Most Negative Treatment: Check subsequent history and related treatments.

2016 ONSC 4133
Ontario Supreme Court of Justice

R. v. Brewster

2016 CarswellOnt 10548, 2016 ONSC 4133, [2016] O.J. No. 7204, 142 W.C.B. (2d) 491

HER MAJESTY THE QUEEN (Respondent) and JOSEPH BREWSTER, GARY CHEN, HUSSEIN DAYA, TONY HUANG, KEN MAI, RITCHIE NGUYEN, CHRISTOPHER SACCOCIA, DAT QUOC TANG, ANTHONY TSENG, LARRY YU, GANNO ABDELLA, HANAD ADEN, AHMED AHMED, CLEMENT APPIAH, JEROME AULD, BENJAMIN BONSU, MOHAMED CAMARA, TYRONE CHAMBERS, KHALIL EVANS, CAMERON LANDRY, JARED LEUNG, BENINU LUKUSA, MUHAMMAD MADBOULI, KAREN NOBLE, ADRIAN NOLAN, AMY PERRAULT, TRUNG PHAM, JERMAINE ROWE, SHANDAL SHAND, JAHWAYNE SMART, TYRONE SMITH, ISHIA STEPHENSON, JASON TO, NATHANIEL VALENTINE, ALEXANDRA VON ACHTEN (Applicants)

M.A. Code J.

Heard: March 2, 2016; April 21, 2016; May 9,17,24-27, 2016; June 2,9-10, 2016
Judgment: June 27, 2016
Docket: CR-15-10000364, CR-15-10000572, CR-15-10000573, CR-15-10000625, CR-15-30000641, CR-15-30000642, CR-15-90000159-MO, CR-16-10000259, CR-16-10000318, CR-16-40000123, CR-16-50000050, CR-16-50000058, CR-16-50000060, CR-16-50000132, CR-16-50000270

Counsel: Michael Passeri, George Lennox, Ron Krueger, Jay Spare for Crown / Respondent
Craig Bottomley, Sherif Foda, Douglas Usher, David Heath, Joseph Giuliana for Applicants

Subject: Constitutional; Criminal; Human Rights

Related Abridgment Classifications

Criminal law
IV Charter of Rights and Freedoms
IV.13 Unreasonable search and seizure [s. 8]
IV.13.b Authorized by law

Headnote

Criminal law --- Charter of Rights and Freedoms — Unreasonable search and seizure [s. 8] — Authorized by law

Police commenced massive investigation that focussed on several rival gangs who police believed were involved in drug trade and who were killing each other's members — Investigation generated substantial amount of evidence which supported police theory and it resulted in 112 accused being charged with various criminal offences set out in 15 indictments — Indictments would be proceeding to separate trials — Judge named M granted three wiretap authorizations to obtain evidence and he also issued several general warrants — Some of accused brought application for order that M's authorizations and warrants violated s. 8 of Canadian Charter of Rights and Freedoms — Accused claimed that police failed to fully disclose certain characteristics of new technology known as MDI to M who issued general warrant that authorized its usage — Accused submitted that police failed to make proper disclosure to M of circumstances that surrounded warrantless entries into common areas of several multi-unit buildings — Accused wanted court to issue declaration that proper disclosure was not made to M about warrantless entries — Accused objected to police installation, without warrant, of surveillance cameras in common areas of three multi-unit buildings — Accused claimed that there was insufficient evidence to name two individuals, one of whom was H, as "known persons" in renewal

and expansion wiretap authorization issued by M — These individuals were not named in initial authorization — Crown claimed they were properly included because interception of their private communications would assist investigation — Application dismissed — Generally, evidence obtained as result of authorizations and warrants were ruled to be admissible at various upcoming trials, subject to two exceptions — First exception was that court did not rule on camera installation issue because s. 8 motion record on this issue was deficient — Second exception was that naming H as "known person" violated s. 8 — All interceptions of H's private communications that depended on him being named in renewal and expansion authorization were excluded — There were no material omissions in relation to police officer's request for general warrant authorizing use of MDI and s. 8 was not violated — In fact, there was compelling evidence that justified issuance of this warrant — Proper disclosure was made to M about warrantless entries — Surveillance carried out in common areas did not amount to "search" and s. 8 was therefore not engaged — In addition, detailed circumstances regarding surveillance was not material to issuance of authorizations and related warrants and did not have to be disclosed.

Table of Authorities

Cases considered by *M.A. Code J.*:

Canada (Director of Investigation & Research, Combines Investigation Branch) v. Southam Inc. (1984), [1984] 2 S.C.R. 145, (sub nom. *Hunter v. Southam Inc.*) 11 D.L.R. (4th) 641, (sub nom. *Hunter v. Southam Inc.*) 55 N.R. 241, 33 Alta. L.R. (2d) 193, (sub nom. *Hunter v. Southam Inc.*) 55 A.R. 291, 27 B.L.R. 297, (sub nom. *Hunter v. Southam Inc.*) 2 C.P.R. (3d) 1, 41 C.R. (3d) 97, (sub nom. *Hunter v. Southam Inc.*) 9 C.R.R. 355, 84 D.T.C. 6467, (sub nom. *Hunter v. Southam Inc.*) 14 C.C.C. (3d) 97, (sub nom. *Director of Investigations & Research Combines Investigation Branch v. Southam Inc.*) [1984] 6 W.W.R. 577, 1984 CarswellAlta 121, 1984 CarswellAlta 415 (S.C.C.) — considered

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MacKay v. Manitoba (1989), [1989] 6 W.W.R. 351, [1989] 2 S.C.R. 357, 61 D.L.R. (4th) 385, 99 N.R. 116, 61 Man. R. (2d) 270, 43 C.R.R. 1, 1989 CarswellMan 184, 1989 CarswellMan 332 (S.C.C.) — referred to

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Robson v. Hallet (1967), [1967] 2 Q.B. 939, [1967] 2 All E.R. 407, 51 Cr. App. R. 307 (Eng. Q.B.) — referred to
World Bank Group v. Wallace (2016), 2016 SCC 15, 2016 CSC 15, 2016 CarswellOnt 6580, 2016 CarswellOnt 6581, 395 D.L.R. (4th) 583, 482 N.R. 200, [2016] 1 S.C.R. 207 (S.C.C.) — considered

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

s. 7 — considered

s. 8 — considered

s. 24(2) — considered

Criminal Code, R.S.C. 1985, c. C-46

Pt. XVIII.1 [en. 2011, c. 16, s. 4] — referred to

s. 185(1)(e) — considered

s. 186 — considered

s. 186(1)(a) — considered

s. 186(1)(b) — considered

s. 186(1.1) [en. 1997, c. 23, s. 5] — considered

s. 487 — considered

s. 487.01 [en. 1993, c. 40, s. 15] — considered

s. 495 — considered

s. 551.3 [en. 2011, c. 16, s. 4] — considered

s. 551.3(1) [en. 2011, c. 16, s. 4] — considered

s. 551.7(3) [en. 2011, c. 16, s. 4] — considered

s. 650(2)(b) — considered

APPLICATION by accused for exclusion of evidence because their rights under s. 8 of Canadian Charter of Rights and Freedoms were violated.

***M.A. Code J.*:**

A. OVERVIEW AND PROCEDURAL HISTORY

1 Thirty-five Applicants have brought the present pre-trial Motion. They are all accused persons charged with various criminal offences set out in fifteen Indictments that are presently before the Court awaiting trial. All of these Indictments are proceeding to separate trials. However, they are connected by the fact that the Crown relies on wiretap intercepts in all of the trials. That wiretap evidence was obtained as a result of authorizations issued by McMahon J. on February 24, April 15, and May 2, 2014.

2 In light of this common source of much of the evidence to be tendered at separate trials, Morawetz R.S.J. made an Order on February 8, 2016 pursuant to s. 551.7(3) of the *Criminal Code* designating a single "case management judge" for purposes of hearing certain pre-trial Motions. In particular, I heard the present Motion alleging that the wiretap authorizations of McMahon J., and various related search and seizure warrants, violated s. 8 of the *Charter of Rights* and that certain evidence should be excluded at the pending trials pursuant to s. 24(2) of the *Charter*. The large number of accused and their trial counsel sensibly appointed a small group of lead counsel to argue the s. 8 Motion.

3 At the four initial appearances before me, I dealt with case management issues. In particular, I allowed all of the accused to be absent from the s. 8 Motion proceedings, and made Orders pursuant to s. 650(2)(b) to that effect. I also heard a number of Motions requesting further disclosure in relation to the s. 8 issues that the Applicants were raising. None of these disclosure Motions required rulings. They were resolved through discussion and negotiation in court, with sensible concessions by the Crown after some suggestions from me. As a result, most of the requested disclosure was provided by the Crown. Campbell J.'s recent decision in *R. v. McKenzie*, [2016] O.J. No. 293 (Ont. S.C.J.) was of great assistance in determining the scope of Crown disclosure in relation to the s. 8 *Charter* issues.

4 A small number of the Applicants' disclosure requests were resisted by the Crown. I deferred any ruling in relation to these requests until after I had heard the evidence and argument on the s. 8 Motion. This was due to the fact that the few requests resisted by the Crown appeared to be of marginal assistance in relation to the s. 8 issues, and because the Crown was relying on "investigative technique" privilege in order to justify non-disclosure. This is a qualified privilege that requires balancing of "the public interest in effective police investigation" with "the legitimate interests of the accused in disclosure of the technique." See: *R. v. Richards* (1997), 115 C.C.C. (3d) 377 (Ont. C.A.). I could not properly assess the competing interests prior to actually hearing the s. 8 Motion. As the s. 8 hearing progressed, the Applicants never renewed their request for these few items of disclosure that the Crown had declined to produce.

5 On May 24, 2016, the s. 8 Motion commenced. The Applicants filed a large documentary record and called one witness. They also sought leave to cross-examine eight police officers. They properly confined the scope of their requested cross-examinations to certain narrow issues. I ruled in favour of leave to cross-examine the eight officers and held that the "some basis" or "reasonable likelihood" test for cross-examination on a s. 8 Motion had been met. See: *R. v. Garofoli* (1990), 60 C.C.C. (3d) 161 (S.C.C.) at 198; *R. v. Lising* (2005), 201 C.C.C. (3d) 449 (S.C.C.) at paras. 3 and 40-41; *R. v. Green* (2015), 22 C.R. (7th) 60 (Ont. C.A.) at paras. 31-54. I will explain the basis for granting leave below, when reviewing the relevant issues.

6 The eight police officers were cross-examined on the narrow issues on which leave was granted, over parts of four days. The Crown called one additional police witness in response. I then heard oral argument over two days and reserved judgment. These are my Reasons for Judgment.

B. THE ISSUES RAISED ON THE S. 8 MOTION

7 The Applicants have raised four main issues on the s. 8 Motion. I allowed some cross-examination of certain police officers in relation to each one of the four issues.

8 The first issue concerns relatively new technology that was used by the police in the course of their investigation. This technology is known as a Mobile Device Identifier (MDI). It is sometimes referred to as a "Stingray," which is one of the makes or models of this kind of technological device. McMahon J. granted a General Warrant, pursuant to s. 487.01, allowing the police to use an MDI. It mimics a cell phone tower and allows the police to pick up the signal of cell phones in a particular area, by deploying the MDI while a particular suspect is under physical surveillance. The police then use the MDI data received by the device in order to determine which cell phone is being used by the suspect at that time. The MDI does not intercept private communications. It simply identifies serial numbers associated with all cell phones in the vicinity where it is deployed. By deploying the MDI at two separate locations where the suspect is present, his/her cell phone serial number can be determined by a process of elimination.

9 I will describe the MDI in greater detail below. The Applicants allege that the police failed to fully and fairly disclose certain characteristics of the MDI to McMahon J. They also allege that the police failed to carry out one particular minimization term imposed by McMahon J. in relation to use of the MDI. I was satisfied, based on the extensive materials filed by the Applicants, that cross-examination of four police officers would assist me in deciding these somewhat novel s. 8 issues. I, therefore, allowed cross-examination of the Affiant who described and explained the MDI to McMahon J., of the RCMP officer who is the leading police expert in Canada concerning the MDI's uses and capabilities, and of the two RCMP officers who actually used the MDI in the course of the present investigation.

10 The second issue concerns alleged trespasses or unlawful entries onto private property by surveillance officers in the course of the present investigation. The Affiants summarized numerous surveillance reports that they had received. These summaries suggested or inferred that the surveillance officers may have entered certain common areas of multi-unit buildings, such as parking garages, lobbies, elevators, and hallways. The manner, the duration, the purpose, and the authority or permission for these entries into common areas was not set out in detail by the Affiants. I was satisfied that these entries by the surveillance officers may or may not amount to trespasses and s. 8 violations, depending on how the recent decision of the Court of Appeal in *R. v. White* (2015), 325 C.C.C. (3d) 171 (Ont. C.A.) is applied to the particular facts of this case. Accordingly, I allowed cross-examination of two of the Affiants and three of the surveillance officers, in order to clarify the above factual circumstances.

11 The third issue concerns the installation of cameras by the police in the hallways of three condominium buildings where suspects apparently resided. The police had permission to install these cameras. The issue raised by the Applicants is whether the manner in which permission was obtained and the source of that permission (either from the property manager or the condominium board), was sufficient to justify this kind of interference with privacy and whether it violated s. 8. In addition, the Applicants seek to quash the General Warrant issued by McMahon J., authorizing video surveillance in the common areas of these buildings, on the basis that the Affiants failed to disclose the pre-existing consent installations of cameras to McMahon J. The existence of these cameras, and the particular manner and source of the permission obtained by the police, was arguably not disclosed to McMahon J. at the time of the initial authorization (although it was disclosed at the time of the subsequent renewal and expansion authorization). Accordingly, I allowed cross-examination of the Affiants and of a senior surveillance officer in relation to this issue.

12 The fourth issue concerns the naming of five individual suspects in the April 15, 2014 renewal and expansion authorization. The Applicants allege that there were insufficient grounds to reasonably believe that intercepting the private communications of these particular "known persons" meets the statutory test set out in s. 185(1)(e). That test is whether interception of their communications "may assist the investigation." See: *R. v. Chesson* (1988), 43 C.C.C. (3d) 353 (S.C.C.) at 365-6; *R. v. Mahal* (2012), 292 C.C.C. (3d) 252 (Ont. C.A.) at paras. 71, 75-6, 81 and 88, leave to appeal refused (2013), 453 N.R. 400 (note) (S.C.C.); *R. v. Nugent* (2005), 193 C.C.C. (3d) 191 (Ont. C.A.) at paras. 8-9. This

argument mainly involves assessing the facial sufficiency of the grounds set out by the Affiants and, therefore, it does not require cross-examination. However, in relation to one target (Tony Huang), the Applicants established two potentially significant sub-facial defects. Accordingly, I allowed cross-examination of the relevant Affiant in order to clarify how he had come to believe these erroneous paragraphs in his Affidavit.

C. FACTS RELATING TO THE POLICE INVESTIGATION

13 The police investigation that is at issue in relation to the wiretaps and warrants issued by McMahon J. can only be described as massive. In fact, it began as three separate investigations which eventually became connected.

14 One investigation was led by the Toronto Homicide Squad. It was focused on four specific incidents (three murders and one attempt murder during a four-month period, from late February to mid-June 2013). Another investigation, known as "Project Battery," was led by the O.P.P. and the Asian Organized Crime Task Force. It was focused on gangs known as the Asian Assassins and the Project Originals. These two gangs appeared to be somewhat allied and they were both associated with the west side of downtown Toronto, in particular, with the area near Vanualey Walk. A third investigation, known as "Project Rx," was led by the Toronto Guns and Gangs Task Force. It was focused on a different group of gangs, known as the Sick Thugz, the Young Regent Niggas, and Chin Pac. These three gangs appeared to be somewhat allied and they were associated with the east side of downtown Toronto, in particular, with the area near Regent Park.

15 During 2013, the three police investigations began to coordinate their efforts, resulting in the initial joint wiretap application that was put before McMahon J. on or about February 21, 2014. He granted this initial authorization on February 24, 2014. Each of the three investigations prepared three separate Affidavits that were before McMahon J., seeking a single wiretap authorization and various related warrants. The three Affiants were D.C. Dhillon, D.C. Clark, and Sgt. Tanabe.

16 What drew the three investigations together, in brief summary, was the police belief that the west side gangs (who were the subject of Project Battery) and the east side gangs (who were the subject of Project Rx) were rivals. There were grounds to believe that all of these gangs were involved in the drug trade, within their own areas of influence. More importantly, there were grounds to believe that the two groupings of gangs were engaged in a kind of open warfare and were killing each other, in "tit for tat" executions carried out in very public places such as restaurants and shopping centres.

17 Perhaps the most chilling illustration of the police theory, linking the two sets of warring gangs to a series of shootings, took place on February 4, 2014, a few days before the three Affidavits were placed before McMahon J. That evening, an alleged member of the Asian Assassins (one Peter Nguyen) parked his car on Yonge Street and had dinner at a nearby restaurant with his girlfriend. While they were at dinner, police surveillance observed an alleged associate of Chin Pac (one Philip Phan) approach the parked car, kneel down, and reach under the car. He did this on two separate occasions, apparently retrieving a GPS tracking device from underneath Nguyen's car. Phan then returned to his own car which was parked nearby. As Peter Nguyen left the restaurant with his girlfriend, the headlights on Philip Phan's car were illuminated, two males approached Nguyen and his girlfriend, and ten to twelve shots were fired. Nguyen was killed. Philip Phan's car and a second car were observed driving away from the scene of the shooting. The shooting occurred at about 9:21 p.m. Shortly afterwards, at 9:59 p.m., police surveillance observed Philip Phan's car driving in tandem with a second car that was associated with his brother, Jerry Phan, an alleged Chin Pac member. The two cars parked at a Loblaw's store on Bayview Avenue and four males were observed standing at the rear of Jerry Phan's car.

18 The police believed that this apparent tracking and execution of Peter Nguyen on February 4, 2014 was carried out by Chin Pac members and associates and that it was connected to the four prior incidents being investigated by the Homicide Squad. Those four earlier incidents, in brief summary, were as follows: on February 24, 2013, an alleged Chin Pac member (one Tony Nguyen) was shot and killed in a Toronto parking lot after leaving a restaurant; on March 30, 2013, an alleged Asian Assassins member (one Michael Nguyen) was shot and killed while leaving the Yorkdale

Shopping Centre; on May 11, 2013, four alleged Chin Pac members and associates (Jerry Phan, Philip Phan, Steven Livingstone, and Kevin Pham) were sitting at the window of a restaurant in the Yorkdale Shopping Centre when two suspects approached the restaurant and fired several shots through the window, striking Jerry Phan in the back; and on June 16, 2013, an alleged associate of the Asian Assassins (one Byron Linares) was shot and killed inside his apartment.

19 Information received by the police, from an anonymous source and from confidential informants, was to the effect that "there is an ongoing war between Chin Pac and Asian Assassins," that "Chin Pac are using Sick Thugz and others from the Regent Park area for their shootings," that "there was a long standing feud between Tony Nguyen and Michael Nguyen," and that the relevant parties were "looking for revenge" and were carrying out "retaliation shootings."

20 The murder of Michael Nguyen on March 30, 2013 at Yorkdale Shopping Centre yielded a significant body of evidence. He was in possession of a loaded handgun when he was killed. He was accompanied by another alleged Asian Assassins member, one Danny Vo, who had $40,000 in cash in his car. Vo was also shot in this same incident but he was only wounded. He declined to cooperate with the investigation. The police seized Michael Nguyen's cell phone and were able to forensically extract a large number of encrypted emails that had been sent between Michael Nguyen and Peter Nguyen. These emails inferred that the Asian Assassins were involved in drug trafficking, firearms trafficking, and in plans to murder rival Chin Pac gang members.

21 The subsequent murder of Byron Linares, on June 16, 2013, also yielded a great deal of evidence supporting the police theory that there was "an ongoing war" between the various gangs and that the homicides under investigation were motivated by "revenge" and "retaliation." Linares was murdered inside his apartment. The apartment had been rented by alleged Asian Assassins member Peter Nguyen (who was subsequently murdered himself on February 4, 2014, as summarized above). Inside the apartment, the police seized the following evidence: a loaded semi-automatic handgun used in the murder of Linares and used in an earlier home invasion linked to Peter Nguyen; an "Uzi" style sub-machine gun with a loaded magazine; additional magazines and ammunition; three assault rifles; two bulletproof vests; various quantities of different drugs, a drug press, and drug trafficking paraphernalia; a GPS tracking device, two empty boxes for GPS tracking devices, and four GPS tracking device manuals; and a variety of tactical equipment, including counter-surveillance devices. Perhaps most significant, in terms of this particular investigation, was the police seizure of the following items in the apartment: three photocopies of a photograph of alleged Chin Pac member Steven Livingstone (from which the police lifted fingerprints of two alleged Asian Assassins members, Peter Nguyen and Paul Truong); and four photocopies of the driver's license of alleged Chin Pac associate Phillip Phan (from which the police lifted fingerprints of three alleged Asian Assassins members, Peter Nguyen, Buck Tran and Paul Truong). Elsewhere in the apartment, the police located numerous fingerprints of five alleged Asian Assassins members and one alleged associate.

22 Based on all this evidence, the police believed that the apartment where Linares was murdered was an Asian Assassins "stash house" and that GPS devices were being used by the Asian Assassins to track and target Chin Pac members and associates. The subsequent murder of Peter Nguyen inferred that Chin Pac was doing the same thing, namely, using GPS devices to track and target Asian Assassins members and associates.

23 Once the wiretap phase of the investigation commenced, in late February 2014, this pattern of criminal activity continued. For example, on March 21, 2014, the police executed search warrants on the apartment and motor vehicle associated with one Jason To. They seized over a kilo of cocaine, a loaded handgun, and a photograph depicting alleged Asian Assassins member Buck Tran together with the now deceased Peter Nguyen. The police also uncovered more evidence inferring that the targets of the investigation were using GPS devices to track and target each other. Finally, on March 25, 2014, there was another murder. Two suspects came to the door of the home of Chin Pac member Thanh Ngo's father, and shot and killed the father in circumstances that suggested that Thanh Ngo was the target. All of this evidence of ongoing tracking and targeting between the rival gangs was set out in the Affidavits in support of the renewal and expansion authorization.

24 The above summary does not begin to do justice to the size, complexity and scope of the three police investigations. I have focused on the homicides, as they were the most serious aspect of the three investigations. However, the alleged

drug trafficking activities of the five separate gangs, and the criminal organization aspect of the investigations, provided critically important context. The evidence supporting these aspects of the investigation was equally compelling. The three Affidavits filed in support of the initial wiretap authorization were 368 pages, 242 pages, and 810 pages in length, that is, a total of 1,420 pages. In addition, lengthy Appendices were attached to the three Affidavits. The request for renewal and expansion of the initial wiretap authorization was again supported by three Affidavits, which were 105 pages, 212 pages, and 462 pages in length, that is, a total of 779 pages. Again, lengthy Appendices were attached to the three Affidavits. In the final result, McMahon J.'s initial authorization permitted wiretapping of 144 "known persons." The renewal and expansion authorization permitted wiretapping of 198 "known persons."

25 I have never seen or heard of a wiretap application that included this much material or that named this many targets. The three Affiants stated that they were trying to be concise. On occasion, there was unnecessary repetition and unnecessary or unhelpful detail in some of the Affidavits. However, there can be no doubt that this was an extremely serious and complex investigation and that there was abundant evidence to support the police theory of the case.

26 The investigation culminated on May 28, 2014 with the arrest of 112 individuals who were charged with numerous offences. The offences included murder, attempt murder, conspiracy to commit murder, drug and firearms and human trafficking, possession of firearms, and possession of drugs for the purpose of trafficking. Search warrants were executed and firearms, ammunition, bullet proof vests, GPS tracking devices, almost $350,000 in cash, and large amounts of heroin, cocaine, and other drugs were seized.

D. MATTERS THAT ARE NOT IN DISPUTE

27 Before turning to the four issues raised by the Applicants on this s. 8 Motion, it is important to set out what is *not* in dispute.

28 The two statutory requirements for a wiretap authorization, known as "probable cause" and "investigative necessity," are set out in s. 186(1)(a) and s. 186(1)(b). See: *R. v. Mahal*, *supra* at para. 39. The former requirement is not explicitly stated in the statutory provisions but the courts have read it into the broad "best interests of the administration of justice" test, found in s. 186(1)(a), in order to interpret that provision in a manner that is compliant with s. 8 of the *Charter*. See: *R. v. Finlay* (1985), 23 C.C.C. (3d) 48 (Ont. C.A.) at 69-72; *R. v. Sanelli* (1990), 53 C.C.C. (3d) 1 (S.C.C.) at 12.

29 The Applicants do not allege that the wiretap authorizations in this case failed to satisfy these statutory and constitutional requirements. As summarized above, there was abundant evidence set out in the three Affidavits to meet the "probable cause" requirement. No facial or sub-facial defects have been raised on the *inter partes* review of McMahon J.'s *ex parte* Orders that could undermine this requirement. In terms of "investigative necessity," the police alleged "criminal organization" offences. No deficiencies in these allegations have been suggested. As a result, s. 186(1.1) states that the "investigative necessity" requirement "does not apply." This relatively recent exemption from the "investigative necessity" requirement has been upheld against constitutional attack. See: *R. v. Doiron* (2007), 221 C.C.C. (3d) 97 (N.B. C.A.) at paras. 19-46, leave to appeal refused (2007), 223 C.C.C. (3d) vi (note) (S.C.C.). Similarly, the underlying "criminal organization" offences have been upheld against constitutional attack. See: *R. v. Lindsay* (2009), 245 C.C.C. (3d) 301 (Ont. C.A.), leave to appeal refused (2010), 251 C.C.C. (3d) vii (S.C.C.).

30 As a result, the vast majority of the wiretapping authorized by McMahon J. has not been challenged. The only attack on any part of the wiretap authorizations is the narrow argument about whether five "known persons" should have been named in the April 15, 2014 renewal and expansion authorization. Even this argument was substantially narrowed as the s. 8 hearing proceeded. In one of these cases (the "known person" Clement Appiah), the Crown decided not to tender any intercepts seized on Appiah's telephone pursuant to the renewal authorization. In another case (the "known person" Anthony Tseng), he resolved his charges by way of a guilty plea while the s. 8 Motion was still proceeding. In a third case (the "known person" Larry Yu), counsel re-considered their position and wisely conceded that there was sufficient evidence to name Yu. In the remaining two cases, even if these targets were improperly named, the Crown

could still tender their intercepts if they were communicating with some other properly named target at the time of the interception or if their communications fell within the "basket clause" relating to "unknown persons." See: *R. v. Nugent*, *supra* at paras. 7-12; *R. v. Shayesteh* (1996), 111 C.C.C. (3d) 225 (Ont. C.A.) at 233 and 238-240; *R. v. Martin* (2010), 257 C.C.C. (3d) 433 (N.B. C.A.) at paras. 44-48, leave to appeal refused (2011), 261 C.C.C. (3d) iv (note) (S.C.C.).

31 The other issues raised on the s. 8 Motion have a relatively narrow compass. The General Warrant authorizing use of the MDI device had an impact on only one of the accused, Tony Huang, as the Crown seeks to tender seven intercepted calls that he made on a telephone whose number was obtained as a result of police deployment of the MDI. The trespass or warrantless entry issue has little impact, as no significant evidence in support of the wiretap authorization appears to have been obtained as a result of police entries into the common areas of multi-unit buildings. Even if all of the surveillance evidence relating to observations made in the common areas of multi-unit buildings were excised from the wiretap Affidavits, pursuant to the principles set out in the Supreme Court trilogy on excision of unconstitutionally obtained grounds, there is no suggestion that the remaining evidence in the Affidavits would be insufficient to satisfy the "probable cause" standard. See: *R. v. Grant* (1993), 84 C.C.C. (3d) 173 (S.C.C.) at paras. 47-50; *R. v. Wiley* (1993), 84 C.C.C. (3d) 161 (S.C.C.) at paras 17-27; *R. v. Plant* (1993), 84 C.C.C. (3d) 203 (S.C.C.) at para. 26. Finally, the issue concerning inadequate disclosure to McMahon J., and inadequate permission or authority to install cameras in the common areas of multi-unit buildings, appears to have limited impact. Little or no relevant evidence was obtained or relied on, as a result of these installations, in relation to the pending "Project Rx" trials. However, I am advised that one of the pending "Project Battery" trials does rely on video surveillance evidence obtained pursuant to the General Warrant authorizing installation of cameras in common areas.

32 It can be seen that the four issues raised by the Applicants on the s. 8 Motion involve interesting points of law but their practical impact does not appear to be broad or significant. The great bulk of the evidence obtained as a result of McMahon J.'s wiretap authorizations and related warrants is not challenged.

33 I will now address the four issues raised by the Applicants, first outlining the evidence tendered on the s. 8 Motion in relation to each issue and then applying the relevant law. I should state at the outset that the extensive *inter partes* evidentiary record, filed in documentary form and elicited in testimony on the s. 8 Motion, greatly expands the record that was before McMahon J. Indeed, almost none of the expanded record was before McMahon J. when he granted the various *ex parte* Orders. The real issue is the "materiality" of this new evidence, in the legal sense in which that term is used in the s. 8 case law.

E. THE FIRST ISSUE: THE GENERAL WARRANT AUTHORIZING USE OF A MOBILE DEVICE IDENTIFIER (MDI)

(i) Facts Relating to the MDI Issue

34 The lead Affidavit of Sgt. Tanabe described the MDI, and suggested certain minimization conditions, as follows:

> I believe that the Principal Known Persons of the proposed Authorization will communicate on mobile devices that are not known to the investigators at this time. I am aware that persons engaged in criminal activities such as narcotics and firearms trafficking will at times change their devices to avoid police detection. When this happens, investigators are challenged with identifying the new device that the proposed named party had resorted to. If investigators are unable to quickly identify the new device resorted to by the proposed named party, evidence of the named offences will be lost. Investigators require a means to covertly identify the numbers of these mobile devices without alerting the subjects of the investigation. I believe that the Mobile Device Identifier will assist investigators with this goal. Through a previous investigation I am aware of the following in regards to the Mobile Device Identifier and the operation of the Mobile Device Identifier:
>
> > (i) Each GSM mobile telephone or similar communication device (mobile telephone) has a Subscriber Identity Module (SIM) card, which is a removable smart card containing a unique International Mobile

Subscriber Identity (IMSI) number. This number is linked to a subscriber's account information with the telecommunication service provider and identifies the mobile telephone subscriber to the network. When a mobile telephone subscriber transfers his SIM card from one mobile telephone to another, the new mobile telephone will instantly operate using the subscriber's phone number and account.

(ii) Each GSM mobile telephone also has a unique International Mobile Equipment Identity (IMEI) number which is permanently attached to that individual mobile telephone and is not affected by the transfer of SIM cards.

(iii) Each CDMA mobile telephone has a Mobile Subscriber Identification (MSID) number, which is linked to a subscriber's account information with the telecommunication service provider, and identifies the mobile telephone subscriber to the network.

(iv) Each CDMA mobile telephone also has a unique Equipment Serial Number (ESN), which is permanently attached to that individual mobile telephone.

(v) The MDI will collect device information from all mobile telephones within its range, including those which are not related to this investigation. This information will include each mobile telephone's IMSI, IMEl, ESN and/or MSID.

(vi) The Operator will activate the MDI at more than one location. Prior to activating the MDI, there will be reasonable grounds to believe that one of the persons listed in paragraph 3(a) of the proposed Authorization is located within the range of the MDI. This will allow the Operator to analyze the information collected by the MDI and, through a process of elimination, to accurately identify the ISMI, IMEI, ESN and/or MSID of any mobile telephone that one of the Principal Known Persons is in possession of, or is using.

(vii) The MDI will not receive voice or audio communications and will not receive text messages or emails.

(viii) When the MDI is in use, mobile telephones within its range will be unable to complete or receive calls, but calls already in progress when the surveillance device is activated will normally not be affected.

(ix) The following measures will be taken to minimize the potential to cause unreasonable interference with any mobile telephones, since it is an offence under s. 9(1)(b) of the *Radio Communication Act* to interfere with or obstruct any radio communication without lawful excuse:

1. The Operator will activate the MDI for not more than 3 minutes at a time, with rest periods of at least 2 minutes between activations;

2. The MDI will shut down if a mobile telephone in its range attempts to place a 911 call. When this occurs, some mobile telephones will complete the 911 call automatically while others will not complete the call unless the user re-dials 911;

3. The Operator will use the MDI as close to the Principal Known Persons as practicable without putting at risk the covert nature of the surveillance or the Operator's safety and will limit the range of the Surveillance Device as much as is reasonably possible in the circumstances. This will reduce the number of mobile telephones which will be affected by the use of the MDI;

4. The Operator of the MDI will ensure investigators are only given access to information identifying the mobile telephones the Operator reasonably believes the Principal Known Persons were in possession of, or were using.

. . .

> The MDI will be used to assist in identifying the International Mobile Subscriber Identity (IMSI) number, International Mobile Equipment Identity (IMEI) number, Equipment Serial Number (ESN), and/or Mobile Subscriber Identification (MSID) number for any mobile telephone or similar communication device that the persons listed in paragraph 3(a) of the proposed Authorization is in possession of, or is using.
>
> If the proposed General Warrant is granted, a member of the RCMP trained in the operation of the Mobile Device Identifier (MDI) and under the direction of an officer of the RCMP's Special "I" Section or designate, will perform electronic surveillance by covertly using the MDI which will assist in identifying the International Mobile Subscriber Identity (IMSI) number, International Mobile Equipment Identity (IMEI) number, Equipment Serial Number (ESN), and/or Mobile Subscriber Identification (MSID) number for any mobile telephone or similar communication device that the persons listed in paragraph 3(a) of the proposed Authorization is in possession of, or is using. [Emphasis added.]

35 The Affiant, Sgt. Tanabe, had no direct personal experience or knowledge concerning the MDI. Indeed, the RCMP may be the only police force in Canada that possesses the MDI and knows how to use it. As a result, Sgt. Tanabe obtained all of the above information about the MDI from another officer, D.C. Clarke, in the exact form set out above in the Affidavit. D.C. Clarke had been the Affiant in an earlier Part VI investigation known as "Project Traveller," where an MDI was used. D.C. Clarke provided the MDI portions of the "Project Traveller" wiretap Affidavit to Sgt. Tanabe, who simply adopted them. Sgt. Tanabe understood that D.C. Clarke had obtained the wording for this part of his Affidavit from an officer in the RCMP who was knowledgeable about the MDI. It was the RCMP who owned and operated the MDI used in the present case and Sgt. Tanabe understood that the above descriptions of the MDI's uses and capabilities, and the minimization procedure proposed in the Affidavit, all came directly from the RCMP experts who were knowledgeable on this topic and who had actually operated the MDI.

36 Sgt. Roach is the RCMP National Program Manager for MDI Deployment. He confirmed that the RCMP has developed standard wording for warrants seeking authorization to deploy the MDI and that his office provides this standard wording to other police forces. The standard wording has been recently updated. Cpl. Smith, one of the MDI operators in the present case, provided similar evidence about passing along the standard RCMP wording for the MDI warrants in Project Traveller and in the present case, and confirming with the Affiants that the RCMP wording was being used.

37 The expanded evidentiary record on the s. 8 Motion successfully established three areas where the standard RCMP wording, as set out above in Sgt. Tanabe's Affidavit, is incomplete. First, the MDI has two distinct uses. Its main use is the one set out in Sgt. Tanabe's Affidavit, namely, to capture certain signals of cell phones in order to identify their IMSI and IMEI serial numbers and thereby determine which cell phone is being used by a particular target. Its secondary and less frequent use is to find a known cell phone, for example, in the case of a kidnapping or missing person who is in possession of a known cell phone, the MDI can help the police find that person by finding their cell phone. The Affidavit of Sgt. Tanabe made no mention of this secondary use because the standard RCMP wording makes no mention of it.

38 The second potential deficiency in the standard RCMP wording used in Sgt. Tanabe's Affidavit is that the MDI has two different modes of use. In one mode, which is the one that is generally used by operators, the MDI interrupts cell phone calls for about 10 to 15 seconds, before the call resumes on the phone's normal network. The MDI has a second mode, where the call is interrupted for a longer two minute period, before the signal goes back to the normal cell phone network. This second mode is only used in circumstances where a target is particularly suspicious of police surveillance (for reasons of public interest immunity, it was not explained how the MDI's second mode is more effective when a target is suspicious, and counsel sensibly did not pursue this issue and seek the explanation). Sgt. Tanabe's Affidavit, and the standard RCMP wording, makes no mention of the MDI having these two different modes of operation. Cpl. Smith testified that the operator in the field decides which mode to use.

39 The third and last issue concerning the MDI was that Sgt. Tanabe's Affidavit proposed, and McMahon J. adopted, what the parties referred to as the "three minute rule." As set out above, the first of the four minimization terms suggested by Sgt. Tanabe was:

> The Operator will activate the MDI for not more than 3 minutes at a time, with rest periods of at least 2 minutes between activations. [Emphasis added.]
>
> McMahon J. adopted this proposed term in the General Warrant.

40 Sgt. Roach and the two MDI operators, Cpl. Smith and Cpl. Douek, all agreed that the literal wording of this minimization clause was not followed. The way in which the MDI is used, in practice, is that the operator deploys it on one network frequency for less than three minutes and then switches to a different network frequency. As a result, the MDI captures all cell phones in the vicinity of a named suspect that are presently using a Bell frequency, for example, and the MDI then switches to a Rogers frequency, for example, after a maximum period of three minutes on the Bell frequency. As a result, the MDI is "activated" continuously without any "rest periods" (contrary to the literal terms used in the Affidavit and in the General Warrant) but no one cell phone should be interfered with for more than a three minute period (consistent with the arguable intent of the minimization clause). No mention was made in Sgt. Tanabe's Affidavit, or in the standard RCMP wording, of this practice of switching frequencies every three minutes as opposed to completely shutting down any "activations" of the MDI for a two minute "rest period."

(ii) Analysis Relating to the MDI Issue

41 In my view, the above three deficiencies in Sgt. Tanabe's Affidavit are undoubtedly omissions. The real issue is whether they are *material* omissions, that is, could their full and accurate inclusion in the Affidavit have made a difference to either McMahon J.'s decision to grant the General Warrant or to the minimization conditions that he imposed on use of the MDI. Nothing stated in Sgt. Tanabe's Affidavit about the MDI can be described as "erroneous information" that should be excised. See: *R. v. Ebanks* (2009), 249 C.C.C. (3d) 29 (Ont. C.A.) at para. 28. It is simply incomplete or, in the case of the "three minute rule," it was arguably not followed when the warrant was executed. The expanded record filed by the Applicants on the s. 8 Motion must now be taken into consideration "to fill the gaps in the original ITO," as Fish J. put it in *R. v. Morelli* (2010), 252 C.C.C. (3d) 273 (S.C.C.) at para. 60. The General Warrant can then be assessed, on this expanded record, to determine whether the omission is "material." See: *R. v. Araujo* (2000), 149 C.C.C. (3d) 449 (S.C.C.) at paras. 56-58; *R. v. Jaser*, 2014 ONSC 6052 (Ont. S.C.J.) at paras. 68-84.

42 The meaning of "materiality," in this s. 8 context, was explained by Blair J.A. in *R. v. Nguyen* (2011), 273 C.C.C. (3d) 37 (Ont. C.A.) at paras. 48 and 51:

> It is trite law that an applicant for a search warrant has a duty to make full, frank and fair disclosure of all material facts in the ITO supporting the request. [citations omitted.] This duty includes the duty not to omit material facts. . . . The obligation on applicants for a search warrant is not to commit the error of material non-disclosure. "Materiality" is something that bears on the merits or substance of the application rather than on its form or some other inconsequential matter: *R. v. Land* (1990), 55 C.C.C. (3d) 382 (Ont. H.C.), per Watt J. at p. 417.

43 The above reference to the decision of Watt J., as he then was, in *R. v. Land* (1990), 55 C.C.C. (3d) 382 (Ont. H.C.) at 417, is to the following passage:

> This requirement, shortly described as "materiality", ensures that the matter of the error and/or omission is one which bears upon the merits or substance of the application, rather than its form or some other inconsequential matter. It must be a matter of such significance as to be likely to influence the determination of the dual conditions precedent of probable cause and investigative necessity or to alter the character of the supportive affidavit. [Emphasis added.]

It should be apparent from Watt J's reference to "the dual conditions" that *Land* involved an attack on a wiretap and not, as in the present case, on a General Warrant.

44 McKinnon J. recently addressed the meaning of a "material" omission, in the context of a s. 8 sub-facial review, in *R. v. Alizadeh*, 2014 ONSC 1624 (Ont. S.C.J.) at paras. 8-9 and 13. I agree with his analysis, which is similar to Watt J.'s in *Land* and which is squarely based on *Garofoli*:

> There is no dispute that CSIS was under an obligation to provide full, frank, and fair disclosure in the *ex parte* proceedings before the Federal Court when seeking the ss. 12 and 21 warrants (*R. v. Ahmad*, 2009 CanLII 84784, at para. 18, "Ruling No. 23"). However, the failure to comply with that duty is not in and of itself an independent ground upon which a warrant may be set aside on a *Garofoli* hearing. As clearly stated by the Court in *Garofoli* at para. 58, "the existence of fraud, non-disclosure, misleading evidence and new evidence are all relevant, but, rather than being pre-requisite to review, their *sole impact* is to determine whether there continues to be any basis for the decision of the authorizing judge".
>
> Thus, in the context of an application for leave to cross-examine, it must be remembered that an affiant's duty of full, fair, and frank disclosure is only relevant on the ultimate *Garofoli* hearing to the extent that the failure to comply with this duty may undermine one of the statutory pre-conditions for authorization.
>
> . . .
>
> What is crucial to note is that the duty of full, frank, and fair disclosure is intended to ensure that the issuing justice is presented with a clear and concise summary of the evidence. In virtually every case, it will be possible for counsel to argue that the affiant ought to have included more details or more information. Ultimately, in assessing an affiant's candour, the court must evaluate any argument that the affiant ought to have included more detail in the affidavit by asking whether such an omission was material. Stated otherwise, would the justice have had reason to be concerned about issuing the warrant had he or she been made aware of these other facts? [Italics of McKinnon J. in the original, underlining added.]
>
> See also: *R. v. Garofoli*, *supra* at paras. 56 and 62.

45 The root case, setting out the above approach to "materiality," is *R. v. Church of Scientology of Toronto* (1987), 31 C.C.C. (3d) 449 (Ont. C.A.) at 528-9. The passage from the Court of Appeal's decision, which was later adopted by LeBel J. in *R. v. Araujo*, *supra* at para. 57 on behalf of a unanimous court, is as follows:

> . . . [T]he function of the reviewing judge is to determine whether there is any evidence remaining, after disregarding the allegations found to be false and taking into consideration the facts found to have been omitted by the informant, upon which the justice could be satisfied that a search warrant should issue. We recognize that in such event it is not known whether the justice would have been satisfied but keeping in mind that the proceedings are not a trial involving the guilt or innocence of an accused, it is sufficient that he or she could have been satisfied. [Emphasis added.]

46 In my view, the three deficiencies in Sgt. Tanabe's Affidavit summarized above were not "material" in the above sense. Had the relevant facts been fully explained to McMahon J., as they have been in the now expanded record before me, I am satisfied that it would have made no difference to issuance of the General Warrant or to its minimization terms.

47 The above conclusion turns on the explanations provided by the RCMP witnesses for the three deficiencies in the Affidavit. In relation to the failure to mention the second use of the MDI, as a tracking device, Sgt. Roach testified that older technology exists to track a known cell phone and that the MDI is rarely used for this secondary purpose. He explained that the police will normally get a tracking warrant or will rely on exigent circumstances when the MDI is needed, for example, during a kidnapping where the victim is known to be carrying a particular cell phone. It was not

contemplated that the MDI would be used to track a known cell phone, in the course of the present investigation, and so this second use was not mentioned.

48 However, there was one occasion on May 23, 2014 when the MDI was used to confirm or verify that a target was using a particular cell phone. Both Sgt. Roach and Cpl. Smith testified that this one instance of a "confirmation" or "verification" use of the MDI is different than using the MDI as a "tracking" device. What happened on May 23, 2014 was that the police believed that a known target, Thanh Vo, was using a particular cell phone but they were not sure. Instead of deploying the MDI in the conventional way, at two separate locations where Vo was present and where all cell phone users in those two vicinities would be interfered with, Cpl. Smith re-programmed the MDI so that it would only seek the suspected IMSI number of Vo's phone. This is the same program or function as the one that is used when the MDI tracks a known cell phone in a kidnapping or missing person case. There is no dispute that when the MDI is deployed in this secondary way, it "only affects the phone that the investigator is trying to locate . . . It does not affect third party phones and it has no effect on the cellular network," as Sgt. Roach put it in one of his Affidavits filed on the Motion. Cpl. Smith testified that he believed this "verification" use of the MDI was permitted under the General Warrant, which he interpreted as allowing him to provide the investigators with the current cell phone serial numbers of a named target but only when the MDI operator was "100% sure" of the numbers.

49 It would be better if the standard RCMP wording for an MDI General Warrant referred to this slightly different "verification" use of the MDI, in a case like the present one where the MDI might be deployed in this way. However, the one isolated use of this secondary function was a minor departure from what McMahon J. was told about the proposed function and use of the MDI in this case. I am satisfied that it would have made no difference to his decision to grant the General Warrant or to the minimization terms that he imposed. Indeed, where the police suspect but are not sure that a certain cell phone is being used by a known target, it is far better to use the MDI in this "verification" way, rather than in its primary and conventional way, because there is no interference with innocent third parties' cell phones. The "verification" use has the same substantive purpose as the conventional and primary use of the MDI, namely, to identify the IMSI number of a known suspect's cell phone. Accordingly, the failure to mention this potential secondary way of using the MDI was not *material* to issuance of the General Warrant in this case. Indeed, I am satisfied that McMahon J. would have allowed it, had he been told about it.

50 The second deficiency in the Affidavit concerns the fact that the MDI has two separate modes, when used in its primary function as a means of seizing IMSI numbers. The evidence establishes that one mode interferes with cell phone calls for a shorter period than the other mode (10 to 15 seconds as opposed to two minutes) and so it is generally preferable. The evidence also establishes that this less intrusive 15 second mode is the one that is generally used by the RCMP operators, that the more intrusive two minute mode is rarely used, and that it is only used when the police believe that a target is particularly suspicious of police surveillance. I appreciate that Sgt. Roach could not be sure which mode was actually used by the two RCMP operators in this case. However, in the absence of evidence to the contrary, it is reasonable to infer that they followed the general practice of using the less intrusive mode unless a known target was particularly suspicious of police surveillance.

51 Once again, it would be better if the standard RCMP wording for an MDI General Warrant referred to the two different modes and to their different impacts on innocent third party cell phone users. However, there was no evidence that the RCMP operators in this case ever resorted to the longer and more intrusive mode. Sgt. Roach testified that the operator has to configure the MDI's software to one mode or the other. Accordingly, the operator will know which mode is being used. Counsel did not seek leave to cross-examine Cpl. Smith and Cpl. Douek as to whether they ever configured the software in this case for use in the longer and more intrusive mode and, if so, in what circumstances. Furthermore, Sgt. Roach testified that temporary interference with cell phone signals is a common reality of modern life. He gave the example of being in an elevator or underground parking garage and temporarily losing a cell phone signal. There are many other similar kinds of interferences with cell phone calls that frequently occur in normal daily life for periods varying between 15 seconds and two minutes.

52 I am satisfied that McMahon J., had he been told about the longer and more intrusive mode and about the limited circumstances in which operators may resort to it, would not have prohibited its use. At most, he would have ordered that the operators should generally use the less intrusive mode and should only resort to the more intrusive mode when necessary, which is what happened in any event. The need to interfere with cell phone calls in a target's vicinity for two minutes, as opposed to 15 seconds, where the target is exhibiting heightened suspicion of police surveillance, is a matter where discretion needs to be left in the hands of the police officer who is executing the warrant. A good analogy can be made to the police discretion to use "dynamic entry" when executing a search warrant and entering a dwelling without prior announcement, which is a far more significant discretion than choosing the mode in which to operate an MDI. In both cases, the appropriate exercise of police discretion depends on the circumstances that the officer finds in the field when executing the warrant, and so the decision is best left to that police officer. See: *R. v. Cornell* (2010), 258 C.C.C. (3d) 429 (S.C.C.) at paras. 18-24; *R. v. Thompson* (2010), 255 C.C.C. (3d) 236 (Ont. S.C.J.) at paras. 33-68.

53 The third deficiency in the Affidavit (and in the manner of execution of the General Warrant), concerns the "three minute rule." The evidence on the s.8 Motion is that the two RCMP officers who operated the MDI did not follow the strict letter of the "three minute rule," as set out in the General Warrant. Instead, they used a technique referred to as "switching frequencies" every three minutes. This technique was not mentioned in Sgt. Tanabe's Affidavit and it is not mentioned in the standard RCMP wording for an MDI warrant.

54 One explanation for this deficiency in the standard wording, according to Sgt. Roach, is that it was drafted by policy-making officials at RCMP Headquarters and not by the operators who actually use the MDI in the field. Both Sgt. Roach and Cpl. Douek testified that standard practice is for the RCMP operator to configure the MDI's timer at three minutes, so that it stops automatically after being deployed on a particular network or frequency for three minutes. The operator then switches the frequency and the three minute timer begins again. There are approximately 15 different cell phone networks or frequencies in Toronto. If the MDI were deployed for three minutes on each frequency, and completely shut down for two minutes between each frequency, it would have to be deployed for over an hour at each location. Sgt. Roach explained that the operator could lose a suspect during such a lengthy period of time and the MDI would then have to be deployed again at a new location in order to capture the target's cell phone signal. He was of the view that the practice of "switching frequencies" meant that the MDI was deployed for a shorter time at fewer locations and that it interfered with fewer cell phones when used in this way. Cpl. Douek agreed in this regard, and testified that the practice of "switching frequencies" is a way to "maximize efficiency." Finally, and most importantly, Sgt. Roach testified that the substantive effect of "switching frequencies" every three minutes is the same as completely shutting down the MDI every three minutes. In either case, no one cell phone is interfered with for more than three minutes. Once a cell phone is operating on one strong frequency, it tends to stay on that frequency and it will generally not be interfered with again when the MDI is re-deployed on a different frequency. This is the fundamental purpose of the "three minute rule."

55 I appreciate that Mr. Bottomley was able to point to two or three isolated instances where the MDI was deployed on a Bell frequency and yet it appeared to pick up a cell phone signal on a Rogers frequency. It is possible that a particular cell phone might have been interfered with for more than three minutes, in these two or three instances, because of the practice of "switching frequencies" rather than completely shutting down the MDI after three minutes. Sgt. Roach suggested an explanation for these possible violations of the "three minute rule," while conceding that he was "guessing." Whatever the explanation, I am satisfied that these two or three examples represent a tiny percentage of the thousands of cell phone signals that the MDI intercepted. It was apparent from the MDI data filed on the s. 8 Motion that the technique of "switching frequencies" generally worked as intended and that no cell phone was interfered with for more than three minutes in the vast majority of cases, and perhaps in all cases.

56 This third deficiency raised by the Applicants is undoubtedly the most serious because it is not simply a matter of failing to mention some technical feature of the MDI (such as its two different uses and its two different modes). In this case, the operators were not following the strict letter of the General Warrant's "three minute rule." There is no satisfactory explanation for the RCMP's failure to ensure that the standard wording provided to other police forces for

MDI General Warrants reflected the actual practice of the RCMP operators in the field. The re-drafted wording now being used by the RCMP has still not corrected this or the other deficiencies in their standard wording.

57 Nevertheless, there was no reason for Sgt. Tanabe to question the standard wording that was provided to him by D.C. Clarke. It had apparently been used without difficulty in "Project Traveller." Furthermore, he had no reason to question the RCMP experts about a subject in which he had no experience. In all these circumstances, it was reasonable for Sgt. Tanabe to rely on the draft wording he had been provided. Finally, and most importantly, I am not satisfied that full and fair disclosure to McMahon J. of the practice of "switching frequencies" would have made any difference to the decision to grant the General Warrant. Sgt. Roach and Cpl. Douek make a persuasive case that this practice is more efficient than completely shutting down for two minutes and that it may well interfere with fewer cell phones at fewer locations for shorter time periods. The likely result of full disclosure of the preferred practice of "switching frequencies" every three minutes would have been a minimization term that expressly permitted this practice.

58 For all these reasons, I am satisfied that there were no *material* omissions in relation to Sgt. Tanabe's request for a General Warrant authorizing use of the MDI and there were no s.8 violations in this regard.

59 I should not leave this issue without noting that there was compelling evidence justifying issuance of the MDI General Warrant in the Affidavits placed before McMahon J. The Applicants have not suggested that the statutory criteria in s. 487.01 were not satisfied on the present record. In particular, there was evidence in the Affidavits of multiple cell phones being used by the known targets of the investigation. There was also compelling evidence that the known targets were conscious of police surveillance and that they engaged in concerted counter-surveillance tactics, including changing their cell phones, aggressively challenging and evading undercover surveillance officers, using and changing multiple rental vehicles, using multiple residences or premises, using false identification and false addresses, and possessing "counter surveillance devices . . . capable of undermining the proper functioning of surveillance equipment."

60 The MDI undoubtedly interferes to some extent with the privacy interests of innocent third parties, who are in the vicinity of a known target, by interrupting their cell phone calls for a short period of time and by seizing IMSI and IMEI numbers associated with their cell phones. However, these are minor and temporary interferences with privacy when balanced against the strong public interest in facilitating the investigation of very serious crimes, as in this case. The RCMP were bound by the minimization terms to end any such interference with a particular cell phone's calls after three minutes and, most importantly, they were bound to withhold all innocent third parties' cell phone serial number data from the investigators. They could only provide the investigators with the identifying serial numbers of known targets' cell phones. Violation of this term of McMahon J.'s Order would constitute a very serious contempt of court. It was not suggested by the Applicants that the MDI data relating to innocent third parties, presently held by the RCMP, should be destroyed. I agree that destruction of this data, while cases remain pending before the Court, would only invite s. 7 *Charter* issues. However, once all cases are complete, the RCMP should consider destroying this irrelevant data and, in future cases, such an additional minimization term could be considered.

61 It has always been the case that wiretapping has some inevitable impact on innocent third parties. As Sopinka J. put it, speaking for the majority in *R. v. Thompson* (1990), 59 C.C.C. (3d) 225 (S.C.C.) at 272-3:

> The Court of Appeal held in the case at bar that the appellants have no standing to raise the rights of third parties which might be affected by interception of communications at public pay telephones. This holding was followed in *R. v. Mead* (1988), 72 Nfld. & P.E.I.R. 33, 5 W.C.B. (2d) 355 (P.E.I.S.C.). In my view, the extent of invasion into the privacy of these third parties is constitutionally relevant to the issue of whether there has been an "unreasonable" search or seizure. To hold otherwise would be to ignore the purpose of s. 8 of the *Charter* which is to restrain invasion of privacy within reasonable limits. A potentially massive invasion of the privacy of persons not involved in the activity being investigated cannot be ignored simply because it is not brought to the attention of the court by one of those persons. Since those persons are unlikely to know of the invasion of their privacy, such invasions would escape scrutiny, and s. 8 would not fulfill its purpose.

> In any authorization there is the possibility of invasion of privacy of innocent third parties. For instance a wiretap placed on the home telephone of a target will record communications by other members of the household. This is an unfortunate cost of electronic surveillance. But it is one which Parliament has obviously judged is justified in appropriate circumstances in the investigation of serious crime.
>
> In my view, in some cases the possibility of invasion of privacy of innocent persons may become so great that it requires explicit recognition along with the interests of the investigation of crime. A "resort to" clause creates just this possibility if among the places resorted to are telephones frequently used by the general public or other such places. I do not mean to suggest that there should be a constitutional prohibition of intercepting communications at places frequented by the public; in that case drug importing conspiracies could virtually insulate themselves from perhaps the only effective investigative technique against them merely by using public places to conduct their business.
>
> In this case, public telephones were involved and the discussion concentrates on them. This should not be taken, however, as a finding that public telephones are to be distinguished from other places frequented by the public. The police knew prior to seeking the first authorization that the persons named in the authorization resorted to public pay telephones.
>
> . . .
>
> On these facts, given the breadth of the authorizations, hundreds of private conversations may have been intercepted when not one target was involved. In *Finlay*, *supra*, the authorization required physical surveillance of the public pay telephone to ensure that conversations were intercepted only when a target was using the telephone at the time. There is no such provision here, nor any other such limitation. At minimum, I would think that such an authorization would provide that conversations at a public telephone not be intercepted unless there were reasonable and probable grounds for believing that a target was using the telephone at the time that the listening device was activated. The police cannot simply install a listening device and leave it running indiscriminately in the hope that a target may come along. In some instances, that is what occurred here. [Emphasis added.]
>
> See also *R. v. Rogers Communications Partnership*, 2016 ONSC 70 (Ont. S.C.J.), where Sproat J. dealt with overly broad "tower dump" Production Orders that sought highly intrusive and unnecessary personal information of innocent third parties.

62 In the case at bar, unlike *Thompson*, the private conversations of innocent third parties were *not* intercepted by the MDI. Unlike the *Rogers* case, the names and addresses of innocent third party senders and recipients of phone calls, their locations at the time, and their bank and credit card billing information were *not* sought or obtained. Only cell phone serial numbers of innocent third parties were seized and they were withheld from the investigators, as a result of minimization terms imposed by McMahon J. It was only in the case of "Principal Known Persons," named in the authorization, that the cell phone serial numbers were passed along to the investigators. On these facts, there is no basis to conclude, as in *Thompson*, that "the possibility of invasion of privacy of innocent persons may become so great" as to raise s. 8 concerns that outweigh "the interests of the investigation of crime." I am, therefore, satisfied that the General Warrant authorizing use of the MDI, subject to strict minimization terms, did not violate s. 8.

F. THE SECOND ISSUE: WARRANTLESS ENTRIES INTO THE COMMON AREAS OF MULTI-UNIT BUILDINGS

(i) Facts Relating to the Warrantless Entries Issue

63 As noted previously, the second issue on the s. 8 Motion concerns the Affiants' alleged failure to make full, fair and frank disclosure to McMahon J. of the circumstances surrounding warrantless entries by surveillance officers into certain common areas of multi-unit buildings such as parking garages, elevators, and hallways. The Applicants submit that the law in this area is complex, nuanced, and badly divided and that it has changed, as a result of the Court of

Appeal's recent decision in *R. v. White*, *supra*. The Applicants do not seek the remedy of excision of the references to these warrantless entries in the wiretap Affidavits, assuming such entries amount to s.8 violations as a result of *White*. The Applicants concede that this traditional *Grant*, *Wiley*, and *Plant* remedy would have no impact on the grounds for a wiretap in this case. Rather, the remedy sought is simply a declaration that proper disclosure was not made to McMahon J. as to the circumstances surrounding the warrantless entries. The Applicants submit that this declaratory remedy will be useful as context for the third issue on the s. 8 Motion, concerning alleged non-disclosure of the installation of cameras, and that it may be relevant at trial in some cases where search warrants may be subject to attack and/or where evidence derived from such entries may be tendered.

64 The police devoted considerable resources to physical surveillance during the course of the three investigations in this case. Each surveillance team produced a report at the end of each day, setting out their observations. The three Affidavits summarized some of these reports for purposes of the wiretap application. The full surveillance reports were filed in the expanded Motion record before me and a number of the surveillance officers testified on the s.8 Motion. As a result, I have a great deal more evidence than what the Affiants put before McMahon J. about the police practice of entering the common areas of multi-unit buildings.

65 Typical examples of the surveillance summaries in D.C. Clark's Affidavit, that make reference to an apparent warrantless entry into a common area of a multi-unit building, include the following:

> • On October 29, 2013, members of the Asian Organized Crime Task Force conducted surveillance at the address of 18 Valley Woods Road. A black 2013 Range Rover . . . was observed in the underground parking lot. This vehicle is believed to be used by Hung Binh "Buck" Tran.
>
> • On November 20, 2013, members of the Firearms Enforcement Unit conducted surveillance at 18 Valley Woods Road, Toronto. This is the home address of Hung Binh "Buck" Tran. The following observations were made:
>
> > . . . [after following Tran to various locations] Hung Binh "Buck" Tran returned to 18 Valley Woods Road . . . Tran parked the silver Toyota Corolla on level 1 of the underground of 18 Valley Woods Road, spot . . .
>
> • On December 4, 2013, members of the Toronto Drug Squad . . . conducted surveillance at 18 Valley Woods Road which is the home address of Hung Binh "Buck" Tran. The following observations were made:
>
> > (a) The 2013 black Land Rover . . . was located in underground parking spot . . .
> >
> > (b) The 2006 grey Toyota Corolla . . . was located in underground parking spot . . .

66 Typical examples of the surveillance summaries in Sgt. Tanabe's Affidavit, that make reference to an apparent warrantless entry into a common area of a multi-unit building, include the following:

> • On October 7, 2013, D.C. Clarke . . . authored a report in relation to surveillance conducted on Steven Livingstone and Jerry Phan. I read this report and learned the following:
>
> > (a) Police conducted surveillance at 1048 Broadview Avenue.
> >
> > (b) Police observed a 2010 black Mercedes Benz . . . parked in space # . . . in the underground parking lot at this address.
> >
> > (b) Police observed both associated vehicles in the underground of 1048 Broadview Avenue. The black Range Rover . . . was parked in space # . . . and the grey Mercedes Benz . . . was parked in parking space . . .
>
> • On October 8, 2013, D.C. Rabbito . . . authored a report in relation to surveillance conducted on Steven Livingstone and Jerry Phan. I read this report and learned the following:

. . .

• On January 15, 2014, I spoke with D.C. Plunkett . . . in regards to the building located at 1048 Broadview Avenue, Toronto. D.C. Plunkett advised me of the following:

(a) Police officers from 54 Division attended 1048 Broadview Avenue, Toronto for the purpose of obtaining residency and parking information for this premises.

(b) In order to prevent notifying management of the existence of a Part VI wiretap investigation, police advised management that they were investigating the theft of gas and that they wished to view residency and parking information for the building.

(c) Management advised police they required a Judge's Order or Warrant to give this information to police.

• On January 24, 2014, I spoke with D.C. Younger . . . One of D.C. Younger's duties includes mobile surveillance. D.C. Younger advised me of the following:

(a) On January 14th 2014, Detective Constable YOUNGER attempted to enter 1048 Broadview Avenue.

(b) Detective Constable YOUNGER entered the underground parking lot which consists of two separate gated check points. The first check point is the visitor's level. The second check point is the resident's section.

(c) Each level of the parking structure contains a separate entrance to the elevators which is electronically locked and requires a resident's key fob to enter.

(d) Once inside the elevator lobby a resident's key fob is required again to travel to any floor other than the lobby of the building.

(e) The security desk is next to the elevators. Once in the lobby, security requires that visitors identify a suite number and resident's name that they wish to contact.

(f) Security then notifies the resident of the visitor's presence.

(g) Going through security is the only method to gain access to other parts of the building without a resident's key fob.

i) I believe police will require a Production Order for residency and parking information for the building along with a key fob, access card, key, passcode, or a combination thereof in order to identify the unit utilized by Steven LIVINGSTONE and Jerry PHAN and conduct surveillance on them.

67 Given the limited declaratory remedy sought by the Applicants in relation to this issue of warrantless entries into common areas of multi-unit buildings, I do not intend to review all of the large body of evidence tendered on the s.8 Motion concerning this issue. As I read the case law on this subject, culminating in the recent decision in *White*, there are a number of issues that are important. I have focused on these issues in the summary of evidence that follows.

68 The first important point emerging from the evidence is that the vast majority of the physical surveillance did not involve entries into common areas of multi-unit buildings. The Crown helpfully summarized all of the Affiants' references to surveillance reports in a chart. It shows a total of 145 surveillance reports referred to by the Affiants, of which 24 included some observations in a parking garage and 5 included some observations in an elevator and/or hallway. I have reviewed all of the Affiants' references to physical surveillance and there is no question that the vast majority involved following cars and suspects at public locations away from their residences. The observations made inside the common areas of multi-unit buildings represent a very small percentage of the total surveillance evidence. Furthermore, most of

these observations in common areas were made inside underground parking garages. There are very few observations made in elevators or hallways.

69 The testimony of the surveillance officers on the s.8 Motion confirmed this overall pattern to the surveillance evidence. For example, D.C. Frigon testified that the time spent inside the common areas of a multi-unit building was minimal compared to the time spent outside these buildings. He explained that it is risky to conduct surveillance inside the common areas of a building as you are more likely to be detected. In any event, the surveillance officers' main task was to follow the targets and determine their associations. D.C. Wahidie similarly testified that the time spent in the common areas of multi-unit buildings was a tiny percentage of the overall time spent conducting surveillance. Finally, Det. Sgt. Johnston confirmed that total surveillance time outside of buildings is very long whereas it is minimal inside buildings. He also confirmed that it is dangerous to conduct surveillance inside a building and that officer safety was a real concern in this case, given that the targets were very surveillance conscious and given that one homicide had already taken place while a target was under police surveillance.

70 The second important point emerging from the evidence concerns the purpose for these warrantless entries into common areas of multi-unit buildings and the nature and intrusiveness of any observations made upon entry.

71 D.C. Frigon testified that the purpose of entering a building's parking garage was to determine whether a target's car was parked in the garage. At the start of a shift, a surveillance officer would drive into the parking garage, determine if the target's car was there, drive back out, and the team would then set up surveillance around the building (if the target's car was parked in the garage). It would take about two or three minutes to accomplish this objective. In some buildings, the surveillance officer would only have to enter the visitor's parking area in order to see whether the target's car was parked in the resident's area. In other buildings, the surveillance officer would have to go into the resident's parking area. D.C. Wahidie confirmed that when he entered a common area such as the parking garage of a building, to determine whether a particular target's car was there, it would take him about two or three minutes. Finally, Det. Sgt. Johnston testified that the purpose in entering a parking garage was to see if a target's car was parked there. The "best practice" is to do this quickly by entering, determining whether the car is present, and then leaving. However, on occasion a surveillance team could remain in the parking garage for several hours. Det. Sgt. Johnston gave the example of one occasion where a surveillance camera was being installed in a hallway, with the consent of property management, and surveillance officers remained in the parking garage throughout in order to alert the technical installers in case the target's car returned to the building. Det. Theriault gave another example where the surveillance team spent about 6 hours in a building's underground parking garage on October 29, 2013, at the early stages of the investigation. The only observation noted in the surveillance report during this period is that "Binh Hung Tran's known vehicle, a black Range Roger with license . . . was observed in the underground parking . . . in spot . . . ". Det. Theriault explained that, at this early stage, the investigators believed Tran lived at the building but they also knew he rented an apartment across the street at another building.

72 As noted previously, there were fewer entries into elevators and hallways, as compared to the number of entries into parking garages. D.C. Frigon testified that he went up to individual residential units in building elevators on about five or six occasions. His purpose was to determine the unit number that a target entered and to see the direction in which the target's unit faced. This information was important for the security of the surveillance team as it allowed them to park their cars and set up surveillance in positions where they could not be seen from the windows of the target's unit. D.C. Frigon never listened at the door of a unit and he never overheard conversations. The kind of observations his team made at the door of a unit can be seen in an April 2, 2014 surveillance report that D.C. Frigon authored which states, "Ken Mai keys his way in through the front door of Unit 1420 of 38 Joe Shuster Way." D.C. Frigon testified that he never listened at the doors of units, hid in stairwells, or regularly followed suspects into buildings. The purpose in following suspects in the elevators and hallways was only to determine the unit where they resided.

73 D.C. Wahidie similarly testified that he followed a suspect in the front door, into the elevator, and up to her unit on one occasion. He wanted to know the floor and the unit where she lived. He did not listen to any conversations at her door. He explained that it was important to know the unit number of a suspect in order to be able to obtain a search

warrant. D.C. Wahidie also entered building hallways on occasion in order to provide security for technical installers who were putting cameras in hallways with the consent of property management.

74 Det. Sgt. Johnston testified that, at the early stages of the investigation, the purpose in following a suspect through the front door, into the elevator, and up to a unit was to see if they had a key fob and were, therefore, a resident of the building. At this early stage, the police were not sure where the targets resided, given that many of them used false identification, rented cars in false names, and had drivers' licenses in someone else's name. The surveillance officers would not listen at the doors or look into storage lockers, according to Det. Sgt. Johnston. Indeed, there was no evidence in the record on the s.8 Motion of surveillance officers ever listening at the door of a unit or looking into a storage locker, unlike the common area surveillance that was carried out in *White*.

75 The third important point emerging from the evidence concerns whether efforts were made to obtain the consent of property management (or the condominium boards) in order to enter common areas. There was evidence on this issue from almost every witness who testified on the s. 8 Motion. There appears to be no real dispute, as I understand the evidence, that the surveillance officers sometimes did not obtain consent, especially at the early stages of the investigation, but that they did eventually obtain consent as the investigation progressed in relation to all relevant buildings.

76 Perhaps the most useful witness on this issue, in terms of an overview, was Det. Sgt. Johnston of the O.P.P. He was in a senior position, as one of the lead investigators in "Project Battery," and he also conducted surveillance. He testified that at the early stages of the investigation the police were not sure where the targets resided. In these circumstances, the surveillance teams operated on the belief that it was lawful to follow a target who was under surveillance into the common areas of a condominium building, such as the front door, lobby, elevators, hallways, and parking garage. The sole purpose of these entries was to make observations as to whether the person was a resident, for example, to see if the person had a security fob, keys to a unit, or a resident's parking spot. Det. Sgt. Johnston testified that his understanding was that privacy exists on a continuum and that the police could not listen at a door or look into a storage locker, when carrying out these warrantless entries into common areas, and that these more intrusive kinds of observations required a warrant. The Court of Appeal's decision in *R. v. White*, *supra*, makes this clear. However, it was not released until July 7, 2015. The investigation in this case took place in late 2013 and early 2014, well before the date when *White* was decided. It is, nevertheless, significant that the police in this case understood, or they accurately foresaw, these limits to their powers.

77 Det. Sgt. Johnston testified that once a target's residency in a building was established, the police would have to speak to property management in order to obtain permission to carry out these warrantless entries into common areas on an ongoing basis. It was a long term investigation and the police needed long term access. He explained that this is a particularly sensitive step because it exposes the investigation and raises security concerns. It was a "criminal organization" investigation of alleged gang members who were believed to be armed and committing homicides. Nevertheless, in every case in "Project Battery," he believed that permission was obtained from property management to enter the common areas of the relevant condominium buildings on an ongoing basis.

78 At this further stage of the investigation, the police were preparing a Part VI wiretap application (and the related General Warrants). They obtained legal advice from the Ministry of the Attorney General. They would approach property management and seek permission to be on the property. They would advise that they were conducting a "criminal investigation" or they would sometimes say that it involved a "car theft ring." They would not disclose the fact that it was an investigation of gangs and that it involved homicides. They believed that this kind of detail would risk exposing the investigation, cause it to collapse, and possibly endanger lives. In all cases, the police obtained key fobs that allowed them access to the common areas, according to Det. Sgt. Johnston.

79 In some circumstances, the police would obtain warrants. Det. Sgt. Johnston explained that when a "stash house" was discovered, or when a tracking device needed to be installed, the police would obtain a search warrant for the alleged "stash house" or a tracking warrant for a suspect's car. They believed they could install cameras in the common areas, or access existing video surveillance in the common areas of buildings, without a warrant and on the basis of consent from property management (this warrantless camera installation issue is the subject of the next argument on the s. 8 Motion,

addressed below). One further circumstance in which a warrant would be required is when property management or a condominium board refuses to permit police access to common areas of the building. In these circumstances, it would be necessary to get a warrant according to Det. Sgt. Johnston, although this never became necessary in "Project Battery."

80 Finally, Det. Sgt. Johnston testified that the above approach to physical surveillance in the common areas of multi-unit buildings had been used, without challenge to his knowledge, in many earlier investigations. He had 20 years' experience in the O.P.P. and it was "common practice" to enter common areas of buildings in accordance with the steps described above. He again stressed that this "common practice" did not include listening at the doors to units or pointing hallway cameras into the inside of units or looking into storage lockers.

81 All of the other witnesses testified in a manner that was generally consistent with the above overview from Det. Sgt. Johnston. The Affiant, Sgt. Tanabe, testified that he had previously done surveillance work. His practice, when following a suspect into the common areas of a multi-unit building such as a parking garage, was to buzz security and either ask for access or get a fob from security. He never had trouble getting access to a parking garage. He would simply identify himself to security as "police." He assumed the surveillance officers in this case followed the same practice. His experience was that it is more difficult to get access to a floor, in order to determine a suspect's residence, and that this usually requires a fob from security. You can get fobs on a short term basis, in Sgt. Tanabe's experience, but given the long term nature of this investigation he thought that it was advisable to get Production Orders and Assistance Orders and not rely on permission from building security, once the investigation progressed into its Part VI phase. There were significant concerns for the safety of the surveillance officers in this case and Sgt. Tanabe wanted to keep some distance between the police and building security. He also wanted the benefit of the "gag order" that usually accompanies Production and Assistance Orders.

82 As to his understanding of the law relating to warrantless entries into common areas of multi-unit buildings, Sgt. Tanabe got advice from the Crown. He believed that it was a "grey area" because of the reduced level of privacy. As long as the police purpose was simply to confirm residence or to follow a vehicle entering and exiting, the observations were brief, and the officers were in the execution of their duties, he believed that this kind of surveillance was lawful. He read the surveillance reports and, after seeking legal advice and relying on his own prior experience in conducting this same kind of surveillance, he had no concerns about including it in his Affidavit. All of the references to common area surveillance in Sgt. Tanabe's Affidavit are observations made in parking garages.

83 D.C. Clark's first Affidavit, in addition to references to parking garage surveillance, contains two references to elevator and/or hallway surveillance. The first reference, at para. 71, is to surveillance on the suspect Hung Binh "Buck" Tran on November 19, 2013. He was observed leaving his known residence at 18 Valley Woods Road and attending at three different buildings. He was observed entering and exiting these buildings. In relation to the third building Tran visited on that day, 33 Isabella Street in downtown Toronto, D.C. Clark included the following from the surveillance report: "He [Tran] was observed attended [sic] the third floor." It is implicit that the surveillance officers must have followed Tran up to the third floor of a building where Tran did not reside. No relevant observations were noted as to what Tran did at this location. The second reference, at para. 365, is to surveillance on the now deceased Peter Nguyen. He was observed leaving his known residence on November 4, 2013 and driving to a building at 500 Murray Ross Parkway. D.C. Clark included the following from the surveillance report: "He [Nguyen] was observed looking around and being surveillance conscious while walking to the building. Once inside the building he met with an unknown white male [later identified as Michael Dos-Santos] and went up to the 7 th floor of the building . . . Peter Nguyen and Michael Dos-Santos left 500 Murray Ross Parkway and Michael Dos-Santos was observed carrying a yellow No Frills shopping bag." Once again, it is implicit that the surveillance officers must have followed Nguyen up to the 7 th floor of a building where Nguyen did not reside. The relevant observations were not of anything Nguyen did inside the building but of Nguyen's association with Dos-Santos and the appearance of the yellow No Frills bag when he left the building.

84 D.C. Clark's second Affidavit also contains one reference to "storage locker area" surveillance and two references to elevator and/or hallway surveillance. The first of these references, at para. 152, is simply that Larry Yu was "observed

leaving this storage locker area of this address with a package." There is no suggestion the surveillance officer looked into a storage locker or entered the storage locker area. The second reference, at para. 389, is similar to the above references in the first Affidavit as the surveillance officers followed Hung Binh "Buck" Tran from the building where he resides to a building at 1600 Keele Street. He was followed up to a particular floor at 1600 Keele Street and no further observations were made inside the building. The relevant observation is that Tran was then seen leaving 1600 Keele Street in his car with "an unknown male with a red gym bag." The third reference, at para. 265, is more substantial. The police believed that the suspect Ken Mai resided at 125 Western Battery Road. However, he was also observed in video surveillance on the 17th floor of 38 Joe Shuster Way, leaving unit 1719 without a jacket during cold winter months. The police believed that he was attending at a second unit within the same building. D.C. Clark included the following from the April 3, 2014 surveillance report: "Mai was observed on the 17th floor . . . wearing his winter jacket. Approximately 7 minutes later he was observed leaving the 17th floor not wearing his winter jacket. Mai was observed enter [sic] the stairwell and go [sic] to the 14th floor. He used a key and entered unit 1420. Six minutes later he left and returned to the 17th floor." Again, it is implicit that the surveillance officer was in the hallways and stairwell of a building that did not appear to be Mai's primary known residence. The relevant observations were that Mai was associated with two specific units in this building and that he had the key to at least one of them. The surveillance officer, Det. Sukumaran, testified at the preliminary inquiry and made it clear that "I didn't hear any conversation," while conducting surveillance in the stairwell and hallways. D.C. Clark swore in his Affidavit at para. 241 that he believed Mai resided at 125 Western Battery Road with his girlfriend but that he also leased and/or used the units at 38 Joe Shuster Way as a "stash location."

85 D.C. Clark testified that he knew the surveillance officers had key fobs or pass codes allowing them to enter the common areas of certain buildings. He would see them pick up the key fobs in the office at the start of their shifts. He generally did not enquire further about their permission to be in the common areas, although he did speak to some officers and was told that they had permission. He never heard any mention of building management not cooperating with the police or about needing to get a warrant. Indeed, he never heard of the police having any difficulties in getting permission. He assumed that permission was required and that the police had obtained permission.

86 D.C. Wahidie, one of the surveillance officers, testified that he would ask security for permission to enter common areas such as the parking garage. On occasion, when following a suspect, he would not stop at the security desk and ask for permission, unless security stopped him. His understanding was that it was lawful to enter the common areas of a building, provided he did not carry out a search and provided he was in the execution of his duties.

87 Another surveillance officer, D.C. Frigon, testified to similar effect. He would either buzz security and get permission to enter or he would use a key fob or pass code obtained from building management. On occasion, he would simply follow a target into the common areas. It was D.C. Frigon who obtained a key fob and pass code from property management at 38 Joe Shuster Way, on or about December 2/3, 2013. The key fob allowed access to the elevator and hallways and the pass code allowed access to the parking garage. D.C. Frigon did not believe that obtaining permission from property management was that important, and he made no notes or reports about it. This was because he believed that it was lawful for surveillance officers to follow a suspect into a parking garage or to the door of a unit, without permission, provided the officers remained in the common areas and were engaged in an active investigation.

88 There are good reasons to be concerned about D.C. Frigon's credibility on these points, given his failure to keep proper notes and given some inconsistencies that emerged from his preliminary inquiry testimony. However, the Applicants called the property manager from 38 Joe Shuster Way, one Phillip Chudnofsky. He confirmed that he granted D.C. Frigon permission to enter the common areas of the building. He worked as a property manager for First Service Property Management at various condominium buildings in Toronto. He is an experienced 64 year old who kept notes and confirmed the steps that he took in emails. I found him to be entirely credible and reliable.

89 Mr. Chudnofsky explained that the property manager at a condominium building works with the builder during the early stages of a condominium project, and then works with the elected condominium board once control passes from the builder to the board. The property manager's responsibilities include contracting and supervising the cleaners,

the electrical and mechanical staff, the security staff, any repairs to the building, budgeting, and building inspections. One of his buildings was 38 Joe Shuster Way. It is located near Dufferin and King Streets on the west side of downtown Toronto in an area generally referred to as Liberty Village. It was built in 2005/2006 and was relatively full when he started working there in November 2012.

90 When Mr. Chudnofsky took over as the property manager in late 2012, there were serious security problems at the building. There were suspicious cars in the parking garage, vagrants and prostitutes in the stairwells, drug deals were taking place, people were coming and going without challenge, and the cleaners did not feel safe. The builder was still in charge, as significant alterations were being made to the building. Mr. Chudnofsky persuaded the builder to hire a new security firm and to increase the security budget. The new security staff began watching the lobby and patrolling the stairwells, hallways, and parking garage. The residents began to feel more secure. Control of the building was handed over to the elected condominium board in mid or late 2013. Mr. Chudnofsky began to report to the board. He described the residents as an eclectic group, including young urban professionals, elderly persons, students, and some "criminals who should be behind bars," as he put it.

91 The security system at the building required either a key or a key fob to enter any of the doors, as well as to enter the underground parking garage. Each resident was given two fobs and they were strictly controlled. The first level in the parking garage was for visitors who would gain access through a buzzer system. Each resident was assigned a spot and there were three levels of resident parking. All visitors using a parking space had to report in with security and the duration of their stay would be checked by the new security firm.

92 On December 2, 2013, according to Mr. Chudnofsky, he met D.C. Frigon in the office at the condominium building. D.C. Frigon advised that the police were investigating a sophisticated car theft ring and that they required access to the building. They suspected stolen cars were being stored in the garage. Mr. Chudnofsky agreed to assist and he provided D.C. Frigon with a key fob and an access code that could be used at both the front lobby door and at the entrance to the garage. D.C. Frigon asked Mr. Chudnofsky to keep this information "quiet," as there could be serious consequences if anyone knew about the investigation. Mr. Chudnofsky decided not to tell the condominium board.

93 Mr. Chudnofsky was aware of officers attending at the building several times. He assumed they were checking for stolen cars. On a few occasions, D.C. Frigon asked if he could look through the building's video surveillance tapes. There are surveillance cameras in the building's lobby where people enter and leave, on the parking garage ramp where cars enter and leave, in the elevator lobby in the garage, and in the elevators. Mr. Chudnofsky looked through the tapes with D.C. Frigon and they were able to find a particular suspect entering, going up in the elevator, and getting off at a particular floor. Mr. Chudnofsky copied this tape and gave it to D.C. Frigon.

94 On January 20, 2014, Mr. Chudnofsky spoke to another officer, D.C. Ghaznavi, who advised that the police wanted to install a hidden camera in the ceiling of the hallway where certain suspects were believed to have a unit. The police would have to do some drilling in the ceiling so Mr. Chudnofsky felt that he had to confer with his head office supervisor, who advised him to seek permission from the condominium board. He and the supervisor discussed whether to tell the condominium board the identity of the suspects and the floor where the hidden camera was to be installed. They agreed not to divulge these details to the board, given the need for secrecy and given that some members of the board can be "curious," as Mr. Chudnofsky put it. His emails with the board members were produced. He advised the board as follows:

> Just to let you know, a number of different police divisions have been keeping an eye on some residents. It's come to the point where they require more surveillance and want to put a camera on the floor to monitor the goings on for that floor. As far as Privacy is concerned, this is a Hallway so there is no privacy issues [sic], but I do wish to have you informed and obtain your permission to have the surveillance camera installed.
>
> This is somewhat urgent if you could get back to me as soon as possible with your decision I will let them know. All equipment, installation etc . . . etc is at their expense, we just nee[d] to provide them with the OK.

95 Two of the three board members replied with their approval but they also inquired about the floor where the camera was to be installed and they asked for written confirmation that the police would cover all costs. Mr. Chudnofsky sent an email to D.C. Ghaznavi as follows:

> Two of the three board members replied with their approval
>
> So you're good to go,
>
> However, Both wanted to know what floor, I haven't told them and as I wasn't sure if it was a good idea. Can I let them know, or just tell them that it would be better if it wasn't given out just yet
>
> One would like a quick note that all expenses for this is [sic] being covered by the police departments involved, So an Email reply would be quite sufficient.

D.C. Ghaznavi replied:

> Just to confirm that no expenses will be passed onto you.
>
> If you can avoid letting them know the floor that would be preferred.
>
> Thank You for your help,

96 Mr. Chudnofsky passed this response on to the board members. Again, two of the three replied stating, "Okay, great! Let us know if you need anything from us." Mr. Chudnofsky forwarded the response to the police. The third board member never responded and was, apparently, notorious for not responding.

97 As a result of this process, the camera was installed. Mr. Chudnofsky did not supervise the installation but he understood that it was in the hallway outside the door to the unit of a suspect. Mr. Chudnofsky's supervisor, who approved this process, was the Regional Director for the property management firm. He was in charge of all property managers in the area. The entire process of requesting and receiving permission to install the hallway camera was completed in one day, on January 20, 2014. This was the first time Mr. Chudnofsky had told the board members about his earlier decision, on December 2, 2013, to give the police a key fob and an access code, permitting entry into the common areas of the building.

98 Mr. Chudnofsky testified that his management team felt that they had to address the problem of crime in the building. He was trained by the senior property managers and supervisors in his company and he was always told to give the police any help they needed. It was company policy to help the police. The actual crime under investigation did not matter. The police needed help in relation to an investigation and Mr. Chudnofsky was willing to give it. He understood the logic of maintaining as much secrecy as possible, in order to avoid the risk of tipping off the suspects. The police did not try to prevent Mr. Chudnofsky from telling the board members. He simply agreed that it was better to tell fewer people, to reduce the risks to the investigation.

99 The final witness in this area was Det. Theriault. He is a senior Toronto Police officer and was one of the lead investigators in "Project Battery." He described the process of obtaining consent in relation to another building, 18 Valley Woods Road, where "Buck" Tran was believed to reside. Det. Theriault first spoke to a junior member of property management on November 6, 2013. She was unsure whether she had authority to permit police access to the building and she referred Det. Theriault to a more senior off-site supervisor. That same day, Det. Theriault spoke to the senior supervisor, one Mark Marshall, and asked for management's help with a police investigation. He specifically sought permission to access the common areas of the building, including the parking garage.

100 By this point, the police had already conducted some surveillance in the parking garage, at the early stages of their investigation. Like Det. Sgt. Johnston, Det. Theriault had conducted many organized crime investigations in his

27 years with the Toronto Police. In those prior investigations, surveillance officers would enter the parking garage of a condominium building without a warrant and without permission. This had not been regarded as problematic. Like Det. Sgt. Johnston, he believed that privacy exists "on a continuum" and that s. 8 *Charter* rights had recently become a "complicated issue" in this particular area, in light of the decision in *R. v. White*, *supra*, of which he was now aware. However, he believed at the time that privacy interests were reduced in the common areas of these buildings and so he proceeded with the early entries into the parking garage, without permission from property management.

101 Mr. Marshall did not immediately grant permission, during Det. Theriault's preliminary discussion with him on November 6, 2013. However, during a second telephone discussion on November 27, 2013, Det. Theriault spoke to another more senior supervisor, one Craig McMillan. Det. Theriault made notes of the call. Permission was granted at this time to conduct physical surveillance in the common areas. The subject of installing cameras was not raised at this time, although it must have been raised the next day, on November 28, 2013, as it is admitted that permission to install cameras was granted on that day. Det. Theriault sent an officer over to 18 Valley Woods Road to pick up a key fob, after his telephone call with Mr. McMillan on November 27, 2013.

102 I have some concerns about Det. Theriault's credibility, given some of the inconsistencies that emerged with his evidence at the preliminary inquiry. However, there seems to be no dispute that he did obtain consent to enter the common areas of 18 Valley Woods Road on November 27, 2013, and that consent to install cameras was received on November 28, 2013. In any event, Det. Theriault's evidence is generally consistent with Det. Sgt. Johnston, who was a co-lead investigator on the same team. Their evidence is also consistent with the entire body of evidence on the s.8 Motion in relation to this issue, to the effect that entries were sometimes made into common areas of buildings without permission at the early stages, followed by a process of receiving permission from property management as the investigation progressed.

(ii) Analysis of the Warrantless Entries Issue

103 In my view, the issue of warrantless entries into common areas of multi-unit buildings should be resolved in much the same way as the MDI issue was resolved. There is no doubt that the small number of references to these warrantless entries in the Affidavits placed before McMahon J. contain very little detail about the manner, duration, purpose, and permission (or lack of permission) for the entries. A much more fulsome record of all these surrounding circumstances has been placed before me on the *inter partes* review. The main issue, once again, is the "materiality" of these omitted details.

104 McMahon J. undoubtedly appreciated from the summaries of the surveillance reports that were included in the Affidavits (as set out above) that the police were entering common areas of condominium buildings on occasion. The fact of observations being made in these areas and the nature of the observations was set out. No mention was made of a warrant having been obtained or of permission having been granted and McMahon J. would, therefore, have assumed the entries were warrantless and without permission. In fact, it was made clear on occasion that no permission had been granted (for example, as of January 14/15, 2014, it appeared that property management at the 1048 Broadview Avenue building was requiring some kind of judicial order, as set out above in the excerpt from Sgt. Tanabe's Affidavit). Accordingly, what was set out in the Affidavits was neither erroneous nor misleading. It simply lacked additional details.

105 In terms of the "materiality" of the missing details, it is important to remember the Applicants' concession that the observations made in the common areas of these buildings were of little or no significance to the grounds for granting a wiretap authorization. Indeed, they could all be excised with no impact on the wiretap authorization or the related General Warrants. The one particularly useful observation, of Ken Mai entering units on both the 14th and 17th floors of 38 Joe Shuster Way on April 3, 2014, was relevant to obtaining search warrants for those locations but it added little to the wiretap application or to the General Warrants. In any event, the police clearly had consent to be in the common areas of this particular building by this time, in April 2014, from Mr. Chudnofsky, his supervisor, and the condominium board.

106 In all these circumstances, it would not have been useful or necessary to elaborately set out all the details about the warrantless entries in what were already very lengthy Affidavits. In this regard, LeBel J.'s admonition to affiants, speaking on behalf of a unanimous Court in *R. v. Araujo*, *supra* at para. 46, must be borne in mind:

> Looking at matters practically in order to learn from this case for the future, what kind of affidavit should the police submit in order to seek permission to use wiretapping? The legal obligation on anyone seeking an *ex parte* authorization is *full and frank* disclosure of *material facts*: [citations omitted]. So long as the affidavit meets the requisite legal norm, there is no need for it to be as lengthy as *À la recherche du temps perdu*, as lively as the *Kama Sutra*, or as detailed as an automotive repair manual. All that it must do is set out the facts fully and frankly for the authorizing judge in order that he or she can make an assessment of whether these rise to the standard required in the legal test for the authorization. Ideally, an affidavit should be not only full and frank but also *clear and concise*. It need not include every minute detail of the police investigation over a number of months and even of years. [Italics of LeBel J. in the original, underlining added.]
>
> Galligan J., as he then was, made much the same point in *R. v. Ho*, [1987] O.J. No. 925 (Ont. H.C.):
>
> > I turn now to the allegation of material non-disclosure. Before going into it in detail I think it worth saying that the police in preparing affidavits in support of the applications for wiretap authorizations have to be somewhat selective. They cannot put into it their whole investigation. To disclose everything is not practically feasible, and in an era of opening the packet it may be inimicable to the public interest.
> >
> > In my opinion what they must do is give sufficient highlights of the investigation so that the judge can decide whether there have been reasonable attempts by other investigative means to obtain the information sought, and to judge the likelihood of success of other possible ones. Much of the investigation need not be disclosed, and the bare fact of some non-disclosure cannot be grounds for setting aside the authorization. It is only non-disclosure of a matter material to the judicial decision that could justify setting aside the authorization. [Emphasis added.]
> >
> > Also see: *R. v. Villa*, [1988] O.J. No. 10 (Ont. H.C.) per Watt J., as he then was; *R. v. Ebanks*, *supra* at para. 43.

107 Given the factual insignificance of the relatively minor amount of warrantless surveillance of the common areas of multi-unit buildings in this case, detailed elaboration in the Affidavits about these entries would not have been justified.

108 This immediately distinguishes the present case from *R. v. White*, *supra* at paras. 24 and 60, where Huscroft J.A. (Simmons and Brown JJ.A. concurring) noted that the warrantless entries in that case were *essential* to the grounds for the search warrant:

> The trial judge . . . found that Detective Hill's unconstitutional searches of the common areas of the building formed the foundation for the search warrant pursuant to which the respondent's unit was searched.
>
> . . .
>
> Detective Redmond acknowledged there was no basis for the judge to issue a search warrant to search the respondent's unit in the absence of the evidence obtained by Detective Hill pursuant to the three searches. [Emphasis added.]
>
> In other words, the three warrantless entries in *White* were highly "material" and had to be fully disclosed. It was in this context that Huscroft J.A. went on (in *White*, *supra* at para. 64) to state that "one would have expected to see details . . . in the ITO" about the "three surreptitious entries into the respondent's condominium in order to obtain evidence to support the issuance of a warrant." In the present case, none of the warrantless entries purported to support issuance of the wiretap authorization or the related General Warrants. Indeed, they could have been completely excised from the Affidavits. For this reason alone, the omission of details concerning the warrantless entries was not "material."

109 In any event, I do not accept the underlying legal premise of the Applicants' submission in relation to this issue. Mr. Foda submits that the s. 8 case law in this area is complex, nuanced, and divided, and that it has recently changed as

a result of *R. v. White*, *supra*. In this subtle and difficult legal landscape, he submits, the police were obliged to place all the circumstances concerning these warrantless entries before McMahon J. so that he could determine whether the police had been acting unlawfully and in violation of s. 8 of the *Charter*. This, in turn, would have been important context for McMahon J.'s decision as to whether to grant a General Warrant allowing the police "to make observations by means of a television camera or other similar electronic device . . . throughout the common areas of addresses listed in para. 4(a) which are multi-unit buildings."

110 I do not agree with the Applicants' reading of the case law. In my view, the authorities in this area are relatively clear, they are not divided, and *White* has not changed the law. That case involved a bad set of facts (from the Crown's perspective) and the Court simply affirmed and applied the pre-existing case law to those unfavourable facts. Applying the law, as I understand it, the police in the present case were not acting unlawfully and they did not violate s.8 by conducting limited physical surveillance in the common areas of multi-unit buildings in the manner set out above. This provides a further reason in support of my conclusion that the omitted details about the manner, duration, purpose, and permission (or lack of permission) to make the warrantless entries were not "material." Had it all been fully disclosed to McMahon J., he would not have concluded that the police were acting unlawfully and it would not have influenced his decision to grant the General Warrant permitting video surveillance in the common areas.

111 I do not intend to conduct a detailed review of the considerable body of case law that now exists concerning warrantless entries into the common areas of multi-unit buildings. As I read these authorities, five broad propositions have emerged, as follows:

The meaning of a "search"

• The first step in any s. 8 analysis is to determine whether the police investigative technique under consideration amounts to a "search" and, therefore, engages s. 8. This inquiry turns on "reasonable expectations of privacy." Sopinka J. and Major J. gave separate judgments in *R. v. Evans* (1996), 104 C.C.C. (3d) 23 (S.C.C.) at paras. 10-11 and 47-8 but they agreed on this fundamental starting point. Sopinka J. stated:

> I agree with Major J. that not every investigatory technique used by the police is a "search" within the meaning of s. 8. In particular, I agree with Major J.'s view that the court must inquire into the purposes of s. 8 in determining whether or not a particular form of police conduct constitutes a "search" for constitutional purposes.
>
> What then is the purpose of s. 8 of the *Charter*? Previous decisions of this court make it clear that the fundamental objective of s. 8 is to preserve the privacy interests of individuals. As this Court stated in *Hunter v. Southam Inc.* (1984), 14 C.C.C. (3d) 97 at p. 109, the objective of s. 8 of the *Charter* is "to protect individuals from unjustified State intrusions upon their privacy". Clearly, it is only where a person's reasonable expectations of privacy are somehow diminished by an investigatory technique that s. 8 of the *Charter* comes into play. As a result, not every form of examination conducted by the government will constitute a "search" for constitutional purposes. On the contrary, only where those state examinations constitute an intrusion upon some reasonable privacy interest of individuals does the government action in question constitute a "search" within the meaning of s. 8. [Emphasis added.]
>
> After quoting *Canada (Director of Investigation & Research, Combines Investigation Branch) v. Southam Inc.* (1984), 14 C.C.C. (3d) 97 (S.C.C.) at 108, to the effect that compliance with s. 8 turns on whether "in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement," Major J. stated the following in *Evans*:
>
> > This balance between individual and state interests must be considered not only in determining whether or not a search was reasonable but also at the threshold stage of determining whether a

> particular investigative technique used by the police constitutes a search at all within the meaning of s. 8.
>
> . . . [s. 8] protects individuals only against police conduct which violates a reasonable expectation of privacy. To hold that every police inquiry or question constitutes a search under s. 8 would disregard entirely the public's interest in law enforcement in favour of an absolute but unrealistic right of privacy of all individuals against any state incursion however moderate. This is not the intent or the effect of s. 8. [Emphasis added.]
>
> Also see: *R. v. Wise* (1992), 70 C.C.C. (3d) 193 (S.C.C.) at 217.

The meaning of "reasonable expectation of privacy"

• The leading authorities on the meaning of "reasonable expectation of privacy" are *R. v. Edwards* (1996), 104 C.C.C. (3d) 136 (S.C.C.) and *R. v. Tessling* (2004), 189 C.C.C. (3d) 129 (S.C.C.). They hold that a number of well-known factors ("the totality of the circumstances") must be taken into account in determining whether a "reasonable expectation of privacy" does or does not exist in a particular situation. *Edwards* dealt with a warrantless seizure of drugs from an apartment. Cory J. reviewed the leading authorities and stressed that s. 8 protects privacy and not "a proprietary or possessory interest" in the apartment. Those two interests are simply two of seven non-exhaustive factors to be considered in determining whether a reasonable privacy interest exists. The other five factors are: "presence"; "historical use"; "the ability to regulate access"; "a subjective expectation of privacy"; and "the objective reasonableness of the expectation." On the facts of *Edwards*, the accused was a boyfriend and "especially privileged visitor" who had keys to his girlfriend's apartment. He also had a history of using it. However, "one very important factor" that is an "important aspect of privacy" was absent, namely, he "lacked the authority to regulate access to the premises." It was his girlfriend who was the tenant and she controlled access to the apartment. In *Tessling*, Binnie J. "tailored" the *Edwards* factors to a case that involved information seized outside the home rather than from entry into the home. The police used a "FLIR camera," without a warrant, to detect "heat radiating" from the accused's house. Binnie J. identified four important issues: the nature or "subject matter" of the information seized outside the home and whether it "permits any inferences about the precise activity" inside the home; whether the accused had a direct personal interest in the information seized; whether the accused had a subjective expectation of privacy in the information seized; and whether the expectation was objectively reasonable. Binnie J. held that this latter issue turned on a number of factors, in particular, the following: the place where the information was seized was the accused's home; the information in question "exists on the external surfaces" and is "exposed to the public"; the police technique of seizing "externally obtained information about the home" was "both non-intrusive in its operations and mundane in the data" actually obtained; and the seized information "does not touch on a 'biographical core of personal information' nor does it 'tend to reveal intimate details of [his] lifestyle,'" citing *R. v. Plant*, *supra*. In *Edwards*, *Tessling*, and *Plant*, the Court found that no "reasonable expectation of privacy" existed in relation to the warrantless seizures in those cases.

Parking garages in multi-unit buildings

• Applying the principles that emerge from the above authorities, it has been held in this province that there is no reasonable expectation of privacy in observations made concerning "use of a spot in an underground parking garage in the condominium building" in order for the police to infer "the unit occupied by the [accused] in the building." Epstein J., as she then was, so held and the Court of Appeal agreed in *R. v. Drakes*, 2009 ONCA 560 (Ont. C.A.) at paras. 17-18. The Court (O'Connor A.C.J.O., MacPherson and Cronk JJ.A.) reasoned as follows:

> The trial judge referred to the "totality of circumstances" test formulated in *R. v. Edwards* (1996), 104 C.C.C. (3d) 136 (S.C.C.), at para. 45. In our view, she correctly applied this test, noting that the appellants

shared the parking garage with 440 other units, that they had limited control over it, and that management (who did have control over the garage) consented to the police gaining access to it for the purposes of their investigation. See also: *R. v. Thomsen*, [2007] O.J. No. 4863 (C.A.) and *R. v. Laurin* (1997), 113 C.C.C. (3d) 519 (Ont. C.A.).

In *R. v. Verret* (2013), 574 A.R. 212 (Alta. Q.B.) at paras. 11, 17 and 22, Thomas J. reached the same conclusion and stated:

> In respect to Stall 205, the accused may have had a right to park his motor vehicle or store goods in that space, a right which was seldom exercised by him in 2010. That said, he could have asserted control over the parking space and had the right to use it. However, the accused would not have been in the position to stop any other person in the parking garage from making observations about the vacant space defined in the Condominium Plan for Stall 205, or in respect to what was parked or placed in it. He had no right to construct an enclosure around that space and he was aware of that. At the time of his arrest on September 4 he had not constructed any enclosure which would have limited the view of what might be placed in Stall 205. . . . [I]t would not be reasonable to expect privacy in this open space . . .

Elevators and hallways in multi-unit buildings

• When the same principles are applied to similarly non-obtrusive observations made in elevators and hallways of multi-unit buildings, such as odours emanating out into these common areas or the number of the unit where a suspect enters or exits, the authoritative and binding decisions of courts in Canada have consistently found no reasonable expectation of privacy. In *R. v. Laurin* (1997), 113 C.C.C. (3d) 519 (Ont. C.A.) at 533, Morden A.C.J.O. (McKinlay and Laskin JJ.A. concurring) stated:

> I have concluded that this was not a search. My reasons are as follows. The police officers making their way to the appellant's apartment were entitled to be in the hallway, as were other tenants of the building, their visitors, repair people, the landlord, and so on. I do not think that the fact that they were engaged in an investigation of a complaint meant that they had no right to use the common hallway to attend at the door of the appellant's apartment. Their presence there was not dependent on the invitation of the appellant, express or implied. I refer to the fact that the outer doors of the building were not locked or otherwise secured.
>
> I do not think there is any tenable basis for holding that the appellant had a reasonable expectation with respect to the smells emanating from his apartment into the hallway.

In *Laurin*, the police had received an anonymous tip from a confidential informant who was described as "a person from the neighbourhood." When they entered the small apartment building, the exterior doors were unlocked. In the subsequent case of *R. v. Thomsen* (2005), 72 W.C.B. (2d) 349 (Ont. S.C.J.) [2005 CarswellOnt 9997 (Ont. S.C.J.)] at paras. 40-42, aff'd [2007] O.J. No. 4863 (Ont. C.A.) the facts were somewhat different. The exterior doors to the large apartment building were locked and controlled by a buzzer system which the police by-passed. However, the police had received a complaint from the property manager, prior to entering. On these somewhat different facts, the trial judge also found no "reasonable expectation of privacy" relating to non-obtrusive observations made in the common hallway. Garton J. stated:

> I find that Mr. Thomsen had no reasonable expectation of privacy in the common hallway at 2085 Islington Avenue despite the buzzer and key system at the front door. Other tenants, their invitees, the landlord, and maintenance workers could be expected to be in the hallway. There

was no expressed intention by Mr. Thomsen to keep the hallway private, and, as in *Piasentini*, the odour of marijuana was noticeable from the elevator doors in any event.

In any case, I am of the view that the officers' attendance in the building was a result of an implied invitation from the property manager. Ms. Spencer called Officer Bobbis and related certain information to him. She presumably wanted and expected the police to investigate further and to confirm the information that she had received. Certainly Officer Bobbis perceived his conversation with her as an invitation to attend.

In *Piasentini*, Wein J. found an implied invitation to attend where the police had received a tip from a confidential informant. She noted that this approach is consistent with the analysis of implied licence set out in the *Evans* case, in *R. v. Tricker* (1995), 96 C.C.C. (3d) 198 (Ont. C.A.) and in *R. v. Mulligan* (2000), 142 C.C.C. (3d) 14 (Ont. C.A.).

I conclude that the officer' detection of the faint smell of marijuana as soon as the elevator doors opened on the ninth floor, and their observation that the smell became strong the closer they came to the door of apartment 901, did not constitute a search.

In addition to the odour of marijuana emanating out into the hallway, the police officers in *Thomsen* observed the accused emerging from apartment 901 and this evidence was also admitted. In a brief endorsement, the Court of Appeal (Laskin, MacPherson and Simmons JJ.A.) stated: "We agree with the reasons of the trial judge." The Alberta and Saskatchewan Courts of Queen's Bench and the British Columbia Court of Appeal have similarly held that there is no "reasonable expectation of privacy" in the common areas of multi-unit buildings. Two of these cases involved large (150 and 200 unit) condominium buildings with locked security systems controlling access to the buildings. In these three leading western cases, the police made unobtrusive warrantless observations as to which unit in the building was being used by a suspect. The s. 8 challenges to these observations were dismissed in all three cases, including on appeal in the B.C. case. The s. 8 issue was not pursued on appeal by senior and experienced counsel in the Alberta case. See: *R. v. Nguyen* (2008), 462 A.R. 240 (Alta. Q.B.) at paras. 28-31 and 161-8, aff'd (2010), 477 A.R. 395 (Alta. C.A.); *R. v. Webster* (2015), 326 C.C.C. (3d) 228 (B.C. C.A.) at paras. 20-24, 36 and 73-7; *R. v. Rogers* (2014), 114 W.C.B. (2d) 611 (Sask. Q.B.) [2014 CarswellSask 378 (Sask. Q.B.)].

Obtrusive observations into the interior of a unit or locker

• The only circumstance where s. 8 has been held to be engaged, when police enter the common areas of multi-unit buildings, is when they go beyond making observations as to what is externally visible or externally emanating into the common areas. For example, in *R. v. Laurin*, *supra* at 534, Morden A.C.J.O. appeared to warn against more "intrusive" observations of activities inside a unit, such as listening at the door:

Clearly, in the present case, the police conduct could not be considered to be "intrusive" - in the sense that they did not take an unusual advantage of their presence in the hallway. It may be thought that the police did take unusual advantage in their presence in the hallway in *R. v. Sandhu* (1993), 82 C.C.C. (3d) 236 (B.C.C.A.) in putting their ears to the door of an apartment. In *Sandhu* Prowse J.A. (at pp. 258-64) held this conduct to be a search . . . [Emphasis added.]

Similarly, in *R. v. Thomsen*, *supra* at paras. 45-7, Garton J. held that certain "highly intrusive" conduct by the police at the door to the suspect's unit did engage and did violate s. 8. She followed Prowse J.A. in *R. v. Sandhu* (1993), 82 C.C.C. (3d) 236 (B.C. C.A.) and stated:

There remains the question of whether the actions of the officers, in bending down and putting their noses to the crack between the floor and the apartment door, constituted a search. These actions are akin to what has been described as highly intrusive snooping in *Sandhu*, *supra*, where the police put their ears to an apartment door in order to overhear conversations taking place within. Prowse J.A., at p. 264, stated:

> No doubt eavesdropping is a standard form of police information gathering which, in many circumstances, cannot be criticized. In my view, however, there are limits to what our society will tolerate in terms of non-electronic surveillance by the state. For example, I do not believe that our society is prepared to tolerate agents of the state looking through the keyholes or under the doors of our homes in order to further their investigations, in the absence of authorization permitting them to do so. Similarly, I am satisfied that the public is not prepared to tolerate agents of the state pressing their ears up against their windows or doors, in circumstances such as occurred here, in the absence of authorization.
>
> Morden A.C.J.O., in commenting on the *Sandhu* decision in *Laurin*, stated at p. 534 that "[i]t may be thought that the police did take unusual advantage [of] their presence in the hallway". . . .
>
> I find that there is little, if any, difference in the level of intrusiveness between looking through a keyhole or under a door and placing one's nose to a crack below the door. I agree with the reasoning of Prowse J.A. and find that Officers Bobbis and Andrew, in bending down and putting their noses to the door, took advantage of their presence in the corridor. I find that their actions in this regard constituted an unreasonable search within the meaning of s. 8 of the *Charter*. [Emphasis added.]
>
> > Finally and most recently, in *R. v. White*, *supra*, at paras. 8, 13, 37, 46 and 58, the Court of Appeal reached the same conclusion in a case where the police entered the common areas of a small (10 unit) condominium building and "observed the contents" of the accused's storage locker and "overheard a conversation inside the unit." Huscroft J.A. affirmed the earlier authorities, including *Laurin* and *Thomsen*, and stated the following:
> >
> > > In any event, the court [in *Laurin*] did not conclude there was never a reasonable expectation of privacy in an apartment hallway. On the contrary, the trial judge found that the police conduct at issue could not be considered intrusive and that the police "did not take unusual advantage of their presence in the hallway": para. 44. It was simply a case in which there was no reasonable expectation of privacy concerning smells emanating from an apartment into the common hallway of the building.
> > >
> > > . . .
> > >
> > > In this case, the respondent owned a unit in a relatively small building that Detective Redmond testified had only 10 units over four floors. The building was small enough that Detective Hill had to hide, otherwise his presence as a stranger in the building might have been noteworthy. It was small enough that, from the stairwell, Detective Hill could overhear conversations taking place in the respondent's unit and identify specific sounds connected to activities going on in the apartment (such as the unrolling of packing tape). And, save for the

> malfunctioning north stairwell door, the building was always locked to non-residents.
>
> . . .
>
> Even assuming that the police entered the building pursuant to an implied licence, the appellant would have to establish that the searches were conducted reasonably. In my view, it would also fail at this step. Detective Hill did not simply walk through the hallways of the building. He took advantage of defects in a security system in order to enter the building and conduct surveillance. He hid near the respondent's unit in an attempt to eavesdrop or witness something. The building was so small and the insulation was so poor that he was able to overhear conversations and activities in the respondent's unit from the stairwell. [Emphasis added.]

112 In my view, a coherent and consistent view of the applicable s. 8 principles emerges from the above case law. Applying those principles to the facts concerning warrantless entries into the common areas of multi-unit buildings in this case, I am satisfied that the surveillance officers' conduct was lawful and that no s. 8 violations occurred. In particular, I rely on the following five considerations:

- The officers had abundant reasonable grounds to be following and investigating the suspects, prior to the warrantless entries into the common areas. They were in the course of investigating serious crimes and they did not acquire their reasonable grounds from the entries;

- The nature of the observations, like those in *Tessling*, were mundane and non-obtrusive involving the fact of residency and the number of the unit where the suspect resided. As in *Plant*, none of this information touched on a "biographical core of personal information" or "intimate details of the lifestyle and personal choices of the individual." The fact of residency and the place of residency is information that is widely disseminated and disclosed in numerous transactions during the course of our daily lives. In addition, it is information that has always been available to surveillance officers, simply by following a suspect to his/her dwelling house. The modern phenomenon of multi-unit residency cannot shield or accord greater privacy to this kind of mundane information. As Chicoine J. put it in *R. v. Rogers*, *supra* at para. 130, in finding no reasonable expectation of privacy in relation to observations made in the common areas of multi-unit buildings, "This, in my view, puts occupants of apartment buildings and condominium complexes on the same footing as occupants of single family dwellings";

- Unlike in *Evans*, *White*, and *Sandhu*, the surveillance officers never acquired information about any activity inside the home or inside premises belonging to a suspect, for example, by looking into a unit, listening at the door, or sniffing at the threshold, transom, or open door. As in *Tessling*, *Laurin*, and *Thomsen*, the seized information was "exposed to the public" who happened to be in the parking garage or in the hallways;

- The condominium buildings were large with numerous units (38 Joe Shuster Way has 517 units, 18 Valley Woods Road has 167 units, 1600 Keele Street has 182 units). As a result, large numbers of residents, their friends, family and guests, condominium staff, tradespeople, and miscellaneous visitors who had some reason to be on the premises, all had access to the parking garage, the lobby, the elevators, and the hallways. As in *Edwards*, "one very important factor" is that an individual suspect who resided in one of these buildings could not "regulate access" to these common areas;

- The police did not initially seek and obtain permission to enter the common areas of these buildings, in all cases, although in some cases they did seek permission simply by pressing the buzzer and advising security staff that it was "police." Once the fact of residency was known to exist in relation to some suspect (and, therefore, some degree of privacy interest in the building was established), permission was sought from property management. In all

cases, permission was granted. Furthermore, there was abundant evidence that property management was already conducting surveillance in the common areas of these buildings with video cameras, inferring that the residents had given up control over certain expectations of privacy in these common areas in order to achieve the goal of collective security.

113 The above five considerations infer a relatively low expectation of privacy in the common areas of the multi-unit buildings and in the kind of information being acquired by the surveillance officers in this case. Balanced against that relatively low expectation of privacy, the state interest in effective law enforcement was relatively high. The crimes under investigation were extremely serious, representing a direct threat to the safety of the public. Learning the residential unit of a suspect within a large condominium building is essential to being able to obtain a s. 487 search warrant in relation to a "place" and to being able to seize, for example, a firearm used in a murder. It is similarly important in relation to a s. 186 wiretap to be able to describe "the place at which private communications may be intercepted."

114 For all these reasons, I am satisfied that the physical surveillance carried out in this case in the common areas of multi-unit buildings did not amount to a "search." Accordingly, s. 8 of the *Charter* was not engaged. I am also satisfied that the detailed circumstances surrounding this surveillance were not "material" to issuance of the wiretap authorization and the related General Warrants and did not need to be set out in the Affidavits.

115 Before leaving this issue, there are two related but subsidiary points that should be briefly mentioned. It was submitted, somewhat faintly, that it was only the condominium board that could permit the surveillance officers to enter the common areas of multi-unit buildings, and not property management. The argument is based, in part, on a somewhat technical reading of the "Rules" that exist at one particular condominium building. Those "Rules," at most, require the condominium board to authorize any "duplication of keys." As I understand the facts of this case, the police were never given duplicate keys. They certainly were never given the keys to any unit.

116 In any event, in those cases where the issue of permission to enter the common areas of buildings has arisen, it has always been "property management" or "the property manager" who has granted permission and no issue has been taken with the sufficiency of this permission. See, e.g.,: *R. v. Drakes*, *supra*; *R. v. Thomsen*, *supra*; *R. v. Verret*, *supra* at paras. 11 and 30. I also note that in the cases dealing with the "implied license" doctrine in the context of condominium buildings, which I will discuss below, it has been the security staff who called the police and took them to the particular unit where some trouble had arisen. See: *R. v. MacDonald* (2014), 303 C.C.C. (3d) 113 (S.C.C.) at paras. 3-5 and 27; *R. v. Zargar*, 2014 ONSC 1415 (Ont. S.C.J.) at paras. 9-10 and 28-32.

117 I am satisfied that property management staff have the authority to call the police and to cooperate with an ongoing police investigation, without needing express permission from the condominium board for each cooperative interaction with the police. This is simply practical common sense. It also reflects the longstanding "moral or social duty . . . to assist the police," which the courts have always recognized. See: *Rice v. Connolly*, [1966] 2 All E.R. 649 (Eng. Div. Ct.) at 652; *R. v. Grafe* (1987), 36 C.C.C. (3d) 267 (Ont. C.A.) at 271; *R. v. Grant* (1993), 245 C.C.C. (3d) 1 (S.C.C.) at para. 37. When Mr. Chudnofsky and his property management firm adopted a policy of cooperating with police investigations, they were simply acting in accordance with this longstanding "moral or social duty." Of course, it is always open to a particular condominium board to decide not to retain a property management firm that adopts this cooperative policy, or to restrain and prevent certain kinds of assistance to the police. There is no evidence that this occurred in the present case.

118 The other subsidiary point in relation to warrantless entries into common areas of condominium buildings concerns the "implied license" doctrine. If the police entries into parking garages, elevators, and hallways did amount to a "search," contrary to the conclusion that I have reached, then the further question that arises is whether these searches were "reasonable." That question turns on whether the searches were "authorized by law." See: *R. v. Edwards*, *supra* at paras. 33, 39 and 45; *R. v. Tessling*, *supra* at para. 18; *R. v. Evans*, *supra* at paras. 21-25; *R. v. Collins* (1987), 33 C.C.C. (3d) 1 (S.C.C.) at 14. In this regard, the police possess the same authority at common law as any member of the public, "to approach the door of a residence and knock," provided they understand that this "implied license ends at the door"

and does not permit entry into a dwelling. See: *R. v. Evans*, *supra*; *R. v. Tricker* (1995), 96 C.C.C. (3d) 198 (Ont. C.A.) at 203; *Robson v. Hallet*, [1967] 2 Q.B. 939 (Eng. Q.B.) at 950-2; *R. v. MacDonald*, *supra* at paras. 6-8 and 26-7; *R. v. Zargar*, *supra*.

119 I heard very little argument on the question of how to apply the "implied license" doctrine to the facts of this case. Indeed, the existing authorities can be difficult and somewhat unclear as to how the "implied license" doctrine applies in the context of multi-unit buildings. As it is not essential to my decision, I will only briefly address this question. In the leading Canadian case, *R. v. Evans*, *supra* at paras. 13 and 40, Sopinka J. described the common law power as "an implied license . . . to approach the door of a residence and knock" and Major J. described it as "an implied license . . . to approach and knock for a lawful purpose." In the leading English case, *Robson v. Hallett*, *supra*, Lord Parker C.J. described the power as "the right to go in at the garden date and go up to the front door." In the leading Ontario case, *R. v. Tricker*, *supra* at p. 203, Galligan J.A. described the power as an "an implied license to . . . a police officer, on legitimate business, to come onto the property. The implied license ends at the door of the dwelling."

120 On the basis of these broad descriptions of the "implied license" doctrine, it would appear that the surveillance officers in the present case complied with the common law as they did no more than "come onto the property," while "on legitimate business," and "approach the door of a residence" on occasion. They never crossed the threshold and went inside anyone's condominium dwelling, unlike the officers in *R. v. Zargar*, *supra*.

121 What complicates the analysis is that the majority in *R. v. Evans*, *supra* at paras. 14-21, held that there must be a separate inquiry into the police *purpose* in entering onto the property and approaching the door of a dwelling. On the somewhat unusual facts of the *Evans* case, where the police wanted the suspect to open his door so they could secure incriminating evidence from inside the residence (the scent of marijuana), Sopinka J. concluded that they were "engaged in a 'search' of *the occupant's home*" and that they went "beyond that which is permitted by the implied license." [Emphasis added.] In other words, approaching the door and making observations outside the door was not a "search," and was lawful at common law, but seeking to seize incriminating evidence from inside the home, once the door opened, was a "search" of the "home" and was unlawful. This kind of seizure of evidence from inside the home never happened in the present case.

122 There are certain passages in the majority judgment in *Evans*, to the effect that the "implied invitation to knock extends no further than is required to permit convenient communication with the occupant of the dwelling." That was *not* the police purpose in the present case, as the surveillance officers intended to investigate and make observations in common areas but they did not intend to communicate with any occupant. In the subsequent case of *R. v. Mulligan* (2000), 142 C.C.C. (3d) 14 (Ont. C.A.) at paras. 18 and 23-28, the Court of Appeal addressed the issue of whether the *Evans* case should be read as limiting the "implied license" doctrine to situations where the officer intends to speak to the homeowner. In *Mulligan*, the officer "did not enter the property with the intention of communicating with the occupant or owner" but entered with the intention of investigating a possible crime. Sharpe J.A. (Laskin and Feldman JJ.A. concurring) stated the following:

> The implied licence to knock discussed in *Tricker*, *supra*, and *Evans*, *supra*, appears to be specifically related to activities reasonably associated with the purpose of communicating directly with the owner or occupant. However, it seems to me that the underlying principle is a broader one. Licences may arise at common law by implication from the nature of the use to which the owner puts the property. As Prof. Ziff notes in *Principles of Property Law* (Carswell, 2d ed., 1996) at 274, licences may be implied "such as where a shop is open for business to the public at large." In my opinion, the implied invitation principle extends to situations where the very purpose of entry is to protect the interests of the property owner or occupant, particularly where the entry occurs on an area of the property to which all members of the public ordinarily have access to do business with the property owner. It is plainly in the interests of a property owner or occupant that the police investigate suspected crimes being committed against the owner or occupant upon the property. For that reason, absent notice to the contrary, a police officer may assume that entry for that purpose is by the implied invitation of the owner, particularly where entry is limited to areas of the property to which the owner has extended a general invitation to all members of the public.

. . .

> As with all police investigative powers, this licence must be strictly curtailed to avoid the risk of abuse. The officer must have a *bona fide* belief that gives rise to a reasonable suspicion of criminal activity being perpetrated against the owner or occupant or the property. The police officer must be able to demonstrate an objective basis in fact that gives rise to his suspicion. To borrow the language of Doherty J.A. in *R. v. Simpson* (1993), 79 C.C.C. (3d) 482 (Ont. C.A.) at 500-501, discussing the common law power to detain a suspect for questioning, there must be some "articulable cause" above the level of a mere "hunch", "a constellation of objectively discernible facts which give the detaining officer reasonable cause to suspect that the detainee is criminally implicated in the activity under investigation."
>
> In the present case, the trial judge accepted the *bona fides* of the officer and specifically found that his purpose was to investigate suspected criminal activity directed against the property. There was also an articulable cause for the officer's suspicion based upon objectively discernable facts. [Emphasis added.]
>
> Also see: *R. v. Piasentini*, [2000] O.J. No. 3319 (Ont. S.C.J.) at para. 45.

123 *Mulligan* did not involve a multi-unit building. *Laurin* did involve a multi-unit building but, when it was decided in 1997, the Court did not have the benefit of Sharpe J.A.'s reasoning in *Mulligan*. Nevertheless, there is a logical consistency between the reasoning in the two cases. In my view, *Laurin* effectively applied the same reasoning as in *Mulligan* to the context of a multi-unit building. In this regard, Morden A.C.J.O. distinguished *Evans* on the following basis (*R. v. Laurin*, *supra* at paras. 44-5):

> This case is different from *R. v. Evans*, *supra*, on which the appellant relies, in that in *Evans* the police observations took place on the accused's property in circumstances in which the majority of the court held that the police could not rely upon what would otherwise have been an implied invitation by the accused to the police to knock at the front door of his private dwelling. I refer to the reasons of Sopinka J. for the majority of the court at pp. 31-33.
>
> The policy considerations relating to the reasonable expectation of privacy of an apartment dweller with respect to different kinds of police surveillance in the common hallways may be varied. On the one hand, it may be thought that tenants would not wish police officers to have the same scope as neighbours and visitors with respect to making ordinary observations in the hallways. On the other hand, it may be quite in the interests of tenants that they have this scope, if they are legitimately engaged in investigating a complaint, to enter and make observations in the hallway which are not intrusive. "This rule gives tenants the benefit of much-needed police protection in common hallways . . . , while it preserves for them the privacy of their actual places of abode, their apartments": *United States v. Holland*, 755 F. 2d 253 at 256 (2nd Cir. 1985). [Emphasis added.]

124 In my view, the result of *Evans*, *Mulligan*, and *Laurin* is that the police cannot rely on the "implied license" doctrine to enter the common areas of multi-unit buildings if their purpose is to seize evidence from inside a residence, upon the opening of the door (as in *Evans*). However, if they have articulable cause and are in pursuit of a *bona fide* criminal investigation that requires them to make observations in common areas outside a residential unit, and if such an investigation is to the benefit of the law-abiding residents of the building, then the police can proceed to make non-obtrusive observations in these common areas on the basis of an "implied license" granted by and for the benefit of these tenants (as in *Mulligan* and *Laurin*).

125 For all these reasons, I would have found that the warrantless entries into common areas of multi-unit buildings in this case were "reasonable" because they were "authorized by law," had I found that the entries amounted to a "search." This provides yet another reason for concluding that the omission of details concerning the warrantless entries was not "material."

G. THE THIRD ISSUE: WARRANTLESS INSTALLATION OF SURVEILLANCE CAMERAS IN THE COMMON HALLWAYS OF MULTI-UNIT BUILDINGS

126 As noted above, the third issue raised by the Applicants on the s. 8 Motion concerns the police installation of surveillance cameras in the common hallways of condominium buildings. McMahon J. authorized the installation of such cameras, pursuant to the initial General Warrant dated February 24, 2014. However, prior to that date, the police had already installed cameras at three buildings (18 Valley Woods Road, 38 Joe Shuster Way, and 1600 Keele Street) pursuant to permission obtained from property management and, in one case, from the relevant condominium board.

127 The Applicants raise a number of arguments in relation to this issue, in particular, the following: whether the permission or consents obtained by the police were sufficient to satisfy the requirements of s. 8 of the *Charter*; whether full, fair, and frank disclosure of these prior installations was made to McMahon J.; whether McMahon J. would have granted the General Warrant authorizing the camera installations, had he known all the material facts about the prior installations; and finally, whether certain evidence obtained as a result of these camera installations should be excluded at the pending trials of certain accused. I should add that the Applicants concede that the camera installation issue has no impact on the wiretap authorizations.

128 I heard a considerable amount of evidence in relation to this issue. In particular, I heard testimony from Mr. Chudnofsky and from Det. Theriault about the permission to install cameras that the police received from property management at two of the buildings. I also heard testimony from the Affiants explaining what they did and did not disclose to McMahon J. about the prior installation of cameras. In addition, the parties filed a helpful Agreed Statement of Facts relating to this issue. Finally, I have all the material that was placed before McMahon J. concerning this issue of camera installations.

129 What I do *not* have in the s. 8 Motion record, however, is the following: the actual images seized by the surveillance cameras, which I am told are significant and which last several hours; and a proper appreciation of the actual case or cases in which these images will figure as evidence tendered by the Crown at trial. What I mean by this latter point is that none of the following is before me: the actual indictments; the parties and their trial counsel; and a full understanding of the issues and evidence to be called by the parties in the actual trials where these video surveillance images are said to be significant. All that I have are a few samples of the kinds of images that were seized, in the form of still photographs.

130 Based on this record, I could not decide any s. 24(2) exclusion of evidence issues because I could not assess the impact of the seizures on an individual accused's s. 8 *Charter* interests or the impact of exclusion on the Crown's ability to prove its case (the second and third set of *Grant* factors). I could decide the s. 8 issues but, in my view, it would be unwise to sever the s. 8 and s. 24(2) issues. I may or may not be the trial judge in the one pending trial where these video images are said to be significant. If I am assigned to conduct that trial, where the camera installation issue may have some practical impact, then an efficient s. 8 hearing can be held at that time, given that I have already heard a considerable amount of the relevant evidence.

131 We do not yet have a lot of experience with the relatively new provisions of Part XVIII.1 of the *Criminal Code*, dealing with the appointment of a "case management" judge. Those provisions outline the kinds of pre-trial rulings that a "case management" judge can make, in s. 551.3, including rulings on the admissibility of evidence and on *Charter* issues. However, the decision whether to make such rulings is discretionary. Section 551.3(1) states, "the case management judge, as a trial judge, *may exercise the powers* that a trial judge has before that stage, including . . . adjudicating any issues that can be decided before that stage." One important consideration in relation to the exercise of this s. 551.3(1) discretion, is whether a full and sufficient evidentiary record is before the "case management" judge and whether a more complete record is likely to be before the "trial judge." See: *MacKay v. Manitoba*, [1989] 2 S.C.R. 357 (S.C.C.); *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086 (S.C.C.); *R. v. Mansingani*, 2012 ONSC 6509 (Ont. S.C.J.).

132 For all these reasons, I am not prepared to decide the camera installation issue at this early stage of the proceedings. It can be raised again in a future proceeding, either before me as the "case management" judge or before the "trial judge," once a full and sufficient Motion record has been prepared.

H. THE FOURTH ISSUE: NAMING DAT TANG AND TONY HUANG AS "KNOWN PERSONS" IN THE RENEWAL AND EXPANSION AUTHORIZATION

(i) Introduction

133 The fourth and last issue is whether there was sufficient evidence to name Dat Tang and Tony Huang in the renewal and expansion authorization issued by McMahon J. on April 15, 2014. They were not named in the initial authorization dated February 24, 2014.

134 The statutory test for naming a "known person," and thereby authorizing interception of his/her private communications, is set out in s. 185(1)(e). The test is whether interception of that person's private communications "may assist the investigation." It has repeatedly been held that this threshold is "a low one." It has also been held that each interception of each individual target's communications need not meet the higher "will afford evidence" standard, which is the s. 8 "probable cause" constitutional standard that the wiretap authorization, viewed as a whole, must meet. Indeed, a known target of a wiretap authorization may be an entirely innocent third party who is not implicated in the offence under investigation, provided that seizure of the third party's communications may somehow further the investigation. See: *R. v. Chesson*, *supra* at 365-6; *R. v. Mahal*, *supra* at paras. 71, 75-6, 81 and 88; *R. v. Nugent*, *supra* at paras. 8-9; *R. v. Finlay*, *supra* at para. 84; *R. v. Sampson* (1983), 9 C.C.C. (3d) 194 (Ont. C.A.) at para. 16.

(ii) The Naming of Dat Tang

135 I am satisfied that there was sufficient evidence to justify naming Dat Tang as a "known person," and Mr. Usher did not strenuously press this point. The relevant evidence in relation to this issue, relied on by D.C. Clark in his renewal and expansion Affidavit, included the following:

- Confidential Informant No. 9 stated that Dat Tang "is a heroin dealer" and that his driver is Gary Chen. These assertions are conclusory and the informant's means of knowledge is unclear. However, the informant went on to provide some detail about Tang and Chen's drug trafficking and some of this detail was corroborated by police investigation. This informant had only been used once before and his/her information had not led to any arrests or seizures. Accordingly, the informant was untested. He/she was also described in the Affidavit as a "career criminal" who had been convicted of "several crimes of dishonesty";

- More significantly, the Affiant asserted that Dat Tang "has a longstanding history of association with the Asian Assassins." The Affiant documented the basis for this assertion in an Appendix. In that Appendix, a synopsis was set out of five relatively serious criminal incidents that led to five separate sets of charges in 2003, 2004 and 2006. Dat Tang was found, arrested and charged in all five of these incidents, together with a number of alleged members/associates of the Asian Assassins. Although Dat Tang was only found guilty in one of the five matters, the Appendix undoubtedly established the fact of past "association," as asserted by the Affiant;

- Most importantly, the Affiant set out recent evidence inferring current association between Dat Tang and alleged members/associates of the Asian Assassins. The telephone number associated with Dat Tang was found in the contact lists of two telephones belonging to two victims in two of the shooting incidents being investigated by the police (the March 2013 shooting of Asian Assassins members Michael Nguyen and Danny Vo and the January 2014 shooting of Project Originals member Premier Hoang). In addition, wiretap intercepts on February 25 and 27, 2014 inferred that Dat Tang was associating with alleged Asian Assassins members/associates Danny Vo and Larry Yu.

136 The tip from Confidential Informant No. 9, standing alone, would be unlikely to satisfy the requirement of "reasonable and probable grounds" for a s. 487 search warrant or for a s. 495 arrest. See: *R. v. Debot* (1986), 30 C.C.C. (3d) 207 (Ont. C.A.) at 218-219, aff'd (1989), 52 C.C.C. (3d) 193 (S.C.C.). However, the "may assist" requirement in s. 185(1)(e) is a lower standard. More importantly, this tip from an informer did not stand alone. The evidence of past and current associations with a number of Asian Assassins members/associates, combined with the informant's tip, provided a strong basis to conclude that intercepting Dat Tang's private communications "may assist the investigation." It certainly provided a basis on which McMahon J. "*could*" conclude that these interceptions "may assist the investigation," which is the deferential *Garofoli* standard of review. See: *R. v. Ebanks*, *supra* at paras. 20-21; *R. v. Abdirahim* (2013), 111 W.C.B. (2d) 844 (Ont. S.C.J.) [2013 CarswellOnt 18711 (Ont. S.C.J.)] at paras. 49-70.

137 For all these reasons, I am satisfied that Dat Tang was properly named as a "known person" in the renewal and expansion authorization.

(iii) The Naming of Tony Huang

138 Of all the issues raised on the s. 8 Motion, the argument concerning whether Tony Huang should have been named as a "known person" in the renewal and expansion authorization has the greatest merit. I am satisfied that he should not have been named.

139 The relevant evidence on this point, relied on by D.C. Clark in his Affidavit, was as follows:

- Surveillance evidence from March 5, 2014 to the effect that Huang "was observed placing a bag in the rear of the black Mazda" driven by Danny Vo;

- Huang was said to have two prior convictions in 2011 for possession of cocaine for the purpose of trafficking and for fail to comply with a recognizance; and

- Huang's past association with two Asian Assassins members/associates, namely, with Anthony Tseng in a 2010 incident and with both Kevin Tiao and Anthony Tseng in a 2006 incident.

140 Mr. Heath, counsel for Tony Huang, mounted a substantial sub-facial attack on this body of evidence. In the result, he successfully established that the first and second asserted facts are fundamentally inaccurate: Tony Huang was *not* identified as the man observed placing a bag in Danny Vo's car on March 5, 2014; and Tony Huang has *no* criminal record whatsoever. The Crown concedes that these two parts of D.C. Clark's Affidavit are erroneous and they must be excised.

141 More importantly, Mr. Heath's cross-examination of D.C. Clark successfully established that the Affiant ought to have known that these two parts of his Affidavit were inaccurate. This is the relevant inquiry on a s. 8 Motion where asserted facts in an affidavit are sub-facially attacked and shown to be untrue. As Moldaver and Côté JJ. put it, speaking for a unanimous Court in *World Bank Group v. Wallace*, 2016 SCC 15 (S.C.C.) at paras. 119 and 122:

> A *Garofoli* application does not determine whether the allegations underlying the wiretap application are ultimately true — a matter to be decided at trial — but rather whether the affiant had "a reasonable belief in the existence of the requisite statutory grounds" (*Pires*, at para. 41). What matters is what the affiant knew or ought to have known at the time the affidavit in support of the wiretap authorization was sworn. As this Court stated in *Pires*, albeit in the context of an application to cross-examine the affiant:
>
> > . . . cross-examination that can do no more than show that some of the information relied upon by the affiant is false is not likely to be useful unless it can also support the inference that the affiant knew or ought to have known that it was false. We must not lose sight of the fact that the wiretap authorization is an investigatory tool. [para. 41]

. . .

> [Various authorities] accord with this Court's observation in *Pires* that an error or omission is not relevant on a *Garofoli* application if the affiant could not reasonably have known of it (para. 41). Testing the affidavit against the ultimate truth rather than the affiant's reasonable belief would turn a *Garofoli* hearing into a trial of every allegation in the affidavit, something this Court has long sought to prevent (*Pires*, at para. 30; see also *R. v. Ebanks* (2009), 97 O.R. (3d) 721 (C.A.), at para. 21). [Emphasis added.]

142 In cross-examination, D.C. Clark frankly conceded his two fundamental errors in relation to Tony Huang. In terms of his erroneous attribution of a prior criminal record to Huang, D.C. Clark agreed that he had done a CPIC check for Tony Huang and had learned that Huang had no criminal record. When setting up the section of his Affidavit relating to Huang on his computer, D.C. Clark was using a template relating to another suspect named Tu Van Nguyen. That other suspect (Nguyen) did have convictions in 2011 for constructive cocaine trafficking and breach of recognizance. As a result, the other suspect Nguyen's criminal record was incorporated into the part of the Affidavit relating to Huang. D.C. Clark explained that he had been "cutting and pasting" from the part of the Affidavit that related to the other suspect Nguyen. He knew that Huang had no criminal record and he agreed that it was "extremely negligent" not to have caught this error when he was reviewing the Affidavit.

143 In relation to the erroneous identification of Huang as the man placing a bag in Danny Vo's car on March 5, 2015, D.C. Clark explained that this error was based on his reading of a summary or chronology prepared by the file manager, D.C. Tai. This summary or chronology is a secondary document that D.C. Clark would read each morning, to see what progress had been made in the investigation. If there was anything significant, he would then read the underlying report prepared by the investigator who was the source of the evidence referred to in the summary. In this instance, D.C. Tai's secondary summary document stated that "Tony Huang is identified as the unknown male" who "was placing a bag into Vo's vehicle." D.C. Clark agreed that this was a very important development as it potentially linked Tony Huang to Danny Vo and to current drug trafficking activity. As a result, D.C. Clark went to the underlying source report prepared by the surveillance officer, D.C. Ghaznavi. It stated that the unknown male "could not be conclusively identified" and that further investigation was "required at this time." D.C. Ghaznavi testified at the preliminary inquiry that his further investigation led him to conclude that the unknown male was *not* Tony Huang. D.C. Clark conceded that he read D.C. Ghaznavi's report but that he "breezed through it" and he must have "missed" the critical part concerning D.C. Ghaznavi's inability to identify the unknown male. D.C. Clark agreed that it was an error for him to rely on the secondary chronology, that he ought to have read the source report carefully, and that he ought to have known the true facts.

144 In these circumstances, the Crown concedes that the only remaining basis in the Affidavit supporting the naming of Huang as a "known person" is the two historical incidents of association with Anthony Tseng in 2010 and with Anthony Tseng and Kevin Tiao in 2006. Both incidents are minor and dated. The 2006 incident involved the theft of a cell phone. Tiao was the only person charged. The Affiant states only that "Huang was investigated" in relation to this same incident and that Tseng was "also investigated in this incident." It is hard to see how any inference concerning current association in 2014 could arise from these limited facts. The 2010 incident involved the O.P.P. stopping a van in a rural area north of Peterborough, finding "small flakes of marijuana" and some gardening tools in the van, and deciding to lay no criminal charges. There were four persons in the van, namely, Huang, Tseng, and two older males. Huang and Tseng were age 21 at the time, consistent with the demographics of the Asian Assassins. The two older males were age 47 and 59 at the time, which is inconsistent with the demographics of the Asian Assassins. This incident is more suspicious and it is more current. The Crown submits that it infers gang-related activity and gang-related associations. It is difficult to support such inferences on the basis of the 2010 incident, given that the two older males accompanying Huang and Tseng were unlikely to be gang members/associates.

145 In my view, the most important contextual fact in relation to Tony Huang is the complete absence of any current evidence of association with Asian Assassins members/associates, in spite of the substantial amount of successful

wiretapping, physical surveillance, and seizures of evidence that had been carried out by the time the Affiants sought the renewal and expansion authorization from McMahon J. on April 15, 2014. It is conceded that Huang had not been heard in the wiretaps or seen in the physical surveillance evidence in the company of alleged Asian Assassins and his phone number had not been in the contact information found in their seized phones. Given this current context, the two historical incidents in 2006 and 2010 could not provide a basis to believe that intercepting Tony Huang's private communications "may assist the investigation" in April 2014.

146 Accordingly, it was unlawful and in violation of s. 8 of the *Charter*, to have named Tony Huang in the renewal and expansion authorization. Needless to say, this was through no fault of McMahon J. who was unaware of the two significant sub-facial defects in D.C. Clark's Affidavit.

147 The only remaining issue is whether to exclude any of the interceptions of Huang's private communications pursuant to s. 24(2) of the *Charter*. The Crown concedes that there are a number of interceptions of Huang that depend for their admissibility on him being named in the renewal and expansion authorization, given that these communications are not with some other "named person" and they do not fall within the "basket clause." Accordingly, these interceptions were "obtained in a manner" that infringed Huang's s. 8 rights. Furthermore, the Crown does not strenuously contest the proposition that the admission of these interceptions would "bring the administration of justice into disrepute."

148 In terms of the first set of *Grant* factors, this violation was serious. D.C. Clark was an honest witness and, in my view, he was genuinely upset and embarrassed by his two mistakes. They were not deliberate but they were inexcusably negligent and they were significant. In these circumstances, the first set of *Grant* factors points towards exclusion of the evidence. See: *R. v. Morelli*, *supra* at paras. 100-103; *R. v. Blake* (2010), 251 C.C.C. (3d) 4 (Ont. C.A.) at para. 33; *R. v. Kokesch* (1990), 61 C.C.C. (3d) 207 (S.C.C.) at paras. 52-3; *R. v. Grant*, *supra* at para. 75.

149 The second set of *Grant* factors also argues in favour of exclusion of the evidence. Wiretapping is arguably the most significant state interference with privacy. In this instance, it is conceded that some 2000 interceptions of Huang's telephone calls took place pursuant to the renewal and expansion authorization that improvidently named him. As a result, the impact on Huang's s. 8 *Charter* interests was very significant. See: *R. v. Nugent*, *supra* at para. 16; *R. v. Sanelli*, *supra* at pp. 11-12.

150 The Crown concedes that the first two sets of *Grant* factors argue in favour of exclusion of the evidence. The Crown rests its s. 24(2) argument solely on the third set of factors and submits that exclusion of the interceptions will mean that the Crown cannot proceed with two counts of conspiracy to traffic (in marijuana and ketamine) against Huang and with any "criminal organization" allegations. It is unclear whether the remaining counts could still be prosecuted as they depend on a search warrant that may be challenged (the police seized 2.5 kilos of marijuana and an unloaded firearm from Huang's residence).

151 I am prepared to accept that the third set of *Grant* factors points in favour of admission of the evidence, as the impact on the Crown's ability to prosecute the case against Huang is significant and the evidence is reliable. However, as Doherty J.A. recently stated, speaking for the Court in *R. v. McGuffie*, 2016 ONCA 365 (Ont. C.A.) at paras. 62-3, "If the first and second inquiries make a strong case for exclusion, the third inquiry will seldom, if ever, tip the balance in favour of admissibility."

152 In my view, the first two *Grant* lines of inquiry strongly favour exclusion of the evidence because the violation was serious and the impact on Huang's s. 8 interests was serious. On balance, this is a clear case for exclusion of any interceptions of Huang's private communications that depend on him being named as a "known person" in the April 15, 2014 authorization.

I. CONCLUSION

153 In the result, the s. 8 Motion is dismissed and the fruits of the wiretap authorizations and the General Warrants issued by McMahon J. are ruled admissible at the various trials pending in this Court, subject to two exceptions. The first

exception is that the wiretap interceptions that depend on Tony Huang being named as a "known person" in the renewal and expansion authorization dated April 15, 2014 are excluded, pursuant to ss. 8 and 24(2) of the *Charter*. The second exception concerns the video images seized from hallway cameras in condominium buildings pursuant to permission from property management or the condominium board, or pursuant to the General Warrants issued by McMahon J. In relation to this second exception, I have simply not ruled on the issue and it will have to await renewal of the s. 8 Motion at some future date on a full and complete record, either before me as the "case management" judge or before the "trial judge" at a trial where the issue arises.

154 I wish to thank all counsel for the very thorough materials that they prepared, for their professionalism throughout this hearing, and for their helpful and effective advocacy.

Order accordingly.

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