Court File No. 64301

**COURT OF APPEAL FOR ONTARIO**

B E T W E E N:

**HER MAJESTY THE QUEEN**

Respondent

- and –

**DAT QUOC TANG**

Appellant

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**APPELLANT'S FACTUM**

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## PART I: STATEMENT OF THE CASE

1. This appeal raises the following central question: are police entitled to conduct protracted, secret investigations inside private condominium buildings without a warrant? The Appellant Dat Quoc Tang submits the answer is no.

2. To the Appellant Tang's knowledge, this was the largest ever warrantless investigation inside private condominium buildings in Canadian history. The police made 112 warrantless entries on 90 different days into the common areas of various buildings, sometimes staying for hours at a time. They installed secret cameras inside buildings without judicial authorization. In some cases, when seeking after-the-fact permission from property management, they lied about the nature of their investigation and forbade property management from sharing information with the condominium board. The police were not merely walking through a common area on the way to someone's door to knock on it, or responding to a call for assistance, as in some other

condominium cases in the jurisprudence. Here, they were conducting a sprawling, secret, police-led, warrantless investigation on private property, in order to obtain evidence against some of the residents.

3. Simply put, there is no good reason for such an expansive police power to exist. If the police wish to sneak onto private property 112 times to make surreptitious observations, they should be required to get a warrant. To condone what happened in this case is to create a two-tiered system of privacy rights: one for Canadians who can afford to live in detached houses; and another for Canadians who live in condominiums.

4. The co-appellants in this case were all targets of two large investigations into Toronto area gang activity dubbed Project Battery and Project Rx. Throughout the course of Project Battery and Project Rx, the police used a variety of surveillance techniques to gather information about the targets, including warrantless surveillance and installation of covert cameras in condominium buildings, and tracking mobile phones using a sophisticated device referred to as a mobile device identifier (an "MDI"). The police also obtained various wiretap authorizations, general warrants and search warrants.

5. Project Battery and Project Rx ultimately led to charges against 35 accused for offences set out in 15 different Indictments. Some of the accused were charged with murder, attempted murder and/or conspiracy to commit murder. Some were charged with firearms offences. The Appellant Tang was charged with offences related to drug trafficking for the benefit of a criminal organization. The 15 Indictments were set to proceed to separate trials. Much of the evidence against the various accused was in the form of wiretaps obtained pursuant to three judicial authorizations by Justice McMahon. The accused all sought to challenge the legality of these

wiretap authorizations and Justice Code was appointed as a "case management judge" under s. 551.7(3) of the *Criminal Code* to hear a global s. 8 motion on behalf of all 35 accused.

6. The main attacks against the wiretap authorizations had to do with police surveillance in condominium buildings and use of the MDI prior to obtaining the authorizations. Justice Code ultimately dismissed the defence's s. 8 motion in two rulings, subject to one exception not relevant to this appeal. The Appellant Tang subsequently appeared before the trial judge, Justice McMahon and entered a plea of not guilty to one count of possession of heroin for the purpose of trafficking and one count of trafficking a controlled substance for the benefit of a criminal organization without contesting the Crown's allegations of fact. He was sentenced to seven years imprisonment, less four months of pretrial credit.

7. The Appellant Tang appeals from Justice Code's two rulings on the s. 8 motion. He raises three grounds of appeal:

1. Justice Code erred by failing to find that the warrantless entries into condominium common areas and subsequent warrantless installations of cameras breached his s. 8 rights;
2. Justice Code erred by failing to find that the police disclosure to the judge who issued the wiretap authorizations and search warrants fell short of the requirement to be full, fair and frank; and
3. Insufficient grounds existed to name him in the renewal and expansion wiretap authorization.

8. The Appellant Tang's appeal is joined with those of co-appellants Larry Yu, Ken Mai and Christopher Saccoccia. The co-appellants have sought to avoid duplication of arguments in their respective facta and have divided common issues between them. Several arguments

applicable to the Appellant Tang's appeal are addressed in the facta of the Appellants Yu and Mai, and he adopts and relies on those arguments. This factum will address two arguments:

1. The 112 warrantless police entries into private condominium buildings amounted to unlawful searches (applicable to all four co-appellants); and

2. Insufficient grounds existed to name the Appellant Tang in the second wiretap authorization (applicable to the Appellant Tang only).

## PART II: SUMMARY OF THE FACTS

### A. Background

3. In 2013, three large police investigations in Toronto were combined. One, led by the Toronto Homicide Squad, was focused on three specific murders and an attempted murder. Another, dubbed Project Battery and led by the O.P.P and the Asian Organized Crime Task Force, was focused on two gangs known as the Asian Assassins and the Project Originals. A third, dubbed Project Rx and led by the Toronto Guns and Gangs Task Force, was focused on three gangs known as the Sick Thugz, the Young Regent Niggas and Chin Pac.[1] The police ultimately came to believe that the targets of Project Battery and Project Rx were at war with one another and were committing murders in furtherance of their conflict. They also believed that the various gangs were involved in drug trafficking.[2]

4. Throughout the course of their investigations (which were ultimately amalgamated), the police used a variety of surveillance techniques to gather information about the targets. One such technique, discussed further below, was to engage in warrantless surveillance inside private

[1] Reasons for Decision of Justice Code, dated June 27, 2016 ("First Reasons for Decision"), paras. 13-16, *Joint Appeal Book*, pp. 109-110.
[2] First Reasons for Decision, paras. 17-26, *Joint Appeal Book*, pp. 111-112.

condominium buildings. Other techniques relevant to these appeals, such as the installation of cameras in condominium buildings and the use of an MDI to locate and identify cellphones, are discussed in the facta of the Appellants Yu and Mai.

5. The police ultimately obtained three wiretap authorizations, as well as various general warrants and search warrants. The wiretap authorizations were some of the largest in Canadian history. The initial authorization permitted wiretapping of 144 "known persons" and the renewal and expansion authorization permitted wiretapping of 198 "known persons". Justice Code remarked that he had had never seen or heard of a wiretap application that named so many targets.[3] To the extent they are relevant to these appeals, the specific facts related to the wiretap authorizations, general warrants and search warrants are discussed in the sections of the co-appellants' facta related to the associated grounds of appeal.

6. Project Battery and Project Rx ultimately led to charges against 35 accused for various offences set out in 15 different Indictments which were set were set to proceed to separate trials. Much of the evidence against the various accused was in the form of wiretaps obtained pursuant to three judicial authorizations by Justice McMahon. The Crown intended to rely on this wiretap evidence in each of the trials. Since the accused all sought to challenge the legality of these wiretap authorizations, Justice Code was appointed as a "case management judge" under s. 551.7(3) of the *Criminal Code* to hear a global s. 8 motion on behalf of all 35 accused.[4]

7. Justice Code heard viva voce evidence relevant to the defendants' attacks on the wiretap authorizations. This evidence is summarized in the sections of the various co-appellants' facta related to the associated grounds of appeal. Justice Code ultimately dismissed the defence's s. 8

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[3] First Reasons for Decision, paras. 24-25, *Joint Appeal Book*, p. 112.
[4] First Reasons for Decision, paras. 1-2, *Joint Appeal Book*, p. 107.

motion in two rulings delivered on June 27, 2016 and December 21, 2016, subject to one exception not relevant to this appeal.

**B. The Appellant Tang's Convictions**

8. The Appellant Tang was initially charged with offences related to drug trafficking – specifically: two counts of possession of a controlled substance for the purpose of trafficking (heroin and cocaine); three counts of conspiracy to traffic in a controlled substance (ketamine, marijuana and MDMA); three counts of trafficking a controlled substance (ketamine, marijuana and MDMA); one count of possession of property obtained by crime; and one count of trafficking a controlled substance for the benefit of a criminal organization.

9. After Justice Code's rulings dismissing the defence s. 8 applications, the Appellant Tang entered a plea of not guilty to one count of possession of heroin for the purpose of trafficking and one count of trafficking a controlled substance for the benefit of a criminal organization, without contesting any of the Crown's allegations of fact which were tendered through an agreed statement of facts. The agreed statement of facts provided that the Appellant Tang was involved in the possession, sharing and distribution of large amounts of controlled substances for the benefit of and in association with a criminal organization. When police executed a warrant at a condominium associated with him, they found 273 grams of heroin as well as smaller quantities of several other drugs, cash and drug paraphernalia.[5] The Appellant Tang was sentenced to seven years imprisonment less four moths credit for pretrial custody.

[5] General Synopsis, *Joint Appeal Book*, pp. 9284-9291.

## C. Facts Related to the First Ground of Appeal: Warrantless Police Entries into Condominium Buildings

10. During the course of their investigation, police repeatedly entered the common areas of private condominium buildings. An agreed statement of facts sets out the circumstances of 112 warrantless police entries into condominium buildings.[6] The defence sought a declaration from Justice Code that these entries amounted to unlawful searches, which would be relevant in two ways. First, the individual defendants could use such a declaration at their respective trials to seek to exclude evidence. For example, as discussed, the police found drugs in the Appellant Tang's condominium while executing a search warrant. That warrant was based in part on evidence obtained from a camera installed in the Appellant Tang's building. The general warrant to install the camera was itself based in part on warrantless police observations made in the Appellant Tang's building.[7] Had Justice Code granted the s. 8 declaration sought by the defence, each of the co-appellants could have engaged in this sort of analysis at their respective trials. Second, as discussed in more detail in the factum of the Appellant Mai, the police in many cases failed to disclose the nature of these entries to Justice McMahon when seeking authorization for the three wiretap authorizations. If the entries were illegal, it would increase the materiality of such failures to disclose.

11. Given the declaratory remedy sought, and the fact that many of the entries are similar to one another, defence counsel did not go through each of the 112 entries in detail before Justice Code. Instead, for the sake of efficiency, defence counsel cross-examined police officers and made submissions about a small sample of these entries. The cross-examination focused on

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[6] Agreed Statement of Facts: Entries, *Joint Appeal Book*, pp. 4716-4739.
[7] See, for example, the ITO in support of search warrants for the homes of the Appellants Dat Tang and Yu: Exhibit 46, *Joint Appeal Book*, pp. 7828-8018.

he did not disclose the prior entries he and his team had made.[11] Detective Theriault also threatened the property manager with "criminal consequences" if he revealed the fact of the investigation to any person.[12] He wrote in his notes that he "could not allow [property management] to tell any person on the condo board because of the possibility of information getting out to tenants".[13] Detective Theriault made no efforts to find out the identity of the members of the condominium board.

*2. Entries into 125 Western Battery Road*

15. 125 Western Battery Road is a private 25-storey condominium building. There are conspicuous signs on the outside of the parking garage that say: "Authorized Parking Only".[14] There is visitor parking on street level, but also on P1, in the underground garage. The gate to P2—a parking level reserved exclusively for residents—is an additional security barrier intended to prevent unauthorized access.[15] The Crown led no evidence that police obtained permission to access any areas of 125 Western Battery Road.

16. Detective Constable Wahidie Testified that he entered the secured P2 level on multiple occasions. He also accessed hallways in the building and walked up to individual units. In one instance he listened at a unit door to make sure the resident would not come out while another police officer was installing a camera or a probe (he could not remember which).[16]

17. In addition to the in-court evidence, the parties agreed that police made the following entries into 125 Western Battery Road:

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[11] Testimony of Detective Theriault, *Transcript* Vol. 4, pp. 34-35.
[12] Testimony of Detective Theriault, *Transcript* Vol. 4, p. 42.
[13] Testimony of Detective Theriault, *Transcript* Vol. 4, p. 42.
[14] Exhibit 35, *Joint Appeal Book*, p. 7631.
[15] Exhibit 36, *Joint Appeal Book*, p. 7633.
[16] Testimony of Detective Constable Wahidie, *Transcript* Vol. 4, pp. 142-143.

- January 20, 2014;
- January 29, 2014;
- January 30, 2014;
- February 3, 2014;
- February 12, 2014;
- March 24, 2014;
- March 25, 2014;
- March 26, 2014;
- March 27, 2014;
- March 31, 2014;
- April 1, 2014;
- April 13, 2014;
- April 14, 2014; and
- April 15, 2014.[17]

18. These, too, were not fleeting entries. For instance, on April 13, 2014, officers stayed in the underground parking garage for several hours making observations.[18]

*3. Entries into 38 Joe Shuster Way*

19. 38 Joe Shuster Way is a 22-storey private condominium building. Both the doors and parking garage are locked and require a key fob to enter. There is a 24-hour concierge and a conspicuous sign outside the parking garage that says: "Private Property – Authorized Parking Only".[19] Phillip Chudnofsky, the property manager, testified that residents were concerned about strangers following people into the building, and a security company was hired to address this issue.[20]

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[17] Agreed Statement of Fact: Entries, *Joint Appeal Book*, pp. 4716-4739.
[18] Agreed Statement of Fact: Entries, *Joint Appeal Book*, p. 4738.
[19] Agreed Statement of Fact: Cameras, *Joint Appeal Book*, p. 4706.
[20] Testimony of Phillip Chudnofsky, *Transcript* Vol. 2, pp. 108-113.

20. Mr. Chudnofsky said that, on December 2, 2013, Detective Constable Frigon told him that the police needed a key fob and garage access to investigate a car theft ring (which was not true).[21] Detective Constable Frigon also told Mr. Chudnofsky that he could face "serious consequences" if he divulged anything to anyone about their investigation. After hearing this, Mr. Chudnofsky gave the police a key fob and an access code and did not tell the condominium board what he had done.[22] As set out in an agreed statement of facts, the condominium board, and not property management, was responsible for authorizing unfettered access to 38 Joe Shuster Way.[23]

21. As discussed in the Appellant Yu's factum, police later asked the condominium board for permission to install secret cameras in the hallways of 38 Joe Shuster Way. However, even then, members of the board were given limited information and were not told about the police's prior access to the building.[24] Police made the following entries into the building prior to speaking to anyone on the condominium board:

- December 3, 2013;
- December 4, 2013;
- December 5, 2013;
- December 16, 2013;
- December 31, 2013;
- January 8, 2014; and
- January 20, 2014.[25]

22. During these entries, police accessed the parking garage, stairwells and hallways, and followed residents (including the Appellant Mai) up to their units.[26]

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[21] Testimony of Phillip Chudnofsky, *Transcript* Vol. 2, pp. 117-119.
[22] Testimony of Phillip Chudnofsky, *Transcript* Vol. 2, pp. 119-121.
[23] Agreed Statement of Fact: Cameras, *Joint Appeal Book*, p 4707.
[24] Testimony of Phillip Chudnofsky, *Transcript* Vol. 2, p. 127.
[25] Agreed Statement of Fact: Entries, *Joint Appeal Book*, pp. 4716-4739.

police entries into three buildings: 18 Valley Woods Road; 125 Western Battery Road (where units linked to the Appellants Tang, Yu and Mai were located); and 38 Joe Shuster Way (where units linked to the Appellants Mai and Saccoccia were located).

*1. Entries into 18 Valley Woods Road*

12. 18 Valley Woods Road is an 11-story condominium with a locked entrance, locked underground parking garage, 24-hour concierge, and conspicuous signs that say: "Visitor Parking by Permit Only".[8] Before police received any form of permission, they made entries on the following occasions:

- October 26, 2013;
- October 29, 2013 (entry + photos);
- October 30, 2013;
- November 12, 2013;
- November 14, 2013;
- November 18, 2013;
- November 25, 2013 (entry + photos); and
- November 27, 2013.[9]

13. These entries were not fleeting. For instance, Detective Theriault testified that, on October 29, 2013, four police officers surreptitiously entered the underground parking garage and stayed there for about six hours making observations.[10]

14. Police subsequently sought permission from property management to enter the building and ultimately obtained a key fob. However, when Detective Theriault sought this permission,

[8] Agreed Statement of Fact: Cameras, *Joint Appeal Book*, p. 4705.
[9] Agreed Statement of Fact: Entries, *Joint Appeal Book*, pp. 4716-4739.
[10] Testimony of Detective Theriault, *Transcript* Vol. 4, pp. 21-25.

*4. The nature and duration of most of the entries is unknown because of poor police practices*

23. As set out in the agreed statements of fact, the only points of disagreement on the warrantless entries were (1) the scope and validity of permission and (2) the duration of the warrantless entries.[27] At the hearing below, the applicants were unable to establish the true extent and scope of the warrantless entries through no fault of their own. The parties were able to agree on the duration of entries in the unusual instances where duration is apparent from the surveillance reports. But for the majority of the entries, neither the surveillance reports nor the officers' notes could assist in determining the duration of the entries. The parties were also unable to agree on the "permission" granted to access the buildings. Again, in most cases, there were no reports and no notes.

24. The following example is illustrative of this difficulty. As discussed above, Mr. Chudnofsky, the property manager at 38 Joe Shuster Way, gave evidence about his interactions with Detective Constable Frigon, who asked for and received a key fob and an access code for the building. Detective Constable Frigon himself was cross-examined by the defence. Originally, he did not bring his memo book to court. He was then sent back to the police station to retrieve it on a break. When he returned with it, he had no notes at all for December 2, 2013 (the date of his interaction with Mr. Chudnofsky).[28] There was no mention anywhere in his notes at all of either meeting with Mr. Chudnofsky or ever receiving a key fob, and he had previously testified at the preliminary inquiry that he *had not* received a key fob and had simply followed

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[26] Testimony of Detective Constable Frigon, *Transcript* Vol. 4, pp. 77-82, 108-112.
[27] Agreed Statement of Fact: Cameras, *Joint Appeal Book*, pp. 4701-4715; Agreed Statement of Fact: Entries, *Joint Appeal Book*, pp. 4716-4739.
[28] Testimony of Detective Constable Frigon, *Transcript* Vol. 4, p. 103.

residents into the building.[29] Before Justice Code, Detective Constable Frigon said he now remembered meeting with Mr. Chudnofsky and obtaining the key fob,[30] but could not remember if he shared the key fob with other officers. When asked where he recorded the access code given that it was not in notes, he said he had memorized it.[31] Detective Constable Frigon was responsible for a majority of the entries into 38 Joe Shuster Way. Given his lack of memory or accurate notes about what transpired, it was difficult to impossible for the defence to establish what happened during those entries.

*5. Justice Code's conclusions on the warrantless entries*

25. Justice Code concluded that the police entries in this case did not amount to searches. The building residents had relatively low expectations of privacy, he said, which were insufficient to trigger the protection of s. 8, in light of the state interest in effective law enforcement.[32] He also concluded that, even if the entries were searches, they were authorized by law under the implied license doctrine and were carried out reasonably.[33]

## D. Facts Related to the Second Ground of Appeal: Grounds to Name the Appellant Tang in the Renewal and Expansion Wiretap Authorization

26. The Appellant Tang was not named in the initial wiretap authorization dated February 24, 2014. He was first named as a "known person" (such that all his communications could be intercepted) in the renewal and expansion authorization issued by Justice McMahon on April 15, 2014.

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[29] Testimony of Detective Constable Frigon, *Transcript* Vol. 4, pp. 82-89.
[30] Testimony of Detective Constable Frigon, *Transcript* Vol. 4, p. 94.
[31] Testimony of Detective Constable Frigon, *Transcript* Vol. 4, p. 89.
[32] First Reasons for Decision, paras. 113-114, *Joint Appeal Book*, pp. 145-146.
[33] First Reasons for Decision, paras. 124-125, *Joint Appeal Book*, p. 149.

27. Three grounds were offered to justify naming him in the renewal and expansion authorization. First a confidential informant described the Appellant Tang as a heroin dealer. This informant was described as a "career criminal" with convictions for "several crimes of dishonesty".[34]

28. Second, the Appellant Tang was said to have had a "longstanding history of association with the Asian Assassins". Five times, between 2003 and 2006, he was arrested and charged in association with other alleged members of the Asian Assassins.[35] However, the only substantiated criminal activity relating directly to the Appellant Tang was a single *Youth Criminal Justice Act* disposition for robbery dating from 2003. The affiant in support of the initial wiretap authorization acknowledged that the Appellant Tang had not been named as a "known person" in that authorization because the evidence of his connections to criminality in association with a gang under investigation was too dated, the evidence of his connections to the current known members and associates under investigation was too remote, and there was no recent evidence to suggest that he was currently operating with this criminal organization.[36]

29. Finally, telephone numbers associated with the Appellant Tang were found in the phones of two suspected gang members and intercepts indicated that he was associating with two targets, Danny Vo and Larry Vu.[37] However, these intercepts disclosed no suggestion of criminal activity and were about mundane matters such as getting take-out food.[38]

30. Justice Code concluded that, while the tip from the confidential informant standing alone would not amount to reasonable and probable grounds, the standard for naming a "known

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[34] First Reasons for Decision, para. 135, *Joint Appeal Book*, p. 151.
[35] First Reasons for Decision, para. 135, *Joint Appeal Book*, p. 152.
[36] Clark affidavit #1, Appendix G2, para. 6(f-h), *Joint Appeal Book*, pp. 1465-1466.
[37] First Reasons for Decision, para. 135, *Joint Appeal Book*, p. 152.
[38] Clark affidavit #2, p. 75, para. 241, 243, 244; p. 77, para. 159; p. 78, para. 160, *Joint Appeal Book*, pp. 1789-1792.

person" in a wiretap authorization was significantly lower: whether the authorizing justice could conclude that naming the person "may assist" the investigation. He found that this lower standard was met.[39]

## PART III: ISSUES AND THE LAW

### A. The warrantless police entries into private condominium buildings constituted unlawful searches

*1. police conduct amounted to searches, triggering s. 8 of the* Charter

31. The police in this case made at least 112 distinct entries into private condominium buildings. Sometimes they stayed for hours at a time. They went into garages, hallways and stairwells, and followed residents up to their units. They took pictures and later installed cameras. They did not keep detailed notes of what they were doing. Sometimes they entered these buildings without permission from anyone. But even when they did seek permission, they lied about the nature of their investigation and threatened property management with criminal jeopardy if they shared information with residents.

32. If police wish to conduct this sort of sprawling, secret investigation on private property, they should be required to get a warrant. The general warrant provisions of the *Criminal Code* exist for this reason. A warrant would require the police to document their activities and create a paper trail, and it would provide needed judicial oversight to police conduct that has the potential to be highly intrusive.

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[39] First Reasons for Decision, para. 136, *Joint Appeal Book*, p. 152.

33. Whether a person has a reasonable expectation of privacy in the common areas of a multi-unit building requires a contextual analysis and each case turns on its own facts. The jurisprudence provides a variety of examples of different types of police activity in common areas – some found to be searches, others not – but there has never been a case quite like this. What separates this case is the *scale* of the police activity. Here, police were not walking to a door to knock on it, or responding to a complaint – situations where it might be impractical to get a warrant. They were conducting a sophisticated operation involving many police officers over the course of months. They *could* have gotten a warrant. They simply decided not to.

34. The traditional *Edwards* considerations are always the guiding framework for assessing reasonable expectation of privacy, but in the context of multi-unit buildings, this Court's decision in *White* invites consideration of a number of specific elements, including:

> The security features associated with the common areas;
> Ownership or possessory interest in the common areas;
> The size of the building relative to the community's standards;
> The nature of the activities that take place in the common areas; and
> The type of intrusion in the common areas.

*R. v. Edwards*, [1996] 1 S.C.R. 128, para. 45
*R. v. White*, 2015 ONCA 508, paras. 44-45

35. With respect to the first of these factors, the buildings in this case had strict security features. They were modern condominiums with key fobs and access codes, as opposed multi-unit buildings with unlocked common areas.

36. Second, police knew that the targets had possessory interests in the buildings (that is indeed why they were inside the buildings – to observe the targets). While the targets did not own the units, the existence of an ownership interest is not determinative. For instance, in *Wong*, the Supreme Court recognized a reasonable expectation of privacy in a hotel room, where the

guest had invited 30-35 people to attend, largely by virtue of the nature of the state intrusion, namely, video surveillance.

*R. v. Wong*, [1990] 3 S.C.R. 36
*R. v. Buhay*, 2003 SCC 30, para. 22

37. Third, the three buildings in this case range from 11 to 25 storeys. The defence led expert evidence before Justice Code that these were mid-sized condominium buildings in Toronto.[40]

38. Fourth, while the majority of the entries were in parking garages, police also entered hallways and stairwells and walked up to units. It is fair to assume that residents of these buildings expected fellow residents to be in these common areas engaged in normal activities. For instance, they surely expected other residents to pass through the parking garages or stairwells on the way to their cars or units. But they would not have expected, for instance, that a team of four police officers would be camped out in the parking garage for six hours making surreptitious observations, as happened on one occasion here.

39. Finally, with respect to the type of intrusion at issue, it bears repeating that the entries in this case did not involve the police attending a specific unit in response to a complaint. They were systemic. The intrusions here were instigated *by the police* as part of a large-scale investigation, and not by any of the residents of the buildings in question. They were frequent and, in many instances, long-lasting.

40. The above distinction is crucial and was highlighted by this Court in *White*. The Crown in *White* had cited two earlier decisions of this Court, *Laurin* and *Thomsen*, for the proposition that residents of multi-unit dwelling do not have privacy expectations in the hallways. In *Laurin,*

[40] Power Point Slide Show, *Joint Appeal Book*, pp. 9220-9256.

responding to an anonymous complaint, the police entered an apartment building through unlocked doors for the purpose of knocking on the resident's door. Once inside the building, they smelled marijuana in the hallway outside the appellant's apartment. In *Thomsen,* police were called by the property manager, who advised of a possible marijuana grow-op in a particular apartment. Police entered the building and, once inside, smelled marijuana in the hall outside the applicant's apartment. In both cases, this Court concluded that the police officers' mere presence in the hallway did not amount to a search. But in *White*, Justice Huscroft distinguished these two earlier decisions, stating:

> [B]oth *Laurin* and *Thomsen* involved single entries into the common hallways of apartment buildings in order to walk to a resident's door in the course of investigating complaints. The police conduct involved in these cases was much less intrusive than in this case.
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> *R. v. Laurin* (1997), 98 O.A.C. 50 (Ont. C.A.)
> *R. v. Thomsen,* [2005] O.J. No. 6303 (S.C.J.), aff'd 2007 ONCA 878
> *White, supra,* para. 40

41. In *White*, the police were not reacting to a complaint, nor seeking to speak with someone. Instead, as in the present case, they made repeated entries into common areas for the purpose of conducting a *secret investigation* against a resident. Justice Huscroft held that it was unreasonable to grant police "virtually unfettered access" to multi-unit dwellings to conduct such investigations, elaborating that:

> If the police are entitled to climb through windows to gain entry to multi-unit residential buildings and, once inside, enter common areas such as storage rooms, hide in stairwells, and conduct surveillance operations for as long as they want on those who live there – all without a warrant – on the basis that those who live in these buildings have no reasonable expectation of privacy in the common areas, then the concept of a reasonable expectation of privacy means little.
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> ...
>
> [T]he fact that a relatively large number of people may have access to a building's common areas need not operate to eliminate a reasonable expectation of privacy. It is one thing to contemplate that neighbours and their guests, all of whom may be strangers to

another resident, might be present in the common areas of a building, but another to say that a resident has no reasonable expectation of privacy as a result. An expectation of privacy may be attenuated in particular circumstances without being eliminated.

*White, supra*, paras. 42-43, 48

The above reasoning applies equally to this case. Police should not be permitted to "conduct surveillance operations for as long as they want" inside multi-unit dwellings without a warrant.

42. While the jurisprudence has not always been unanimous on the question of s. 8 protection in common areas of multi-unit buildings, there is, contrary to Justice Code's suggestion, a strong basis to find a reasonable expectation of privacy in underground garages and hallways of condominiums. Long before *White* was decided, various courts from across the country recognized the need for privacy in a variety of circumstances (some less intrusive than the present facts), including:

- In *Nguyen* the police entered an apartment lobby without permission and smelled marijuana. This was held to be a search under s. 8 of the *Charter*.
- In *Chomik*, the police entered the secured underground parking garage of an apartment building without permission. This was held to be a search under s. 8.
- In *Krzychowiec*, the police bypassed a buzzer system and entered an apartment building hallway without permission. This was held to be a search under s. 8.
- In *Thomas*, the police, while standing on common property, made observations inside an accused's apartment. The Court found a breach of s. 8.
- In *Hugh*, the police made observations from the common property fire lane of a multi-unit office building. This was held to be a search under s. 8.
- In *Sandhu*, Justice Prowse of the British Columbia Court of Appeal in concurring reasons concluded the police performed a search under s. 8 by standing in an apartment hallway and listening to a conversation inside an apartment.
- In *Thomsen*, the Court of Appeal endorsed Justice Prowse's conclusion in *Sandhu*, finding that police breached an apartment tenant's s. 8 rights by standing in an apartment hallway and smelling marijuana under a door. The Court stated, in relation to the marijuana smelling under the door, that the

accused had "a *reduced* expectation of privacy in an apartment hallway." [As discussed above, the Court also concluded that the police's mere presence in the hallway at the invitation of property management was not a search.]

- In *Laurin*, police stood on property owned by the landlord, without permission, and made observations about condensation developing on an apartment tenant's window. This was held to be a search under s. 8. [As discussed above, the Court also concluded that the police's mere presence in the hallway in response to a complaint was not a search.]

- In *Clarke*, this Court held that by entering the accused's underground parking garage, "police went beyond the limit of private property leading up to the [accused's] door".

*R. v. Nguyen*, [2004] O.J. No. 2698 (S.C.)
*R. v. Chomik*, 2011 ABPC 152
*R. v. Krzychowiec*, 2004 NSPC 60
*R. v. Thomas*, 2010 ABPC 401
*R. v. Hugh*, 2014 BCSC 1426
*R. v. Sandhu* (1993), 82 C.C.C. 3d 236 (B.C.C.A.)
*R. v. Thomsen*, (Ont. S.C.), *supra*, para. 58
*R. v. Laurin*, *supra*
*R. v. Clarke*, [2005] O.J. No. 1825 (Ont. C.A.)

43. Overlapping and shared privacy is a reality of living in modern society, one to which the law must adapt. The "reasonable expectation of privacy" test must continue to reflect what Canadians *reasonably expect* and cannot become bogged down in rigid or outdated notions of exclusivity. Canadians increasingly store their private documents on partially shared servers or devices, with access limited to certain classes of people with passcodes. And, similarly, they increasingly live in multi-unit dwellings, with physical access limited to certain classes of people with key fobs. In both cases, the analysis must turn on their expectations and whether those expectations are reasonable. Here, residents would not have reasonably expected the police to conduct an elaborate, secret investigation on their private property.

*R. v. Marakah*, 2017 SCC 59, para. 38

*2. The police cannot rely on any "permission" they obtained*

44. The police are unable to rely on any "permission" they received from property management. First, they made many of their 112 entries before seeking any kind of permission at all. But even the "permission" they later received is not the kind of consent that our law considers to be valid. While police might be entitled to rely on the ostensible authority of a property manager to make decisions for the condominium as a whole in some circumstances, they cannot do so where they lie to property management and prohibit them from talking to the condominium board.

45. In general, for a consent to be valid, the *Wills* criteria must be satisfied. But almost none of the *Wills* criteria, listed below, were met in this case:

> (i) there was a consent, express or implied;
>
> (ii) the giver of the consent had the authority to give the consent in question;
>
> (iii) the consent was voluntary in the sense that that word is used in Goldman, supra, 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;
>
> (iv) the giver of the consent was aware of the nature of the police conduct to which he or she was being asked to consent;
>
> (v) 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,
>
> (vi) the giver of the consent was aware of the potential consequences of giving the consent.

*R. v. N.N.M.*, [2007] O.J. No. 3022 (Ont. S.C.) at para. 292
*R. v. Wills*, [1992] O.J. No. 294 (Ont. C.A.)

46. Granting police unfettered access to a condominium building is a decision that must be taken by the condominium board, or by a true agent of the board (i.e. one who is permitted to communicate all relevant facts to the board and seek instructions). Property management cannot make these decisions themselves in situations where information is withheld from them or they are prohibited form consulting with the board. Property managers have no authority other than that which is delegated to them in accordance with the *Condominium Act*. They are akin to the hotel staff members who invited the police to investigate crimes in *Wong*. In *Mercer*, another case involving hotel staff inviting the police to investigate crime, Arbour J.A. (as she then was), discussed the nuances associated with obtaining "third party" consent for searches, and ultimately held that there was a s. 8 breach, despite hotel staff's "consent". Property management, like hotel staff, are not judges and cannot be expected to oversee state conduct in the manner the judiciary does.

*R. v. Mercer*; [1992] O.J. No. 137 (Ont. C.A.)

47. Had the police been concerned about residents finding out about their investigation, they could have made *bona fide* efforts to find out who the members of the condominium board were. They did not. Police could have gotten a warrant and an assistance order to secure assistance from property management. Or they could have gotten a warrant and entered surreptitiously, as they had already been doing.

48. The reason judicial oversight is required for this type of activity is two-fold. First, it forces the police to keep a paper trail. The ITO would document the grounds for entering the building and the warrant would clearly set out the limits on the surveillance. Second, the courts would be able to impose appropriate limitations on the surveillance as they see fit—or perhaps even not issue the warrant. Neither of these situations was contemplated in the case at hand.

*3. The doctrine of implied licence does not apply in these circumstances*

49. Justice Code concluded that, even if the entries constituted searches, they were nevertheless authorized by law under the implied license doctrine.[41] This position – that police have an "implied licence" to enter common areas of condominiums as long as they are investigating crime – was advanced by the Crown in *White* and was conclusively rejected by this Court, which stated that:

> The appellant [Crown] asserts, but did not establish, that the searches were authorized by law because the police had an implied invitation to enter common areas of the building to conduct non-intrusive investigative steps. Although it is clear that the police, along with members of the public, have an implied licence to enter a property and knock on the door, this is for purposes of communicating with the resident. In this case, the police did not use their implied licence to knock on the respondent's door. On the contrary, the police did everything possible to conceal their presence in the building.
>
> *White, supra*, para. 56.

The implied licence doctrine has no application to the facts of this case. Justice Code's conclusion is contrary to this Court's holding in *White* and is an error.

50. For these reasons, this Court should conclude that the repeated police entries into private condominiums in the present case amounted to a series of unlawful searches.

**B. This Court should revisit its rulings in *Mahal* and *Beauchamp* and should conclude there were insufficient grounds to name the Appellant Tang as a "known person" in the renewal and expansion wiretap authorization**

51. The Appellant Tang does not seek to relitigate Justice Code's conclusion that sufficient grounds existed for the authorizing justice to find that naming him "may assist" the investigation.

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[41] First Reasons for Decision, paras. 124-125, *Joint Appeal Book*, p. 149.

Justice Code applied the test set out in this Court's decisions in *Mahal* and *Beauchamp,* which were binding on him. Instead, the Appellant asks this Court to revisit its decisions in *Mahal* and *Beauchamp* and to instead hold that the minimum standard for naming a "known person" in an authorization for the purpose of intercepting all of that person's communications is: reasonable grounds to believe that the interception of the specific known person's communications "*will* afford" evidence of an offence. There were insufficient grounds to meet this higher standard in the present case (indeed, there were barely sufficient grounds to meet the very low "may assist" standard). As Justice Code was bound by this Court's decisions in *Mahal* and *Beauchamp*, the argument now advanced on appeal was not open to trial counsel, who did not raise it.

> *R. v. Mahal*, 2012 ONCA 673, paras. 68-79, application for leave to appeal to S.C.C. dismissed, [2012] S.C.C.A. No. 496
> *R. v. Beauchamp*, 2015 ONCA 260, paras 104-105

52. The Appellant Tang asks this court to find that the minimum constitutional threshold for the issuance of a Part VI authorization should be assessed as regards *each person* whose communications are going to be intercepted and who has a reasonable expectation of privacy under s. 8. If the police want to intercept every communication of a known person, they should be required to establish on reasonable and probable grounds that the interception of *that* person's communications *will* afford evidence of the offence. This is not a novel position. It has been adopted by multiple Ontario courts prior to *Mahal* and by courts in other provinces.

53. Section 185(1)(e) of the *Criminal Code* provides that the affiant must include "the names … if known, of all persons, the interception of whose private communications there are reasonable grounds to believe may assist the investigation of the offence…" But there are two ways of reading this provision. One is that s. 185(1)(e) is directed solely at what information the affiant must include in the supporting affidavit, and does not set out the minimum standard for

intercepting all of a person's communications. In other words, it is directed at insuring that the issuing justice has as much information as possible, the affiant being required to name a broader class of people than can be named as targets in the *authorization* itself. The other reading, endorsed in *Mahal*, is that s. 185(1)(e) itself creates the standard for intercepting all of a person's communications. In *Chung*, Justice Ducharme explained the above distinction and endorsed the former interpretation (the one urged by the Appellant Tang here) as follows:

> The parties are correct that the test for naming "knowns" in the authorization under s. 186(4)(c) is that the person is someone whose private communications would assist in the investigation. This is required by s. 8 of the *Charter* as interpreted in *Hunter et al. v. Southam Inc.* (1984), 1984 CanLII 33 (SCC), 14 C.C.C. (3d) 97 (S.C.C.) and its progeny. However, it does not follow that the standard of "may assist the investigation of the offence" set out in s. 185(1)(e) of the Code offends s. 8 of the *Charter*. This is because that standard is not the one used to authorize the electronic surveillance. Rather, it is merely the standard that requires the police to name the known person in their application. This distinction was recognized by Charron J.A. in *R. v. Shayesteh*, (1996), 1996 CanLII 882 (ON CA), 111 C.C.C. (3d) 225 (Ont. C.A.) at 245 where she rejected the notion that the officer making the application must subjectively believe that the interceptions would assist in the investigation:
>
> > this is not so with respect to an application for a wiretap authorization. It is the judicial officer who is authorized to act upon the grounds and grant the authorization, not the applicant. While the officer's belief may be a relevant factor for the authorizing justice to consider, it is in no way determinative of the issue.
>
> This distinction has also been recognized by Justice Dambrot of this Court in a paper he delivered at an educational seminar of the Supreme Court of British Columbia:
>
> > An unusual feature of Part VI is that it requires the affiant to name in the affidavit not merely the persons whose private communications are proposed to be intercepted, but rather all persons whose private communications, if intercepted, may reasonably be expected to assist the investigation. [*R. v. Shayesteh* (1996), 1996 CanLII 882 (ON CA), 111 C.C.C. (3d) 225(Ont. C.A.)]. As a result, the affiant may properly include the names of family members or innocent persons connected to the targets of the investigation who would not otherwise be likely to find their way into the affidavit. In addition, the affidavit may contain descriptions of persons whose existence is known to the police, but whose names are not known. Note however that only persons, the interception of whose communications will assist the investigation, may be named in the authorization.

> Moreover, as already discussed in paragraph 20, supra, the less stringent standard of "may assist the investigation of the offence" for naming "knowns" in the application is consistent with the purpose of Part VI of the Code, i.e. the protection of privacy. It provides more information to the issuing Justice as to what persons may well have their communications intercepted because of their relationships with named targets. In this way the issuing judge can more carefully consider the scope and impact of any authorization. [Emphasis added.]

*R. v. Chung*, 2008 CanLII 12705 (ON SC), paras. 25-26

54. Similarly, in *Lepage*, the British Columbia Court of Appeal, per Hall J.A., stated:

> ...the trial judge applied a standard of "may" or "could" afford evidence, a standard less than that constitutionally mandated by the cases of *Duarte* and *Garofoli*. It is fair to observe that there seems to have been some confusion as to the proper test in the argument and discussions before the learned trial judge. The judge did, on the ruling concerning the cross-examination of Cpl. Gresham, correctly advert to the proper test for review as articulated in *Garofoli*. However, it does appear she may have erroneously considered the lesser standard of "may" in her consideration of the appropriateness of including Morin as a named party in the authorization granted by Grist J. The proper test is whether the interception of private communications will afford evidence of the offence or offences being investigated. ... [Emphasis added.]

*R. v. Lepage*, 2008 BCCA 132, para. 15, leave to appeal to S.C.C. refused [2008] S.C.C.A. No. 249

55. The above interpretation – that if police want to intercept every communication of a known person, they should be required to establish on reasonable and probable grounds that the interception of *that* person's communications *will* afford evidence of the offence – is both constitutionally sound and has been endorsed by a variety of Canadian courts pre-*Mahal*. *Mahal* and *Beauchamp* should be revisited and the reasoning in these other decisions preferred.

*R. v. Ahmad et al.*, 2010 ONSC 123, para. 14
*R. v. Beauchamp*, [2008] O.J. No. 4919, para. 18-23
*R. v. Lee*, 2001 BCSC 1649
*R. v. Shayesteh*, (1996), 111 C.C.C. (3d) 225 (Ont. C.A.) at 245
*R. v. Chow*, [2005] 1 S.C.R. 384, para. 34

56. The effect of the *Mahal* line of cases is to water down the constitutional protections in s. 8 of the *Charter* by allowing all of a person's private communications to be intercepted in

situations, like the present case, where there is little evidence that interception of their communications will afford evidence of an offence. It also leads to the perverse result of making it easier to obtain larger wiretap authorizations, such as the ones in this case, than smaller wiretap authorizations, when common sense tells us that the reverse should be true. If the police had sought to intercept only the Appellant Tang's communications and no one else's, they would have lacked grounds to do so. But by combining him with dozens and dozens of other targets, they only had to produce minimal grounds with respect to each target, and could seek to satisfy the constitutional "will afford" standard with respect to a huge wiretap authorization as a whole (the latter being easier to do, interception of more targets necessarily generating more evidence). It is respectfully submitted that this result is both illogical and contrary to the purpose of s. 8.

## PART IV: ORDER REQUESTED

57. The Appellant Tang requests that this Court grant the appeal, quash his conviction and order a new trial.

It is estimated that the Appellant Tang's oral argument will take 90 minutes.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 30th of July, 2018.

**Andrew Burgess**
Barrister and Solicitor
111 Queen Street East,
South Building, Suite 450
Toronto, ON M5C 1S2
Tel: 416-562-5137
Fax: 1-866-677-9338
Email: andrew@andrewburgesslaw.ca

Counsel for the Appellant

## SCHEDULE A

## AUTHORITIES TO BE CITED

*R. v. Ahmad et al.*, 2010 ONSC 123

*R. v. Beauchamp*, [2008] O.J. No. 4919 (S.C.)

*R. v. Beauchamp*, 2015 ONCA 260

*R. v. Buhay*, 2003 SCC 30

*R. v. Chomik*, 2011 ABPC 152

*R. v. Chow*, [2005] 1 S.C.R. 384

*R. v. Chung*, 2008 CanLII 12705 (ON SC)

*R. v. Clarke*, [2005] O.J. No. 1825 (Ont. C.A.)

*R. v. Edwards*, [1996] 1 S.C.R. 128

*R. v. Hugh*, 2014 BCSC 1426

*R. v. Krzychowiec*, 2004 NSPC 60

*R. v. Laurin* (1997), 98 O.A.C. 50 (Ont. C.A.)

*R. v. Lepage*, 2008 BCCA 132

*R. v. Lee*, 2001 BCSC 1649

*R. v. Mahal*, 2012 ONCA 673

*R. v. Marakah*, 2017 SCC 59

*R. v. Mercer*; [1992] O.J. No. 137 (Ont. C.A.)

*R. v. N.N.M.*, [2007] O.J. No. 3022 (Ont. S.C.)

*R. v. Nguyen*, [2004] O.J. No. 2698 (S.C.)

*R. v. Sandhu* (1993), 82 C.C.C. 3d 236 (B.C.C.A.)

*R. v. Shayesteh*, (1996), 111 C.C.C. (3d) 225 (Ont. C.A.) at 245

*R. v. Thomas*, 2010 ABPC 401

*R. v. Thomsen,* [2005] O.J. No. 6303 (S.C.J.), aff'd 2007 ONCA 878

*R. v. Wills*, [1992] O.J. No. 294 (Ont. C.A.)

*R. v. White*, 2015 ONCA 508

*R. v. Wong*, [1990] 3 S.C.R. 36

## SCHEDULE B: LEGISLATION CITED

*Criminal Code* (R.S.C., 1985, c. C-46)

**Application for authorization**

**185 (1)** An application for an authorization to be given under section 186 shall be made *ex parte* and in writing to a judge of a superior court of criminal jurisdiction or a judge as defined in section 552 and shall be signed by the Attorney General of the province in which the application is made or the Minister of Public Safety and Emergency Preparedness or an agent specially designated in writing for the purposes of this section by

> **(a)** the Minister personally or the Deputy Minister of Public Safety and Emergency Preparedness personally, if the offence under investigation is one in respect of which proceedings, if any, may be instituted at the instance of the Government of Canada and conducted by or on behalf of the Attorney General of Canada, or
>
> **(b)** the Attorney General of a province personally or the Deputy Attorney General of a province personally, in any other case,

and shall be accompanied by an affidavit, which may be sworn on the information and belief of a peace officer or public officer deposing to the following matters:

> **(c)** the facts relied on to justify the belief that an authorization should be given together with particulars of the offence,
>
> **(d)** the type of private communication proposed to be intercepted,
>
> **(e)** the names, addresses and occupations, if known, of all persons, the interception of whose private communications there are reasonable grounds to believe may assist the investigation of the offence, a general description of the nature and location of the place, if known, at which private communications are proposed to be intercepted and a general description of the manner of interception proposed to be used,
>
> **(f)** the number of instances, if any, on which an application has been made under this section in relation to the offence and a person named in the affidavit pursuant to paragraph (e) and on which the application was withdrawn or no authorization was given, the date on which each application was made and the name of the judge to whom each application was made,
>
> **(g)** the period for which the authorization is requested, and
>
> **(h)** whether other investigative procedures have been tried and have failed or why it appears they are unlikely to succeed or that the urgency of the matter is such that it would be impractical to carry out

the investigation of the offence using only other investigative procedures.

**Judge to be satisfied**

**186 (1)** An authorization under this section may be given if the judge to whom the application is made is satisfied

**(a)** that it would be in the best interests of the administration of justice to do so; and

**(b)** that other investigative procedures have been tried and have failed, other investigative procedures are unlikely to succeed or the urgency of the matter is such that it would be impractical to carry out the investigation of the offence using only other investigative procedures.

**Exception for criminal organizations and terrorism offences**

**(1.1)** Notwithstanding paragraph (1)(b), that paragraph does not apply where the judge is satisfied that the application for an authorization is in relation to

**(a)** an offence under section 467.11, 467.111, 467.12 or 467.13;

**(b)** an offence committed for the benefit of, at the direction of or in association with a criminal organization; or

**(c)** a terrorism offence.

**Where authorization not to be given**

**(2)** No authorization may be given to intercept a private communication at the office or residence of a solicitor, or at any other place ordinarily used by a solicitor and by other solicitors for the purpose of consultation with clients, unless the judge to whom the application is made is satisfied that there are reasonable grounds to believe that the solicitor, any other solicitor practising with him, any person employed by him or any other such solicitor or a member of the solicitor's household has been or is about to become a party to an offence.

**Terms and conditions**

**(3)** Where an authorization is given in relation to the interception of private communications at a place described in subsection (2), the judge by whom the authorization is given shall include therein such terms and conditions as he considers advisable to protect privileged communications between solicitors and clients.

**Content and limitation of authorization**

**(4)** An authorization shall

**(a)** state the offence in respect of which private communications may be intercepted;

**(b)** state the type of private communication that may be intercepted;

**(c)** state the identity of the persons, if known, whose private communications are to be intercepted, generally describe the place at which private communications may be intercepted, if a general description of that place can be given, and generally describe the manner of interception that may be used;

**(d)** contain such terms and conditions as the judge considers advisable in the public interest; and

**(e)** be valid for the period, not exceeding sixty days, set out therein.