 23, 2017. The Crown conceded standing for one applicant--Mr. Vagh--because his image was captured in the material collected pursuant to the production order. However, the Crown contested the standing applications for Mr. Kang, Mr. Ghuman and Mr. Braich. Mr. Kang and Mr. Ghuman grounded their applications on the basis of the Crown's theory; that they were members of the purported criminal organization.
- [114] Mr. Kang had only attended at the relevant building one time; September 17, 2017. Mr. Ghuman attended at the building six times in 2017, with the first being July 21, 2017 and the evidence suggested that he used the fob for suite 907 in October 2017. Justice Winteringham rejected both of their applications.

- [115] In relation to Mr. Kang, the CCTV and fob records did not reveal enough about him and his association to the building for the court to conclude that his group activity could establish a reasonable expectation of privacy: paras. 161-162. As for Mr. Ghuman, the fact that he did not attend at the building until some time after the production order was issued did not permit the court to reach back to the May 23, 2017 production order to establish Mr. Ghuman's reasonable expectation of privacy: para. 164.
- [116] However, prior to making her determination in this regard, Winteringham J. found:
- [154] As I have stated, I do not accept the Crown's position that the applicants only had a reasonable expectation of privacy if their image was captured during the time specified in a particular production order. In my view, the Latimer and Kim decisions require a purposive and functional approach. One's expectation of privacy is not so circumscribed.
- [117] Winteringham J. did not foreclose the possibility that group activity could connect an individual to the subject matter of a search so as to ground a reasonable expectation of privacy: para. 162.
- [118] The proper approach is to consider each individual in relation to the group activity and the search in question to determine if it could establish a reasonable expectation of privacy in the subject matter of the search at the relevant time. In the circumstances of Saed #1, I found Mr. Aruldevarajan's position was similar to that of both Mr. Kang and Mr. Ghuman.
- [119] However, in the circumstances of the current application relating to Site 44D, the substantive decision concerning Mr. Braich warrants further analysis.
- [120] In that regard, the narrative reveals that during the relevant period authorized by the production order, police had conducted an unwarranted search and seized CCTV footage and fob records from the concierge for May 4 and 5, 2017. This unwarranted search was the only time Mr. Braich was captured on the CCTV footage or fob records during the relevant period of the production order (i.e. April 1 to May 23, 2017). As noted above, the Crown did not concede standing for Mr. Braich and advised that it did seek to rely on the warrantless searches from early May 2017. Following execution of the production order, other investigative facts revealed that he attended at the Bidwell building
- [121] With regard to defining the subject matter of the search, Winteringham J. found that an applicant's image was not necessary to establish standing:
- [115] Taking into account that the court must take a broad, purposive approach, I am of the view that the Crown's submission regarding subject matter is unduly narrow. An applicant's image may well open the door to establish standing. However, I am not satisfied that the converse is true; that is, that an applicant whose image was not captured at the material time does not have standing. There may very well be evidence establishing that an applicant's privacy interests are otherwise engaged.

- [122] Applying *R. v. Marakah*, 2017 SCC 59, Winteringham J. considered the subject matter of the search, first finding that police were really after information about the identities, associations and activities of the applicants and other individuals associated with suite 907. It follows that the next inquiry was "what were the police able to determine about the applicants from the material they reviewed?": para. 117.
- [123] The subject matter of the production order at issue in *Braich Excision* allowed the police to draw inferences about Mr. Braich, including that he appeared to be working together with others trafficking drugs and that he was involved in organized drug trafficking activity with other members of the alleged criminal organization: para. 122.
- [124] The Court then concluded that Mr. Braich had a direct interest in the subject matter of the search--the information contained in the CCTV footage, fob records and Form K relating to suite 907. Though he was not the owner or occupier of the suite, he was someone with access to the suite and was observed during the unwarranted search of the CCTV footage as accessing the 9th floor: paras. 124-127.
- [125] Applying the Supreme Court of Canada's jurisprudence, including *R. v. Jones*, 2017 SCC 60, Winteringham J. concluded that Mr. Braich had a subjective expectation of privacy in the subject matter of the search even though he did not lead any direct evidence of the same: para. 129.
- [126] Lastly, Winteringham J. determined that Mr. Braich's subjective expectation of privacy was objectively reasonable based on both his territorial and informational privacy interests. With regard to his territorial interests, the Crown argued that as they did not intend to rely on the pre-May 5, 2017 material, and Mr. Braich was not seen on the CCTV footage during the remaining days authorized by the production order, he had relinquished control of the suite. Justice Winteringham rejected this argument, writing that the earlier events could not be discarded where it is the Crown's theory that Mr. Braich had ongoing and continuous access to the suite during the time material to the production order: para. 147.
- [127] With regard to Mr. Braich's informational privacy interests, Winteringham J. wrote as follows:
- [150] To that end, I have analyzed reasonable expectation of privacy with the subject matter defined as "information about the identities, associations and activities of the accused as well as their movements in the elevator lobby and secure underground parking area in relation to suite 907 and its designated parking stall." Viewed in this light, the information gathered about Mr. Braich during the currency of the May 23, 2017 Production Order revealed details relating to Mr. Braich's biographical core and lifestyle choices. The police were able to establish connections between Mr. Braich and others and obtain information about activities associated to Bidwell. I agree that but for the initial warrantless review of the fob records for suite 907, the police may not have been able to establish any connection between Mr. Braich and the others at Bidwell. The fob records with the corresponding CCTV footage enabled the police to learn associations of those connected to suite 907 at

Bidwell. Mr. Braich is correct in his submission that the initial warrantless search enabled the police to connect Mr. Braich to Randy Kang and that the information regarding Mr. Braich's activities at Bidwell can be directly tied to the activities of Randy Kang and others.

[128] Justice Winteringham's conclusion on Mr. Braich's standing to challenge the production order is summarized in the following paragraphs:

[152] In summary, I have found that the fact that Mr. Braich's image was not captured beyond the warrantless seizure is only part of the question. It cannot be said there was no search. The Agreed Statement of Facts and the ITO confirm that Mr. Braich, based on his earlier attendance at Bidwell, was targeted during the currency of the May 23, 2017 Production Order. Though his image was not captured after his attendance on May 5, information obtained was nonetheless available for the Project Territory investigators to draw inferences about Mr. Braich's association to Bidwell. Det/Cst. Unheim's May 10th email to Ms. Mueller specifically asks about the "bearded man" (believed to be Mr. Braich) and if it's not too much trouble, to give Det/Cst. Unheim updates if they show up each day." In other words, Det/Cst. Unheim is asking for assistance in tracking those associated to suite 907, including Mr. Braich. In my view, the question of Mr. Braich's standing is similar to the circumstances presented in Marakah, where the appellant had standing to challenge the search of text messages on someone else's phone because he had a privacy interest in the content of the messages. The information gathered over time allowed the Project Territory investigators to build a profile of Mr. Braich, his contacts and attendance patterns thereby enabling the police to draw reasoned inferences about his core biographical information.

[129] In my respectful view, I find Howjeen's position in the current matter to be similar to that of Mr. Braich in Braich Standing. Although the circumstances are not entirely analogous, there are parallels between the two.

[130] In summary, Howjeen's connection to 833 Seymour Street is as follows:

- (a) On December 2, 2020, police observed a vehicle associated to Howjeen drive in and out of the parkade at 833 Seymour Street with Mr. Dhillon. The vehicle then drove to a historic address for Howjeen and police noted that the driver appeared to match the appearance of Howjeen. The vehicle eventually returned to 833 Seymour Street.
- (b) On January 6, 2021, police observed the BMW 335i leased to Howjeen parked in front of 833 Seymour Street unoccupied. At 20:51, Howjeen walked from the area of in front of 833 Seymour Street, got into the BMW 335i and departed the area.
- (c) Mr. Greyson advised in his second audio recorded statement that on January 7, 2021, a man in a puffy jacket later identified as Howjeen left from suite 3408 carrying duffel bags and returned later without the duffel bags.

- (d) Howjeen is captured on the 24F Footage. At 22:49-22:51, Howjeen and Ms. Cepeda entered the elevator from P2 and Howjeen used the fob to take the elevator to the 36th floor. At 23:01-23:02, Howjeen and Ms. Cepeda enter the elevator on the 34th floor. Howjeen was carrying a black and white shopping bag and a backpack. Ms. Cepeda fobbed the elevator for P1 where both got off and entered the parkade.
  - (e) Following execution of Site 44D, police sought and obtained additional authorizations (Sites 39C, a Part VI authorization, Site 42B and Site 46A) in relation to 833 Seymour Street before the applicants were arrested on May 31, 2021. Audio and video interceptions pursuant to these later authorizations captured Mr. Bardales Medina and Howjeen inside suite 3408.
  - (f) Between April 12 and May 31, 2021, police observed Howjeen attending at 833 Seymour Street on a number of occasions.
  - (g) Howjeen is charged with Counts 6-8 on the indictment related to this case, which allege possession of the items (i.e. drugs and weapons) seized from suite 3408 of 833 Seymour Street.
- [131] Beyond these instances connected directly to 833 Seymour Street, following their execution of Site 24F, police continued to observe members of the group at various downtown locations suspected to be stash sites. Police observed Howjeen and other members of the group attending at these various buildings with Mr. Aruldevarajan on several occasions in each of the months between January and April 2021.
- [132] Within the dates authorized by Site 44D, as noted by the applicants in their written submissions, police observed Mr. Aruldevarajan meeting with other members of the group. On April 10, 2021, for example, police observed Mr. Aruldevarajan meeting with Howjeen, Diego, and Mr. Onederfull at Beach Avenue prior to attending at 833 Seymour Street.
- [133] In my view, in the totality of circumstances surrounding Site 44D, Howjeen has a reasonable expectation of privacy in the subject matter of the search, notwithstanding his image was not captured in the CCTV footage.
- [134] I would define the subject matter of the search similarly to that in *Braich Standing* and the other jurisprudence regarding informational privacy rights: as information about the identities, associations, and activities of the accused, as well as their movements in the elevator lobby and parking area in relation to suite 3408. Similarly, the search allowing the police to draw inferences concerning Howjeen, including that he appeared to be working together (or directing) others trafficking drugs; and that he was involved in organized drug trafficking activity with other members of the alleged criminal organization: see *Braich Standing* at para. 122.
- [135] The period authorized by Site 44D was late in the investigation. The police, at this point, had been observing Howjeen and the other alleged group members for several months prior. Howjeen in particular was an early target of the investigation as he was observed in or around September 2020. Further, the ITO sworn in support of Site 44D contains a

number of observations of the individuals interacting with one another and attending at the buildings thought to be drug stash sites. In particular, police observed Howjeen associating with Mr. Aruldevarajan--the individual captured in the Site 44D footage--on numerous occasions prior to and during the relevant dates for Site 44D. In other words, the associations between these individuals had largely been established at this point in time.

- [136] As noted in the Crown's submission, it is the Crown theory that Mr. Aruldevarajan moved the stash site from the suspected stash site at Alberni Street to suite 3408 at 833 Seymour Street on April 7, 2021. In my view, it can be assumed that this theory is based in large part on what police learned from Site 44D, as the footage captured Mr. Aruldevarajan using a fob to access suite 3408 while carrying suitcases and bags.
- [137] Though the Crown has not expressly stated their theory regarding Howjeen on this application, it can be inferred from the nature of the charges, the information contained within the ITO, and the Crown synopsis, that it is the theory that Howjeen was the directing mind of the group: Jones at para. 32. The fruits of the search related to Site 44D showed an alleged associate participating in and furthering such activity, following in time after Howjeen's own activities in or around 833 Seymour Street.
- [138] In these circumstances, I find it is open to Howjeen to rely on the Crown's theory to establish his subjective expectation of privacy in this regard on the basis of Jones.
- [139] In addition as in Braich Standing at para. 147, this reliance is also relevant to a finding Howjeen's subjective expectation of privacy was objectively reasonable. At that time 833 Seymour Street was alleged to be a stash site, the police believed Howjeen to be taking on a leadership role in the organization and that Howjeen and Mr. Aruldevarajan were partaking in drug trafficking together: see e.g. paragraphs 38 and 41 of the ITO. The police's observations in the ITO also establish that Howjeen and Mr. Aruldevarajan were associated with one another.
- [140] Further, Howjeen's image was captured at 833 Seymour Street in Site 24F; he was observed attending at the building following execution of Site 44D; he was captured on video and audio recordings obtained pursuant to later authorizations, and was ultimately charged in relation to the findings in suite 3408. Though the Crown's theory does not create an automatic right to standing--as was discussed in Saed #1--the accused can rely on it to establish certain facts relevant to their s. 8 claim in combination with some objective evidence: see e.g. R. v. Labelle, 2019 ONCA 557 at para. 31.
- [141] The approach taken in Saed #1 and by Justice Wedge in R. v. Kang, 2023 BCSC 1881 at para. 17, suggests that other investigative facts can be considered in determining whether an applicant has a reasonable expectation of privacy. In my view, the constellation of facts here, and the Crown's theory regarding Howjeen and the group's activities in relation to 833 Seymour Street, suggest that Howjeen has established a reasonable expectation of privacy in Site 44D.

- [142] As previously stated, Howjeen's position is not precisely analogous to Mr. Braich's position in Braich Standing. The observations of Howjeen at 833 Seymour Street are not as temporally close to the period authorized by the production order. However, in my view, it is relevant that Howjeen was captured in the CCTV footage gathered from Site 24F attending at the 34th floor of 833 Seymour Street and using a fob to enter the building and travel in the elevator banks. The Crown conceded standing for Howjeen in this search. As the Crown notes, there is no information about whether the fobs depicted were shared and/or which unit the fobs were associated thereto. However, in the circumstances, the focus is on the information obtained from the search, namely, that Howjeen had some association to the building and suite at some point during the investigation.
- [143] In my view, this sufficiently distinguishes the circumstances at bar from those considered in *R. v. Kang*, 2020 BCSC 1616. There, Winteringham J. rejected Mr. Braich's application for standing to challenge CCTV footage at a different building. The footage captured Mr. Braich in a vehicle driving into the parking garage, parking in a stall for several minutes and having some limited interaction with two individuals. He did not have any connection with a suite or the other common areas of the building in that case: para. 25.
- [144] Finally I must acknowledge the submission of the Crown that a fair reading of these trilogy of cases makes it clear there can be no finding that a person has an expectation of privacy, in the absence of that person's image being captured in or about the target building at the relevant time. The Crown submits Justice Winteringham ultimately rejects the notion that such an expectation could be found, absent a captured image.
- [145] With respect, I read the evolution of this discreet point somewhat differently.
- [146] Justice Winteringham applied Ker J.'s decisions in Braich Excision. In Braich Excision, having obtained standing to challenge the production order at issue in Braich Standing, Mr. Braich sought to excise CCTV footage of Mr. Vagh. He argued that although Charter rights are personal, his reasonable expectation of privacy (as found in the standing application) encompasses information beyond his own image captured on the CCTV footage. In this regard, they argued that their associations with others engaged their privacy interests and that the subject matter of the search should inform the excision analysis. Mr. Braich in particular argued that his position set him apart from the applicant in the Latimer Excision Decision; he sought excision from the ITO "from the very thing where he has exhibited a reasonable expectation of privacy--CCTV images and fob records and that all information of persons connected to suite 907 flowed through him": para. 99.
- [147] In rejecting this submission with regard to excision, Winteringham J. held that the Latimer Excision Decision was the complete answer to Mr. Braich's contention on the excision exercise: para. 104. Mr. Braich's submission that his privacy rights included the images of others was inconsistent with the jurisprudence; an accused's privacy interests do not extend to the images of others solely on the basis of association: para. 106.

- [148] In coming to this decision, Winteringham J. agreed with the Crown that the applicants' submission was more appropriately dealt with at the s. 24(2) stage of the Charter analysis:
- [107] A Garofoli review that finds a warrant valid does not prevent a future hearing under s. 24(2): *R. v. Reilly*, 2020 BCCA 369 at para. 50. However, the approach sought by Mr. Braich is not appropriate for a Garofoli hearing. I make no findings in relation to any s. 24(2) argument that may later be advanced: Bentley at para. 83.
- [149] In my view, Winteringham J.'s decision in Braich Excision cannot be read as an answer to the question of standing, despite the Crown's submission to this effect. Together with Ker J.'s decisions noted above, these decisions provided helpful insight into the broader question at issue in Saed #1 regarding global standing--an argument ultimately rejected by this Court.
- [150] However, accepting that the excision rulings provide an analogous context from which one can derive and confirm the notion that s. 8 rights are personal to the individual; does not foreclose the broad and purposive approach that must be taken to determine s. 8 standing. Howjeen may not be allowed to rely on his own reasonable expectation of privacy to excise the images and information about his associates from an ITO on the basis of the jurisprudence in this province. However, as discussed, he nonetheless has standing to challenge Site 44D on the basis of his own privacy interests.
- [151] Chief Justice McLachlin in *Marakah* said this at para. 51: "standing is merely the opportunity to argue one's case. It does not follow that the accused's argument will succeed, or that the search of the [CCTV footage and fob records] will be found to violate s. 8." See also Braich Standing at para. 7.
- [152] I conclude Howjeen has standing to challenge Site 44D.

### **Hemen and Mr. Bardales Medina**

- [153] With regard to Hemen and Mr. Bardales Medina, in my view, they do not have a sufficient connection to 833 Seymour Street at the relevant time to establish standing to challenge Site 44D. While I appreciate that the Crown's theory is that these applicants were involved in the criminal organization during the period authorized by Site 44D, their connection is more limited than Howjeen's.
- [154] For example, the Crown takes the position that Mr. Bardales Medina was not implicated in the investigation between January 30, 2021 and April 7, 2021. He was not observed at 833 Seymour Street at any time prior to May 2021; other than very early on, in August 2020.

[155] Though Hemen was captured in the footage obtained pursuant to Site 24F, police did not observe him at 833 Seymour Street after January 7, 2021, nor was he observed inside the building via information collected from a later authorization. Hemen is also not charged on the indictment in relation to the specific findings at 833 Seymour Street, beyond the broader criminal organization offences.

[156] In these circumstances, I find there is a limited inference that can be drawn from the Site 44D information regarding Mr. Bardales Medina and Hemen. It is not, as was the case in Saed #1, that police were able to uncover information about their identities and activities at an early stage of the investigation. Here the inference would need to be derived from association with other members of the group alone for Hemen, and a combination of association and the nature of the charges for Mr. Bardales Medina. Granting standing to Hemen and Mr. Bardales Medina on these facts would represent something more akin to the 'global standing' that has been consistently rejected by this Court.

[157] Their applications for standing to challenge Site 44D must therefore be dismissed.

"Crossin J."

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