

CANADA / JUDGMENT

R. v. Alkhalil

2020 BCSC 1219

COURT

Supreme Court of British Columbia

DECIDED

17 August 2020

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2020 BCSC 1219 R. v. Alkhalil

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Alkhalil,

2020 BCSC 1219

Date: 20200817

Docket: 27393-23

Registry: Vancouver

Regina

v.

Rabih Alkhalil (a.k.a. Robby Alkhalil), Dean Michael Wiwchar and

Larry Ronald Amero

Restriction on Publication: A publication ban has been mandatorily imposed under s. 648(1) of the Criminal Code of Canada, restricting the publication, broadcasting or transmission in any way of any portion of the trial at which the jury is not present. This publication ban applies until the jury retires to consider its verdict.

Before: The Honourable Madam Justice Maisonville

Ruling re Application No. 23 - Exclude Evidence seized pursuant to a General Warrant

Counsel for the Crown, appearing via video conference:

D.A. Jardine, Q.C.

N. Gregoire

D. Darby

A. La Bar

S. Dworkin

M. Sheardown

Counsel for the Accused, Rabih Alkhalil (a.k.a. Robby Alkhalil), appearing via video conference:

K. Blok

Counsel for the Accused, Dean Michael Wiwcar, appearing via video conference:

S. Buck

A. Dorin

Counsel for Larry Ronald Amero, appearing via video conference:

K. Blok appearing as agent

Place and Date of Hearing:

Vancouver, B.C.

June 22, 2020

Place and Date of Judgment:

Vancouver, B.C.

August 17, 2020

introduction

- [1] The applicant, Dean Michael Wiwchar, is charged with first degree murder and conspiracy to commit murder in relation to the death of Sandip Duhre on January 17, 2012. He applies to exclude evidence seized by police during the search of an apartment in Surrey, BC (the "Surrey Safe House") on the grounds that the general warrant for the search was issued on the strength of an information to obtain ("ITO") that included unlawfully obtained information from CCTV footage and fob records.
- [2] The Crown urges the Court to exercise its discretion to decline to hear the application on the grounds that it does not have sufficient merit to justify embarking upon an evidentiary hearing. It says that there has already been a judicial pronouncement that the ITO was sufficient and the warrant valid. Further, there is no reasonable prospect that the applicant will be able to establish standing to challenge the ITO, since, as an unauthorized occupant of the Surrey Safe House, he had no reasonable expectation of privacy in CCTV images and fob records relating to a residential building in which he had no basis to be.

Background Information

History of the Proceedings

- [3] On April 23, 2012, Det./Cst. Lisa Wu of the Vancouver Police Department ("VPD") affirmed an affidavit (the "P3 ITO") in support of a general warrant to search two residences associated to the applicant: an apartment on Jervis Street in Vancouver where he lived with his girlfriend, and the Surrey Safe House, which the applicant was observed attending with an associate, Philip Ley. The general warrant was issued on April 23, 2014 in relation to murder and conspiracy to commit murder.
- [4] On April 24, 2012, members of the VPD executed a search of the Surrey Safe House. 14 operational firearms were seized, as well as numerous other items of interest, including prohibited magazines, leg irons and handcuffs, large quantities of bleach, and disguises and a mask.
- [5] The applicant and Mr. Ley were charged with a number of offences, most notably, possession of the firearms seized from the Surrey Safe House. Justice Bowden presided over several voir dires during which the applicant and Mr. Ley challenged the P3 authorization. An application to cross-examine the affiant was denied (*R. v. Ley*, 2014 BCSC 2694). The applicant and Mr. Ley also argued that the statutory conditions in s. 487.01(a) of the Criminal Code, R.S.C. 1985, c. C-46 [Criminal Code] had not been satisfied since there were no reasonable grounds to believe that the applicant had murdered Mr. Duhre or that the two men had conspired to commit murder. Justice Bowden concluded in a ruling (*R. v. Ley and Wiwchar*, 2015 BCSC 84) that there was sufficient evidence in the ITO to provide some basis upon which the authorizing justice could have found reasonable and probable grounds to believe that the applicant was involved in the murder of Mr. Duhre and that a search of the two premises would provide evidence regarding the offence. Justice Bowden reached the same conclusion in regards the offence of conspiracy to commit murder. Justice Bowden further concluded that there was a basis upon which the authorizing judge could have found investigative necessity under s. 186(1).
- [6] Mr. Ley pleaded guilty before trial. The applicant proceeded to trial and was convicted by Bowden J. (*R. v. Wiwchar*, 2015 BCSC 973). The applicant's appeal on grounds unrelated to the judicial authorization was dismissed (*R. v. Wiwchar*, 2017 BCCA 9).

CCTV Surveillance Video and Fob Records

- [7] The following facts derive from the submissions of the Crown and are not disputed by the applicant.
- [8] The Surrey Safe House was located at 1209-13380 108th Avenue, Surrey, a high-rise condominium complex known as the City Point Towers ("CP Towers"). The complex comprised two towers: Tower 1, which had 25 floors and 261 units, and Tower 2, 21 floors and 196 units.

[9] The bylaws for the strata corporation in effect in 2012 included the following provisions:

3. Use of Property

(15) An owner, tenant or occupant or visitor must not:

- (r) give keys, combinations, security cards or other means of access to the building, the parking garage or common areas to any person other than an employee, contractor, occupant or guest of the strata lot permitted by these bylaws.

35. Rentals

Subject to the provisions of this bylaw strata lots shall be allowed to be rented with the following conditions:

- (1) The council will not screen tenants, establish screening criteria, require the approval of tenants, require the insertion of terms in tenancy agreements or otherwise restrict the rental of a strata lot except as set out in this bylaw;
- (2) Before a tenant may move into any strata lot, the owner shall deliver or cause to be delivered to the Strata Corporation a "Form K - Notice of Tenant's Responsibilities" in the form set out in the Act signed by the tenant.

[10] CP Towers had a security system that required an electronic key fob to enter the building and to access a particular floor in the elevator. Every time a person used a fob or was buzzed in, the security system automatically recorded the following information: time, date, location of entry, mode of entry (fobbed or buzzed in), serial number of the fob and its corresponding suite.

[11] CP Towers also had a CCTV system that captured images at several locations within the complex, including the front door, the parking gate, and inside the elevators. The CCTV system ran separately from the fob security system.

[12] In late 2011, members of the Surrey RCMP began investigating suspected drug trafficking at the CP Towers centred around suite 1902. Two of the initial targets were Amrit Rai and Mandeep Randhawa. The applicant was not a target of this investigation.

[13] In January 2012, an RCMP member met with the property manager for CP Towers to advise of the investigation and to seek CCTV footage. The property manager was eager to assist, and the officer was provided with fobs to access both the security room and building as a whole. The RCMP used the fobs and accessed the security room to conduct video surveillance of their targets over a number of months.

[14] The VPD learned of the applicant's association to CP Towers on March 28, 2012 when he was surveilled there from his residence on Jervis Street in Vancouver, picking up Mr. Ley en route. They observed the applicant using a fob to enter the front door of Tower 2.

- [15] The VPD became aware that the Surrey RCMP was conducting an unrelated drug trafficking investigation at CP Towers and had established a relationship with property management, Gateway Property Management Corporation ("Gateway"). The VPD was aware that the RCMP had received the consent of Gateway to access CCTV footage and fob records in the complex.
- [16] On April 4, 2012, an inspector with the RCMP directed S/Sgt. Paradis to assist the VPD in determining whether there was CCTV footage of two males matching the description of the applicant and Mr. Ley attending at Tower 2 on the evening of March 28, 2012 during the time period identified by VPD surveillance.
- [17] On April 7, 2012, S/Sgt. Paradis and Cst. Lucic attended at CP Towers and accessed the security room. Cst. Lucic retrieved CCTV images from March 28, 2012 during the relevant time period. They observed two males matching the description of the applicant and Mr. Ley approach the main entrance. The applicant was seen using a fob to enter the building. The two men were then observed entering the elevator and the applicant used the fob to access the elevator keypad. Once the elevator doors opened on the 12th floor, the men exited to the right of the elevator, outside the view of the security camera in the elevator. They subsequently took the elevator to the parking garage and then returned to the 12th floor. The two men eventually departed the building through the main entrance doors, consistent with the observations of VPD surveillance.
- [18] Cst. Lucic also accessed the fob activity records for the 12th floor for the relevant time period and determined that the fob that had been used by the two men was associated to suite 1209.
- [19] Cst. Lucic was tasked with assisting the VPD with its investigation on several other occasions. On April 7 and 11, 2012, he and Cst. Sangha accessed CCTV footage, and made similar observations about the movements of the applicant and Mr. Ley within the building on April 7, 10, and 11. Fob records indicated that the fob used by the applicant at those times was associated with suite 1209.
- [20] On April 12, 2012, the VPD made contact with Gateway to request fobs for the building, owners' and renters' Form Ks for the 12th floor, and a floor plan for the 12th floor (A Form K is a Notice of Tenant's Responsibilities which owners are required to have their tenants sign pursuant to the Strata Property Act, S.B.C. 1998, c. 43. Owners must then provide the signed Form K to the strata corporation so that it has current records of who is authorized to occupy the strata units). Gateway advised it could provide this material later that afternoon.
- [21] The VPD received a list of the ten units on the 12th floor. That list showed that suite 1209 was owned by Tejinder Singh Badyal, Sukhvinder Badyal, and Lovedeep Badyal. According to the Form K, the registered tenant was Michael Pham.

- [22] The VPD spoke with Tejinder Baydal and obtained a copy of the tenancy agreement, which was the standard form residential tenancy agreement issued by the Residential Tenancy Branch. The tenancy was for a term of six months commencing on November 15, 2011. It was a term of the tenancy that the tenant could assign or sublet the suite to another person with the written consent of the landlord. Mr. Pham was provided with a key to suite 1209 and a fob to access the building. Mr. Pham paid Mr. Baydal for the rent every month in cash.
- [23] Mr. Pham never sought and Mr. Badyal never gave permission for suite 1209 to be sublet. Mr. Badyal believed that Mr. Pham resided in the suite he had rented. When shown photographs of the applicant and Mr. Ley, Mr. Badyal indicated that he did not know who they were.
- [24] According to a 2014 will-say statement of Mr. Pham, reflecting a conversation with Crown counsel, he, along with a friend, sublet suite 1209 to another person. The applicant says the Court should infer that that person was him. The Crown says there is no evidence it was the applicant, and that when shown photographs of the applicant and Mr. Ley by the police, Mr. Pham was not able to identify them.
- [25] On April 24, 2012, the general warrant to search suite 1209 was executed and various items were seized as noted earlier. The applicant's DNA was recovered from several items in the suite.

Positions of the Parties

- [26] The applicant seeks to argue in Application #23 that when improperly obtained evidence is excised, the ITO is not sufficient to support the reasonable belief that evidence of the offences being investigated would be found in suite 1209. The relevant paragraphs in the ITO with respect to this issue are paras. 232, 308, and 309.
- [27] Paragraph 232 is entitled "Video and FOB Activity at 13380 108th Avenue, Surrey", and sets out Cst. Sangha's and Cst. Lucic's observations of the applicant and Mr. Ley on April 7, 2012 drawn from the CCTV video at the CP Towers and fob records.
- [28] Paragraph 308 refers to the applicant and Mr. Ley entering the front door of the CP Towers with a fob on April 12, 2012, following which the lights were turned on in suite 1209, which had previously been dark.
- [29] As set out in paragraph 309, the applicant was then observed walking inside the suite past the windows.
- [30] The applicant argues that the CCTV footage and fob records upon which these paragraphs were based were obtained by the police without lawful authority. Excision of these paragraphs from the ITO, he says, will undermine the requisite belief that evidence of the offences being investigated would be found in suite 1209. He advances two bases for excision.

- [31] The first is that the VPD did not have lawful authority to access the CCTV video and fob records. The applicant submits that there is no evidence that the initial permission that the RCMP obtained from building management to access these materials for their own purposes extended to the VPD's unrelated investigation.
- [32] The second is that, in obtaining the impugned evidence, the police breached the applicant's rights under s. 8 of the Charter. The applicant submits that he had a reasonable expectation of privacy in the common areas of the building and in the fob records for suite 1209, relying principally on *R. v. Latimer*, 2020 BCSC 488, and *R. v. Kim*, 2019 BCSC 2150. The applicant submits that in *R. v. Marakah*, the Supreme Court of Canada altered the framework for assess privacy. He notes, as well, that the Court of Appeal has recently weighed in on the issue in *R. v. Pipping*, 2020 BCCA 104.
- [33] The applicant takes the position that circumstances have changed materially since Bowden J.'s decision in *Ley*. The issue of whether the ITO supported a reasonable belief that evidence of the offences would be found in suite 1209 was not before Bowden J. Moreover, the law with respect to the reasonable expectation of privacy in the common areas of residential complexes and fob records has evolved.
- [34] The Crown answers that the applicant has not demonstrated that there is a reasonable prospect that he could establish standing to challenge the search and seizure of the CCTV video and fob records by police. Accordingly, the proposed voir dire will not assist the Court in the proper determination of the real issues in this case.
- [35] In respect of both the CCTV images and the fob records, the Crown submits that a factor that weighs heavily against a finding of a reasonable expectation of privacy is the fact that the applicant did not have lawful authority to access the Surrey Safe House. It says that Mr. Pham was a sham tenant, and that any purported assignment or subletting of the suite was undertaken without the knowledge of the owner and contrary to the tenancy agreement and the purpose of the strata bylaws. There is no evidence the applicant was a guest of the lawful tenant.
- [36] The Crown argues that in the totality of the circumstances, the applicant could not reasonably have expected that images and records of his comings and goings at the CP Towers, kept by the property management company charged with maintaining the safety and security of the premises, would not be shared with police investigating crime. Accordingly, it would be contrary to the interests of justice to embark upon an evidentiary hearing to determine the lawfulness of the police conduct, as there is no reasonable prospect that the applicant can establish a reasonable expectation of privacy in the materials obtained.
- [37] The Crown further submits that the recent authorities regarding the expectation of privacy in the common areas of multi-unit buildings upon which the applicant relies are distinguishable on their facts from the present case.

Governing Legal Principles

Vukelich Applications

- [38] As this Court has already issued several rulings in regard to Vukelich applications brought by the Crown, it is not necessary to review in detail the legal principles that govern such applications.
- [39] In brief, the purpose of a Vukelich hearing is to screen out proposed pre-trial applications where the remedy sought cannot reasonably be granted, assuming the allegations could be proven: *R. v. Edwardsen*, 2019 BCCA 259 at para 62. Generally speaking, to justify a *voir dire* alleging a breach of the Charter, the applicant must be able to demonstrate a reasonable basis upon which the court could find a breach: *R. v. Frederickson*, 2018 BCCA 2 at para. 26.
- [40] On a Vukelich application, the court assumes that the facts alleged by the applicant are true, and then determines whether those facts are capable of giving rise to the remedy sought: *R. v. Haevischer*, 2014 BCSC 2172 at paras. 9 and 28.
- [41] In that case, the applicants, following their convictions for six counts of murder in relation to the deaths of the "Surrey Six", sought a judicial stay of proceedings for abuse of process arising from systemic police misconduct during the investigation. The Crown argued that the stay application ought to be dismissed because, even assuming that all of the allegations of state misconduct could be proven, a stay of proceedings would be a grossly disproportionate response. Justice Wedge assumed, for the purposes of the Vukelich application, that the facts regarding the state misconduct alleged by the applicants were true but ultimately concluded that even taking the applicants' case at its highest, a stay of proceedings would be a disproportionate response in light of the seriousness of the offences and the interest of the community in the entry of their convictions. Accordingly, she declined to conduct an evidentiary hearing.

Reasonable Expectation of Privacy

- [42] Section 8 of the Charter guarantees everyone in Canada the right to be secure against unreasonable search and seizure.
- [43] The Supreme Court of Canada has identified three broad privacy interests protected by s. 8: personal privacy (bodily integrity), territorial privacy (places), and informational privacy (personal information). In any given case, these privacy interests may overlap: *R. v. Tessling*, 2004 SCC 67.
- [44] The concept of territorial privacy encompasses a hierarchy of places, some of which, such as a home, attract higher expectations of privacy.

- [45] As for informational privacy, s. 8 protects a biographical core of personal information, described in *R. v. Plant*, [1993] 3 S.C.R. 281 as information which tends to reveal intimate details of the lifestyle and personal choices of the individual. In *Latimer*, Justice Ker noted at paras. 147-148 that the Supreme Court of Canada in *R. v. Marakah*, 2017 SCC 59, at para. 24, referred to "details of the claimant's lifestyle or information of a biographic nature", thus expanding the scope of the private nature of the subject matter being assessed.
- [46] To assert a s. 8 claim, an applicant must establish a reasonable expectation of privacy in the subject matter of the search. This is assessed on the totality of the circumstances: *R. v. Edwards*, [1996] 1 S.C.R. 128. In *Edwards*, the Supreme Court of Canada identified a number of factors that may inform the determination, including the claimant's presence at the time of the search, ownership, possession or control of the place searched, which includes the ability to admit or exclude others, the historical use of the property; the existence of a subjective expectation of privacy, and the objective reasonableness of that expectation.
- [47] In *R. v. Spencer*, 2014 SCC 43, the Supreme Court said the following about the totality of the circumstances assessment (at paras. 17-18):
- [17] We assess whether there is a reasonable expectation of privacy in the totality of the circumstances by considering and weighing a large number of interrelated factors. These include both factors related to the nature of the privacy interests implicated by the state action and factors more directly concerned with the expectation of privacy, both subjectively and objectively viewed, in relation to those interests: see, e.g., *Tessling*, at para. 38; [*R. v. Ward*, 2012 SCC 660] at para. 65. The fact that these considerations must be looked at in the "totality of the circumstances" underlines the point that they are often interrelated, that they must be adapted to the circumstances of the particular case and that they must be looked at as a whole.
- [18] The wide variety and number of factors that may be considered in assessing the reasonable expectation of privacy can be grouped under four main headings for analytical convenience: (1) the subject matter of the alleged search; (2) the claimant's interest in the subject matter; (3) the claimant's subjective expectation of privacy in the subject matter; and (4) whether this subjective expectation of privacy was objectively reasonable, having regard to the totality of the circumstances: *Tessling*, at para. 32; *R. v. Patrick*, 2009 SCC 17, [2009] 1 S.C.R. 579, at para. 27; *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34, at para. 40. However, this is not a purely factual inquiry. The reasonable expectation of privacy standard is normative rather than simply descriptive: *Tessling*, at para. 42. Thus, while the analysis is sensitive to the factual context, it is inevitably "laden with value judgments which are made from the independent perspective of the reasonable and informed person who is concerned about the long-term consequences of government action for the protection of privacy": *Patrick*, at para. 14; see also *R. v. Gomboc*, 2010 SCC 55, [2010] 3 S.C.R. 211, at para. 34, and *Ward*, at paras. 81-85.

[48] In *R. v. White*, 2015 ONCA 508, the Court provided useful guidance with respect to the application of the Edwards principles as they relate to the reasonable expectation of privacy in the hallways of multi-unit buildings specifically. Justice Huscroft noted that the lesson from Edwards is that the reasonable expectation of privacy is a context-specific concept that is not amenable to categorical answers. He identified several considerations that might be relevant, noting that none was dispositive:

- a) The degree of possession or control exercised over the common area by the claimant;
- b) The size of the building - the larger the building, the lower the expectation of privacy in common areas;
- c) The presence of security systems or locked doors that function to exclude the public and regulate access; and
- d) Ownership of the property - a resident of a large building with many units may have a lesser expectation of privacy than a resident of a small building with only a couple of units.

[49] In *Pipping*, Garson J.A. highlighted the following factors as relevant to the assessment:

- a) The ability to regulate access, including the right to admit or exclude others from the place;
- b) Exclusivity of occupation;
- c) The size of the building;
- d) Whether property management or a condominium board has consented to the police presence;
- e) The breadth of the observations being made by the police;
- f) The ownership of the property; and
- g) The frequency with which a particular area is used.

[50] Ultimately, the numerous authorities that have considered this issue establish that a contextual approach is required when analyzing expectation of privacy, and that there is no categorical bar to a reasonable expectation of privacy in shared common areas.

Discussion

[51] The issue to be addressed in Application #23 is whether the ITO for the general warrant was sufficient to support the reasonable belief that evidence of the offences being investigated would be found in suite 1209. The applicant argues that the information contained in paras. 232, 308 and 309 of the ITO to support this belief derives from CCTV footage and fob records obtained by police without lawful authority. The issue on the present Vukelich application is whether the applicant has standing to advance this argument. If he does not, then there is no purpose in embarking upon an inquiry with respect to Application #23.

- [52] The applicant asserts standing on the basis of a reasonable expectation of privacy in the common areas of the CP Towers and in the fob records.
- [53] The Crown's argument against standing rests substantially, though not exclusively, on the proposition that the applicant was an unauthorized occupant with no ownership or tenancy rights in suite 1209. It is not disputed that the applicant was neither the registered owner of suite 1209 nor the tenant to whom the owner, Mr. Badyal, rented his premises.
- [54] The facts that the applicant alleges and submits the Court must assume for the purposes of the Vukelich application are these:
- a) Subsequent to Mr. Pham's rental of suite 1209, the applicant accessed suite 1209 on a number of occasions using a fob and a key and was not acting suspiciously;
 - b) The applicant was authorized to access suite 1209; and
 - c) The building management at CP tower did not give the VPD permission to use the CCTV footage or fob records to investigate the death of Sandip Duhre.
- [55] The applicant says that the inference in (b) is sound and follows logically from (a). He has not specifically indicated what evidence he proposes to call to substantiate (b). While he suggests that he might seek admissions from the Crown with respect to the evidence of Mr. Pham, the Crown advises that given the inconsistencies in Mr. Pham's account of his rental of the suite, such admissions are not likely to be forthcoming.
- [56] The applicant did not make detailed submissions on this application addressing whether he had a reasonable expectation of privacy in the CCTV video and fob records. As the brief reference to some of the general legal principles with respect to the expectation of privacy and, therefore, standing above makes clear, the assessment is context-specific and requires a full analysis of the relevant facts.
- [57] At this stage, I am not prepared to consider the matter without giving the applicant the opportunity to make full argument on the issue. I will also permit the parties to call evidence relevant to the question of whether the applicant had a reasonable expectation of privacy in the CCTV video and fob records, which may include evidence with respect to the RCMP's or the VPD's permission to access those materials. I encourage the parties to arrive at admissions to the extent that is possible however.
- [58] To be clear, any evidence and submissions will be limited to the expectation of privacy and standing, not the broader issues raised by Application #23.

"Maisonville J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/20/12/2020BCSC1219.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-alkhalil-2020-bcsc-1219>

Prepared on 26 October 2026 · Esheria