COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Yu, 2019 ONCA 942

DATE: 20191202

DOCKET: C64338, C64301, C64280 & C63924

Tulloch, van Rensburg and Harvison Young JJ.A.

DOCKET: C64338

BETWEEN:

Her Majesty the Queen

Respondent

and

Larry Yu

Appellant

DOCKET: C64301

AND BETWEEN:

Her Majesty the Queen

Respondent

and

Dat Quoc Tang

Appellant

DOCKET: C64280

AND BETWEEN:

Her Majesty the Queen

Respondent

and

Ken Ying Mai

Appellant

DOCKET: C63924

AND BETWEEN:

Her Majesty the Queen

Respondent

and

Christopher Saccoccia

Appellant

R. Craig Bottomley and Sherif M. Foda for the appellant Larry Yu

Andrew Burgess for the appellant Dat Quoc Tang

James Lockyer and Eva Taché-Green for the appellant Ken Ying Mai

Anthony Moustacalis and Christen Cole for the appellant Christopher Saccoccia

Randy Schwartz and Jennifer Epstein for the respondent

Heard: April 8-9, 2019

On appeal from the orders of Justice Michael Code of the Superior Court of Justice, dated June 27, 2016 and December 21, 2016, with reasons reported at *R. v. Brewster*, 2016 ONSC 4133 and *R. v. Brewster*, 2016 ONSC 8038 (C64338, C64301, C64280 & C63924).

On appeal from the convictions entered by Justice John McMahon of the Superior Court of Justice on April 6, 2017 and from the sentence imposed on September 21, 2017 (C64338).

On appeal from the conviction entered by Justice John McMahon of the Superior Court of Justice on April 6, 2017 (C64301).

On appeal from the conviction entered by Justice John McMahon of the Superior Court of Justice on May 26, 2017 and from the sentence imposed on September 21, 2017 (C64280).

On appeal from the conviction entered by Justice Julie A. Thorburn of the Superior Court of Justice on May 18, 2017 (C63924).

Tulloch J.A.:

A. OVERVIEW

[1] This is a joint appeal by four co-accused.

[2] The appeal concerns the constitutionality of certain police investigative techniques and wiretap authorizations issued by McMahon J. on February 24, April 15, 2014 and May 2, 2014, and a related general warrant issued on February 24, 2014, and renewed on April 15, 2014. Police were investigating criminal gang activity in Toronto.

[3] Police obtained wiretap authorizations under ss. 185 and 186 of the *Criminal Code*, R.S.C. 1985, c. C-46, authorizing them to intercept the communications of certain targets. The initial wiretap authorized interception of the communications of 144 "known persons."

[4] The general warrant issued under s. 487.01 of the *Criminal Code* authorized the police to use a Mobile Device Identifier ("MDI") to identify the cell phones of the targets of the investigation.

[5] The general warrant also authorized the police to enter common areas of multi-unit buildings, to enter the private units of some of the appellants and their associates, and to install hidden cameras in the hallways outside the condominium units of some of the targets of the investigation.

[6] The police investigation led to the arrest of some 112 individuals on a variety of charges.

[7] A combined pre-trial application was brought by 35 accused – including each of the appellants – seeking to exclude evidence obtained through the wiretaps and general warrants on the basis that the authorization and execution of the wiretaps and general warrants violated their rights under s. 8 of the *Canadian Charter of Rights and Freedoms*.

[8] Code J., acting as the designated case management judge, dismissed the application.

[9] The first part of the decision on the application, *R. v. Brewster,* 2016 ONSC 4133 ("*Brewster I*"), dealt with the following key issues:

- Whether there had been non-disclosure or omissions with respect to obtaining a judicial authorization to use a cell phone identifier (referred to as a MDI), and if so, the materiality of those omissions; and

- Whether warrantless entries made by the police into the common areas of certain condominium buildings were constitutional, and if not, the impact of those warrantless entries on the warrants that followed.

[10] The second part of the decision on the application, *R. v. Brewster*, 2016 ONSC 8038 ("*Brewster II*"), which was released following further submissions, considered:

- Whether police cameras installed in common areas of condominium buildings without a warrant, but with the consent of the condominium management, violated s. 8 of the *Charter*;

- Whether the officers violated the duty to make full, frank and fair disclosure by failing to disclose these prior camera installations when seeking judicial authorization to install more cameras; and

- Whether any such non-disclosure was material to the issuing judge's decision to grant the subsequent warrants, in violation of the applicants' s. 8 *Charter* rights.

[11] After the application was dismissed, the appellants Mr. Mai, Mr. Tang and Mr. Yu, did not contest their convictions and were convicted on an agreed statement of facts. McMahon J.

sentenced Mr. Mai and Mr. Yu to 13 years imprisonment less 19 months credit for time served, and sentenced Mr. Tang to 7 years imprisonment less 4 months credit for time served.

[12] The appellant Mr. Saccoccia brought an application to exclude evidence obtained after a search of his condominium unit under the considerations as set out in *R. v. Garofoli*, [1990] 2 S.C.R. 1421, and a s. 11(b) application claiming that he was not tried within a reasonable time. Thorburn J., as she then was, dismissed both applications.

[13] Following those dismissals, Mr. Saccoccia also did not contest his conviction. Thorburn J. sentenced him to 33 months imprisonment.

[14] The appellants jointly argue that the application judge erred in failing to exclude evidence obtained through the wiretaps and general warrant. They renew the s. 8 arguments made before the application judge surrounding: (1) material non-disclosure in relation to the MDI; (2) warrantless entries into condominium common areas; and (3) warrantless installation of hidden cameras in condominium hallways.

[15] The appellants also raise individual arguments.

[16] Mr. Tang argues that there were insufficient grounds to name him in the second wiretap authorization.

[17] Mr. Saccoccia argues that the trial judge erred in dismissing his *Garofoli* application and s. 11(b) application, and that the sentence imposed on him was demonstrably unfit.

[18] Mr. Mai also appeals his sentence. He claims that the reasons for sentence are unclear and alleges the trial judge made several errors.

[19] For the reasons that follow, the appeals are dismissed apart from Mr. Mai's sentence appeal.

B. BACKGROUND FACTS

[20] This matter arose out of a large scale, multi-jurisdictional, coordinated police investigation targeting criminal gangs in Toronto engaged in high level drug trafficking.

[21] The police investigations, named Project Battery and Project Rx, investigated a number of offences related to several major Toronto gangs. The "Asian Assassinz" and "Project Originals" gangs were targeted in Project Battery, and the "Sick Thugz", "Young Regent Niggas", and "Chin Pac" gangs were targeted in Project Rx. These two sets of criminal gangs were involved in a gang dispute synonymous with "open warfare" in downtown Toronto. All of the appellants were targets of Project Battery and were members of, or investigated in association with, the Asian Assassinz gang.

[22] Many of the targets of the police investigation lived in condominium buildings, including buildings on Western Battery Road, Joe Shuster Way and Valley Woods Road.

[23] The investigation resulted in the arrest of 112 individuals. Those individuals were charged with offences including murder, drugs and firearms and human trafficking, possession

of firearms, and possession of drugs for the purpose of trafficking. The police seized items including firearms, ammunition, bullet proof vests, GPS tracking devices, almost $350,000 cash, and large amounts of heroin, cocaine and other drugs. The facts and background of this matter are described in greater detail in the application judge's two decisions, *Brewster I* and *Brewster II*.

[24] As part of the investigation, on February 21, 2014 the police applied before the issuing justice, McMahon J., to obtain a wiretap authorization, general warrants and other ancillary orders. The issuing justice approved that application and subsequently renewed and expanded it on April 15, 2014. The latter application targeted, among others, Mr. Mai, Mr. Tang and Mr. Yu. Through inadvertence, it did not include Mr. Saccoccia even though by that time police knew that he was associated with Mr. Mai. On May 4, 2014, the police obtained a revised authorization, also targeting Mr. Saccoccia.

[25] One of the investigative tools that the police used, and that was authorized under the general warrants, was a Mobile Device Identifier. The MDI functions by mimicking a cell phone tower. It allows the police to pick up all cell phone signals from a particular area and record the serial numbers associated with the cell phones in that area. The MDI does not record conversations. Rather, it assists police in identifying what cell phone is being used by a particular suspect. By deploying the MDI to two or more locations where a suspect is under surveillance the police can, by process of elimination, identify the serial number of the cell phone being used by the suspect.

[26] On April 15, 2014 and May 2, 2014, the issuing justice issued general warrants authorizing the police to enter the common areas of three condominium buildings to make observations, and to install a hallway camera in one of the buildings. Prior to the issuance of those warrants, the police had already accessed common areas of the condominium buildings to make observations, including in the parking garages, hallways and stairwells. This generally had been done with the consent of the condominium building management. The police had also installed hidden hallway cameras in some of the condominium buildings, again with the consent of condominium management. Only one of the cameras, in the building on Joe Shuster Way, is relevant to this appeal.

[27] The investigation culminated in a "take-down" conducted on May 28, 2014. The police executed numerous search warrants that day, which included searches of the units occupied by the four appellants. The evidence obtained against the appellants was overwhelming. Their defences to the criminal charges were largely dependent upon the exclusion of the evidence obtained through the warrants and authorizations.

C. PROCEDURAL HISTORY

(i) *R. v. Brewster*, 2016 ONSC 4133 (*Brewster* I)

(a) Issue No. 1: MDI Device

[28] In the first of the application decisions, *Brewster I*, the application judge dismissed the application, finding that the manner in which the wiretaps and general warrants were authorized did not violate the applicants' s. 8 *Charter* rights.[1] He concluded that while there were some omissions relating to the proposed use of the MDI by the police, those omissions were immaterial and would not have affected the issuing justice's decision to issue the general warrant.

(b) Issue No. 2: Warrantless Entries

[29] The applicants argued that the affiants on the wiretap authorizations and general warrants failed to make full, fair and frank disclosure, by failing to mention that the police had already made warrantless entries into the common areas of condominium buildings of interest in the investigation, including the parking garages, elevators and hallways.

[30] The applicants did not seek to excise the references to the warrantless entries from the wiretap authorizations – as they conceded that excision would have no impact on the grounds for the wiretap in this case – but rather sought a declaration that the affiants failed to make full disclosure.

[31] The application judge reviewed the surveillance reports generated in the investigation (not all of which were before the issuing justice or summarized in the affidavits filed in support of the wiretap authorization) and heard testimony from several surveillance officers.

[32] Based on the evidence before him, the application judge made several findings:

- The vast majority of the physical surveillance conducted in the investigation did not include entries into the common areas of the condominium buildings. Of those that did, most of the warrantless entries occurred in relation to parking garages, rather than hallways or other common areas;

- The purpose of entering a building's parking garage was to determine whether the suspect's car was parked in the garage. These entries allowed police to decide whether to set up surveillance outside the building. Generally, this entry would occur at the start of a surveillance shift and last approximately two to three minutes;

- The purpose of the entries into the elevators and hallways (which comprised a small portion of the overall entries) was to confirm whether the suspect was a resident of the building, determine the unit number that the suspect entered and determine which way the unit faced. This information was important not only to enable police to obtain a search warrant, but also so that the surveillance team could know where to position themselves inside or outside of the building to avoid detection; and

- The evidence established that, at the early stages of the investigation, the surveillance officers did not always obtain consent from the buildings' property management to enter the common areas, but ultimately did obtain consent in relation to all relevant buildings.

[33] The application judge accepted that the information placed before the issuing justice contained very little detail about the manner, duration, purpose and permission (or lack thereof) for the warrantless entries. However, the application judge was satisfied that those omissions were not material and would not have affected the decision to issue the authorizations. In support of this conclusion, the application judge was satisfied that the warrantless entries into the common areas did not violate s. 8 of the *Charter.*

[34] To begin, the application judge found that the information set out in the affidavits was not erroneous or misleading; it simply lacked additional detail. The issuing justice would have appreciated, from the summaries of the surveillance reports which were before him, that police had entered into the common areas of various condominium buildings on several occasions without a warrant.

[35] Further, the application judge concluded that the police did not violate s. 8 of the *Charter* by conducting limited physical surveillance in the common areas of the buildings.

[36] He reviewed the relevant authorities and concluded that the entries into the common areas of buildings did not constitute a “search” within the meaning of s. 8 of the *Charter*, as the applicants had no reasonable expectation of privacy in the common areas of condominium buildings. He relied on the following considerations in reaching this conclusion:

- The officers had abundant reasonable grounds to be following and investigating the suspects;

- The nature of the observations, like those in *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432, were unobtrusive and mundane. None of the observations touched on a “biographical core of personal information” or “intimate details of personal life”;

- The surveillance officers never acquired information about any activity inside a unit (distinguishing this case from *R. v. Evans*, [1996] 1 S.C.R. 8; and *R. v. White*, 2015 ONCA 508, 127 O.R. (3d) 32);

- The condominium buildings in question were large with many units. Large numbers of residents, their friends, family, guests, condo staff and tradespeople, etc., had access to the common areas. As a result, the residents could not “regulate access” to these common areas;

- Once the fact of residency was known to exist in relation to some suspects, the police did seek permission to enter from property management or, sometimes, the condominium board. In all cases, they were granted permission; and

- There was evidence that the property management was already conducting video surveillance of the common areas of the buildings. This suggested that the residents had given up certain expectations of privacy in relation to these common areas.

[37] As a consequence, the application judge was satisfied that the limited physical surveillance carried out in the common areas of the condominium buildings did not amount to a “search” under s. 8 of the *Charter*. He was also satisfied that the detailed circumstances

surrounding this surveillance were not material to the issuance of the wiretap authorization and related general warrants.

[38] The applicants had conceded that excising the observations made in the common areas of the condominium buildings would not affect the issuance of the wiretap authorization or general warrant. Given the factual insignificance of the warrantless surveillance of the common areas, detailed elaboration in the affidavits would not have been helpful or justified. In the application judge's view, this distinguished the present case from *White*, because in that case, the warrantless entries into the condominium building's common areas were essential to the grounds for the search warrant.

[39] The application judge was satisfied that the property management staff – not solely the condominium board – had the authority to consent to allow police officers to enter the common areas of the condominium buildings to conduct surveillance.

[40] The application judge further concluded that, had he found the warrantless entries to constitute a "search", the entries were reasonable and authorized by law, based on the doctrine of implied licence.

[41] Finally, the application judge found that the warrantless surveillance entries – if considered "searches" within the meaning of s. 8 of the *Charter* – were "reasonable" because they were authorized by law. This provided another reason for concluding that the omission of details concerning the prior warrantless entries was not material.

(ii) *R. v. Brewster*, 2016 ONSC 8038 ("*Brewster* II")

[42] In the second decision, issued on December 21, 2016, the application judge addressed the applicants' challenge to the general warrant issued on February 24, 2014, which authorized the installation of surveillance cameras in the common areas, including hallways, of certain condominium buildings associated with targets of the investigation.

[43] The applicants argued that the affiant failed to make full, fair, and frank disclosure in the application for the general warrant, and that the warrant should be set aside. In particular, the applicants focused on the fact that the affiant failed to disclose that the police had already installed video surveillance cameras in three of the buildings (including the building on Joe Shuster Way) with the consent of property management, prior to issuance of the general warrant authorizing the installation of video cameras. While the affiant did not disclose the pre-existing cameras in his affidavit filed in support of the initial general warrant, he did disclose the existence of the earlier warrantless cameras in his affidavit filed on the extension of the general warrant, two months later.

[44] Again, only the camera installed at Joe Shuster Way is relevant to this appeal.

[45] The Crown intended to tender at trial evidence obtained from the camera which had been installed before a warrant was obtained at Joe Shuster Way, at least in relation to Mr. Mai. The applicants argued that the consent of condominium management to install the camera was insufficient for the purpose of s. 8 of the *Charter*, and that a warrant was required.

[46] The application judge addressed three issues:

- Whether the cameras installed without warrant, but with the consent of the condominium management, violated s. 8 of the *Charter*;

- Whether the failure to disclose these prior installations in the affidavit sworn in support of the application for the February 24, 2014 general warrant violated the duty to make full, fair and frank disclosure; and

- Whether any such non-disclosure was material to the issuing justice's decision to grant the warrant, thus violating the applicants' s. 8 *Charter* rights.

[47] The application judge concluded that the police did not violate the applicants' s. 8 rights by installing hidden hallway cameras without a warrant. He found that the police had obtained valid and sufficient consent from condominium management to install the cameras, and that a warrant was not required in the circumstances given the diminished expectation of privacy in common areas such as the hallways.

[48] The application judge further concluded that while there was a failure to make full, fair and frank disclosure in relation to these two warrantless cameras, the omissions were not material to the decision to issue the general warrant given the minimization conditions imposed in the general warrant.

D. ISSUES ON APPEAL

[49] The appellants raise individual and joint grounds of appeal. The joint grounds are:

1) Did the police make material omissions in the Information to Obtain ("ITO") concerning the use of the MDIs?

2) Warrantless Entries

(a) Did the police fail to make full, frank and fair disclosure in the application for the general warrants, by failing to mention the warrantless entries they had already made into common areas of targeted condominium buildings?

(b) Did these entries violate the appellants' s. 8 rights?

(c) If the entries did violate s. 8, should the subsequent general warrants be quashed, and the evidence obtained from them excluded under s. 24(2)?

3) Warrantless Video Cameras

(a) Did the police fail to make full, frank and fair disclosure in the application for the February general warrants by failing to mention that they had already installed hidden cameras in the hallways of some condominium buildings, and using misleading forward-looking language implying they had not yet installed any cameras?

(b) Did the installation of the warrantless hidden cameras violate the appellants' s. 8 rights?

(c) If the cameras did violate s. 8, should any evidence from them be excluded, and should certain of the subsequent general warrants be quashed and the evidence from them also be excluded under s. 24(2)?

[50] They raise the following individual grounds:

1) Did the police have insufficient grounds to name Mr. Tang in the second wiretap authorization?

2) Did the trial judge err in dismissing Mr. Saccoccia's applications under ss. 8 and 11(b) of the *Charter*?

3) Was the sentence imposed on Mr. Mai demonstrably unfit?

E. DISCUSSION

[51] I will deal first with the joint grounds of appeal, and then turn to the individual grounds of appeal raised by Mr. Tang, Mr. Saccoccia, and Mr. Mai.

(1) The Joint Grounds of Appeal

I. MDI Arguments

[52] The Crown submits that it is unnecessary to consider this ground of appeal for several reasons. First, the Crown argues that Mr. Tang, Mr. Yu and Mr. Saccoccia have no standing to make submissions regarding the MDI, since the police never obtained nor even attempted to obtain evidence about them through the use of an MDI.

[53] The only appellant who was targeted for investigation through the use of an MDI was Mr. Mai. However, he never had his phone identified through the use of the MDI, and none of his communications were intercepted. As a result, the Crown submits that the use of the MDI played no role in his conviction. A decision on this ground therefore would have no bearing on his appeal.

[54] I agree with the Crown's submissions that it is unnecessary to decide the appellants' arguments in relation to the MDI. As the application judge noted in *Brewster I*, the general warrant authorizing the use of the MDI affected only a co-accused, and not any of the appellants.

[55] I would dismiss this ground of appeal.

II. Warrantless Entries

[56] The appellants make three distinct arguments about the warrantless entries into the common areas of the condominiums, made both prior to and after the consent of the condominium management. First, they argue that in the ITO for the general warrant, the affiant failed to make full, fair, and frank disclosure about the extent of the warrantless entries, and

that this failure would have undermined the basis for the general warrant. Second, they argue that these entries violated their s. 8 rights to be free from unreasonable search. Third, they argue that if the warrantless entries were contrary to s. 8, the general warrant should be quashed and the evidence obtained from it excluded pursuant to s. 24(2) of the *Charter*.

[57] I reject the appellants' argument about the failure to make full, fair, and frank disclosure, largely for the reasons of the application judge.

[58] With respect to the alleged s. 8 breach, as I will explain, the vast majority of the pre-consent warrantless police entries into common areas of the condominiums did not violate s. 8. Most of the entries were into underground parking garages. In these cases, the appellants did not have a reasonable expectation of privacy in the parking garages of these buildings, and their s. 8 rights were not engaged.

[59] The only entries which engaged s. 8 were those into condominium hallways. The appellants had a reasonable, but low expectation of privacy in the condominium hallways. However, the appellants' reasonable expectation of privacy was attenuated by the authority of the condominium board and property management to consent to police entry. The valid consent given by property management at Joe Shuster Way authorized the police entries that followed. The entries into the hallways with the valid consent of property management did not infringe s. 8.

[60] In the single instance where the police entered the common hallways without the consent of property management, this violated the s. 8 rights of the targets of their surveillance. The entry was not authorized by law. This violation had only a minor impact on the *Charter*-protected interests of the affected appellants, which was not the result of any bad faith on the part of the police.

(i) Appellants' Arguments on Warrantless Entries and the General Warrant

[61] The appellants' arguments on this issue have many layers. They argue first that the affiant failed to disclose the fact of the warrantless entries into multiple buildings, not just the ones discussed above, thus failing in the obligation to make full, fair, and frank disclosure. As I understand this argument, it does not turn on whether the warrantless entries violated s. 8. The appellants submit that the failure to disclose the extent of the warrantless entries would have been misleading to the issuing judge, and had the entries been disclosed, the issuing judge would have appreciated that the warrantless entries were largely ineffective as an investigative technique, and he either would not have authorized further entries or he would have limited further entries. The appellants argue that the application judge should have excised the references to the warrantless entries in the April ITO. Had he done so, the general warrant authorizing further covert entries and the installation of covert cameras at Joe Shuster Way and Western Battery Road, as well as covert entry and audio and video probes at Mr. Mai and Mr. Saccoccia's units at Joe Shuster Way could not have issued.

[62] I reject these arguments, based on three key findings made by the application judge. First, he found that the issuing justice would have appreciated from the context that some of the entries referred to were warrantless. The ITO therefore was not misleading. Second, he found that the affiant was not required to set out the detailed circumstances surrounding the

prior warrantless surveillance because those circumstances were not "material". His findings are entitled to deference: *R. v. Paryniuk*, 2017 ONCA 87, 134 O.R. (3d) 321, at paras. 72-73, leave to appeal refused, [2017] S.C.C.A. No. 81. Finally, as the application judge found, none of the information gathered from the warrantless surveillance was material to the issuance of the subsequent warrants. Its excision from the ITOs would have had no impact on the validity of the warrants. Notably, before the application judge, the appellants conceded that the observations made in the common areas could all be excised with no impact on the general warrants.

(ii) Section 8 of the *Charter*

[63] For s. 8 of the *Charter* to be engaged, the accused person must possess a reasonable expectation of privacy: *R. v. Edwards*, [1996] 1 S.C.R. 128, at para. 45. Once it is determined that the accused has a reasonable expectation of privacy, a warrantless search that intrudes on that expectation will be presumptively unreasonable. The onus is on the Crown to show that the search was authorized by law: *R. v. Caslake*, [1998] 1 S.C.R. 51, at para. 30. The authorizing law must be reasonable, and the search must have been conducted in a reasonable manner: *Caslake,* at para. 10.

[64] As a preliminary matter, the Crown argues that even if condominium residents in general have a reasonable expectation of privacy in the common areas of their buildings, the appellants cannot all have a reasonable expectation of privacy in both of the relevant addresses – Joe Shuster Way and Western Battery Road – because some of the appellants are unconnected with one or both of these addresses. If the appellants cannot have a reasonable expectation of privacy in these addresses at all, let alone in the common areas, they would not have standing to challenge the warrantless entries at addresses with which they are unconnected. For example, the Crown submits that Mr. Tang has no standing to challenge the warrantless entries at either address, because (1) Mr. Tang did not have any connection with Joe Shuster Way, and (2) although Mr. Tang resided at the Western Battery Road address, the surveillance at that address did not target him, nor did it yield any information relating to him.

[65] I agree with the Crown that Mr. Tang does not have standing in relation to Joe Shuster Way. Mr. Yu, who did not have any connection with that address, also does not have standing. Neither had any reasonable expectation of privacy at that address. Similarly, Mr. Saccoccia did not have any connection with the Western Battery Road address. The Crown accepts that Mr. Mai has standing in relation to both addresses.

[66] I disagree with the Crown's position that Mr. Tang does not have standing in relation to Western Battery Road – where he resided – because the surveillance in the common areas of that building did not target him and yielded no information relating to him. Assuming condominium residents have a reasonable expectation of privacy in the common areas of their residence (discussed below), I am not prepared to say that Mr. Tang lacked such an expectation of privacy in his own residence simply because the surveillance was not directed at him. Further, the fact that the surveillance yielded no information about him is more relevant to the issues that arise under s. 24(2), should a breach of s. 8 be found, than to the question of standing.

[67] I turn now to the issue of reasonable expectation of privacy in the common areas of a multi-unit dwelling. The existence of a reasonable expectation of privacy is determined against the totality of the circumstances. The Supreme Court of Canada stated in *R. v. Spencer*, 2014 SCC 43, [2014] 2 S.C.R. 212, that the various factors in this contextual analysis can be grouped into four lines of inquiry:

1) The subject matter of the alleged search;

2) The claimant's interest in the subject matter;

3) Whether the claimant had a subjective expectation of privacy in the subject matter; and

4) Whether the subjective expectation of privacy was objectively reasonable.

[68] This court expanded on this analysis in the context of the reasonable expectation of privacy in common areas of a multi-unit dwelling in *White*. The court laid out the following factors that are relevant to the level of expectation of privacy in common areas of multi-unit buildings:

- Degree of possession or control exercised over the common area by the claimant;

- Size of the building: the larger the building, the lower the degree of reasonable expectation of privacy in common areas;

- Security system or locked doors that function to exclude the public and regulate access; and

- Ownership of the property.

[69] In my view, these factors lead to different conclusions depending on the type of common area accessed by the police, which in this case relates to the parking garage and the hallways. I conclude that the appellants did not have a reasonable expectation of privacy in the parking garages, but they did have such an expectation of privacy in their hallways, albeit a diminished one. I address first what I consider to be the subject matter of the search, and then explain why I conclude that the appellants had no reasonable expectation of privacy in relation to the garages but did have a reasonable expectation in the hallways.

[70] Third party consent to the police entries – here, property management or the condominium board – is an important aspect of the "totality of the circumstances". I note that the law on the role of third-party consent to police entries into shared residential spaces is unsettled: *R. v. Reeves*, 2018 SCC 56, 427 D.L.R. (4th) 579, at paras. 19-26. In *Reeves*, Karakatsanis J., writing for the majority, declined to decide whether police entry into a shared home with the consent of one resident would violate the *Charter*. Karakatsanis J. considered the validity of third-party consent to turn over a computer. She concluded that a co-resident's consent could not eliminate the accused's reasonable expectation of privacy in the shared computer.

[71] Karakatsanis J. left open the possibility that a co-resident could consent to police entry into shared residential spaces. She recognized that police entry into a shared home involves "competing considerations": para. 23. On the one hand, privacy in the home is of central importance. On the other hand, other residents may have valid interests in consenting to police entry, especially if the other residents are victims of crime: para. 24. The issue before this court is analogous to the issue left undecided in *Reeves*, and involves similar but not identical competing considerations.

[72] The role of third-party consent in the analytical approach to police entries into shared residential spaces is similarly unclear. In this court's decision in *R. v. Reeves*, 2017 ONCA 365, 350 C.C.C. (3d) 1, at para. 49, Laforme J.A., writing for the court, concluded that consent by a co-resident to police entry "is relevant as part of determining whether the police have intruded upon a reasonable expectation of privacy held by the accused". Laforme J.A. concluded that "the inquiry is two-staged: (a) would the accused reasonably expect that his or her co-resident would have the power to consent to police entry into a common space, and (b) if so, did the co-resident actually consent?" In Laforme J.A.'s view, if the accused had the relevant reasonable expectation, and the co-resident actually consented, the accused's reasonable expectation of privacy would be negated, and there would be no "search" in s. 8 terms.

[73] Other courts have preferred to consider the second question – actual consent – on the issue of whether the search was authorized by law, rather than as negating the accused's reasonable expectation of privacy: *R. v. Clarke*, 2017 BCCA 453, 357 C.C.C. (3d) 237, leave to appeal refused, [2018] S.C.C.A. No. 65; *R. v. R.M.J.T.*, 2014 MBCA 36, 311 C.C.C. (3d) 185.[2]

[74] For the purposes of this case, it is unnecessary to decide whether the actual consent of condominium management is taken into account in assessing the appellants' reasonable expectation of privacy, or whether the police entries were "authorized by law". Both before this court and the application judge, the appellants' primary argument was not that the condominium board could never consent to police entries into common areas. Instead, they argued that there are limits to the board's ability to consent, that only the board, and not property management, could give valid consent, and that the consent given in this case was invalid for various reasons.

[75] I will proceed on the basis that the possibility of consent affects the appellants' reasonable expectation of privacy, while any actual consent provides legal authorization for the search, as this is effectively how it was discussed by the parties.

i. Subject Matter of the Search

[76] The question to be answered when determining the subject matter of the search is "what the police were really after": *R. v. Marakah*, 2017 SCC 59, [2017] 2 S.C.R. 608, at para. 15. In my view, the subject matter of the search here was information about the appellants' residency and their comings and goings. I agree with the respondent that what the police were really after in the preliminary hallway entries was basic information such as the fact of residency in the building and the unit number of a suspect. This is information that would be available to

the police and in public view if, for example, the police followed someone home to a detached house. A person's physical address is not personal information that attracts *Charter* protection: *R. v. Saciragic*, 2017 ONCA 91. The police also wanted to determine the direction that the suspects' units faced, so they could conduct surveillance inside or outside the building without detection.

[77] After these basic facts had been established, the police were interested in obtaining information about the appellants' comings and goings – whether they were at home (when the police checked to see if their cars were parked in the garage), who they visited and who visited them, what they were carrying, and how long they stayed during these visits. Although any individual observation made from the physical surveillance might be characterized as "mundane", the surveillance observations together and over time produced more invasive information about what happened in and around the appellants' homes.

ii. Reasonable Expectation of Privacy

a) The Garage Entries Do Not Engage s. 8 of the *Charter*

[78] The bulk of the police entries at both Joe Shuster Way and Western Battery Road were into the parking garages. As this court held in *R. v. Drakes*, 2009 ONCA 560, 252 O.A.C. 200, leave to appeal refused, [2009] S.C.C.A. No. 381, none of the appellants had a reasonable expectation of privacy with respect to the parking garages.

[79] In *Drakes*, this court upheld the finding of Epstein J. (as she then was) that condominium unit owners did not have a reasonable expectation of privacy with respect to the use of a spot in the underground parking garage. It reasoned that the unit owners shared the parking garage with 440 other units and had limited control over it, and that management consented to the police gaining access (at para. 18). In short, to put it in terms of the factors set out in *Spencer*, unit owners could not have an objectively reasonable expectation of privacy in a garage shared with so many other owners and over which they had very little control.

[80] Similarly, the parking garages in both Joe Shuster Way and Western Battery Road were large, and the appellants had limited control over them. The Western Battery Road garage had a visitors' section that was accessible to the general public. As explained below, the police obtained consent before all prolonged surveillance in the Joe Shuster Way garage. While there is insufficient evidence of consent in relation to Western Battery Road, such consent was not necessary as the police generally entered the visitors' section to determine whether a target's car was parked in the garage or not, which they were entitled to do as any visitor could do. The appellants had no reasonable expectation of privacy regarding observations made from a space accessible to the general public. Even if the appellants had a subjective expectation of privacy in the garage, that expectation was not objectively reasonable.

b) Hallway Entries Engage s. 8 of the *Charter*

[81] The hallways are a different story. Under the *White* framework, in my view, the appellants had a reasonable expectation of privacy in the hallways of their respective buildings, although it was at the low end of the spectrum. *White* establishes that a contextual

approach is required when applying the reasonable expectation of privacy analysis, and there is no categorical bar to a reasonable expectation of privacy in shared common areas.

[82] Once inside an access-controlled condominium building, residents are entitled to expect a degree of privacy greater than what, for instance, they would expect when approaching the building from the outside. This results from the fact that anyone can view the building from the outside, but there is some level of control over who enters the building.

[83] The level of expectation of privacy inside a condominium building will vary. The level of expectation of privacy is dependent on the likelihood that someone might enter a certain area of the building, and whether a person might reasonably expect a certain area to be subject to camera surveillance.

[84] Some areas of condominium buildings are routinely accessed by all condominium residents, such as the parking garage or elevator lobby. The level of expectation of privacy in those areas is low, albeit remaining greater than would be expected outside of the building. The level of expectation of privacy increases the closer the area comes to a person's residence, such as the end of a particular hallway of a particular floor of the building. Even in those less-frequented areas the level of expectation of privacy is low, but not as low as in the more commonly used areas.

[85] A resident or occupant's reasonable expectations surrounding camera surveillance in a condominium building depend on whether the cameras are visible, and whether the resident has been informed by the condominium management as to the location of any security cameras installed in the building. If there is no visible camera, and if the resident has been told that there are no security cameras, then residents are entitled to expect their movements are not subject to camera surveillance.

[86] The only time that condominium residents should expect complete privacy is when they are inside their unit with the door closed. As soon as they open their door, or exit their unit, it is reasonable to expect that they may be observed, with that level of expectation increasing the closer they get to the main areas of the building or to any security cameras.

[87] On balance, the factors listed above establish a low, but reasonable expectation of privacy in these common areas. The buildings had strict security features designed to exclude outsiders, and the condominium rules at Joe Shuster Way barred non-owners and non-occupants from accessing the common areas unless accompanied by an owner or occupant. It was thus reasonable for the appellants to believe that the buildings' security systems would operate to exclude the police from entering the common areas of the building multiple times without permission. At the Joe Shuster Way building, security cameras are installed in the lobby, the ramp to the parking garage, at the elevator lobby, and in the elevators – but not in the hallways outside units. The appellants had some limited reasonable expectation of privacy in those areas.

[88] This case is distinguishable from cases such as *R. v. Laurin* (1997), 113 C.C.C. (3d) 519 (Ont. C.A.), and *R. v. Thomsen*, [2005] O.J. No. 6303 (S.C.), aff'd 2007 ONCA 878, where the court found no reasonable expectation of privacy in the hallways of multi-unit buildings.

Notably, in *Thomsen*, the police were responding to a complaint made by the building's management about the smell of marijuana in the hallways, so had been expressly invited to the premises by management. In *Laurin*, the building was accessible to the general public, unlike the buildings here.

[89] However, the appellants' reasonable expectation of privacy in these areas was low. Both condominium buildings in this case were much larger than the ten-unit building in *White*. Each had over 300 units. The police observations in this case – the subject matter of the search – were also narrower. Unlike in *White*, the officers did not make or attempt to make any observations about things happening within the units or enter private areas such as storage lockers.

[90] Further, given the context in which the condominium operated, the appellants would have reasonably expected that the board, and by extension, property management, could consent to police entry.

[91] The condominium corporation has a statutory duty to administer the common elements and to manage the property of the corporation on behalf of the owners: *Condominium* Act, 1998, S.O. 1998, c. 19, ss. 17(1), 17(2). The board is elected by the owners to manage these affairs in their best interests: ss. 27-28. This statutory duty can be understood as conferring a responsibility and authority on the board to act as the decision maker for the owners as a collective.

[92] The condominium board and, by extension, property management, were entrusted with security of the building and the residents. The appellants would have reasonably expected that the property manager could consent to police entry into the building and its hallways and, in fact, would be likely to consent to police entry if informed of the possibility of criminal activity within the building.

[93] I emphasize that the authority of the condominium board and property management to regulate access to the building is just that: an authority to regulate access. As I will discuss in the context of the warrantless camera installations, the authority to consent to police entry does not translate into an authority to consent to more intrusive police investigative measures, such as entry into a particular condominium unit.

[94] Accordingly, the appellants' expectation of privacy with respect to the common areas is further reduced given the possibility that property management could consent to police entry. The appellants had a reasonable expectation of privacy, albeit on the low end of the spectrum.

iii. Consent of Property Management to Authorize Entries

[95] As outlined above, the possibility of consent of the condominium board or management to allow police entry further attenuated the appellants' low reasonable expectation of privacy.

[96] As I will explain, property management at Joe Shuster Way validly consented to the police entries, and as a result, the entries were authorized by law. There was insufficient

evidence to conclude that the police had consent to enter Western Battery Road, and accordingly, those entries were not authorized by law.

a) Property Management Validly Consented at Joe Shuster Way

[97] In written submissions, the appellant Tang on behalf of the appellants submitted that the validity of the consent in this case should be determined by the factors set out in *R. v. Wills* (1992), 7 O.R. (3d) 337 (C.A.), namely:

- There was a consent, express or implied;
- The giver of the consent had the authority to give the consent in question;
- The consent was voluntary and was not the product of police oppression, coercion or other external conduct which negated the freedom to choose whether or not to allow the police to pursue the course of conduct requested;
- The giver of the consent was aware of the nature of the police conduct to which he or she was being asked to consent;
- The giver of the consent was aware of his or her right to refuse to permit the police to engage in the conduct requested; and
- The giver of the consent was aware of the potential consequences of giving the consent.

[98] The consent provided at Joe Shuster Way was valid on all of these factors. I have addressed above why the board had the authority to provide consent to police entry. The property manager, Mr. Chudnofsky, likewise had the authority to provide consent. The condominium board entrusted him with management of the property, including its security.

[99] There was extensive evidence in front of the application judge about the circumstances surrounding Mr. Chudnofsky's consent. The evidence was that the police obtained Mr. Chudnofsky's consent to access 38 Joe Shuster Way on December 2, 2013, a day prior to the first entry into the garage, and more than a month prior to the first entry into the hallways or stairwells.

[100] While the appellants submit that Mr. Chudnofsky was coerced to participate in the investigation, this was contrary to his own evidence, which evidence the application judge was entitled to accept. The application judge found as a fact that Mr. Chudnofsky was aware of his right to refuse to give consent. Regarding the nature of the police conduct, Mr. Chudnofsky was aware that the police required access to both the garage and the building, and thus granted them a key fob and access code that could be used at both the garage entrance and the front lobby door.

[101] As for awareness of the potential consequences, *Wills* clarifies that what matters is whether the person giving consent understands whether she is a target or merely an "innocent bystander" whose help is requested by the police: at para. 71. Here, Mr. Chudnofsky clearly understood that both he and nearly all the residents of the building were innocent bystanders,

and the police required their help. While the police had deliberately misstated the nature of the investigation to him in order not to compromise the investigation, his evidence was that the specific crime under investigation did not matter to him. In the circumstances of this case, the provision of inaccurate information about the offence under investigation did not affect the validity of the property manager's consent.

[102] The warrantless hallway entries at Joe Shuster Way conducted after the consent was provided did not violate s. 8 of the *Charter*. The appellants had a reasonable expectation of privacy in the hallways, which was attenuated by the ability of the board and property management to consent to police entry. Property management in fact consented. Accordingly, the resulting search was authorized by property management's consent. Section 8 of the *Charter* was not violated.

b) Insufficient Evidence of Valid Consent at Western Battery Road

[103] There is insufficient evidence of a valid consent by property management at Western Battery Road.

[104] The best the Crown can point to is the evidence that the police generally sought consent as soon as they learned that a target was associated with an address. Accordingly, the Crown submits that the police would have obtained consent prior to the first entry into the building on January 20, 2014.

[105] The application judge did not make any factual findings on whether property management gave consent at Western Battery Road. Even if property management did consent in some form, there is insufficient information before the court to show whether the six *Wills* criteria were satisfied. There is no evidence from the property manager or board on the circumstances surrounding the giving of consent.

[106] As the onus is on the Crown to establish these criteria on a balance of probabilities (*Wills*, at para. 69), it follows that the Crown cannot rely on consent to authorize the warrantless hallway entries at Western Battery Road.

[107] Before this court, the Crown did not rely on any other statutory or common law authority to show the warrantless entries were authorized by law. Accordingly, the search was not authorized by law and violated s. 8.

[108] Before turning to the question of remedy, I note that there were very few warrantless hallway entries at Western Battery Road. The scope of the s. 8 breach is therefore quite limited.

(iii) Remedies Sought in Relation to the Warrantless Entries

[109] The appellants argue that the general warrant that authorized further covert entries, and the installation of cameras, searches of residences, and the installation of audio and video probes should be quashed, and that the evidence obtained from the searches that affected them should be excluded under s. 24(2) of the *Charter.* This argument rests on their allegation of multiple *Charter* breaches, including both the warrantless hallway entries and the

warrantless installation of covert cameras. I do not understand the appellants to be seeking exclusion of observations made on warrantless entries pre-authorization, but for the sake of completeness, I will address this as well. As these arguments rely on the *Charter* breaches considered in concert, I will address them after considering the warrantless camera installation. Before turning to the issue of the cameras, I note that the warrantless entries at Western Battery Road had no impact on any of the appellants' convictions.

III. Warrantless Cameras

[110] The appellants argue, first, that there was a failure to make full, fair, and frank disclosure in the ITO for the February general warrant, and that as a result, the general warrants that authorized the installation of hidden cameras should be set aside and the resulting video evidence should be excluded, pursuant to ss. 8 and 24(2) of the *Charter*. The appellants also make a separate but related argument, that the warrantless camera installations themselves infringed s. 8 of the *Charter*, and as a result, both the pre-warrant and post-warrant footage from those cameras should be excluded, pursuant to s. 24(2) of the *Charter*.

[111] As with the warrantless entries, I will deal first with the question of the issuance of the warrant.

(i) Material Non-Disclosure Regarding Hallway Cameras

[112] The appellants complain that the affiant failed to make full, fair, and frank disclosure in the affidavit he swore to obtain the February general warrant because he failed to disclose that three cameras had already been installed in the target condominium buildings, with the consent of property management. The police were seeking authorization to install hidden cameras and so, the appellants say, the fact that hidden cameras had already been installed should have been disclosed. In his subsequent affidavit, sworn to obtain the April general warrant, the affiant did disclose the earlier camera installations based on consent from condominium management.

[113] The appellants argue that the failure to disclose the three cameras installed on consent was material because had the existence of the cameras been disclosed, the issuing judge would have found that authorizing further cameras was not justified under the "best interests of the administration of justice" requirement for general warrants. The appellants submit that authorizing further cameras was not in the best interests of the administration of justice because the cameras interfered with the privacy of other residents and the existing cameras had not generated any useful evidence. The appellants submit that the issuing judge would not have authorized the continued use of the cameras or would have imposed stricter minimization conditions, had full information been provided.

[114] Respectfully, I disagree.

i. Failure to Make Full and Frank Disclosure

[115] I defer to the findings of the application judge that the affiant's failure to mention that there were cameras already installed was a failure of his duty to make full, frank and fair disclosure on the application. However, I also agree with the application judge that this was a

minor error that was made in good faith and that would not have impacted the issuing justice's decision. At issue in this appeal is the camera installed at Joe Shuster Way only. The application judge accepted the evidence before him that the affiant did not know until very late that the camera had already been installed, and his failure to include this information in his application was a good faith error. The exclusion of the information about the camera was understandable in the circumstances.

ii. Omission Not Material

[116] I agree with the appellants that the "best interests of the administration of justice" test for the issuance of a general warrant outlined in s. 487.01(1)(b) of the *Criminal Code* requires the court to weigh the interests of law enforcement against the individual's interest in privacy: *R. v. Finlay and Grellette* (1985), 52 O.R. (2d) 632 (C.A.), leave to appeal refused, [1985] S.C.C.A. No. 46.

[117] However, in my view, and as the application judge found, the interference with the privacy of other residents was minimal. The camera caught some other residents in the hallways outside their doors, and allowed a very narrow view into the doorways of some neighbouring units. This was not a significant interference with the privacy of the appellants' neighbours and co-residents. Furthermore, it is exactly the kind of third-party privacy interest that the issuing justice already would have considered when making his decision to authorize the use of a hallway camera. He would have learned nothing new if the application had included the fact that a camera had already been installed. The issuing justice already included terms in his authorization that minimized the impact of the cameras on third-party privacy. There is no reason to believe these terms would have been different had he known about the pre-existing camera.

[118] I also agree with the application judge that it is too speculative to determine that, because the camera had not produced relevant evidence at the time of the warrant applications, the issuing justice would have concluded that it was not a useful surveillance tool. The cameras did, in fact, produce important evidence against Mr. Mai. As the application judge noted, in any investigation, some warrants or wiretaps will yield little evidence while others yield a great deal. Some will not be productive initially but will later be very productive. It does not necessarily follow that just because the camera had not produced material evidence at the time of the application, the issuing justice would have concluded that it was not a useful investigative tool.

[119] As a result, if the existence of the consent camera had been disclosed to the issuing justice in the applications for the general warrants and wiretap authorizations, there is no reason to believe that this would have changed his decision. The subsequent warrants could still have been issued.

(ii) Camera Installed on Consent Infringed s. 8 of the *Charter*

[120] As I will explain, in my view, the consent installation of the hidden hallway camera infringed the s. 8 rights of the appellants Mr. Mai and Mr. Saccoccia. The Crown accepts that if this is the case, some of the evidence against them was "obtained in a manner" that infringed

their rights, pursuant to s. 24(2) of the *Charter.* However, in the circumstances of this case, I would not exclude this evidence.

i. Standing

[121] As outlined above, the appellants' standing to allege a s. 8 breach in respect of the cameras turns on their connection with the building at issue, being Joe Shuster Way. I agree with the Crown that Mr. Tang and Mr. Yu have no standing on the issue of the cameras. No cameras were installed at Western Battery Road where Mr. Tang and Mr. Yu resided. While Mr. Tang and Mr. Yu occasionally visited Mr. Mai's unit at Joe Shuster Way, the status of an occasional visitor is clearly insufficient: *Edwards*, at para. 47. The Crown concedes that Mr. Mai and Mr. Saccoccia have standing to challenge the warrantless camera installation at Joe Shuster Way.

ii. Section 8 Is Engaged

a) Mr. Mai and Mr. Saccoccia had a Reasonable Expectation of Privacy

[122] This court accepts the appellants' arguments, and the respondent's concession, that Mr. Mai and Mr. Saccoccia had a reasonable expectation of privacy against surreptitious video recording in the hallways of their building. As discussed above, they had a low but reasonable expectation of privacy in the hallways of their building in relation to police entering and observing. They had a higher expectation of privacy against surreptitious state recording in the same hallways.

[123] It is well established in Canadian law that surreptitious state recording is highly, if not uniquely, invasive of individual privacy. In *R. v. Wong*, [1990] 3 S.C.R. 36, the Supreme Court of Canada recognized that permitting permanent recording can diminish privacy to an extent inconsistent with the aims of a free and democratic society: *Wong* at p. 46. It stressed that permitting the state to use "hidden cameras" without authorization is "fundamentally irreconcilable" with acceptable state conduct: *Wong*, at p. 47. The court's conclusions in *Wong* paralleled its warnings in *R. v. Duarte*, [1990] 1 S.C.R. 30, about the dangers of unauthorized audio recording by the state. Recent Superior Court of Justice decisions in Ontario have also accepted that a reasonable expectation of privacy exists in common areas of condominium buildings in respect of hidden camera recordings: *R. v. Hassan*, 2017 ONSC 233, and *R. v. Batac*, 2018 ONSC 546, 402 C.R.R. (2d) 252.

[124] As the application judge observed, condominium residents may, on occasion, be subjected to video surveillance from cameras installed by the property management in common areas of their buildings, and these inconveniences are to be expected. Indeed, there were such cameras in some locations of the common areas of Joe Shuster Way. It does not follow that residents would reasonably expect to be secretly recorded by the state. Both the fact that the camera was hidden and that it was installed and operated by police distinguish it from regular security cameras. The appellants have different expectations of privacy in these different situations.

[125] First, *Wong* stresses that observation by state agents raises different concerns than observation by other private actors: pp. 46-47, 53. While it might be arguable that condominium residents could not reasonably expect that building management would be unable to share with the police video recordings from cameras that management had installed for its own purposes, it does not follow that residents would reasonably expect building management to permit the police to install cameras for the police's own purposes.

[126] The installation of hidden cameras by the state is not something that condominium residents would reasonably expect the board to do in carrying out its management duties.

[127] Condominium residents expect the board to reasonably cooperate with the police as part of the board's duty to manage common areas in the residents' collective interest. This expectation does not give the board free reign to consent to all manner of police investigative steps in the common areas of the building, no matter how intrusive.

[128] Second, as the appellants argue, the evidence before the application judge was that surveillance cameras installed by condominium management are generally visible. As the appellants submit, while residents expect to be under surveillance by the visible cameras installed by management, they do not expect to be under surveillance by "hidden cameras," much less hidden cameras installed by the police.

[129] Furthermore, the nature of the information the police were seeking engaged heightened privacy interests. As the appellants put it, the camera never blinks. Continuous surveillance over an extended period of time reveals more personal information about its subjects than do discrete and purpose-oriented individual entries. By the point the cameras were installed, the police had already determined where Mr. Mai resided, and were now pursuing information about who he associated with, and his living patterns in terms of when and how often he frequented the unit. As the application judge noted, this evidence had "considerable probative value" because it revealed the frequency of Mr. Mai's attendance at the unit, what he was carrying with him when he came and went, and which persons he associated with.

iii. Surreptitious Recording Cannot be Authorized by Board's Consent

[130] In this case, the heightened privacy interests at stake lead me to conclude that surreptitious recordings cannot be authorized by the consent of the condominium board or property management. Permanent recording creates a risk of a different order of magnitude than visual observation by police officers who have the permission of the board or management to be in the common areas.

[131] As discussed with respect to the warrantless entries, the board and property management have valid authority to cooperate with the police, and to consent on behalf of the building residents to allow police entry. This authority is not unlimited. The respondent, in its factum, agrees that property management has authority to cooperate with the police only to a reasonable extent.

[132] It was not reasonable for the condominium board or its delegates to consent to surreptitious video surveillance on behalf of the residents. This is beyond the bounds of its

authority. The board has a duty to manage common areas. This will sometimes involve allowing non-residents such as maintenance people, management, and perhaps even police, to enter common areas as needed. Surreptitious video surveillance by the police is different. There is a limit to the board's delegated authority. That limit was surpassed when the board purported to consent to the installation of hidden cameras on behalf of residents.

[133] There is no other statutory or common law power that authorized the police to install hidden cameras without a warrant. The warrantless installation of the camera at Joe Shuster Way therefore breached s. 8 because it was not authorized by law.

[134] As the application judge did not conduct a s. 24(2) analysis, it falls to this court to perform this task: *R. v. Ritchie*, 2018 ONCA 918, 424 C.R.R. (2d) 13, at para. 19.

IV. The Impugned Evidence was Admissible under S. 24(2)

[135] Section 24(2) of the *Charter* provides:

> Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this *Charter*, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

[136] Evidence, even when obtained in a manner that infringes the *Charter*, is *prima facie* admissible. The onus is on the person seeking to exclude it to satisfy the court, on a balance of probabilities, that the admission of the proposed evidence could bring the administration of justice into disrepute. The key to the s. 24(2) analysis is the balancing of the following factors: (1) the seriousness of the *Charter*-infringing state conduct; (2) the impact of the breach on the *Charter*-protected interests of the accused; and (3) society's interest in the adjudication of the case on the merits: *R. v. Grant*, 2009 SCC 32, [2009] S.C.R. 353, at para. 71; *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494, at para. 2.

[137] The Crown conceded that if, as I have found, the warrantless camera installation at Joe Shuster Way violated the appellants' s. 8 rights, then all evidence from that camera was obtained in a manner that violated the *Charter*. There is a sufficient connection between the pre-authorization and post-authorization footage, since "uninterrupted footage" was obtained from the same camera both before and after the issuance of the warrant. This is a close contextual and temporal connection.

(i) Effect of the Exclusion of the Evidence

[138] The Crown further conceded that the camera evidence affects some of Mr. Mai's convictions and all of Mr. Saccoccia's convictions.

[139] In relation to Mr. Mai, the exclusion of this evidence would impact his criminal organization and conspiracy convictions, as those convictions relied on his associations with Asian Assassinz members captured by the camera. In relation to Mr. Saccoccia, the excision

of the camera evidence from the ITO for the warrant to search his unit would leave grounds insufficient to justify the issuance of the warrant, which would be fatal to his convictions.

[140] The Crown does not accept, and I agree, that excision of the camera evidence from the various warrants in relation to Mr. Mai would undermine the searches that form the basis for Mr. Mai's other convictions. Taking a deferential approach, there was sufficient other evidence upon which the warrants for those searches could have been issued: *Garofoli*.

[141] The observations made on the few warrantless hallway entries at Western Battery Road would not have undermined any of the appellants' convictions. Accordingly, it is not necessary to consider their admissibility. The fact of this additional s. 8 breach is relevant in assessing the admissibility of the other evidence, as outlined below.

[142] The key evidence at issue, therefore, for the purpose of the analysis under s. 24(2), is: the evidence obtained from the hallway camera at Joe Shuster Way, both pre- and post-warrant, and the evidence obtained from the search of Mr. Saccoccia's residence.

(ii) The 24(2) Analysis

[143] I will now look at the determining factors in the s. 24(2) analysis.

i. The seriousness of the *Charter*-infringing state conduct

[144] In assessing the seriousness of the breach, the court must consider the nature of the police conduct that infringed the *Charter* and led to the discovery of the evidence. The court must also consider the question of dissociation: "Did it involve misconduct from which the court should be concerned to dissociate itself? This will be the case where the departure from *Charter* standards was major in degree, or where the police knew (or should have known) that their conduct was not *Charter*-compliant. On the other hand, where the breach was of a merely technical nature or the result of an understandable mistake, dissociation is much less of a concern": *Harrison*, at para. 22.

[145] First, regarding the cameras, the state conduct was not overly serious. The police sought and obtained consent from the condominium management to install the cameras. As the application judge noted, the police had obtained legal advice from the Ministry of the Attorney General that they could install cameras in the common areas based on consent from the property management. The law on this issue was a "grey area" at the time. This case is, in these ways, similar to *Wong*, where the Supreme Court admitted the evidence on the basis that the police had sought legal advice, and their misunderstanding of the law was entirely reasonable: *Wong*, at p. 59.

[146] A second important aspect of the context here was that, in this case, surveillance of the various targets was highly dangerous. Some of the targets were armed. One target of the investigation had been tracked by gang members and killed while under police surveillance. In light of the advice the police obtained, and the fact that they did not install the cameras out of sheer convenience but rather to minimize the danger faced by officers, the state conduct was at the low end of the spectrum.

[147] The officers also took steps to minimize the impact of the cameras on the privacy rights of third parties. Their placement of the cameras reflected that they were sensitive to this concern.

[148] The s. 24(2) analysis is a balancing exercise. As stated above, in assessing the seriousness of the breach, this court must consider the nature of the police conduct that infringed the *Charter* and led to the discovery of the evidence. The state conduct in entering Western Battery Road without consent was not serious. At the time, the police could have reasonably concluded that such entries were permissible, so long as they did not attempt to make observations about activities within a unit. And, as I have said, there were very few such entries. This factor, in my view, militates in favour of inclusion of the evidence.

ii. The impact of the breach on *Charter*-protected interests of the accused

[149] When considering the impact of the breach on the *Charter*-protected interest of the accused, the court must conduct "an evaluation of the extent to which the breach actually undermined the interests protected by the right infringed": *Grant*, at para. 76. The seriousness of the infringement is considered from the perspective of the accused: "Did the breach seriously compromise the interests underlying the right(s) infringed? Or was the breach merely transient or trivial in its impact? These are among the questions that fall for consideration in this inquiry": *Harrison*, at para 28.

[150] The impact of the breach can range from "fleeting" or "technical" to "profoundly intrusive". The more serious the impact, the more likely that admission of the evidence will indicate to the public that "rights, however high sounding, are of little avail to the citizen, [thereby] breeding public cynicism and bringing the administration of justice into disrepute": *Grant*, at para. 76.

[151] In applying these principles to the case at bar, I find that the impact of the hallway camera on Mr. Mai and Mr. Saccoccia's *Charter* rights was moderate. The camera revealed some personal information. With respect to Mr. Mai, the evidence obtained from the camera strongly suggested that he did not live at Joe Shuster Way but did visit his unit there frequently. It identified his associates. It suggested that Mr. Mai was using his unit as a stash house for a drug operation, rather than as a residence. With respect to Mr. Saccoccia, the evidence from the camera revealed his relationship with Mr. Mai. This information was personal, but not exceptionally so, as it was available for public observation. It was much less significant than, for instance, the personal data contained in a computer. As discussed above, Mr. Mai and Mr. Saccoccia's expectation of privacy in the hallway was diminished, as what they did there could be in the view of whoever entered the building and went to their hallway.

[152] This factor, in my view, militates moderately in favour of exclusion of the evidence.

iii. Society's interest in the adjudication of the case on its merits

[153] The third and final factor is society's interest in the adjudication of the case on its merits. "At this stage, the court considers factors such as the reliability of the evidence and its importance to the Crown's case": *Harrison*, at para. 33. The underlying principle here is the

truth-seeking function of the criminal trial process and whether the criminal justice system would be better served by admission or by exclusion, considering the seriousness of the offence. While these are important factors to be weighed in the balance, they cannot be skewed in such a way that they overwhelm the s. 24(2) analysis. To do this would be to "deprive those charged with serious crimes the protection of the individual freedoms afforded to all Canadians under the *Charter* and, in effect, declare that in the administration of criminal law 'the ends justify the means'": *Harrison*, at para. 40.

[154] In the circumstances of this case, the evidence adduced from the camera was highly reliable. The evidence obtained from the search of Mr. Saccoccia's residence is essential to all his convictions and the evidence from the camera's observations of Mr. Mai is necessary to support his most serious offences. Therefore, the pull of this evidence in favour of admission is particularly strong: *R. v. McGuffie*, 2016 ONCA 365, 131 O.R. (3d) 643, at para. 62.

[155] Weighing all the factors, the repute of the justice system would be adversely affected if the evidence were to be excluded. Taken together, these factors militate in favour of admission.

[156] Accordingly, the evidence obtained will be admitted pursuant to s. 24(2).

(2) Individual Grounds of Appeal

[157] I turn now to the individual grounds of appeal. I will deal first with the individual ground of appeal relating to the appellant Mr. Tang, then turn to those raised by Mr. Saccoccia, and finally, Mr. Mai.

(a) Grounds of appeal raised by Mr. Tang

[158] The appellant Mr. Tang renews the argument he made before the application judge in *Brewster I*, being that there was insufficient evidence to name him as a "known person" in the renewal and expansion warrant issued on April 15, 2014.

[159] The application judge applied the standard for naming a known person that was set out by this court in *R. v. Mahal*, 2012 ONCA 673, 113 O.R. (3d) 209, leave to appeal refused, [2012] S.C.C.A. No. 496, and *R. v. Beauchamp*, 2015 ONCA 260, 326 C.C.C. (3d) 280, and was satisfied that there was sufficient evidence to justify naming Mr. Tang as a "known person".

[160] Mr. Tang's argument that there were insufficient grounds to name him as a "known person" turned on his request for this court to revisit its decisions in *Mahal* and *Beauchamp*. He acknowledged that on the law as set out in those decisions, there were sufficient grounds.

[161] Mr. Tang sought, and was denied, leave to have this appeal heard by a five-judge panel in order to reconsider this court's decisions in *Mahal* and *Beauchamp*. Sitting as a panel of three, we are bound by those decisions. Accordingly, I dismiss this ground of appeal.

(b) Grounds of appeal raised by Mr. Saccoccia

[162] The appellant, Mr. Saccoccia, argues that the trial judge erred in dismissing his s. 8 application and s. 11(b) application. He also submits that the sentence imposed was demonstrably unfit.

(i) Section 8 application

[163] Mr. Saccoccia's s. 8 application related to a warrant to search his residence that was issued on May 24, 2014. Pursuant to that warrant, police searched his residence and found drugs and the proceeds of crime.

[164] Mr. Saccoccia argued before the trial judge that the warrant should not have been issued. His main submission was that the ITO did not reveal reasonable grounds to believe that an offence had been or would be committed in his residence. He sought exclusion of the evidence obtained from the search pursuant to s. 24(2) of the *Charter*.

[165] The trial judge disagreed. She correctly identified the question before her on review of the warrant: whether there was credible and reliable evidence before the issuing judge upon which that judge, acting judicially, could have issued the warrant. She concluded that the ITO, taken as a whole, could support the issuance of the warrant. This evidence included Mr. Saccoccia's relationship with Mr. Mai, a known drug dealer; Mr. Saccoccia's history of visiting Mr. Mai's unit, which was used exclusively as a stash house and which it appears only trusted associates and customers were allowed to enter; and Mr. Saccoccia's apparent preoccupation with the security of his own residence.

[166] On appeal, Mr. Saccoccia renews his argument that the ITO was simply insufficient. He acknowledges that reviewing judges are entitled to deference on appeal, and that absent an error of law, a misapprehension of the evidence, or a failure to consider relevant evidence, this court should not interfere: *R. v. Ebanks*, 2009 ONCA 851, 97 O.R. (3d) 721, at para. 22; *R. v. Grant* (1999), 132 C.C.C. (3d) 531 (Ont. C.A.), at para. 18.

[167] Mr. Saccoccia has not pointed to any error of law, misapprehension of the evidence, or failure to consider relevant evidence on the part of the trial judge. I would not interfere with the trial judge's conclusion on this issue.

(ii) Application for a stay under s. 11(b) of the *Charter*

[168] Mr. Saccoccia sought a stay of proceedings, arguing that his right to be tried within a reasonable time under s. 11(b) of the *Charter* had been infringed.

[169] The trial judge dismissed his application. She applied the framework established by the Supreme Court in *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631. She concluded that the total delay from the laying of the charge to the s. 11(b) application was 35.5 months. This exceeded the presumptive ceiling of 30 months. The trial judge found only one period of defence delay: she attributed seven months of delay to the defence based on the time it took for Mr. Saccoccia to retain counsel and for his counsel, once retained, to bring a *Rowbotham* application. Accounting for the seven months of defence delay brought the overall delay below the 30-month ceiling. The trial judge went on to find that had the delay exceeded the ceiling, the case qualified as exceptionally complex, and because most of the delay accrued prior to

the release of *Jordan*, the transitional exceptional circumstances consideration set out in that case applied.

[170] On appeal, the Crown concedes that the trial judge erred in her findings on defence delay. The Crown accepts that Mr. Saccoccia's delay in obtaining counsel did not in fact cause any delay. I agree. As a result, it is unnecessary to deal with Mr. Saccoccia's arguments that the court and the Crown had an obligation to assist him in obtaining state-funded counsel.

[171] The relevant period of delay for the purposes of this appeal is from the date the first information was laid, on May 28, 2014, to the date of Mr. Saccoccia's conviction, on May 18, 2017.[3] This period exceeds the presumptive 30-month ceiling by almost six months.

[172] In my view, the combined effect of the complexity of this matter and the fact that most of the delay in this case accrued prior to the release of *Jordan*, is that the overall delay is reasonable.

[173] I agree with Mr. Saccoccia and the Crown that to the extent the trial judge attributed specific times to the complexity of the case, her approach was in error. I disagree with the appellant's suggestion that this was not an exceptionally complex case.

[174] There can be no doubt that this case involved a complex and large-scale investigation. The complexity and scale of the investigation translated into complicated legal proceedings. The legal issues raised before the application judge that are now the subject of the joint grounds of appeal were both factually and legally complex.

[175] Mr. Saccoccia argues that his case was not that complex, because the joint application was the only real source of complexity. Respectfully, I disagree. The joint application was certainly complex, but it was not the only complicated feature of this case, which involved a large-scale police investigation and voluminous disclosure. Further, although this was a complex prosecution, it does not appear that the Crown or the court allowed it to languish in the system. Dates were set promptly. The joint application was case managed. As Mr. Saccoccia acknowledges, efforts were made to ensure the joint application proceeded as efficiently as possible, given the number of applicants and the volume of the evidentiary record.

[176] Further, even were this case not sufficiently complex, most of the delay in this case accrued prior to the release of *Jordan* in July 2016. In my view, the transitional exceptional circumstances consideration applies. The overall delay is consistent with the parties' reasonable reliance on the state of the law prior to the release of *Jordan*: *Jordan*, at para. 96.

[177] I agree with the trial judge that the overall delay was not unreasonable. Accordingly, I dismiss this ground of appeal.

(iii) Mr. Saccoccia's Sentence Appeal

[178] The trial judge sentenced Mr. Saccoccia to 33 months in custody. He appeals from that sentence on the basis that it is demonstrably unfit.

[179] Before the trial judge, Mr. Saccoccia's counsel (not counsel on appeal) submitted that a sentence in the range of two to three years would be appropriate. The Crown sought a global sentence of seven years in custody.

[180] The trial judge accepted Mr. Saccoccia's counsel's position that he should receive a sentence at the low end of the range for possession of heroin for the purpose of trafficking, which was the most serious of the charges he faced. She considered the appropriate mitigating factors, including Mr. Saccoccia's addiction, commendable efforts towards rehabilitation, strong family support, and lack of criminal record. She balanced those factors against the need for denunciation and deterrence in the sentencing of drug traffickers.

[181] While it would have been open to the trial judge to have imposed a lower sentence given the unusual mitigating circumstances present in this case, I cannot say that the sentence she did impose was demonstrably unfit, particularly in light of the position taken by Mr. Saccoccia's counsel before her.

[182] Mr. Saccoccia tendered fresh evidence on appeal to demonstrate the progress he has made since he was sentenced. I do not find this fresh evidence to be admissible. Mr. Saccoccia had already made commendable efforts towards rehabilitation by the time of sentencing, and the evidence of this was before the sentencing judge. In my view, the fresh evidence could therefore not be expected to have affected the sentence imposed: *R. v. Lévesque,* 2000 SCC 47, [2000] 2 S.C.R. 487. Even assuming this fresh evidence was admissible, it would not affect the outcome of the sentence, as the sentence imposed was not demonstrably unfit: *Lévesque* at para. 24.

[183] Accordingly, leave to appeal sentence is granted, the sentence appeal is dismissed.

(c) Mr. Mai's Sentence Appeal

[184] The trial judge sentenced Mr. Mai and Mr. Yu each to 13 years incarceration, less 19 months credit for pre-trial detention and restrictive bail. This was two years less than the 15 years the Crown sought, but significantly higher than the nine years Mr. Yu sought, and the seven years Mr. Mai sought.

[185] The trial judge identified the following general aggravating factors for Mr. Mai, Mr. Tang, and Mr. Yu:

- Their activities were profit-driven;
- They were involved in possession for the purpose of trafficking for four months;
- They possessed and dealt many different types of drugs;
- They used a stash house as well as their own residences; and
- They were sophisticated and wary of potential police surveillance and intercepts.

[186] The trial judge then identified individual aggravating factors in relation to both Mr. Mai and Mr. Yu. He found that Mr. Yu's possession of fentanyl was an "extremely aggravating factor." The trial judge noted that fentanyl is 20 times more powerful than heroin and is the most deadly, illicit drug available, and that Mr. Yu was using it for profit. The trial judge emphasized that it was "extremely aggravating" that Mr. Mai was the "quarterback" of the stash house, meaning that he was the one who arranged to lease the condominium unit for the purpose of storing drugs, and he played a leading role in relation to its use. He also referenced the third of a kilogram of heroin and "significant amount" of cocaine and crystal meth that Mr. Mai possessed.

[187] The trial judge also identified the following mitigating factors for Mr. Mai, Mr. Tang, and Mr. Yu:

- None of them had any prior criminal record;
- All had family support;
- All were relatively young;
- After the determination of the application against them, none contested findings of guilt; and
- All were gainfully employed or pursuing education while on bail.

[188] The trial judge stated that he found that a global sentence of 13 years less credit for pre-trial detention and restrictive bail "would have been appropriate" for both Mr. Yu and Mr. Mai. However, when he broke down the sentence for particular counts, the sum was not 13 years but 11 years and 5 months, the appropriate sum after subtracting the 19 months credit.

(i) Did the sentence imposed by the trial judge need to be interpreted by this court for clarity?

[189] Mr. Mai submits that the trial judge imposed an unclear sentence. The trial judge stated he was imposing a 13-year global sentence but the individual sentences for each count, when added up, only amounted to 11 years and 5 months. The indictment does not itemize the individual sentences imposed for each individual count. The appellant argues that this court should prefer the interpretation of the sentence that is most favourable to the defence, and sentence Mr. Mai to 11 years and five months, less 19 months for pre-trial custody and restrictive bail conditions. I reject this submission.

[190] Read in context, there is no lack of clarity in the reasons for sentence. As the Crown submits, the trial judge clearly wrote on the indictment that he imposed a global sentence of 13 years minus 19 months for pre-trial custody and restrictive bail, leaving 11 years and five months remaining. He also stated this clearly on multiple occasions in the reasons for sentence. The apportionment of the sentences to the individual charges simply distributed the portion of the sentence left to be served.

(ii) Did the trial judge misapprehend the evidence as to the quantity of the drugs that Mr. Mai was convicted of possessing?

[191] The Crown concedes that the reasons for sentence reference incorrect quantities of drugs attributed to Mr. Mai. I accept that the trial judge did misapprehend the evidence regarding the quantities of cocaine and methamphetamine seized. I find that this misapprehension merits a modest reduction with regard to the sentence for possession.

[192] The appellant submits that this error led the sentencing judge to impose a longer sentence than he otherwise would have. Larger quantities of drugs attract a greater sentence. In this case, the parties revised the original agreed statement of facts to reduce the quantities of drugs found in Mr. Mai's possession. However, the trial judge only referred to the quantities stated in the original agreed statement of facts. The appellant says the differences were substantial and call for this court to reconsider the sentence. The Crown submits that, where the judge did err, the differences were so minor that they would not have had an impact on the length of sentence.

[193] I do not accept that the trial judge misapprehended the quantity of heroin. While he did erroneously refer to the higher quantum of 442 grams at the beginning of his reasons for sentence, he later correctly found that Mr. Mai had "approximately a third of a kilogram of heroin," which demonstrates he was aware of the revised 310.92 grams figure.

[194] However, the trial judge did misapprehend the quantities of cocaine and methamphetamine seized, and he never referred to the correct quantities in his reasons for sentence. These misapprehensions were substantial – the trial judge sentenced the appellant for more than four times the amount of cocaine (828 grams instead of 189.29 grams) and nearly 14 times the amount of methamphetamine (43.2 grams instead of 3.1 grams) than he actually possessed.

[195] I do not accept the Crown's argument that this would have had no impact on Mr. Mai's sentence. The trial judge specifically stated that the "significant amount" of cocaine and methamphetamine that Mr. Mai possessed was an individual aggravating factor. Nor does it follow that this misapprehension would not have affected the trial judge's determination of the appropriate global sentence. The totality principle is based on determining the overall culpability of the offender, and the quantity of drugs seized is relevant to Mr. Mai's overall culpability: *R. v. M.* (C.A.), [1996] 1 S.C.R. 500, at para. 42; *R. v. Oraha*, 2014 ONCA 359, at para. 5.

[196] In my view, a reduction of one year is appropriate for the misapprehension of the evidence in regard to the quantities of cocaine and methamphetamine. This reduction is minor because the trial judge found that the most powerful individual aggravating factors in regard to Mr. Mai were his leasing and "quarterbacking" of the stash house.

(iii) Did the trial judge err in his decision that Mr. Mai's sentence should be in parity with Mr. Yu's sentence?

[197] The appellant also submits that the trial judge erred in deciding that Mr. Mai's sentence should be in parity with Mr. Yu's sentence because Mr. Yu's culpability was higher than Mr. Mai's. Mr. Yu possessed significantly larger quantities of drugs, and also possessed fentanyl, which Mr. Mai did not possess. Mr. Yu was also associated with a stash house that contained firearms that Mr. Mai was not connected with. The parity principle does not necessarily require

identical offences. The appellant submits that Mr. Mai should have received a lesser sentence than Mr. Yu, given Mr. Yu's greater culpability.

[198] The trial judge was entitled to find that that Mr. Mai and Mr. Yu had equal degrees of culpability. While Mr. Yu was more culpable than Mr. Mai regarding the nature and quantity of drugs, this is only one factor in the total circumstances determining culpability. The sentencing judge had emphasized that Mr. Mai's culpability was increased because he was a manufacturer as well as a trafficker, and because he was the "quarterback" of the stash house at Joe Shuster Way.

(iv) Did the trial judge err by imposing a consecutive sentence for the count of conspiracy to traffic a controlled substance?

[199] The appellant submits that the trial judge likely made a mistake when he imposed a consecutive sentence for the count of conspiracy to traffic a controlled substance, given the comments made by the court when addressing whether that charge should be stayed in light of the conviction for trafficking for the benefit of a criminal organization.

[200] The Crown did not ask for a consecutive sentence on this charge. The trial judge stated during oral submissions that he intended to impose a concurrent sentence. In light of this, Mr. Mai's counsel did not further address the issue. The appellant submits that it was unfair to impose the sentence without giving Mr. Mai's counsel an opportunity to make submissions on its propriety.

[201] I agree with the Crown that the apportionment of a consecutive sentence to the conspiracy to traffic count would not have impacted the global sentence. The trial judge advised the parties multiple times that his approach was to first determine the appropriate global sentence in light of the totality principle and then apply it to the various counts. The total sentence of 13 years less credit was a fit sentence on the totality of the circumstances, regardless of how it was apportioned, and whether the sentence for one charge was concurrent or not.

(v) Conclusion on Sentence Appeal

[202] In all the circumstances, leave to appeal the sentence is granted. The sentence appeal is allowed. Mr. Mai's sentence is reduced by one year.

F. DISPOSITION

[203] For these reasons, the appeal is dismissed, apart from Mr. Mai's appeal from sentence, which is allowed to the extent that Mr. Mai's sentence is reduced by one year.

Released: "M.T." December 2, 2019

"M. Tulloch J.A."

"I agree. K. van Rensburg J.A."

"I agree. Harvison Young J.A."

[1] The sole exception is that the application judge concluded that one applicant, Tony Huang, should not have been named as a "known person" in the wiretap authorization. The application judge found that this violated Mr. Huang's s. 8 rights, and that any intercepts obtained in relation to him ought to be excluded under s. 24(2) of the *Charter*.

[2] Although these cases involve consent by a *co-resident* to police entry into a shared *home*, in my view, the analytical approach to the role of third-party consent applies equally here.

[3]Mr. Saccoccia had submitted that the *Jordan* ceiling should apply for the entire period his matter was pending, until his sentencing in September 2017. After this appeal was argued, this court released its decision in *R. v. Charley*, 2019 ONCA 726. In that decision, Doherty J.A., writing for the court, clarified that the *Jordan* ceilings do not apply to sentencing delay. Sentencing delay should be considered separately. The sentencing delay alone in this case does not raise any s. 11(b) concerns based on the approach set out in *Charley*.