

CANADA / JUDGMENT

R. v. Saed

2024 BCSC 565

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Supreme Court of British Columbia

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2024 BCSC 565 R. v. Saed

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Saed,

2024 BCSC 565

Date: 20240408

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

Oral Reasons for Judgment re:

Voir Dire #1: Standing 1221 Homer Street

Counsel for the Crown:

A. Rice

S. Paulson

A. Hathorn

Counsel for the Accused, Howjeen Saed:

V. de Jong

D. Karp

Counsel for the Accused, Hemen Saed:

D. Ferguson

C. Paquette

Counsel for the Accused, Vinod Aruldevarajan:

J. Myers

M. Polese

Counsel for the Accused, Roger Bardales Medina:

P. Johnston

F. Mahon

No other appearances.

Place and Dates of Hearing:

Vancouver, B.C.

March 11-15, 2024

Place and Date of Judgment:

Vancouver, B.C.

April 8, 2024

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Introduction

- [1] The accused, along with others, are alleged to have been part of a group exercise in the trafficking of drugs here in the Lower Mainland of British Columbia. Unfortunately, not an uncommon state of affairs in this province. The investigation appears to have followed the usual template in relation to investigating the usual modus operandi of alleged drug traffickers. Some kind of tip or information; surveillance of activity, including in and around various buildings; judicial authorizations; searches and seizures; assessment of the fruits of the police labour; arrests.
- [2] Whether those fruits will ultimately be consumed by the trier of fact will be dependent on whether those fruits have been lawfully gathered, packaged and shipped. The accused have brought applications to determine those very questions. There is a threshold issue to determine however, in relation to the initial application seeking to litigate those questions. That of standing.
- [3] There are five accused named in the indictment; Howjeen Saed, Hemen Hewa Saed, Diego Maradona Saed, Vinod Kanna Aruldevarajan and Roger Alfredo Bardales Medina. Mr. Diego Saed is not before the court. A warrant has been issued for his arrest.
- [4] The applicants are four of five accused. The Crown alleges that they were associates in a drug trafficking organization comprised of fifteen individuals. It is the Crown's theory that: Mr. Howjeen Saed was the head of the organization and provided direction to the other accused; Mr. Hemen Saed 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 Bardales Medina was responsible for managing the inventory and accounting related to the group's activities.
- [5] Broadly speaking, the components of the investigation, leading to the preferring of the indictment, included a number of searches and seizures carried out by the investigators directed at various places and persons over the course of some months. The accused have brought an array of applications challenging the lawfulness of those searches and seizures. The Crown takes the position that not all the accused have standing to challenge certain of the judicial authorizations obtained by the investigators.
- [6] Some or all of the accused have filed applications directed at particular authorizations and/or filed applications alleging certain related conduct of the police did not adhere to statutory requirements pursuant to the Criminal Code. The accused as well have signalled some or all may file additional applications. The parties have put in place a tentative schedule over the next three months for the hearing of the applications.
- [7] The initial applications now before the court relate to the issue of standing concerning the potential challenge to the search and seizures carried out at one of the places that forms part of the narrative of the investigation; namely 1221 Homer Street in Vancouver, British Columbia.

- [8] An appreciation of the particular issue these reasons address in that regard is to be found in a very general overview of the investigation to date.
- [9] 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 Mr. Howjeen Saed stepped into Mohammed's shoes.
- [10] In any event it appears based upon the information provided to the court, the police began surveillance 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 buildings, particularly units within the buildings, were being used like weigh stations to facilitate the drug trafficking activities. In other words being used as 'stash sites'.
- [11] The theory of the police was that a variety of stash sites were used intermittently by the group for overlapping periods of time between approximately August 2020 and May 2021. During this 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 various buildings. In addition it was observed fobs were used by certain individuals to gain entry to the buildings as persons came and went. One such building was the Homer Street address as previously referenced, and in particular unit 1005.
- [12] 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, including the Homer Street address.
- [13] 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.
- [14] 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. I am advised this evidence is highly incriminating. The evidence apparently captures at least four of the accused mixing and weighing drugs, counting money, and generally discussing the activities of the alleged drug trafficking organization.
- [15] On May 31, 2021 the police arrested the accused, and as well, carried out searches of certain residences, vehicles, and persons.

The Homer Street Site

- [16] The information before the court reveals the results of police surveillance at Homer Street from December 10, 2020. These observations included, as stated, the observations of a variety of individuals coming and going; including certain of the accused named in the indictment; as well as the observations of the presence of CCTV installation, and the use of fobs to gain entry to the building.
- [17] On December 17, 2020 the police obtained two initial judicial authorizations relating to Homer Street. The investigation created a numbering system corresponding to the places that were the subject matter of judicial authorization during the investigation.
- [18] In relation to Homer Street, the police obtained a general warrant authorizing entry into the building to conduct covert physical surveillance in the hallways, underground parkade, and other interior common areas. This warrant is referenced as Site 17A.
- [19] The same day the police obtained a production order. This order authorized seizure of the CCTV footage from December 10 to December 16, 2020. In addition it authorized seizures of certain fob usage records for the front and back entrance to the building. This authorization has been characterized as Site 17B.
- [20] The information gathered pursuant to these authorizations, coupled with continued surveillance, culminated in the police obtaining a search warrant, authorizing entry into unit 1005. Certain items were seized. This search of unit 1005 is referenced as Site 18.
- [21] On January 14, 2021 the police obtained another production order for inter alia the CCTV security footage from December 9 to December 21; as well as the fob usage records for that same time period relating to unit 1005 (this has been referenced as Site 21B and 21E).
- [22] It was shortly discovered that the time stamp on the video footage seized was out by one hour of the true time. The police determined that the best course of action was to obtain new authorizations for the material. The police proceeded in this fashion and obtained new authorizations on February 10, 2021. The production order now, concerning the fobs relating to unit 1005 is referenced as Site 25E. The production order for the hard drive containing the CCTV video footage for that same time period is now referenced as Site 25H.
- [23] The accused seeks to challenge the lawfulness of the searches relating to Homer Street; namely sites 17A, 17B, 18, and 25H.
- [24] The application currently before the court seeks standing for the four accused to challenge the lawfulness of the authorizations in relation to these sites.
- [25] The Crown concedes that Howjeen Saed, Hemen Saed and Roger Alfredo Bardales Medina have standing to challenge the authorizations regarding 17B, 18, and 25H. The Crown says Howjeen Saed, Hemen Saed, and Roger Alfredo Bardales Medina do not have standing in relation to 17A.

- [26] The Crown takes the position Mr. Arduldevarajan has no standing concerning any of the sites.

Background of the Investigation

- [27] The charges against the applicants stem from an investigation by the Combined Forces Special Forces 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.
- [28] 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 Saed thereafter assumed the leadership role in the organization.
- [29] 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.
- [30] The police did not observe any of the applicants until September 2, 2020, when Howjeen Saed was seen with Mr. Pronteau and Mr. Spencer. Howjeen Saed 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").
- [31] 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.
- [32] 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 a couple of 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.

- [33] 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.
- [34] 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").
- [35] Police identified Seymour Street and The Shangri-La as potential stash sites early in the investigation, prior to first observing Howjeen Saed on September 2, 2020.
- [36] During the Homer Street search on December 21, 2020--the first of the stash site searches--police discovered two one-kilogram bricks of cocaine in a gift bag, along with fentanyl, carfentanil, and methamphetamine. In another gift bag, they located two firearms. Police also found and seized scoresheets, scales, money, packaging, large amounts of cutting agents, and drug paraphernalia. From this search, police concluded that the sole purpose of Homer Street was to produce drugs for street sale. They believed that no one was actively living at in the stash site at Homer Street.
- [37] After conducting searches at the other suspected stash sites noted above, police located firearms; kilogram level quantities of fentanyl, carfentanil and other drugs; large quantities of Canadian currency; and other evidence.
- [38] In addition, police say they observed activities consistent with drug trafficking at what they believed to be Howjeen and Hemen Saed's residence, located at suite 5002 of 1310 Richards Street ("Richards Street"). They obtained production orders ("Site 36D") and a general warrant to gather evidence at Richards Street.
- [39] Investigators learned in March 2021 that Howjeen Saed had moved residences, and determined that he was living at suite 4802 at 1151 West Georgia Street ("Trump Tower"). Police sought and obtained production orders authorizing them to procure CCTV footage, fob records, and Form K information ("Site 35D" and "Site 35F") from that building's management.

- [40] Further, on May 5, 2021, Associate Chief Justice Holmes granted a Part VI authorization. Pursuant to the authorization, the police installed audio and video probes at Seymour Street and the Shangri-La. The probes captured the five accused, among others, mixing and weighing drugs, counting money, transporting money and drugs, and discussing the drug trafficking activities.
- [41] 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").
- [42] During the search at Richards Street, police seized two cellphones believed to belong to Hemen Saed. Police obtained a search warrant to conduct a forensic examination of the phone ("Site 54A"). The Crown says that the examination revealed incriminating messages in furtherance of the drug trafficking operation dating back to December 2020. On the same day, police also obtained a general production order to obtain documents and/or data from property management at Trump Tower regarding a storage locker associated with Howjeen Saed's suite ("Site 46L").
- [43] On May 31, 2021 the police executed the takedown warrants. Police located kilograms-level quantities of fentanyl and other drugs at the alleged stash sites and gram-level quantities at Howjeen Saed and Hemen Saed's respective residences.
- [44] The police arrested Howjeen Saed, Hemen Saed, 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.

Background of Investigation Pertaining to this Application

- [45] Homer Street is a building completely comprised of rental suites.
- [46] The first observation involving Homer Street occurred on December 10, 2020. Thereafter, police observed Mr. Dhillon, Mr. Lowley, Howjeen Saed and others attending at Homer Street on various occasions. On December 16, 2020, police observed Mr. Lowley attending at Homer Street and gathered from his body language that he used a fob to enter the building. Mr. Lowley thereafter exited the building carrying a small bag, which appeared full, and took a taxi to The Shangri-La where he met with an unknown male.

- [47] Based on these observations, police applied for and obtained a general warrant on December 17, 2020, authorizing police to make covert entries into Homer Street to conduct physical surveillance from December 17, 2020 to February 14, 2021 ("Site 17A"). They further obtained a production order for fob records and CCTV footage at Homer Street ("Site 17B") for the following times:
- a) CCTV footage for the following time periods:
 - i. December 10, 2020, between 18:00 and 19:00;
 - ii. December 11, 2020, between 16:15 and 16:45;
 - iii. December 13, 2020, between 19:00 and 20:00;
 - iv. December 16, 2020, between 11:45 to 12:30; and
 - v. December 16, 2020, between 13:30 to 14:30.
 - b) Electronic key fob records for Homer associated to the fob used at the doors of the building for the following time periods:
 - i. December 11, 2020, at 16:28;
 - ii. December 16, 2020, at 11:57; and
 - iii. December 16, 2020, at 13:46.
- [48] Pursuant to Site 17A, Constable Chris Beaver established surveillance at Homer Street on December 17, 2020. On the same day, he observed Mr. Lowley in the hallway on the 10th Floor of Homer Street and observed him use a key to enter the Suite.
- [49] On January 8, 2021, pursuant to Site 17B, Detective Constable Stewart Hay obtained the CCTV footage and fob records from Homer Street for the dates and times specified in Site 17B. He reviewed the footage on January 9, 2021 and realized that the footage was one hour off from what was authorized by Site 17B. Nonetheless, he viewed the video and made a number of observations, including of Mr. Lowley, Hemen Saed, and Mr. Bardales Medina entering and exiting the building carrying different bags.
- [50] On the basis of Constable Beaver's December 17 observations of Mr. Lowley entering the Suite, an Affiant swore an ITO in support of a search warrant to search warrant authorized police to search the Suite ("Site 18"). Police executed Site 18 on December 21, 2021 and found drugs, ammunition, and a large amount of Canadian currency they say are indicative of drug trafficking. The Crown estimates that police, during the warrant execution at Homer Street, seized or observed five kilograms of fentanyl, two and a half kilograms of cocaine, 88 grams of methamphetamine, mixing equipment, and \$65,000 in currency.

- [51] Finally, as relating to this application and Homer Street, police obtained "Site 25H" on February 10, 2021--an authorization allowing police to search a hard drive obtained from Homer Street containing CCTV video of the premises. The videos obtained from the search of the hard drive included several clips of Howjeen Saed, Hemen Saed and Mr. Bardalas Medina attending at Homer Street at various times between December 9 and 21, 2020.
- [52] A number of charges arose from the Homer Street search. The Crown says that the evidence pertains to count 1 that alleges the following: from December 9, 2020 to December 21, 2020, Mr. Bardales Medina, Hemen Saed, and Howjeen Saed unlawfully possessed controlled substances, to wit: carfentanil, fentanyl, methamphetamine, and/or cocaine for the purpose of trafficking, contrary to s. 5(2) of the Controlled Drugs and Substances Act, S.C. 1996, c. 19 [CDSA]. Mr. Aruldevarajan is not charged on this count.
- [53] Counts two and three also pertain to Homer Street and the evidence gathered therein. These counts allege that Mr. Aruldevarajan, Mr. Bardales Medina, Hemen Saed, Howjeen Saed and Diego Saed:
- a) between December 9, 2020 and May 31, 2021, trafficked in controlled substances contrary to s. 5(1) of the CDSA for the benefit of a criminal organization, contrary to s. 467.12(1) of the Criminal Code; and
 - b) between December 9, 2020 and May 31, 2021, unlawfully conspired, contrary to s. 465(1)(c) of the Criminal Code to commit the indictable offence of trafficking in controlled substances, contrary to s. 5(1) of the CDSA.

Parties' Positions

- [54] In general terms, the applicants submit that they have a reasonable expectation of privacy in all evidence obtained pursuant to Sites 17A, 17B, 18 and 25H. They collectively assert standing to challenge each authorization.
- [55] The applicants' submissions are two-fold. First, they seek to establish a notion of "global standing" relating to Sites 17A, 17B, 18, and 25H. They say they have a reasonable expectation of privacy in all evidence obtained pursuant to these authorizations. Given the Crown's concessions, the real contest for Howjeen Saed, Hemen Saed and Mr. Bardales Medina is Site 17A. Mr. Aruldevarajan does not argue that he has standing to challenge any of these authorizations on what could be considered historical jurisprudentially embedded privacy grounds.
- [56] In relation to the submission concerning 'global standing', the applicants rely on the nature of the alleged offences and on the Crown's theory of the case; namely that the applicants and their associates participated in the activities of a criminal organization and that Homer Street was a stash site used collectively by the group. Accordingly, they say, as I understand the submission, that the actions of any individual in the group in accessing the alleged stash site at Homer Street were part of that individual's participation in, or contribution to, the

criminal activity of the organization. Where a member of the alleged organization is engaging in the suspected activities of the criminal organization, the member is acting as a part of the organization. The individual members therefore cannot be separated for the purposes of standing.

- [57] In the alternative, Howjeen Saed, Hemen Saed and Mr. Bardalas Medina assert standing to challenge Site 17A on the basis that they have a reasonable expectation of privacy in the hallway outside of the Suite. They assert a territorial and informational privacy interest in the hallway and evidence gathered therein.
- [58] The Crown says that the submissions of the applicants resting on the notion of a group privacy interest are wholly inconsistent with the foundational principle that Charter rights are personal; and that s. 8 of the Charter cannot be used to litigate breaches of the co-accused where they have not established their own reasonable expectation of privacy in the subject matter of the search.
- [59] In response to the applicants' alternative argument, the Crown says the primary focus of this application is the observation of Mr. Lowley in the 10th floor hallway of Homer Street. Consequently, counsel submits that the applicants cannot establish either a territorial or informational privacy interest in Site 17A.

Evidence on the Application

- [60] An Agreed Statement of Facts ("ASF") was filed as Exhibit #1 on this application. I will provide a summary of the relevant facts below.

The Building - 1221 Homer Street

- [61] Homer Street is a 14-floor residential apartment building located in downtown Vancouver. The building is comprised of rental units.
- [62] There are 128 residential units in the building, with a varying number of suites per floor. From floor three to the top floor (the 14th floor), the number of units per floor decreases with each increasing floor. The unit alleged to be a stash site in this case was located on the 10th floor, with eight suites on that floor. The building is serviced by two elevators.
- [63] There are two entrances to Homer Street, both located on the ground floor. Both doors can be accessed using the fobs provided, but the rear door can be accessed using a key. The tenants of each unit were provided with two electronic fobs for the building. The fobs provided access to, in addition to the entrances, the underground parking garage gates, the underground parking lobby doors, and the two elevators. A fob provides anyone in possession of a fob access to any floor in the building from the elevator. Occupants do not require a fob to take an elevator from a floor down to the main lobby or to any of the levels of the parking garage.

- [64] On the ground floor there is a front (main) lobby, a rear lobby, a common room, a mail room and the elevator bay.
- [65] The main lobby is staffed by an on-site building manager from 8 a.m. to 5 p.m. between Monday and Friday. There are no staff on site outside of these hours.
- [66] Both entrances are serviced with intercoms which provides a list of the units in the building. Visitors can use the intercom to place calls to individuals at the units listed. Tenants can also provide visitors with electronic access to the building via the intercom. Once a visitor was granted remote access into the building, they can use the elevator to access any floor in the building.
- [67] The building has an underground parking garage made up of four floors. Occupants require fob access to enter the parking garage from the exterior of the building. It is not required to access different parking levels. A fob is required to move from the parking garage to the elevator lobbies.
- [68] In the common room, there are windows that provide a view into the common room from the outside. There are also windows located at the front and rear entrances on the ground floor. The windows at the front entrance provide a partial view of the front lobby. The windows at the rear entrance provide a partial view of the rear lobby and the corridor leading to the elevator bay.
- [69] There is a gym and a swimming pool on the second floor. Both these amenities are only accessible with a key fob.
- [70] The building is equipped with 11 security cameras, located in the following locations:
- a) one camera at each intercom (front and rear entrances on the ground floor);
 - b) two cameras in the ground floor main lobby;
 - c) one camera in the common room;
 - d) one camera in the swimming pool;
 - e) one camera in the gym; and
 - f) one camera in each underground parking elevator lobby.
- [71] The security cameras are clearly visible, with a large white base and a dark tinted dome. There are six signs on the ground floor that alerted tenants and visitors of the cameras. Three of these signs are at the front entrance and three are at the back. Footage from the security cameras is stored on a device located in the parking garage. Building managers are able to access the fobs records and camera footage remotely. Residents do not have access to the footage.

Surveillance Prior to Site 17A and Site 17B

[72] Police conducted surveillance on Homer Street before obtaining judicial authorizations to enter the building. The relevant details are as follows:

- a) On December 10, 2020, Mr. Dhillon's BMW X3 (the "X3") was observed outside of Homer Street and tracking data confirmed the vehicle remained there for 17 minutes.
- b) On December 11, 2020, a BMW 335i leased to Howjeen Saed was observed parked outside of Homer Street. At 4:27 p.m., Howjeen Saed and two unknown males (later identified to be Hemen and Diego Saed) exited the vehicle and walked up to the entrance of Homer Street. An unknown male (later identified as Mr. Lowley) met up with the three of them at the entrance. All three entered the building. Howjeen, Hemen and Diego Saed exited Homer Street after approximately an hour.
- c) On December 13, 2020, Mr. Dhillon's BMW X3 was observed parked in front of Homer Street between 7 p.m. and 8 p.m. Tracking data indicated that it remained around Homer Street and Davie Street for 27 minutes.
- d) On December 16, 2020, Mr. Lowley was seen arriving at Homer Street at 11:57 a.m. He held his hand toward the fob scanner and entered the rear entrance of the building. He then later exited the rear entrance and entered the front entrance, motioning towards the fob scanner.

Site 17A and 17B

[73] On December 17, 2020, Constable Timmerman of the CFSEU-BC obtained two judicial authorizations for Homer Street:

- a) Site 17A: General Warrant authorizing the police to enter and conduct covert physical surveillance in the hallways, underground parkade, and other interior common areas; and
- b) Site 17B: Production Order for:
 - i. building security video on the following dates: December 10, 2020 (between 6 p.m. and 7 p.m.); December 11, 2020 (between 4:15 p.m. and 4:45 p.m.); December 13, 2020 (between 7 p.m. and 8 p.m.); December 16, 2020 (between 11:45 a.m. and 12:30 p.m.); and December 16, 2020 (between 1:30 p.m. and 2:30 p.m.); and
 - ii. the fob usage records for the front entrance on December 11, 2020 at 4:28 p.m. and December 16, 2020 at 1:46 p.m. and for the back entrance on December 16, 2020 1:56 p.m. and for the back entrance on December 16, 2020 at 11:57 a.m.

[74] These dates and times corresponded with the police's observations of Mr. Dhillon, Mr. Lowley, and the Saeds attending at Homer Street.

[75] On December 17, 2020, Corporal Bulman of the CFSEU-BC served Site 17A and Site 17B on the property manager of Homer Street.

[76] On the same day, members of the CFSEU-BC conducted surveillance on Homer Street pursuant to Site 17A and their surveillance reports set out the following:

- a) at 12:33 p.m. the X3 drove into the underground parking garage with unknown occupants;
- b) at 12:55 p.m. Mr. Lowley exited the front Homer Street carrying a weighted white bag. He walked towards a vehicle, entered the vehicle for a moment, then exited without the plastic bag. He then entered Homer Street using a key fob;
- c) at 1:21 p.m., a black Infiniti SUV parked on Homer Street. Two unknown males, one of whom was later identified as Hemen Saed, exited the vehicle and approached the BMW 335i, driven by Howjeen Saed. There was an interaction between Howjeen Saed and Hemen Saed and then the BMW left at 1:23 p.m.;
- d) at 1:26 p.m., Mr. Lowley let Hemen Saed and the unknown male into Homer Street. Hemen Saed and the unknown male departed Homer Street at 14:23 p.m.;
- e) at 3:10 p.m. the X3, driven by Mr. Dhillon, exited the underground parkade. Mr. Lowley exited the vehicle and used a fob to enter the building;
- f) at 5:10 p.m., Mr. Lowley exited the elevator on the 10th floor of Homer Street, walked to unit 1005, used a key to open the door of the suite and entered; and
- g) at 9:14 p.m., Mr. Lowley exited Homer Street.

Site 17B

[77] On December 18, 2020, Homer Street's property manager emailed Cpl. Bulman screen shots documenting the fob usage connected with the suite on particular times on December 11 and 16, 2020 corresponding with the police's observations of Mr. Lowley and the Saeds entering the building.

[78] On January 8, 2021, Constable Hay attended Homer Street and obtained an external hard-drive containing the CCTV footage pursuant to Site 17B. Homer Street's property manager advised Cst. Hay on the same day that the electronic stamps had not been adjusted for daylight savings time and that the times were stamped for one hour later than the true time. Later, Cst. Hay learned that the time stamps were actually one hour earlier than the true time. The incorrect times will be marked as "Timestamp Time" in what follows.

[79] On January 9, 2021, Cst. Hay reviewed the footage. He made logs of the footage that indicated the following:

- a) Mr. Lowley was seen moving through the lobby on the following dates and times (Timestamp Time):
 - i. December 10, 2020 at 7:17 p.m.
 - ii. December 11, 2020 at 5:38 p.m.

- b) Mr. Bardales Medina and Hemen Saed were seen moving through the lobby on December 13, 2020 at around 8:25 p.m. (Timestamp Time). At the time they were identified only as unknown males.

Surveillance on December 18, 2020

- [80] Police conducted surveillance of Homer Street on December 18, 2020.
- [81] Mr. Lowley was observed coming and going from Homer Street throughout the day.
- [82] At 5:59 p.m. Mr. Lowley met with an unknown male, later identified to be Howjeen Saed. They entered Homer Street together at 6:00 p.m.
- [83] At 8:01 p.m. an unknown male arrived in a vehicle outside Homer Street. He met with who police first identified was Howjeen Saed and walked up to the doors of Homer Street where Mr. Lowley let them into the building. Police later determined that it was Hemen Saed, not Howjeen.

Site 18: Search Warrant Execution on December 21, 2020

- [84] Police executed Site 18 at Homer Street on December 21, 2020, searching unit 1005.
- [85] In addition to the evidence noted above, police located the following forensic evidence:
 - a) Howjeen Saed's fingerprints were located on a \$10 Canadian dollar bill and a paper note in a safe;
 - b) Mr. Bardales Medina's DNA was found on a drinking glass; and
 - c) police determined that Hemen Saed was a possible contributor of DNA found on a pop can found in the suite.

Site 25H: Homer Street Building Security Video

- [86] On January 14, 2021, Cst. Timmerman obtained a production order for the building security video footage between December 9 and 21, 2020, fob records for the same period, and the rental agreement associated with the suite (Site 21). Upon obtaining and beginning to review the footage, police noticed the time discrepancy and determined they should obtain a new warrant.
- [87] On February 10, 2021, Cst. Timmerman obtained Sites 25E and 25H--a production order for fob records associated to unit 1005 between December 9 and 21, 2020 and a search warrant for the external hard-drive containing the CCTV footage from Homer Street for the same dates, respectively.
- [88] The Site 25H footage included footage from cameras located at the front lobby, the rear lobby, the back intercom, the underground garage gate, and two of the parkade's elevator lobbies.

[89] Police created a log summarizing the footage. Mr. Lowley appears on the footage on all days between December 9 and 21, 2020. The log indicates the following with respect to each of the applicants:

a) Howjeen Saed:

- i. Howjeen Saed is seen entering, exiting and moving through the lobby of Homer Street on December 11, 16, 18, 19, 20, 2020; and
- ii. Howjeen Saed enters the building alone on December 20, 2020.

b) Hemen Saed:

- i. Hemen Saed is seen entering, exiting and moving through the lobby of Homer Street on December 9, 11, 12, 13, 15, 16, 17, 18, 19, 20, 2020;
- ii. on at least some occasions--December 18 and 19, 2020, for example--Hemen Saed accesses the building without Mr. Lowley;
- iii. Hemen Saed is captured fobbing into Homer Street on December 19, 2020.

c) Mr. Bardales Medina:

- i. Mr. Bardales Medina is seen entering, exiting and moving through the lobby of Homer Street on December 12, 13, 14, 15, 16, 19, 20 and 21, 2020;
- ii. he is seen in or accessing the parking garage on December 13, 14 and 15, 2020;
- iii. Mr. Bardales Medina entered the front entrance of Homer Street using a key fob on December 12, 2020;
- iv. on December 15, 2020, Ms. Sangha lets Mr. Bardales Medina into the front entrance and passes him a small object that appears to be a key fob;
- v. on several occasions, Mr. Bardales Medina enters the building alone or with others who were not Mr. Lowley, even if he is not seen using the fob;
- vi. on several occasions, Mr. Bardales Medina lets other alleged members of the criminal organization into Homer Street.

[90] On multiple occasions in the footage, the applicants are seen attending at Homer Street with other targets of the investigation, such as Mr. Mohammed, Mr. Spencer, Mr. Dhillon and Ms. Alysha Sangha.

[91] Mr. Aruldevarajan was never seen at Homer Street.

Legal Principles

[92] The parties have produced a great deal of authorities on this application. Many of these authorities are authored by leading criminal jurists from this court. Consequently I will spend time referring to what I consider to be exceedingly relevant analysis in this area. However, as a starting point, it is helpful to review the foundational cases on s. 8, as well as the reasonable expectation of privacy in the common areas of multi-unit apartment buildings.

Section 8: The Reasonable Expectation of Privacy

[93] Section 8 of the Charter provides that everyone has the right to be secure against unreasonable search and seizure. Section 8, like other Charter rights, is a personal right. It protects people--not places--against unjustified intrusions on their privacy interests: *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 at 159.

[94] As set out in *R. v. Edwards*, [1996] 1 S.C.R. 128 at para. 45, the s. 8 inquiry is two-fold: the accused must first establish that they have a reasonable expectation of privacy in the subject matter of the search and, if they have such an expectation, the question becomes whether the police conducted their search reasonably. Such an approach stands in contrast to one focusing on whether an accused person had a proprietary or possessory interest in the premises searched or the articles seized: para. 43.

[95] In *Edwards*, the Supreme Court of Canada established that whether state action has interfered with a reasonable expectation of privacy is to be determined based on the totality of the circumstances in a given case. At para. 45, Cory J. set out a number of factors that inform the "totality of the circumstances" test:

- a) presence at the time of the search;
- b) possession or control of the property or place searched;
- c) ownership of the property or place;
- d) historical use of the property or item; and
- e) the ability to regulate access, including the right to admit or exclude others from the place.

[96] Though *Edwards* spoke primarily of territorial privacy, the Supreme Court of Canada has since recognized three broad privacy interests protected by s. 8: personal privacy, territorial privacy and information privacy: *R. v. Tessling*, 2004 SCC 67 at paras. 20-23. Though the categories provide useful tools for analysis, the distinction between them is not determinative--the privacy interest in a given case may overlap the categories.

- [97] The Edwards factors to be considered under the totality of circumstances were effectively modified in Tessling at para. 32 where informational privacy interests are at issue. Justice Binnie restated the totality of the circumstances test and specified that it must be tailored to the circumstances of the case at issue:
- a) Does the applicant have a reasonable expectation of privacy?
 - i. What is the subject matter of the search?
 - ii. Did the applicant have a direct interest in the subject matter of the search?
 - iii. Did the respondent have a subjective expectation of privacy in the subject matter of the search?
 - iv. If so, was the expectation objectively reasonable? In this respect, regard must be had to:
 - (1) the place where the alleged "search" occurred;
 - (2) whether the subject matter was in public view;
 - (3) whether the subject matter had been abandoned;
 - (4) whether the information was already in the hands of third parties; if so, was it subject to an obligation of confidentiality?
 - (5) whether the police technique was intrusive in relation to the privacy interest;
 - (6) whether the use of surveillance technology was itself objectively reasonable; and
 - (7) whether the search exposed any intimate details of the applicant's lifestyle, or information of a biographical nature.
 - b) If there was a reasonable expectation of privacy in this case, was it violated by the police conduct?
- [98] This framework for analysis has since been reiterated in *R. v. Spencer*, 2014 SCC 43, *R. v. Marakah*, 2017 SCC 59, *R. v. Jones*, 2017 SCC 60, and most recently in *R. v. Bykovets*, 2024 SCC 6.
- [99] Given that the reasonable expectation of privacy analysis is a contextual analysis, some factors will have more significance than others. Some factors may appear to have little application at all depending on the materials at issue.
- [100] With regard to the types of privacy interests at stake, the notion of informational privacy warrants more attention. Informational privacy encompasses three conceptually distinct but overlapping understandings of privacy: privacy as secrecy, control and anonymity. Privacy as secrecy--or confidentiality--involves, for example, the reasonable expectation that one's medical information will be held in trust by their physician. As to privacy as control, in *Tessling*, Binnie J. described informational privacy as "the claim of individuals, groups, or institutions to determine for themselves when, how and to what extent

information about them is communicated to others": para. 23. Lastly, privacy as anonymity refers to situations where an individual readily provides personal information with the expectation that they will not be identified as the person providing it. Such expectations of anonymity often apply in the context of internet usage.

[101] Following *Edwards*, the Court in *Tessling* determined that the question of whether a person has a reasonable expectation of privacy is a normative standard; reasonable expectations of privacy are assessed in light of the norms of societal conduct: para. 42. As noted by Justice Cromwell in *Spencer*, citing *R. v. Patrick*, 2009 SCC 17 at para. 14: "while the analysis is sensitive to the factual context, it is inevitably "laden with value judgements which are made from the independent perspective of the reasonable and informed person who is concerned about the long-term consequences of government action for the protection of privacy"": para. 18. Where the subject matter of the search is informational, the nature and quality of that information is relevant: *Tessling* at para. 59-62.

[102] For example, in *Tessling*, the Court considered whether the applicant had a reasonable expectation of privacy in heat images taken from a plane flying over the applicant's home. The Court found that the images did not reveal information in which a person could have a reasonable expectation of privacy. The images did not reveal anything about the applicant's biographical core of information. The nature and quality of the information gathered from the heat images was consequently essential to the analysis.

[103] Justice Karakatsanis, writing for the majority in *Bykovets*, confirmed the normative approach at para. 6:

We have never approached privacy piecemeal, based on police's stated intention to use the information they gather in only one way. The right against unreasonable search and seizure, like all Charter rights, must receive a broad and purposive interpretation, reflective of its constitutional source. Since *Hunter v. Southam Inc.*, 1984 CanLII 33 (SCC), [1984] 2 S.C.R. 145, we have held that s. 8 seeks to prevent breaches of privacy, rather than to condemn or condone breaches based on the state's ultimate use of that information. Privacy, once breached, cannot be restored.

[104] With regard to the first line of inquiry--determining the subject of the alleged search--*Spencer* instructs that a court should not approach this question too narrowly. Though the subject matter of the alleged search may be uncontroversial in some cases, in others a court should take a broad and functional approach to the question, examining the connection between the police investigative technique and the privacy interests at stake. A court may look to both the nature of the precise information sought in the search and the nature of the information it reveals. The Court expressly rejected a mechanical approach that defines the subject matter in terms of physical acts, spaces, or modalities in both *Marakah* at para. 17 and *Spencer* at paras. 26 and 31.

- [105] A broad, functional approach to the subject matter of the search is consistent with the normative approach established in the jurisprudence. In Bykovets, Karakatsanis J. embraced this notion:
- [7] To that end, our Court has applied a normative standard to reasonable expectations of privacy. We have defined s. 8 in terms of what privacy should be -- in a free, democratic, and open society -- balancing the individual's right to be left alone against the community's insistence on protection. This normative standard demands we take a broad, functional approach to the subject matter of the search and that we focus on its potential to reveal personal or biographical core information (R. v. Marakah, 2017 SCC 59, [2017] 2 S.C.R. 608, at para. 32).
- [106] In my view the court's approach in determining the subject matter of the search must be expressed broadly and pragmatically. The court must ask the question what do the police want to find out and why. It was expressed in Marakah at para. 15 that the court is to determine "what the police were really after".
- [107] When determining whether the claimant has a direct interest in the subject matter of the search, the state conduct in issue must implicate the claimant's personal privacy rights, as opposed to those of a third party: Edwards at paras. 43, 45-47, Marakah at para. 12.
- [108] As to the inquiry into whether the applicant has a subjective expectation of privacy, this Court has noted that it is not a "high hurdle". A subjective expectation of privacy can be presumed or inferred from the circumstances in the absence of direct evidence from the accused; Tessling at para. 42, and Patrick at para. 37.
- [109] The majority in Bykovets provided some additional context to the factors to be considered in determining if an applicant's subjective expectation of privacy is objectively reasonable. Justice Karakatsanis framed the third factor as "the private nature of the subject matter" rather than as a query as to whether the subject matter was in public view. In doing so, Karakatsanis J. noted that s. 8, in protecting the biographical core of information, is not limited to identity, but also includes information which tends to reveal intimate details of the lifestyle and personal choices of the individual. Appreciating the normative nature of s. 8 means considering the information that police seek to uncover in a particular case alongside the information that the subject matter may tend to uncover: Bykovets at para. 53, citing Patrick at para. 32.

The Reasonable Expectation of Privacy in Common Areas of Multi-Unit Buildings

- [110] The context in the case at bar engages a question of whether the applicants had, in the circumstances at issue, a reasonable expectation of privacy in common areas of a multi-unit building. Two Ontario Court of Appeal decisions are instructive in this regard: R. v. White, 2015 ONCA 508 and R. v. Yu, 2019 ONCA 942.

- [111] White involved an accused person who owned a unit in a multi-dwelling condominium building. Police suspected Mr. White of selling drugs and, as part of their investigation, they made multiple surreptitious entries into the common areas of his building, walking through the hallways, storage area, and examining the contents of his storage locker. Police also hid in a stairwell in the building and watched his unit. On the basis of their observations, police obtained a warrant to search his apartment, upon which they found drugs and cash. Mr. White applied successfully under s. 24(2) of the Charter to exclude that evidence on the basis that police violated his s. 8 rights. The question on appeal was whether Mr. White had a reasonable expectation of privacy in the common areas of his building, namely, the stairways, hallways, and storage rooms.
- [112] The Ontario Court of Appeal held that the accused's reasonable expectation privacy need not be diminished by the fact that a large number of people may have access to a building's common areas: para. 48. Justice Huscroft wrote "[i]t 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": para. 48. Therefore, one's expectation of privacy in the common areas of a multi-unit building may be diminished, but not extinguished.
- [113] Justice Huscroft further noted that "the lesson from Edwards is that the reasonable expectation of privacy is a context-specific concept that is not amenable to categorical answers": para. 44. With regard to multi-unit condominium buildings, four considerations may be indicative of an accused persons privacy interests, considered within the broader Edwards framework: (1) possession or control of the common areas to a lesser or greater extent; (2) the size of the building as, for all factors, it dictates the number of people present in the common areas of building; (3) the security system in place; and (4) ownership of the property: para. 45.
- [114] In White, the Crown argued that there was a strong policy justification for finding that there was no reasonable expectation of privacy; given the increasing number of Canadians living in multi-unit buildings, it would be perverse to make the common areas a "zone of protection for criminal activity": para. 49. The Court of Appeal disagreed, with Huscroft J.A. holding:
- [50] I think this overstates things considerably. The reasonable expectation of privacy does not establish a zone for the protection of criminal activity in the common areas of multi-unit buildings, but neither does it permit the police to enter common areas of those buildings at any time and for any reason. The reasonable expectation of privacy is a concept which protects those interests that courts think ought to be protected having regard to the interests at stake in particular circumstances: *R. v. Tessling*, [2004] 3 S.C.R. 432, [2004] S.C.J. No. 63, 2004 SCC 67, at para. 42. Some limits on police activity are necessary if privacy is to be protected.

- [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*.
- [115] In *Yu*, the appeal concerned--among other issues not relevant to the case at bar--a general warrant that authorized police to enter the common areas of multi-unit buildings and to enter the private units of some of the four co-accused and their associates. The warrant further authorized police to install hidden cameras in the hallways outside the units of some of the targets of the investigation.
- [116] There were three condominium buildings at issue. Prior to the issuance of the warrants, police had already accessed the building's common areas to make observations, including the parking garages, hallways, and stairwells. Police had also installed hidden cameras in some of the buildings. All of this was done with the general consent of the building management. The trial judge held that the accused did not have a reasonable expectation of privacy in the common areas of the condominium buildings.
- [117] The Ontario Court of Appeal overturned this finding, holding instead that the appellants did not have a reasonable expectation of privacy in the parking garages, but did have such an expectation of privacy in the hallways of the buildings: para. 69.
- [118] Firstly, applying *Marakah* to determine "what the police were really after" in the search, Justice Tulloch found that the subject matter of the search was properly characterized as a search for information about the appellants' residency, including to discover a unit number, and information about the appellants' comings and goings: para. 76.
- [119] As to the parking garages, Tulloch J.A. determined that the garages were large and the appellants had limited control over them. In one building, the garage had a visitors' section that was accessible to the general public and police entered that section to determine whether a target's car was parked in the garage. Therefore, even if the appellants had a subjective expectation of privacy in the garage, that expectation would not have been objectively reasonable.
- [120] In contrast, as to the hallways, Tulloch J.A. noted that the level of expectation of privacy inside a building will vary depending on the likelihood that someone might enter a certain area of the building. Further, as was relevant to the facts at issue, an individual's reasonable expectation of privacy also depended on whether a person might reasonably expect a certain area to be subject to camera surveillance: para. 83. In this respect, Tulloch J.A. noted as follows:

- [86] The only time that condominium residents should expect complete privacy is when they are inside their unit with the door closed. As soon as they open their door, or exit their unit, it is reasonable to expect that they may be observed, with that level of expectation increasing the closer they get to the main areas of the building or to any security cameras.
- [121] On consideration of the factors, it was found the appellants had a low, but reasonable expectation of privacy in the common areas. He noted that the buildings' strict security features were designed to exclude outsiders, and the condominium rules at one of the buildings barred non-owners and non-occupants from accessing the common areas unless accompanied by an owner or occupant. Further, the buildings had security cameras installed in the lobby, the ramp to the parking garage, at the elevator lobby, and in the elevators, but not in the hallways outside units.
- [122] In terms of factors weighing against a finding that the appellants had a reasonable expectation of privacy in the building hallways, distinguishing from *White*, the size of the building was relevant. The appellants' reasonable expectations of privacy in the common areas were also tempered by the fact that the condominium management could consent to police entry.
- [123] The British Columbia Court of Appeal relied on both *White* and *Yu* in *R. v. Pipping*, 2020 BCCA 104, to find that the accused in that case had a reasonable expectation of privacy in the hallway outside of a unit in a multi-dwelling building. In the course of their investigation, police observed two co-accused--who they suspected of being involved in drug trafficking--entering a condominium complex in Burnaby. The building at issue was four levels, contained 96 units, required key access to outside entrances, had open access once inside, and no video surveillance. The police obtained a general warrant that authorized a search of the building's common areas. Pursuant to this warrant, police surreptitiously observed one of the accused, Mr. Pipping, using a key to enter a unit. They thereafter obtained a search warrant for that unit, discovering drugs, cash, and firearms. Mr. Pipping applied for standing to challenge the general warrant and search warrant. He was successful, with the presiding judge determining that he had a reasonable expectation of privacy in the hallway leading to the unit he used.
- [124] On appeal, the Crown argued that Mr. Pipping's connection to the property was tenuous as he was neither the owner nor registered tenant and the hallway was a public space once one gained entry to the building.
- [125] Upon reviewing the relevant jurisprudence, including *White* and *Yu*, Justice Garson upheld the findings below:
- [30] In my view, *Edwards*, *Webster*, *White* and *Yu* are consistent in their focus on the manner in which the control of public access to the common areas of a building is key to the assessment of a reasonable expectation of privacy. The focus is on "the ability to regulate access, including the right to admit or exclude others from the place": *Edwards* at para. 45 as cited in *White* at para. 31. Other important factors include the exclusivity of occupation, the

size of the building, whether property management or a condominium board has consented to the police presence, the breadth of the observations being made by the police, the ownership of the property, and the frequency with which a particular area is used.

- [126] In other words, the accused may have a reasonable expectation of privacy in the common areas of a building in some circumstances.
- [127] There are several decisions of this court that I have indicated warrant close consideration: *R. v. Latimer*, 2020 BCSC 488 [Latimer Brighthouse Standing], *R. v. Kim*, 2020 BCSC 1064 [Kim #3], *R. v. Kim*, 2020 BCSC 1075 [Kim #4] and *R. v. Kang*, 2023 BCSC 1881 [Kang Cordova Materials Standing].
- [128] Latimer Brighthouse Standing involved a number of accused who were charged with several CDSA offences as well as criminal organization, conspiracy and weapons offences under the Criminal Code. The charges emerged from an investigation targeting the alleged drug trafficking activities of two groups--the Kang group and the Latimer group. A total of 12 individuals were charged.
- [129] In Latimer Brighthouse Standing, among other things, two applicants--Kyle Latimer and Jacob Pereira--applied for standing to challenge the police's obtaining of CCTV footage of the common areas and fob records from a building at Brighthouse Way in Richmond. Another applicant, Mr. Szucs, sought the same at another building called Pacific Rim Estates in Vancouver. The applicants all argued that their territorial and informational privacy rights were engaged at each location.
- [130] All of the evidence from the three sources were obtained without judicial authorization. The Crown was not seeking to adduce the evidence at trial, but the information obtained in these items formed the basis of several ITO affidavits sworn in support of judicial authorizations in the course of the investigation.
- [131] Brighthouse Way was situated in a larger complex called River Green. River Green was comprised of six multi-unit residential towers. Access to each of the buildings, common areas, secure underground parking, as well as the residential floors of the towers and the units themselves were controlled by electronic key fob. Mr. Szucs was the registered tenant for Brighthouse Way.
- [132] Justice Ker held that the density of any strata property should not create a diminishing scale for objective expectations of privacy. Instead, 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. This expectation is objectively reasonable such that they remain protected from random and unregulated disclosure of this information to outside organizations, including law enforcement agencies. The degree of exclusivity in terms of who can occupy the common areas only informs how diminished one's expectation of privacy might be, not whether it extinguishes it: para. 137.

- [133] Turning to the relevant analytical framework, Ker J. confirmed that Tessling, Patrick, Spencer, Cole, Marakah and Jones all demonstrated "a steadfast approach to the governing analytical framework applicable". However, she noted that with regard to the final line of inquiry, where a court considers whether one's subjective expectation of privacy was objectively reasonable in the totality of the circumstances, the jurisprudence, such as in Marakah, framed the final factor as "whether the informational context exposed any intimate details of the claimant's lifestyle, of information of a biographic nature". This, in her view, expanded the nature of the subject matter being assessed--a point I will return to.
- [134] The Court then provided further context relevant to the analytical framework to be applied, writing as follows with regard to the modern realities of living in a multi-unit building:
- [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.
- [Italics emphasis in original, underlining emphasis added.]
- [135] In Ker J.'s view, the mandatory nature of CCTV and fob use in multi-unit residential settings; and the fact occupants and their guests must submit to private surveillance does not mean that they have relinquished their expectation of privacy therein. Owners, tenants, and their guests in such buildings have no choice but to travel through common areas, crossing lobbies, using elevators, accessing hallways, etc. Though they may implicitly consent to surveillance, "it does not mean they have consented to or waived their residual privacy interest in their movements, images and information vis-à-vis the state".

- [136] Like the case at bar, the parties in *Latimer Brighthouse Standing* took very different positions as to the relevant subject matter of the search, with the Crown suggesting that it was solely the video images obtained from the common areas of the two buildings. Justice Ker rejected a "circumscribed approach", answering the Marakah inquiry of what the police are really after as follows:
- [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.
- [137] In determining that the applicants had a direct interest in the subject matter of the search, Ker J. accepted the Crown's concession that the applicants had an interest in their images that were captured in the CCTV footage. She added that when the fob access records were cross-referenced with the tenancy information and correlated with the CCTV footage, they provided corroborative information about the accused's activities: paras. 178-179.
- [138] On the applicants' subjective expectation of privacy in the subject matter of the search, Ker J. made note of the jurisprudence establishing that this step of the inquiry is not a "high hurdle" and that a subjective expectation of privacy can be presumed or inferred in the circumstances, without direct evidence from the accused. Accordingly, she inferred that even had the applicants known that they were subject to video surveillance and that the buildings compiled fob access records, they still had a subjective expectation of privacy. The CCTV footage captured common areas to which many individuals had access to. However, owners, tenants and guests had no choice but to submit to such surveillance and to use key fobs while moving through the building.
- [139] Ultimately, Ker J. considered whether the applicants' subjective expectation of privacy was objectively reasonable in the totality of the circumstances. An important consideration in this regard was that the both the applicants territorial and informational privacy interests were engaged given the nature of CCTV footage and fob records--the territorial privacy interest was not determinative of the privacy analysis: para. 201. Only Mr. Latimer's territorial privacy interest were engaged as he appears to have resided at both the Brighthouse Way and Pacific Rim Estates. Mr. Pereria had no territorial privacy interest as his attendances at both locations appeared 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. Therefore, Ker J. considered the analysis solely from a informational privacy interest perspective: para. 201.

[140] The Court concluded that all three applicants had a reasonable expectation of privacy in the subject matter of the materials obtained by investigators from Brighthouse Way and the Pacific Rim Estates: para. 225. In so concluding, Ker J. made a number of assessments that in my respectful view are applicable to the application before me:

- a) that Mr. Pereira had a privacy interest despite the fact that he was only an invited guest of Mr. Latimer and Mr. Szucs who alleged they resided at the property and were a tenant, respectively (para. 207);
- b) that the informational content was collected from a common area that, although public, was from a secured area where the public at large were not permitted to travel (para. 208);
- c) citing *R. v. Wong*, [1990] 3 S.C.R. 36 and *Kim #1* at para. 58, the subject of fleeting observations is qualitatively different than the state making a permanent electronic recording of activities; therefore the repeated access and review of CCTV footage and fob records was more powerful than a fleeting observation (para. 209); and
- d) the informational content of the materials provided the police with the ability to draw inferences and conclusions from prolonged review of the information captured from the video recordings including who was meeting with particular vehicles, what they were carrying, who was affiliated with the suite in question, the identity of the individuals and so on. The value of the movements and associations was circumstantial evidence of illicit activity conducted in connection with the occupants and guests of the suite and the activities of the parking stall (paras. 215-216).

[141] The Crown says that *Latimer Brighthouse Standing* does not aid the applicants in their application.

[142] The *Kim* decisions are a number of decisions determining various standing applications related to different groupings of the same parties on different indictments and different claims to standing. The applicants there were charged with several drug offences under the CDSA, as well as criminal organization, conspiracy and weapons offences under the Criminal Code. The Crown submits on this application that the *Kim* decisions are the most relevant to a determination of whether the applicants had a reasonable expectation of privacy in Site 17A.

[143] The *Kim* decisions, at least those discussed in the context of this application, all involve the Brighthouse Way condominium building discussed in *Latimer Brighthouse Standing* and I note a few additional relevant facts.

[144] Brighthouse Way was a 14-floor residential apartment building, consisting of 458 suites. It had a secure two-floor underground parking lot, which serviced the six River Green complex of buildings including Brighthouse. The underground parking lot was only accessible by use of a fob. The elevator bays in the parking lot were accessible to all of the parking lot users of River Green. The building had a single bay of elevators and a ground floor lobby staffed with a concierge 24-hours per day. The unit that became the subject of

several warrants on the 12th floor of the building. There were nine other units on the floor. Brighthouse Way was equipped with CCTV surveillance cameras located in the lobby, the underground parking lot and outside the elevators in the underground parking lot. The CCTV cameras were visible.

- [145] For the apartment in question in the Kim decisions, an unknown individual associated with the unit was given two fobs, which provided access to the 12th floor, the common areas, and the parking garage. A woman believed to be the girlfriend of one of the applicants--Mr. Latimer--was believed to have paid the damage deposit in cash.
- [146] Counsel for Howjeen Saed raised Kim #1 and Kim #3. In Kim #1, Justice Devlin considered whether three applicants--Billie Kim, Mr. Latimer and Jacob Angela Pereira--had standing to challenge evidence obtained from a covert camera installed in the 12th floor hallway. The camera captured who was coming and going from the hallway associated with the suite in question. Police had obtained a general warrant to install the camera, but it was not validly authorized. Justice Devlin ultimately determined that the three applicants had a reasonable expectation of privacy in the subject matter of the search.
- [147] In applying the framework for analyzing a reasonable expectation of privacy, Devlin J. wrote as follows regarding the subject matter of the covert camera surveillance:
- [37] The subject matter of the search was not simply the activity in the hallway. Framing the issue as a matter of territorial privacy alone ignores the fundamental purpose of the installation of the hallway camera. The police were really after the inferences that may be drawn from review of the information captured by the video recordings. Given the constant, uninterrupted video recording of the accused's activity in the hallway, the video camera produced more "invasive information" about what happened in the hallway associated to unit 1204 (Yu at para. 77). The value of that captured activity to the police was potential circumstantial evidence of illicit activity conducted in connection with unit 1204. It was not simply any activity or movement in the hallway. In Sandhu, the unit in connection with the monitored hallway was only identified as a potential stash location. The Court found that the subject matter was "all activity in the hallway". The subject matter of the instant case involved a localized, targeted area of the hallway area leading to unit 1204 pursuant to the GVW. The purpose for seeking the GVW was to target suspicious activity, not to monitor hallway activity for its sake. I find the subject matter of the search to have been all activity by the accused in the hallway in connection to unit 1204.
- [148] Justice Devlin found that the applicants each had a direct interest in the subject matter of the search because the video camera provided direct information about their activities. They also each had a subjective expectation of privacy in the subject matter of the search as both their territorial and informational privacy interests were engaged.

[149] In this regard, two factors were instructive: that only certain areas of the building were subject to security camera surveillance meant that the applicants would have expected to have their activities monitored in some areas, but not on the 12th floor hallway and that access to the 12th floor hallway was restricted and therefore it was more private than public: para. 42.

[150] On the objective analysis, Devlin J. noted several factors:

- a) the fact that none of the accused were neither owners nor tenants was not determinative on a question of both territorial and information privacy interests (para. 47);
- b) the size of the building was similarly not determinative, rather, the fact that there were only ten suites on the 12th floor, that access to the 12th floor was restricted to those with fob access, and that there were no security cameras on the 12th floor were considered relevant factors to establishing a territorial privacy interest in the hallway (paras. 48-49);
- c) that the video recordings captured seemingly mundane activities of the accused did not diminish their privacy interest (para. 51);
- d) results-driven arguments should not factor into the analysis; that police obtained video footage that is similarly collected by the building cameras was irrelevant (para. 52); and
- e) observations of someone passing in a hallway may attract a different level of scrutiny than continuous video observations (para. 54).

[151] In Kim #3, Justice Devlin considered whether the same applicants had standing to challenge the admissibility of the evidence that was obtained from Brighthouse Way, consisting of still images obtained from the CCTV footage of the parking garage area and the key fob records associated to unit 1204. With the assistance of the property manager, the police were able to obtain fobs and fob access records. The CCTV footage between April 30 and August 23, 2017 captured the three accused at different times using the fob associated with the unit. Much of this decision turned on whether Devlin J. was required to follow Latimer Brighthouse Standing as a matter of judicial comity: see paras. 26–59. She determined she was, therefore only Mr. Kim's privacy interests were considered in the reasonable expectation of privacy analysis.

[152] For similar reasons to Ker J. in Latimer Brighthouse Standing, Devlin J. found Mr. Kim had a reasonable expectation privacy in the CCTV footage and fob records. She noted that "whether one considers them to be an occasional tenant, a guest or one who facilitates access to others, the analysis applies". The information contained in the materials was the focus of the analysis--the images together with the fob records enabled police to draw inferences. Like Pipping and Latimer Brighthouse Standing, Kim #3 affirms that occupants within multi-unit dwellings do not relinquish their right to privacy because of the many people accessing common areas and that occupants are required to subject themselves to video surveillance.

- [153] Counsel for Hemen Saed raised Kim #4. There, Justice Devlin considered whether the Mr. Kim, Mr. Latimer and Mr. Pereira had standing to challenge the admissibility of evidence that was obtained from unwarranted covert physical surveillance conducted inside the common of the condominium building at Brighthouse Way. The observations were made in the 12th floor hallway and in the underground parking garage. Mr. Kim and Mr. Pereira asserted a territorial privacy interest in the 12th floor hallway of the building. Mr. Kim also asserted a territorial and informational privacy interest in the parking garage and was joined by Mr. Latimer with respect to his informational privacy interests.
- [154] Justice Devlin considered Yu, White, and Pipping in her analysis. She concluded that none of the applicants had a reasonable expectation of privacy in the parking garage, largely flowing from the fact that there were hundreds of people who had access to the garage.
- [155] With regard to the 12th floor hallway, the Court recalled the findings in previous Kim decisions that the 12th floor hallway was more public than private and that Mr. Kim and Mr. Pereira had standing to challenge the evidence obtained therein. She then concluded that Mr. Kim and Mr. Pereira, and not Mr. Latimer, had standing to challenge the evidence obtained from the covert surveillance to the 12th floor hallway. Justice Devlin concluded:
- [39] As stated in Pipping at para. 30, "Edwards, Webster, White and Yu are consistent in their focus on the manner in which the control of public access to the common areas of a building is key to the assessment of a reasonable expectation of privacy". While each case turns on its own facts, there are several similarities between Pipping and this case. Neither applicant is the registered owner or tenant; the condo building was secured and accessible only by key and there was no evidence of a register of occupants near the entrance. Both units were located at the end of the hallway, resulting in less traffic and somewhat more privacy than other units on the floor. While there was no video surveillance in Pipping, the video surveillance in this case did not extend to the 12th floor thus enhancing one's expectation of privacy. In Pipping access to other areas in the building was not restricted. Although Brighthouse Way was a larger multi-unit residential building, access to the 12th floor was limited to those who had 12th floor fob access.
- [156] In aligning her analysis with that in Pipping, White and Yu, Devlin J. noted that the entry onto the property was without authority.
- [157] Lastly, counsel for Hojween Saed raised Kang Cordova Materials Standing, a recent decision from Justice Wedge of this court. Two accused, Amandeep Kang and Tanisha Bhatti, asserted that they had a reasonable expectation of privacy in the tenancy information, fob records, and CCTV footage seized by police without judicial authorization from the residence located at 1139 Cordova Street in Vancouver. The information from 1139 Cordova was relevant to the broader trial as subsequent authorizations relied in part on descriptions of the CCTV footage.

- [158] Justice Wedge in *Kang Cordova Materials Standing* reviewed a number of decisions dealing with the reasonable expectation of privacy in multi-unit dwellings. In doing so, she highlighted a number of principles emerging from the jurisprudence that are relevant to the case at bar. For example, Wedge J. held that this court in *R. v. Ali, Boparai & Malonga-Massamba*, 2021 BCSC 74--relied on by the Crown in its submission in this case--overlooked the fact that other residents in a complex have access to common areas must be weighed against the fact that access is denied to the public (para. 103) and that a breach of a privacy interest does not depend on how many violations have occurred (para. 110). She held that the emerging case law has concluded, with regard to the objective expectation of privacy analysis, that access to common areas by many individuals living in the building is tempered by access vis-à-vis the public: para. 103.
- [159] Justice Wedge further found the following:
- [117] In the present case, the images of Mr. Kang and Ms. Bhatti at the elevator, and the images of Mr. Kang interacting with the driver of the red Cruze vehicle, which then entered the separate parking garage associated to the suite apparently occupied by the two accused, gave police valuable information, particularly when considered together with other information obtained in the course of the investigation, details of the accused persons activities and relationships.
- [160] Justice Wedge ultimately found that the police wanted access to the information in order to advance its criminal investigation. Turning to the objective privacy analysis, she considered the building's security. Fobs were required to access the common areas as well as the entrances to the buildings. There were CCTV cameras in areas not visible to the public, as well as in the courtyard area leading to the underground parking. Each parking stall was secure with its own door, and the interior of the parking garage was monitored by cameras.
- [161] The applicants in *Kang Cordova Materials Standing* were residents of the building. The Court found that even prior to the police's seizure of materials from the building, they had substantial evidence that the applicants resided there. Even though the information gleaned from the search did not appear to be at first blush to fall within the core of biographical information, it nonetheless revealed personal information about the applicants. The information therefore had the tendency to support other inferences: para. 116. She thus concluded that "residents of the complex, in objective terms, reasonably believed that their privacy was being protected": para. 122.

Analysis

- [162] The issues before me on this voir dire, as framed by the applicants, are:

- a) whether the applicants have established on a balance of probabilities that they have a reasonable expectation of privacy in the evidence gathered pursuant to Site 17A, Site 17B, Site 18, and Site 25H based on the Crown's theory that they were members in a criminal organization; and
- b) if not, whether Howjeen Saed, Hemen Saed and Mr. Bardales Medina have established on a balance of probabilities that they have a territorial and informational privacy interest in the 10th floor hallway on the basis of their privacy interest in the Suite and the common areas of Homer Street.

[163] As a starting point, the Crown and applicants disagree as to the interests at stake. The applicants claim a reasonable expectation of territorial and informational privacy in all evidence gathered pursuant to Sites 17A, 17B, 18 and 25H. They frame the subject matter of those searches as allowing the police to draw inferences and conclusions from extensive and prolonged review of the video recordings, which captured who the applicants were meeting with, who was affiliated with the Suite, the identity of the individuals, and so on.

[164] The Crown frames its submissions primarily, if not solely, as a matter of Site 17A. Counsel say that in terms of an informational privacy interest, the subject matter of the search was limited to identification of the precise location of the stash site.

[165] I agree with the Crown that the application turns primarily on Site 17A, though I do not intend to limit the forthcoming analysis on this point in so doing. While the applicant's cast a wide net in their written submissions, in oral submissions it became apparent that the real contest is with regard to Site 17A, especially given the Crown's concession in the course of the hearings.

Criminal Organization Theory or 'Group Standing'

[166] The applicants assert that they are entitled to use the Crown's broad allegations, and more precisely the Crown's theory of the case, to establish a reasonable expectation of privacy in the images and evidence of other members of the Saed Group. This is relevant because the main contest on this application is in regards to Site 17A, that is the general warrant that allowed police to enter Homer Street and pursuant to which police made a single observation of Mr. Lowley in the 10th floor hallway entering the Suite.

[167] The starting point for the applicants' submissions in this regard is *R. v. Jones*, 2017 SCC 60 and the proposition articulated, namely, "an accused mounting an s. 8 claim may ask the court to assume as true any fact that the Crown has alleged or will allege in the prosecution against him in lieu of tendering evidence probative of those same facts in the *voir dire*": para. 9.

[168] In *Jones*, the issue before the Court was whether the appellant had a reasonable expectation of privacy in text messages seized by police from an account associated with his co-accused.

- [169] The Court's findings on this point began with that the subjective expectation requirement has never been "a high hurdle": Jones at para. 20, citing Patrick at para. 37. The notion behind this is that "a Charter claimant's subjective belief that Big Brother is watching should not, through the workings of s. 8, be permitted to become a self-fulfilling prophecy": para. 21. The subjective expectation of privacy therefore is attenuated in the reasonable expectation of privacy analysis and requires only a modest evidentiary foundation. It is permissible for the court to presume or infer an applicant's subjective expectation of privacy in the circumstances of a particular case. As Cote J. wrote, "[t]his modest evidentiary foundation also aligns with the practical reality of criminal proceedings": para. 22.
- [170] In Jones, Cote J. considered how the principle against self-incrimination should inform the s. 8 analysis. The dilemma, of course, is that it is in the claimant's interest to demonstrate an element of control over the subject matter of the search; but that very submission essentially compels the embracing of an incriminating narrative. Justice Cote wrote:
- [31] What, if anything, does the principle demand in the instant context? It is clear that, to the extent possible, the elements of s. 8 -- which in itself provides a fundamental principle of justice -- should be informed by, and reconciled with, the principle against self-incrimination.
- [32] In my view, that is best accomplished by concluding that counsel for a s. 8 applicant may ask the court to assume as true for s. 8 purposes any fact that the Crown has alleged or will allege in the prosecution against him. In other words, where the alleged Crown facts, if taken to be true, would establish certain elements of the applicant's s. 8 claim, he or she need not tender additional evidence probative of those facts in order to make out those same elements. Although the entirety of the facts and the Crown theory may not be apparent at the time of the voir dire, the court may infer it from the nature of the charges. Alternatively, the court may encourage prosecutors to be forthright in regards to their theory.
- [Emphasis added.]
- [171] Justice Cote therefore concluded that the accused should have been permitted to rely on the Crown allegation that he authored the text messages at issue and, by doing so, he established his direct interest in the subject matter of the search and his subjective expectation of privacy in the same: paras. 9 and 15.
- [172] Counsel on behalf of Mr. Aruldevarajan urged the court that upon a reading of Jones it is the indictment that ought to be the primary, if not exclusive, determinant of the facts to be inferred for this purpose. I do not think this proposition assists in the circumstances of this case. The fact is the Crown has, as it is often required to do, particularized its case. In my view, in these circumstances, it would be artificial in the extreme to speculate as to the particulars of the allegations contained in the indictment, in the face of the express declarations by the Crown relating to the evidence against Mr. Aruldevarajan. The Crown

has stated their theory with regard to Mr. Aruldevarajan. The Crown says that based upon the evidence Mr. Aruldevarajan was not seen anywhere near the Homer Street address. In addition the Crown has confirmed that there is no further evidence to be disclosed with regard to Homer Street.

- [173] I am not persuaded that Jones can be stretched to the extent urged by the applicants. Though the Court uses broader language at some points in Jones, the reasoning as to why an applicant may rely on the Crown's theory of the case is nonetheless tied to the modest evidentiary foundation required under the subjective expectation of privacy inquiry in the overall reasonable expectation of privacy analysis. Justice Cote's reasoning is consistent with a common sense understanding of what both subjective and objective expectations may entail. It is inconsistent to suggest that no evidence is required to prove whether one's subjective expectation of privacy is indeed objectively reasonable. Some indicia must be required to prove the objective element of why one's privacy interests would be implicated in a particular search.
- [174] Indeed, the applicants point to R. v. Flintroy, 2018 BCSC 1790 as an example of where an applicant has relied on the Crown's theory that an accused person was operating as part of a criminal organization to establish standing to challenge a search under s. 8 of the Charter.
- [175] In Flintroy, the Crown's theory was that the applicant was the head of a drug trafficking organization and that a number of individuals were employed by him in that enterprise. In essence, the VPD believed that the applicant, Mr. Halstead, was attempting to set up drug operations in Calgary and in pursuit of this, he would be sending a member of his criminal organization to drive to Calgary to transport drugs and money. The police placed a tracker on this third party's vehicle, and when it indicated that he was travelling towards Alberta, the VPD arranged for his vehicle to be stopped and searched by the Kamloops RCMP.
- [176] Mr. Halstead sought to challenge the contents of an ITO which was used to eventually authorize a search of him directly. He said that the this entitled him to delve into the details of the Kamloops search to demonstrate that it was an unlawful search and that reference to the findings should be excised from the ITO. Relatedly, he argued--on the basis of Jones and the Crown's theory--that although he was not present at the scene of the search, he nonetheless had a reasonable expectation of privacy in the search. In his view, because the Crown argued that the drugs seized from that search belonged to Mr. Halstead, he had a reasonable expectation of privacy in those drugs.
- [177] Justice Williams agreed, despite noting that Mr. Halstead's claim to standing was "by no means overwhelming". Mr. Halstead was asserting a territorial privacy interest in the drugs. Accepting first that a party seeking standing must claim a personal Charter right violation and that a violation of a third party's Charter right will not provided a basis for standing, Williams J. then applied Jones to determine that on the Crown's theory, the drugs were Mr. Halstead's. Justice Williams reasoned as follows:

- [31] Examining the facts at hand in the context of these Edwards factors, it is obvious that Mr. Halstead was not present at the time of the search. With respect to the automobile being driven by Mr. Kematch, there is no evidentiary basis to conclude that Mr. Halstead owned or controlled it nor that he had historically used it. However, as regards the item which was subject of the search, that is the drug package, the police theory is that they were his drugs. As for the ability to regulate access, it is apparent that Mr. Halstead was not in a position to exercise such ability, as he was in Vancouver.
- [32] As regards the existence of a subjective expectation of privacy in the subject of the search, which I will take to be the drugs, it is reasonable to infer that there was such an expectation in these circumstances. Generally, as the authorities make clear, this is not a particularly high hurdle for an applicant to make, and is reasonable inferred in the facts at hand.
- [33] Finally, there is the matter of the objective reasonableness of the expectation. In the circumstances, as I am obliged to consider all of them, and accepting that the fact the goods at issue were illicit contraband is not a feature that detracts from the issue, I accept that his subjective expectation of privacy would be objectively reasonable. My principal basis for so concluding is that, on the theory of the investigators (and thus the Crown), Mr. Halstead was directing the transport of his goods, by his underling, Mr. Kematch, to Calgary. It is reasonable to think that one in such a situation would be keeping a watch over the progress of that move and would consider himself able to have some directory role in the activity, and that keeping the endeavour secret was important.

[Emphasis added.]

- [178] The applicants submit, as in *Flintroy*, it is the Crown's theory that Mr. Lowley, who was observed at Homer Street, was attending the location in order to contribute to the activities of the criminal organization. By the nature of the charges, the applicants say that the Crown has asked the court to assume as true that alleged members of the Saed Group and their associates were committing indictable offences in contribution to the group's activities. Further, they say Mr. Lowley was acting on the direction of other persons in the organization when he attended the 10th floor of Homer Street on December 17, 2020. The applicants submit that the Crown's theory is that the drugs contained within the Suite belonged to the organization, rather than Mr. Lowley, and that Howjeen Saed is alleged to be the directing mind of the organization.
- [179] With deference, in my opinion it is not feasible, without more, to conclude that membership in an alleged criminal organization provides a basis for s. 8 standing.
- [180] It seems to me, *Flintroy* is not particularly analogous. For one, it is not clear that criminal organization charges were at issue nor were the founding basis of the applicant's reasonable expectation of privacy. The applicant in *Flintroy* alleged a territorial privacy interest in the drugs seized pursuant to the search of Mr. Kematch's vehicle. He argued that if it is the Crown's theory that the drugs were his, that should be sufficient to ground a reasonable expectation of privacy in the subject matter of that search (i.e. the drugs). The

applicants' position in the case at bar is different, given the Crown's concessions on Sites 17B, 18, and 25H. It is based on associations, rather than an interest in physical evidence seized.

- [181] The Crown says that courts have consistently rejected group rights claims. On this point, counsel point to *R. v. Kang*, 2020 BCSC 1151 [Kang Legal Framework for Excision] and subsequently *R. v. Latimer*, 2020 BCSC 1958 [Latimer Excision Decision], in addition to the foundational decision in *Edwards*.
- [182] The starting point is *Edwards*, where Cory J. set out that s. 8 is a personal right and that the right to challenge the legality of a search depends on an accused establishing that their personal rights to privacy have been violated in a two-stage inquiry: para. 45. As discussed earlier, *Edwards* established the framework for determining whether an accused has a reasonable expectation of privacy in the subject matter of a search and enumerated the factors to be considered with respect to a territorial privacy interest.
- [183] In *Kang Legal Framework for Excision*, Ker J. considered the "discrete legal issue" of the applicable legal framework to be applied when excising information from an ITO, when such information is obtained in violation of the Charter rights of one or some accused and not others, despite the affidavit supporting an authorization that resulted in evidence being gathered for all accused.
- [184] The accused were all implicated in a police investigation into two interlinked criminal organizations. The investigation utilized a single Part VI authorization that was valid for over 60 days because it named criminal organization offences. The authorization ultimately yielded intercepted communications implicating thirteen accused. These thirteen accused were charged on four separate indictments with various offense under the CDSA and the Criminal Code. The Crown sought guidance from the court on the proper approach to be taken when excising information from the ITO sworn in support of the Part VI authorization.
- [185] To determine whether the proper approach was "excision for one" or "excision for all", Ker J. provided an extensive review on the jurisprudence on excision. In so doing, she discussed the link between standing and a subsequent obtaining of a constitutional remedy:
- [236] In order for an accused to have the fruits of an unconstitutional search excluded at trial, the first step is for the accused to establish standing - a reasonable expectation of privacy in the item or place searched: *Edwards*, *Tetrault*, *Vickerson*, *Brounsuzian* and *Latimer* 488.
- [237] Similarly, in order for an accused to have information, said to have been unconstitutionally obtained, excised from an ITO at a Garofoli review into the sufficiency of the authorization, there needs to be a link between the accused and the information sought to be excised. That link is the standing requirement - a reasonable expectation of privacy in the item or place searched that is the subject of the proposed excision: *Klassen*, *Hok*, *Vickerson*, *Chang*, *Huynh*, *Nguyen*, *Croft*, *Nicholson*, *Chau*, *Serre*, *Abdullahi*, *Merritt* and *Brounsuzian*.

Standing to challenge the search conducted pursuant to the authorization is an insufficient basis to justify excision of material otherwise unrelated to the accused's personal rights.

[Emphasis added.]

[186] With regard to standing in particular, Ker J. wrote the following:

[138] Summarily, these decisions do not permit an accused to challenge searches of third parties not charged on their indictment. Thus, an accused cannot litigate breaches of the Charter rights of third parties as they have no standing - e.g. they cannot establish a reasonable expectation of privacy in the search of another's property or communications.

[Emphasis in original.]

[187] In coming to her conclusion on the approach to excision, Ker J. determined that the excision for all approach "flies in the face of the jurisprudence": para. 239. She reiterated the foundational principle established in *Edwards* that Charter rights are personal to the accused and that one party cannot litigate the breach of another party's Charter rights for the purposes of excision. Though specifically discussing excision, the core principles are the same as those pertaining to standing: the fact that a third party is a co-accused does not circumvent or attenuate the principle that one cannot litigate or rely on another's Charter rights: para. 239.

[188] In other words, the accused in *Kang Legal Framework for Excision* who had not obtained standing and challenged particular searches thereafter could not rely on the breaches established by others of their individual Charter rights.

[189] Subsequently, in *Latimer Excision Decision*, Ker J. applied the framework established in *Kang Legal Framework for Excision*. As established in *Latimer Brighthouse Standing*, both Mr. Latimer and Mr. Pereira's s. 8 Charter rights were breached when police seized CCTV footage of them without judicial authorization. Mr. Pereira pleaded guilty some time after this *Latimer Brighthouse Standing*. Later in the proceedings, Mr. Latimer sought to excise references to both his images and Mr. Pereira's images from an ITO. He argued that his informational privacy interests were co-extensive with Mr. Pereira's because the state action consisted of lifestyle surveillance that collected information about their associations and activities. The state action that breached Mr. Pereira's rights, on this logic, was also state action that breached Mr. Latimer's s. 8 rights. In determining that Mr. Latimer could not rely on breaches of Mr. Pereira's s. 8 rights to "expand the notion of s. 8 rights to become group rights" (para. 7), Ker J. further clarified her comments in both the earlier *Latimer Brighthouse Standing* ruling and *Kang Legal Framework for Excision*:

[15] The *Brighthouse Ruling* found breaches of the s. 8 Charter rights of Mr. Latimer, Mr. Szucs, and Mr. Pereira, in that each person's images and/or personal information captured in the CCTV footage, the related fob access records, and the Form K information, was obtained without a warrant and constituted an unreasonable search and seizure. However, that finding does not mean that Mr. Latimer's informational privacy rights includes the lifestyle

surveillance information that was developed through putting his imagery and fob access record information together with similar information about Mr. Pereira's, which was obtained in breach of Mr. Pereira's own s. 8 Charter rights.

- [16] To put it another way, the state action that infringed Mr. Latimer's s. 8 rights was the police obtaining the CCTV footage of him, the related fob access records that led the police to those images, and the information that suggested Mr. Latimer was the tenant of Suite 1204. The state action that infringed Mr. Pereira's s. 8 rights was the same, but in respect of the images and information about him. However, that information does not become part of Mr. Latimer's s. 8 privacy rights simply because Mr. Pereira was possibly Mr. Latimer's guest.
- [17] To accede to counsel for Mr. Latimer's thesis that his client's s. 8 rights were breached by the obtaining of information specific to Mr. Pereira's s. 8 rights would be to bestow "herd immunity" onto the scope of s. 8 Charter rights. However, there is no such thing as a group s. 8 privacy interest. The jurisprudence on this is clear, and has been since the inception of the Charter and the courts interpreted the scope of s. 8 rights.
- [25] Association alone does not support the expansion of the privacy sphere or "privacy bubble" around an individual to include imagery of others where the individual does not appear at all. Because Charter rights are personal to the accused, an accused's privacy interests do not extend to the images of others simply because they are associated.

[Emphasis added.]

- [190] Accordingly, though Ker J. defined the subject matter of the search broadly in *Latimer Brighthouse Standing*, that should not be taken to extend one's reasonable expectation of privacy into another's.
- [191] The parties also placed *R. v. Braich*, 2021 BCSC 114 before the Court. This was a *Garofoli* review of judicial authorizations. There, Mr. Braich and a co-accused, Mr. Vagh, were said to be members of the same criminal organization. At issue was CCTV footage seized from a building alleged to contain a stash site used by Mr. Braich, Mr. Vagh and their associates. The footage captured only Mr. Vagh. Mr. Braich argued that information related to Mr. Vagh and others should be excised on the basis that the police drew inferences about Mr. Braich from his associations with Mr. Vagh. The inferences were confirmed in the CCTV footage. Justice Winteringham (as she then was) applied *Kang Legal Framework for Excision and Latimer Excision Decision* to dismiss Mr. Braich's claim, writing that "Charter rights are personal to the accused. An accused's privacy interests do not extend to the images of others solely on the basis of association": para. 106.
- [192] On balance, the authorities are still significantly weighted in favour of the proposition that s. 8 rights are individual rights. In my view, and with respect, accepting the applicants' submissions on the basis of *Jones* distorts the holding in *Jones* beyond its logical limits. The purpose of the Court's finding in *Jones* was to avoid self-incrimination by assuming and relying upon damaging facts in pursuit of their standing application. This is why an accused

mounting an s. 8 claim may ask the court to assume as true any fact that the Crown has alleged or will allege in the prosecution against him in lieu of tendering evidence probative of those same facts in the *voir dire*. In light of the jurisprudence, Jones cannot reasonably be extended so as to circumvent the long-established proposition that s. 8 rights belong to an individual who has proven a reasonable expectation or privacy in the subject matter of a search.

[193] In this regard, neither party in the particular referred the court to *R. v. Vickerson*, 2018 BCCA 39, though it is discussed and relied on by Ker J. in *Kang Legal Framework for Excision*. *Vickerson* was decided after *Jones* and before *Flintroy*. The Court of Appeal considered whether the applicant could litigate an alleged breach of a third party's s. 8 rights.

[194] In *Vickerson*, police had conducted surveillance on the third party leaving the appellants home and stopped and searched him and his vehicle, locating drugs. They afterwards searched the third party's phone and found text messages and a call logged from the appellant--a search that the trial judge had concluded the appellant had a reasonable expectation of privacy in.

[195] When considering the issue of standing, Bennett J.A. wrote that there was some conflict in the trial court decisions on standing that the Court was set to resolve: para. 42. Justice Bennett then affirmed that to answer the question, at least in respect of the vehicle and drugs located in the search, the *Edwards* framework should apply, noting Cory J.'s comments at para. 45 of *Edwards*:

1. A claim for relief under s. 24(2) can only be made by the person whose Charter rights have been infringed. See *R. v. Rahey*, 1987 CanLII 52 (SCC), [1987] 1 S.C.R. 588, at p. 619.
2. Like all Charter rights, s. 8 is a personal right. It protects people and not places. See *Hunter*, *supra*.
3. The right to challenge the legality of a search depends upon the accused establishing that his personal rights to privacy have been violated. See *Pugliese*, *supra*.
4. As a general rule, two distinct inquiries must be made in relation to s. 8. First, has the accused a reasonable expectation of privacy. Second, if he has such an expectation, was the search by the police conducted reasonably. See *Rawlings*, *supra*.
5. A reasonable expectation of privacy is to be determined on the basis of the totality of the circumstances. See *Colarusso*, *supra*, at p. 54, and *Wong*, *supra*, at p. 62.
6. The factors to be considered in assessing the totality of the circumstances may include, but are not restricted to, the following:
 - (i) presence at the time of the search;
 - (ii) possession or control of the property or place searched;

- (iii) ownership of the property or place;
- (iv) historical use of the property or item;
- (v) the ability to regulate access, including the right to admit or exclude others from the place;
- (vi) the existence of a subjective expectation of privacy; and
- (vii) the objective reasonableness of the expectation.

See *United States v. Gomez*, 16 F.3d 254 (8th Cir. 1994), at p. 256.

7. If an accused person establishes a reasonable expectation of privacy, the inquiry must proceed to the second stage to determine whether the search was conducted in a reasonable manner.

[196] Applying *Edwards*, the Court of Appeal determined that the appellant had not demonstrated any subjective expectation of privacy through direct or indirect evidence: he was not present at the search, he did not possess or control the property and he had no ownership in the property: para. 47.

[197] *Flintroy* does not reference *Vickerson*. I appreciate that a question of the criminal organization theory was similarly absent from *Vickerson*. However, as an appellate authority on the question of whether an accused person has standing to challenge the arrest and search of a third party decided after *Jones*, and read alongside the jurisprudence indicating that s. 8 cannot be a group right, I am probably bound to follow it. In any event, in my view, I am not persuaded the circumstances at bar undermine in any way the well-established construct of this jurisprudence. I recognize that jurisprudence evolves, but here the court is being asked to expand boundaries beyond principled recognition.

[198] The parties spent some time focussed on the recent decision of *R. v. Brunelle*, 2024 SCC 3. *Brunelle* was a case about standing to seek a remedy under s. 24(1) of the Charter where an abuse of process under the residual category of s. 7 of the Charter is alleged.

[199] In brief, the case involved an investigation into allegations of organized trafficking where 31 persons were arrested and charged. Thereafter they were divided into four groups for separate trials. Group 1 first filed a motion for a stay of proceedings under s. 24(1), alleging there had been an abuse of process resulting from the accumulation of breaches under ss. 8 and 10(b) of the Charter. The trial judge entered a stay of proceedings for all of the accused in group 1. The remaining groups sought the same relief on the basis that the finding was also applicable to them. They were similarly granted a stay. The Quebec Court of Appeal allowed the Crown's appeals and ordered a new trial for all groups on the basis that some of the accused did not have standing to obtain a stay of proceedings.

- [200] The Supreme Court of Canada upheld the new trial order, but found that each of the accused had standing to apply for a remedy under s. 24(1) of the Charter, since all of them asserted that they were directly targeted by the police investigation that resulted in the alleged abusive conduct.
- [201] At the same time, the Court held that the trial judge had erred in finding that the allegations that the s. 10(b) rights of the entire group had been infringed because the police systematically postponed the exercise of this right without first considering the particular circumstances of each arrest. The Court should have applied the s. 10(b) framework to each of the accused: paras. 105-106.
- [202] With regard to standing to seek a remedy under s. 24(1), Justice O'Bonsawin for the majority held that there is a distinction to be drawn between standing and the establishment of an actual breach of a Charter right in respect of a s. 7 abuse of process application:
- [45] Some decisions have suggested, on the basis of a literal interpretation of the text of s. 24, that an accused has standing to apply for a remedy under this provision and to obtain a judgment on the merits of the application only if the accused establishes that one of their Charter rights has been infringed (see, e.g., *Edwards*, at para. 45(1.) and (3.)). That interpretation conflates standing to bring proceedings with the merits of a claim (*Cromwell*, at p. 2; *F. Bachand*, "Le droit d'agir en justice" (2020), 66 McGill L.J. 109, at pp. 110-11; *K. Roach*, *Constitutional Remedies in Canada* (2nd ed. (loose-leaf)), at § 5:10). In *Finlay*, this Court stated that it is essential to distinguish between standing, or the right to seek particular relief, and the entitlement to such relief (p. 635). This distinction was eloquently clarified by Scheibel J. in *R.L. Crain Inc. v. Couture* (1983), 6 D.L.R. (4th) 478 (Sask. Q.B.):
- ... the establishment of a violation of rights is prerequisite to the obtaining of a remedy. It is not a prerequisite to the commencing of a s. 24(1) application. There should be no doubt that in order to bring a s. 24(1) application it is necessary only that the applicant allege that his rights have been infringed or denied. [Emphasis added; p. 517.]
- [48] All of the appellants alleged an infringement of their right under s. 7 of the Charter on the basis of an abuse of process in the residual category (*A.R.*, vol. XI, at pp. 101-2). It is true that they argued that the abuse resulted from an accumulation of infringements of the right to be secure against unreasonable search or seizure and the right to retain and instruct counsel without delay (*A.R.*, vol. I, at pp. 150, 154-55 and 158; see also *A.R.*, vol. X, at pp. 55-56). It is also true that, on the face of the record, some of the appellants could not reasonably allege that they had been the victims of either of these infringements, or possibly even both. However, this did not prevent any appellant from having standing to apply to a court for a stay of proceedings under s. 24(1) of the Charter and to obtain a judgment from the court on the merits of their application if they had duly alleged all the essential elements that had to be shown in order to establish an infringement of their s. 7 right on the basis of an abuse of process in the residual category.

[Underlined emphasis added.]

- [203] On the basis of this passage, counsel for some of the applicants argued that Brunelle has overturned Edwards and the line of case law emerging from that decision. In addition, more generally, it is submitted that Brunelle contributes to the jurisprudence by highlighting the requirement for a broad interpretation of s. 8. I agree with the second proposition. In my view, Brunelle does confirm the long-standing notion that the Charter should be interpreted in a broad and purposive manner as a matter of first principles.
- [204] In my opinion however, with regard to O'Bonswain J.'s comments about para. 45 of Edwards, I do not consider the example of language cited to have overturned Edwards nor do I view there was an intention to do so. Justice O'Bonswain's comments were in reference to the proper interpretation of s. 24 of the Charter. The two points of comment in Edwards were summarizing the jurisprudence to that point and read: (1) a claim for relief under s. 24(2) of the Charter can only be made by the person whose Charter rights have been infringed and (3) the right to challenge the legality of the search depends upon the accused establishing that his personal rights to privacy have been violated: Edwards at para. 45.
- [205] Justice O'Bonsawin's comments on these points fits within her overall holding that an accused does not have to establish a breach of their own Charter rights to have standing to launch of a s. 7 abuse of process application to seek a remedy under s. 24(1). Standing in that situation is based on an allegation that an applicant's own s. 7 Charter rights had been infringed by the allegedly tainted investigation. At least for an abuse of process application, an applicant may thus hang their hat on other accused establishing a series of breaches raising to a level that seriously compromises the integrity of the justice system.
- [206] Brunelle was a decision about whether the applicants would have standing to argue a s. 7 abuse of process application. It was not a matter of s. 8, though some of the applicants argued s. 8 breaches in the lower court. The Supreme Court of Canada determined that the case turned primarily on s. 10(b) and therefore did not comment on the appropriate analysis to be undertaken with regard to s. 8. What O'Bonsawin J. said about s. 8 is limited, but she confirmed that a s. 7 abuse of process application coexists and should be complimentary (para. 68) to the framework for analysis already established for ss. 8-14 of the Charter. She specifically wrote as follows:
- [71] It bears repeating that, in the abuse of process context, both s. 7 and ss. 8 to 14 of the Charter are intended to protect individuals from conduct that is unfair or vexatious to such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the justice system (O'Connor, at paras. 64 and 73). It follows that the frameworks for analyzing these provisions can coexist. Indeed, it is entirely appropriate to use the framework for abuse of process in the residual category developed for the purposes of s. 7 to analyze any accumulation of infringements of one or more procedural guarantees in order to determine whether the infringements as a whole meet the threshold for establishing abuse of process, that is, prejudice to the integrity of the justice system.

[72] Of course, the framework applicable to each of these procedural guarantees will remain relevant in determining whether the infringements making up the accumulation of infringements actually occurred. In fact, this determination will logically have to be made before the court decides whether there has been an abuse of process in the residual category. In this way, the frameworks coexist, those for the procedural guarantees being intertwined with the s. 7 framework.

[Emphasis added.]

[207] Justice O'Bonsawin's language does address in a precise way the order of operations or the pragmatic process to be undertaken when an accused seeks a stay of proceedings under s. 24(1) for alleged infringements of their rights protected under ss. 8 to 14 of the Charter. Justice Rowe however saw the need for some precision. Accordingly, he proposed that where a right under ss. 8 to 14 is relied on as the basis for the abuse of process application in the residual category, the specific right should be addressed first: para. 129. Justice Rowe's comments thus provide some additional insight into the preferred approach.

[208] I do not agree that what is perhaps some ambiguity in the reasons of the majority in Brunelle can be interpreted as doing away with an accused person being required to establish s. 8 standing by way of the reasonable expectation of privacy analysis.

[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.

Reasonable Expectation of Privacy

[214] Turning to the reasonable expectation of privacy framework, the applicants submit that they have a reasonable expectation of privacy in all evidence obtained pursuant to Sites 17A, 17B, 18 and 25H. They assert a territorial and informational privacy interest in this evidence.

[215] As discussed above, the jurisprudence from the Supreme Court of Canada mandates that the existence of a reasonable expectation of privacy is determined by assessing the totality of the circumstances. This contextual analysis can be grouped into four lines of inquiry:

- a) the subject matter of the alleged search;
- b) the applicant's interest in the subject matter of the search;
- c) whether the applicant had a subjective expectation of privacy in the subject matter; and
- d) whether the subjective expectation of privacy was objectively reasonable.

[216] I have set out that the fact that the applicants have been charged with offences relating to their alleged involvement in a criminal organization and criminal conspiracy does not create a standalone right to standing. However, in my view, the Crown's theory in this regard is an important contextual consideration in the totality of the circumstances analysis.

Subject Matter of the Search

[217] The applicants submit that "the subject matter of the evidence allowed the police to draw inferences and conclusions from extensive and prolonged review of the video recordings, which captured who the Applicants were meeting with, who was affiliated with the Suite, the identity of the individuals, and so on."

[218] The Crown takes a more circumscribed approach. It generally frames the application as turning primarily on Site 17A, which it characterizes as a single observation of Mr. Lowley, a third-party associate of the applicants, in the 10th floor hallway of Homer Street. Counsel submits that the applicants incorrectly define the subject matter of Site 17A and incorrectly combine the information obtained pursuant to Site 17A (surveillance in the 10th floor

hallway) with the more incriminating information relating to Hemen Saed, Howjeen Saed and Mr. Bardales Medina obtained pursuant to Sites 17B, 21 and 25H.

- [219] The applicants rely on Latimer Brighthouse Standing in defining the subject matter of the search. Justice Ker found that "what the police were really after"--the proper inquiry to determine the subject matter of the search per Marakah--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 associated with the suite in question, the identity of the individuals and other investigative inferences and conclusions police were able to draw from repeated review of the materials. Accordingly, the proper subject matter of that search was the observation in the hallway and the information about the identities, associations, and activities of the accused as well as their movements within the buildings gained.
- [220] This was the approach in Kim #1, Patrick, Tessling and Spencer. I read the reasoning as directing that a court must not narrowly approach the determination of the subject matter of an alleged search. The focus should not solely be on the physical acts involved or the physical space invaded, but the nature of the privacy interests that are potentially compromised by state action.
- [221] In my view, the Crown's approach in characterizing the search at issue as a single physical observation of Mr. Lowley in the 10th floor hallway does not precisely align with the jurisprudence. Counsel referred to the police log notes as evidence to suggest that the observation of Mr. Lowley was their sole intention in conducting the search. I am not entirely convinced that the notes can only give rise to a narrow interpretation of the goals of the police, but, in any event, I note the Supreme Court of Canada's recent comments in Bykovets that "[t]his Court has never described the constitutional right to privacy according to the state's declared intention, or according to one particular use of the information": para. 38.
- [222] Though the types of observations in this case do vary from those at issue in Latimer Brighthouse Standing, I have come to the view it is appropriate to characterize the subject matter of this search as information about the identities, associations, and activities of the accused as well as their movements within the buildings. I am convinced this is consistent with the broad and functional approach to the subject matter of the search, and the tendency of information sought to support inferences in relation to other personal information. A number of features to this case drive me to this conclusion.
- [223] For one, to obtain Site 17A and 17B, Cst. Timmerman swore a global ITO in support of the two authorizations. With regard to the surveillance in particular, Cst. Timmerman deposed that access to Homer Street would provide information about the "Named Offence by allowing investigators to make evidentiary observations of DHILLON, LOWLEY, [Howjeen] SAED and/or their associates." Constable Timmerman further deposed that purpose of making these observations were as follows:

- a) to observe and/or identify any person Mr. Dhillon, Mr. Lowley or Howjeen Saed, and/or their associates are meeting within the building;
- b) to observe Mr. Dhillon, Mr. Lowley or Howjeen Saed and/or their associates accessing a specific apartment(s) for the purpose of confirming care and control of that specific apartment(s); and
- c) to make the following evidentiary observations that Cst. Timmerman believed would be crucial to establishing care and control, or that of their associates, of any evidentiary contents later discovered in the apartment or vehicles:
 - i. Mr. Dhillon, Mr. Lowley, Howjeen Saed and/or their associates bringing or removing drugs and/or bags believed to be drugs from an apartment;
 - ii. the individuals and their associates bringing drugs and/or bags believed to be drugs or other items to and from vehicles of persons; and
 - iii. to identify their role in the criminal group.

[224] I think it may be said with some confidence Cst. Timmerman made it clear "what the police were really after" in this instance: information about the particular suite number of the suspected stash site, along with broader information about Mr. Dhillon, Mr. Lowley, and Howjeen Saed and their associates and their respective roles in the suspected criminal organization. Though the "result" of Site 17A was one observation of Mr. Lowley, prior to the execution of Sites 17A and 17B, police were only aware of the identity of one of the applicants, Howjeen Saed. The fact is, the search revealed additional personal information about Howjeen Saed, as well as personal information about the other applicants, their associations and particularly their activities.

[225] The police were further able to cross-reference the CCTV and fob records later obtained with the surveillance observations, to determine who went where, with whom, and what they were carrying.

[226] Further, given that police sought Site 17A and 17B at the same time, it is somewhat of an overly tapered view to suggest that the police were solely seeking one observation of Mr. Lowley in the 10th floor hallway. I tend to the view of counsel for Howjeen Saed that the police wanted access to the hallways to track the movements of the members of the Saed Group as well as obtain the suite number to advance the criminal investigation generally.

[227] In my view, it is again somewhat laboured to restrict the subject matter of the search in the manner urged by the Crown. Accepting the Crown's characterization of the subject matter of the search as a single observation of Mr. Lowley is an undue focus on the physical acts involved in the space invaded. My view is this is not consistent with the Supreme Court of Canada's guidance in Marakah. The observation of Mr. Lowley in the 10th floor hallway provided inferences of the applicant's activity within the hallway, including the inference as to where the applicants went once they entered the building. Combined with the

investigative facts that followed very shortly thereafter, the observation was key linkage in the circumstantial chain of information regarding the applicant's associations, patterns, descriptions and activity in the area of the suite. Considering the subject matter of the search in this manner is consistent with the approach taken by Wedge J. in *Kang Cordova Materials Standing*. Similar to *Kang Cordova Materials Standing*, police relied on the observations pursuant to Site 17A and 17B to obtain subsequent authorizations. Identification of the suite number pursuant to 17A grounded the basis for the ITO sworn in support of Site 18.

The Applicants' Direct Interest in the Subject Matter of the Search

- [228] All four applicants say that they have a direct interest in the subject matter of the search. I agree that Howjeen Saed, Hemen Saed and Mr. Bardales Medina have a direct interest in the subject matter of the search.
- [229] The same cannot be said for Mr. Aruldevarajan. There is no evidence or information connecting Mr. Aruldevarajan to the Homer Street stash site. In my view the position of Mr. Aruldevarajan is not dissimilar to the position of Mr. Kang and Mr. Ghuman in *Kang Production Order Standing*. An alleged involvement in the criminal organization, standing alone, on these facts, cannot establish his interest in the subject matter of the search.
- [230] In my view, a finding that Howjeen Saed, Hemen Saed and Mr. Bardales Medina have a direct interest in the subject matter of the search is consistent with an application of *Jones*. The applicant in *Jones* was permitted to rely on the Crown's theory to establish both his direct interest in the subject matter of the search and his subjective expectation of privacy in the same without providing evidence in support of that contention: paras. 15-34.
- [231] It is the Crown's theory, as has already been discussed, that the applicants in this case were members of the same criminal organization. The evidence supports the theory of the Crown that the three applicants, Howjeen Saed, Hemen Saed and Mr. Bardales Medina were part of the criminal organization at the material time where Homer Street was an alleged stash site.
- [232] In my opinion the interests of Howjeen Saed, Hemen Saed and Mr. Bardales Medina in the hallway, suite number, and the inferences that flowed from Site 17A, is apparent. Combined with the CCTV and fob records later reviewed by police, the observations provided information about the purported Saed Group and members' lifestyle and activities, including the inference that they used the Suite as a stash site. The observations pursuant to Site 17A grounded the basis for the ITO sworn in support of Site 18. Howjeen Saed, Hemen Saed and Mr. Bardales Medina are ultimately charged in relation to evidence obtained pursuant to the execution of that warrant.

The Applicants' Subjective Expectation of Privacy

- [233] I conclude, Howjeen Saed, Hemen Saed and Mr. Bardales Medina all have a subjective expectation of privacy in the 10th floor hallway and the information determined from it regarding the alleged membership in the Saed Group, their movements and activities.
- [234] The Crown submits, in their very able submissions, that even though the threshold for a subjective expectation of privacy is low and the claimant is entitled to rely upon the Crown theory of the case, a subjective expectation of privacy cannot be inferred in the circumstances. Counsel submits that the surveillance of Mr. Lowley reveals nothing about the applicants, other than the specific location of a short-term drug stash site used by some members of the group and their associates. Part of this submission relates to the contention that the applicants cannot establish that they were tenants of the building.
- [235] With respect, this position appears to flow, perhaps understandably, as a result of the somewhat narrow view the Crown takes regarding the subject matter of the search.
- [236] In relation to territorial privacy, I do not find the uncertainty around the tenancy at Homer Street to be determinative. In *Kim #1*, Devlin J. rejected the Crown's argument that the accused had a tenuous territorial connection to the building since none of them were owners or tenants of the units and therefore they had no proprietary interest in the property: para. 44. Our Court of Appeal rejected a similar contention in the reasonable expectation of privacy analysis generally in *Pipping* at paras. 26-33. The Court accepted the trial judge's reasoning that Mr. Pipping had a subjective expectation of privacy in the hallway, albeit on the low end: para. 24, 33.
- [237] In relation to the informational component, Jones, again, provides guidance as to the informational component of the applicants claim that they have a subjective expectation of privacy in the subject matter of the search.
- [238] On the basis of the Crown's theory, Howjeen Saed, Hemen Saed and Mr. Bardales Medina were all associates of the Saed Group criminal organization at the material time when Homer Street was thought to be a stash site. I have already found that the subject matter of the search was the observation of Mr. Lowley in the 10th floor hallway entering the alleged stash site, layered with the information gained--and combined with the investigative facts that flowed from it--that revealed information about the applicant's lifestyles, associations and activities. It follows that Howjeen Saed, Hemen Saed and Mr. Bardales Medina would have a subjective interest in keeping this information private. The Supreme Court of Canada's guidance is clear that the reasonable expectation of privacy analysis must be content-neutral, not focused on the legal or illegal nature of the activity or items sought.

Whether the Applicants' Subjective Expectation of Privacy is Objectively Reasonable in the Circumstances

- [239] The search pursuant to Site 17A engaged a blend of territorial and informational privacy interests. With regard to the "totality of the circumstances", where an applicant asserts an information privacy interest the assessment mandates that the court consider 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, 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, if it was 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.
- [240] While the factors to establish if one has a territorial interest per Edwards differ slightly, they largely map onto the factors enumerated above and the facts similarly address the relevant concerns. I will consider the two together.
- [241] Given that the totality of the circumstances analysis is contextual, some of the factors will have more significance than others. The relevant factors depend on what type of privacy interests are at stake. In what follows, where I have not addressed a factor directly, it is because, in my view, it does not weigh heavily in the analysis.
- [242] At the outset, I note again the comments in Marakah with regard to the place of the search: since s. 8 protects people, not places, the question is what the individual, in all of the circumstances, should have reasonably expected: Latimer Brighthouse Standing at para. 197, citing Marakah at para. 30.
- [243] The observation of Mr. Lowley was the product of surveillance on the 10th floor of Homer Street. There were only eight suites on that floor and there were no surveillance cameras in Homer Street besides those in the common areas on the ground floor and in the parking garages. The building required key fobs for access and, once inside, individuals could move freely in the building.
- [244] I find that Howjeen Saed, Hemen Saed and Mr. Bardales Medina's control vis-à-vis the general public informs their privacy interest. All three individuals were observed by police prior to the police's execution of Site 17A attending at Homer Street with various targets of the investigation. In the CCTV footage gathered pursuant to Site 25H, Howjeen Saed, Hemen Saed and Mr. Bardalas Medina are all seen attending at Homer Street and either fobbing into the building or independently entering the building (with the inference being

that they were in possession of a fob given the realities of the building) on at least one occasion.

- [245] Pipping is instructive on this point. The police identified Mr. Summers and Mr. Pipping as targets in their dial-a-dope investigation and set out to discover where they might be keeping their drugs and cash. Their purpose in obtaining the general warrant was to make observations of the two men in the apartment building and to identify the specific unit within the building the police suspected they were using. They followed the two men and observed them entered an apartment complex--a four-level condominium building containing 96 units, with key access to outside entrances, open access inside, and no video surveillance. After obtaining a warrant, four officers entered the building and spread out over the four floors, one of whom observed Mr. Pipping entering a unit with a key. The police then used that observation of Mr. Pipping as the basis to seek and obtain a search warrant for that unit.
- [246] Applying *Edwards*, *White* and *Yu*, the Court found the important factors in *Pipping* to be the property manager's refusal to grant the police access to the building without a warrant, the secured access to the building, the lack of video surveillance, that the unit in question was at the end of the hallway, and the narrow breadth of observations made by the police. The Court held that "the judge was correct to find that the occupants of the building reasonably expected that entry to the building would be limited to invitees and otherwise members of the public would be excluded": para. 32.
- [247] *Pipping* is also instructive in that the hallway in question was outside of what was found to be a drug stash site.
- [248] In the *Kim* decisions determining whether the applicants had standing in the various searches of the 12th floor hallway (*Kim* #1 and *Kim* #4), the Crown similarly argued that the applicants had a tenuous connection to the property because they had no proprietary interest and though they had fob access to the floor, many others did as well: see e.g. *Kim* #1 at para. 44. Justice Devlin rejected the Crown's argument, finding that the absence of a landlord-tenant relationship was relevant, but not determinative. This was partly due to the fact that the subject of that standing application did not turn primarily on a territorial privacy interest as in *Edwards*. Territorial considerations were therefore not the sole focus of the analysis. Even on territorial grounds alone, the overriding consideration was that the 12th floor hallway was more private than public, rather than the lack of tenant relationship. The Court of Appeal in *Pipping*, as discussed, was of a similar view.
- [249] The Court in *Marakah* also noted that control is not an absolute indicator of a reasonable expectation of privacy, nor is a lack of control fatal to a finding that an applicant has a privacy interest in the subject of a given search. The Crown in the case at bar pointed to *Kim* #1 and #4 to suggest that the applicants' ability to exclude the public from the hallway (it was fob-access only) was nearly determinative in Devlin J.'s finding that they had standing. I do not read the reasoning of Devlin J. in those stark terms.

- [250] In Kim #1, for example, she additionally notes the number of suites on the floor, the strata bylaws in place that indicated that building management was sensitive to privacy, and the absence of security cameras on the 12th floor as relevant factors: para. 45. In Kim #4, two of the applicants' ability to regulate access to the 12th floor was a factor. However, in considering the factual similarities between that case and Pipping, Devlin J. commented as follows:
- [39] As stated in Pipping at para. 30, "Edwards, Webster, White and Yu are consistent in their focus on the manner in which the control of public access to the common areas of a building is key to the assessment of a reasonable expectation of privacy". While each case turns on its own facts, there are several similarities between Pipping and this case. Neither applicant is the registered owner or tenant; the condo building was secured and accessible only by key and there was no evidence of a register of occupants near the entrance. Both units were located at the end of the hallway, resulting in less traffic and somewhat more privacy than other units on the floor. While there was no video surveillance in Pipping, the video surveillance in this case did not extend to the 12th floor thus enhancing one's expectation of privacy. In Pipping access to other areas in the building was not restricted. Although Brighthouse Way was a larger multi-unit residential building, access to the 12th floor was limited to those who had 12th floor fob access.
- [251] Homer Street is closer in size to the building at issue in Pipping than Kim #4, a matter of 128 to 438 suites, respectively.
- [252] Taken together, the jurisprudence suggests that, to use the language of Wedge J. in Kang #1, that the question is one of control and access vis-à-vis the general public: para. 105. This is the approach commended by our Court of Appeal in Pipping. I do not accept that one's privacy interest turns solely nor necessarily primarily on whether a particular hallway is restricted to fob access. That was not a determinative factor in Pipping nor do I find it determinative here.
- [253] I also note again the Supreme Court of Canada's guidance that the approach to s. 8 must be broad and contextual. In the case at bar, as set out in the ASF, Howjeen Saed, Hemen Saed and Mr. Bardales Medina are directly linked to the Homer Street unit via their fingerprints and DNA evidence. The Crown has conceded that they have standing to challenge the search of that unit, with the implication being that they had a reasonable expectation of privacy in the Suite. It seems somewhat incongruous to submit that despite that state of affairs, Howjeen Saed, Hemen Saed and Mr. Bardales Medina could not have a reasonable expectation of privacy in the hallway directly outside of the same unit. In my view, this reduces one's privacy interests to a matter of closed doors. This is contrary to the long-established principle that s. 8 protects people, not places.
- [254] With regard to whether the informational content of the search was in public view, the Crown concedes that this factor weighs in favour of a finding of a reasonable expectation of privacy, as the hallway was not in public view.

- [255] I also note that, as set out in the ITO in support of Site 17A and 17B, the police were cognizant that Howjeen Saed, Mr. Dhillon and Mr. Lowley may have a reasonable expectation of privacy in the information sought from Homer Street. The police note that one of the motivations for seeking the general warrant and production order was because of this reality.
- [256] While I appreciate the police sought a warrant before conducting the search, a finding that the applicants have a reasonable expectation of privacy would not stand as a critique of the police's investigatory techniques. Although police obtained judicial authorizations prior to undertaking the search at issue, that is not a bar to a finding that an accused person has standing under s. 8 to challenge the searches: see e.g. *R. v. Craig*, 2016 BCCA 154 at para. 142. Indeed, the Court of Appeal in *Craig* considered the police's need to obtain a warrant to search the communications at issue in that case as a factor supporting a finding of a reasonable expectation of privacy: *Craig* at para. 104.
- [257] The Crown says that the police took an incremental, restrained approach to the search and that the investigative technique revealed a very limited scope of information: the specific location of the stash site within the target building. I agree that the fact that police ceased surveillance once they observed Mr. Lowley entering the suite represents a purposefully restrained approach to Homer Street. Further, physical observations are certainly less intrusive than installing a covert camera, such was the case in *Kim #1*.
- [258] However, I respectfully disagree with the Crown's contention that the police took an incremental approach. Site 17A and 17B were sought at the same time--the information gained formed the basis for Site 18. The other authorizations, while important, were obtained at least in part because of some discrepancies in the time stamps. In any event, the approach urged by the Crown in highlighting that the investigative technique revealed a very limited scope of information seems to represent the results-based approach I reject. I do not find that either of these factors weighs heavily against a finding that Howjeen Saed, Hemen Saed and Mr. Bardales Medina had a reasonable expectation of privacy in the circumstances. On balance, I find this to be a neutral factor in the analysis.
- [259] Finally, the Crown says that last factor--that queries whether the informational content exposes details of the claimant's lifestyle, or informational of a biographical nature--weighs strongly against an expectation of privacy in this case. Counsel submits that: the information revealed was limited to the precise location of a stash site in the building, it did not add or detract from the police belief that there was a stash site in the building, reveal the identities of individuals involved, or delineate any associations between members of the group.
- [260] I have already considered this point when discussing the subject matter of the search. I cannot accept that the sole informational content of the search was the suite number. I agree that the subject matter of the search does not strike at the core of the applicants' biographical information, but I nonetheless find that it revealed information about their

associations and activities and confirmed inferences the police had about the applicants. The observation of Mr. Lowley also provided the basis of further authorizations that established and confirmed the suspected associations between the Saeds and Mr. Bardales Medina.

[261] Further, Howjeen Saed, Hemen Sead and Mr. Bardales Medina grounded their subjective expectation of privacy in the Crown's theory that they were engaged in a criminal organization to traffic in drugs. Therefore, it follows that if the search confirmed the same (i.e. the existence of a stash site) and the respective associations to Howjeen Saed as a target of the search, the search revealed information about their activities and associations. Thinking of the information in this way refers to the nature of the privacy interests potentially compromised by state action. This is not to be understood as suggesting that the Crown's theory can establish an objective basis for the applicants' reasonable expectation of privacy, but rather that the Crown's theory can inform the overall analysis depending on the information revealed.

Conclusion

[262] Having considered the totality of the circumstances, I find that Howjeen Saed, Hemen Saed and Mr. Bardalas Medina have established on a balance of probabilities that they each have a reasonable expectation of privacy in the subject matter of the search. On all of the evidence the expectation of privacy is not high. It is frankly minimal. Certain factors tended to diminish any prospect of an expectation of privacy, but, in the end, in my view the whole of the circumstances did generate that expectation. These three applicants have standing to challenge the warrant.

[263] Mr. Aruldevarajan has not established that he had a reasonable expectation of privacy in the subject matter of the search. His application in this respect is dismissed.

"Crossin J."

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