

CANADA / JUDGMENT

R. v. Alkhalil

2021 BCSC 326

COURT

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2021 BCSC 326 R. v. Alkhalil

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Alkhalil,

2021 BCSC 326

Date: 20210225

Docket: 27393-23

Registry: Vancouver

Regina

v.

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

Larry Ronald Amero

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Before: The Honourable Madam Justice Maisonville

Ruling Re Application No. 23 - Police Seizure of CCTV Footage and

FOB Records from the Surrey Safe house

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(September 8-10, 2020)

M. Rock (September 15, 17-18, 2020 and January 28, 2021)

Place and Dates of Hearing:

Vancouver, B.C.

September 8-10, 15, 17-18, 2020 and

January 28, 2021

Place and Date of Judgment:

Vancouver, B.C.

February 25, 2021

introduction

- [1] The applicant, Dean Wiwchar, seeks standing to challenge the admissibility of CCTV footage and fob records (the "materials") from the City Point Towers condominium complex ("CP Towers") in Surrey, BC. He maintains that he has both a territorial privacy interest in the condominium complex and an informational privacy interest in the materials.

- [2] The Crown says that in the totality of the circumstances, the applicant could not reasonably have expected that images and records of his comings and goings at CP Towers, kept by the property management company charged with maintaining the safety and security of the premises, would not be shared with the police investigating crime.

EVIDENTIARY BACKGROUND

- [3] The following facts derive from an Agreed Statement of Facts and from the testimony of the four witnesses who gave evidence on the voir dire.
- [4] On January 17, 2012, the Vancouver Police Department ("VPD") commenced an investigation into the shooting death of Sandip Duhre at the Sheraton Wall Centre in Vancouver.
- [5] The VPD began surveillance of the applicant in March 2012 and through that surveillance learned of his association to CP Towers, a high rise condominium complex in Surrey. The complex has two towers:
- a) Tower 1, at 10777 University Drive, has 25 floor with 261 units; and
 - b) Tower 2, at 13380 108th Avenue, has 21 floors with 196 units.
- [6] The strata corporation for CP Towers entered into an agency agreement with Gateway Property Management Corporation ("Gateway") in June 2010. The agreement was in effect during the January to April 2012 period. Pursuant to the terms of the agency agreement, Gateway agreed to assist the strata council in managing the affairs of the strata corporation. Jack Foo was the property manager and Chester Emmanuel was the onsite building manager.
- [7] The bylaws in effect for the strata corporation 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.

CP Towers Security System

- [8] At all relevant times CP Towers had a security system that required an electronic fob to enter the building and to access particular floors in the elevator. Every unit owner had access to the front doors of their building, the elevator, the floor of their unit, the parking level associated to that unit, the floor associated to their storage lockers, and common facilities such as the lounge and gym.
- [9] Every time a person used a fob, the security system automatically made an electronic record of the event by recording the following information: time, date, location of entry, mode of entry (fob or buzzed in), serial number of the fob and corresponding unit in the complex. Fob records could be viewed or printed by those with access to the security system. After 30 days, the fob records were permanently erased.
- [10] CP Towers also had a CCTV system that captured images at several locations in the complex, including the front door, lobby, parking gate and inside the elevators. The areas captured by the security cameras within the elevators and in the parking garage were not visible from outside the building. The cameras themselves were visible and covered with a dome. There were no cameras on the residential floors.
- [11] A copy of the CCTV footage was stored on a computer in the security room. The footage was retained for a period of about two weeks and then automatically deleted from the system.
- [12] Both the CCTV and fob systems had been installed by the developer of CP Towers.

Police Presence at CP Towers

- [13] According to Joanne Purser, president of CP Towers' strata council from 2010 to 2016, the complex suffered a significant amount of criminal activity, including vandalism, break-ins, drug activities and prostitution. As a result, the strata council was "borderline desperate" and welcomed police presence in the building, happy to assist whenever the police came to them for information. The police were given blanket permission to access both the property as well as CCTV and fob records. The security company the strata council had hired to provide 24-hour security in the building often corresponded directly with the police. When the strata council was subsequently advised, "we were quite comfortable and quite happy about it", Ms. Purser testified.
- [14] The strata council was the decision maker in permitting police access. However, it communicated its unanimous support for any efforts by the police to investigate crime in the buildings to the Gateway employees, and permitted the police to communicate directly with Mr. Foo or Mr. Emmanuel regarding access. Council did not place any restrictions on

their ability to assist the police. By "police", Ms. Purser meant the police generally, not any one particular investigative agency, and said that the council was fine with the police liaising and sharing information with other police agencies since council was always looking for support and assistance in addressing their various challenges.

- [15] In 2012, the strata council did not require the police to follow any particular process to access CCTV footage or fob records, such as providing the request in writing or advising of the suspect's name or police file number. Ms. Purser testified that council did not require police to make a new request whenever they required further access to records. She said that at some point, police were simply given fobs and keys to facilitate their access to the information they required from the security room. This was approved by council at the discretion of Mr. Emmanuel.

RCMP Access to the CCTV and Fob Systems

- [16] In late 2011, members of the Surrey RCMP began investigating suspected drug trafficking at CP towers. Two of the initial targets of the investigation were Amrit Rai and Mandeep Randhawa. The police were aware that Mr. Randhawa was a resident of unit 1902 in Tower 1. The applicant was not a target of this investigation.
- [17] On January 20, 2012, an officer from the Surrey RCMP, Cst. Berube, attended at the main office of Gateway and met with Mr. Foo. Cst. Berube advised Mr. Foo that he was a Surrey RCMP officer and was conducting an investigation pertaining to CP Towers. He said that he was in need of camera footage, both recorded and live, if possible.
- [18] Mr. Foo was extremely willing to help. He told the officer that a lot of suspicious activity had been taking place at CP Towers and that he was pleased the police were investigating. Mr. Foo advised that he could provide Cst. Berube with floor plans for the units in the towers and he invited him to speak with Mr. Emmanuel, who could assist him with entry to the security room where the CCTV and fob records could be accessed.
- [19] Cst. Berube and another RCMP officer, Cst. Lucic, met with Mr. Emmanuel and were provided with a key to access the security room and a fob to access the building. The RCMP used the fob and accessed the security room to conduct video surveillance of Mr. Rai and Mr. Randhawa over the course of many months.
- [20] The security room at CP Towers was located in the common parkade for both towers. The room also served as Mr. Emmanuel's office. Once police officers had been granted access to the security room, Mr. Emmanuel often saw them there looking at the CCTV and fob records.

VPD Seeks Assistance from Surrey RCMP

- [21] The VPD learned of the applicant's association to CP Towers on March 28, 2012 when he was surveilled there from his residence in downtown Vancouver, picking up a male, later identified as Phillip Ley, en route. The two men were observed at a London Drugs in Surrey purchasing bleach and cleaning wipes. They were then observed at CP Towers where the applicant was seen using a fob to enter the front door of Tower 2 at approximately 7:25 p.m. At 8:47 p.m., the applicant and Mr. Ley walked out the front doors of Tower 2 and drove away.
- [22] From April 2 to 4, 2012, Insp. Wade Lymburner of the Surrey RCMP was present at an inter-agency meeting in Vancouver concerning National Tactical Enforcement Priorities. On April 3, Insp. Brad Desmarais of the VPD provided a briefing on the Duhre homicide and mentioned they were surveilling the applicant, who was a suspect, in Surrey. Insp. Desmarais asked Insp. Lymburner if there was anything he could do to assist, and provided him with surveillance reports regarding the applicant from March 28, 2012 that referred to him attending at CP Towers. Insp. Lymburner recognized the address because several Surrey RCMP investigations had involved the condominium building. He was aware that the drug unit had been there quite extensively and had a relationship with the property management of the building, and that property management had permitted the police to access CCTV and fob records in the complex.
- [23] On April 4, 2012, Insp. Lymburner asked S/Sgt. Paradis to assist the VPD in determining whether there was CCTV footage of two males matching the descriptions of the applicant and Mr. Ley attending at Tower 2 on the evening of March 28, 2012. In his email sent that morning, Insp. Lymburner asked S/Sgt. Paradis whether there was "any video at the location including elevators and front door to determine where in the building they went, as well as who's [sic] key fob was used to gain entry and if that fob has been used prior and post this incident and by whom".
- [24] That day, S/Sgt. Paradis and Cst. Lucic, of the Surrey RCMP drug section, attended at CP Towers. To access the security room, Cst. Lucic used the key that had been provided to him and Cst. Berube to assist in their investigation of Mr. Rai and Mr. Randhawa. He retrieved images from March 28 during the time periods identified by VPD surveillance. Cst. Lucic observed two males matching the description of the applicant and Mr. Ley approach the main entrance. The applicant used a fob to enter the main doors and the two men then entered the elevator. The applicant used the fob to access the 12th floor. There the two men exited to the right of the elevator and outside the view of the security camera in the elevator. There were no cameras on the 12th floor.
- [25] Cst. Lucic fast-forwarded the security footage to the time the two men were seen by the VPD leaving Tower 2, and he observed them taking the elevator down to the lobby and exiting the building through the main doors.

- [26] Cst. Lucic also used the security computer to access and print the fob records for the 12th floor during the relevant time. The logs showed activity related to five units on the floor. Cst. Lucic believed that the fob used by the two men belonged to unit 1209.
- [27] The material obtained was provided to the VPD.
- [28] In the early morning hours of April 7, 2012, VPD surveillance observed the applicant and Mr. Ley arrived at Tower 2. The applicant used a fob to enter the main entrance door and the two men went inside.
- [29] On April 7, 2012, Cst. Lucic and Cst. Sangha attended at the security room at CP Towers and located CCTV footage consistent with the VPD surveillance observations of the applicant and Mr. Ley entering Tower 2 earlier in the day. Their review of the fob records for the day confirmed that the fob used by the applicant was associated to unit 1209. The officers obtained still images from the CCTV system and fob activity records, and provided them to the VPD.
- [30] On April 11, 2012, Det. Dykman of the VPD was assigned to liaise with the RCMP to obtain still photos from surveillance video and fob activity records for Tower 2. He spoke with Sgt. Desrosiers of the Surrey RCMP drug unit and asked her to have members of the unit to review building footage and obtain photos specific to certain timeframes for April 10 and 11, 2012.
- [31] On April 11, 2012, Cst. Lucic and Cst. Sangha also attended at CP Towers and entered the security room using the fob and the key that had previously been obtained in the investigation of Mr. Rai and Mr. Randhawa. They accessed the security footage and obtained still images of the applicant and Mr. Ley in CP Towers on April 10 and 11, 2012. They also obtained fob activity logs for unit 1209 for April 10 and 11, and provided both this information and the photographs to Det. Dykman in an email the following day.
- [32] Det. Dykman did not seek permission from Gateway or the strata council to obtain the information he had received from Cst. Sangha on this occasion (nor did he seek permission for any of the other video and fob information the VPD obtained over the following few weeks). He explained that this was because the RCMP had been conducting an unrelated investigation at the same location and had already assisted the Project Reality team with accessing video images and fob records, and he therefore assumed that the RCMP had obtained permission to be in the security room. As for approaching the strata council, Det. Dykman testified that he was not the lead on the file and therefore it was not his decision to make. In any event, it was not something that would ever be considered for a pending covert operation since the council was made up of people who lived in the building.
- [33] On April 12, 2012, Det. Dykman met with Mr. Foo following an exchange of emails and a telephone conversation earlier in the day. He explained he was a detective with the VPD Homicide Unit and was investigating a person or suspect in CP Towers on the 12th floor. He requested fobs for the building, Form Ks for the units on the 12th floor, and a floor plan of

the 12th floor. He did not reveal the specific suite the police were interested in in order to maintain covertness. Det. Dykman had initially been in contact with Mr. Emmanuel, the building caretaker, as the RCMP had provided his name as the contact person for the building and the individual who could provide him with a fob. Mr. Emmanuel, however, asked that the officer first obtain permission from Mr. Foo.

- [34] Mr. Foo was again very cooperative. He provided a master list of the ten units on the 12th floor and the Form Ks. The list showed that unit 1209 was owned by Tejinder Singh, Sukhvinder Badyal, and Lovedeep Badyal. The registered tenant was Michael Pham, whose name and signature appeared on the Form K for unit 1209. Neither the applicant's nor Mr. Ley's name were on the master list or the Form K. Mr. Emmanuel provided two fobs and a key to an empty suite on the 12th floor that police intended to use as a staging area for covert entry.
- [35] On April 18, 2012, Det. Dykman attended at CP Towers and met with Cst. Lucic, who instructed him how to use the CCTV system, as well the computer that kept the log of fob activity. Det. Dykman reviewed the security video of the applicant and Mr. Ley on April 11 and 17, 2012, and the fob records for unit 1209 for those days. He took several stills from the CCTV footage. Det. Dykman also printed a log of all fob swipes registered to unit 1209 between April 11 and 18, 2012. He was able to observe the applicant through the corresponding security video for each fob swipe at the swipe location. This was the first time that Det. Dykman was able to personally connect the applicant to suite 1209; he had relied previously on information provided by the RCMP.
- [36] At some point between April 18 and April 23 (the date of the covert entry), Det. Dykman received his own key to the security room from Mr. Emmanuel. The key allowed him to access the room without having to ask. He testified that it was his understanding that it was not necessary for him to receive permission when he wanted to access the security room, as permission was already in place. The purpose of his getting his own key was so that the VPD could stop relying on the RCMP and obtain the materials they wanted themselves.
- [37] Investigators subsequently obtained the fob records associated to unit 1209 for the period from March 23 to May 8, 2012. As of May 4, 2012, there were four fobs issued and activated for the unit. The fob records showed that only one of the four fobs associated to unit 1209 was used from March 23, 2012 to April 24, 2012.
- [38] CCTV footage does not show anyone other than the applicant using a fob for unit 1209 from March 23, 2012 to April 24, 2012.
- [39] On May 1, 2012, Juanita Hyslop, acting on the instructions of the applicant, met with Mr. Ley and gave him the fob and apartment key for unit 1209.

Unit 1209

- [40] As noted, unit 1209 was owned by Mr. Tejinder Badyal jointly with his aunt and uncle. On November 15, 2011, he rented the unit to a person named Michael Pham, who told him that he would be living in the unit by himself. They entered into a lease agreement, using the standard form from the Residential Tenancy Branch. The lease was for a term of six months and the rent was \$1350 per month. Mr. Badyal filled out the Form K listing Mr. Pham as the tenant.
- [41] It was a term of the lease that the tenant could assign or sublet the suite to another person with the written consent of the landlord. Mr. Badyal testified that he did not allow sublets and would want any new tenant to enter into a lease with him directly. Mr. Pham never sought and Mr. Badyal never gave permission for suite 1209 to be sublet.
- [42] Mr. Pham paid his rent in cash every month.
- [43] Mr. Badyal testified that because he was renting a two-bedroom unit, Mr. Pham would have received two fobs for the building and two keys to the unit. He did not retain a fob or key for himself. Had Mr. Badyal become aware that people he had not authorized were using the unit, he would have asked the tenant to move out. Had he known that unauthorized persons were using a fob, he would have had the building manager cancel the fob and asked the tenant to move out.
- [44] Mr. Badyal did not know the names Dean Wiwchar or Philip Ley. When shown CCTV images of the two men, he did not recognize either of them.

VPD Execute General Warrant at Unit 1209

- [45] On April 24, 2012, a general warrant to covertly search unit 1209 was executed by the VPD. During the search, the police located a substantial number of operational firearms, as well as ammunition and magazines. Various items connected to the applicant were also located, including the bleach and cleaning wipes purchased at London Drugs, and various disguises.
- [46] The police believed the applicant was using unit 1209 to store evidence of the conspiracy to commit murder and/or of the Duhre murder.

GOVERNING LEGAL PRINCIPLES

- [47] Section 8 of the Charter guarantees the right to be secure against unreasonable search and seizure. The purpose of s. 8 is to protect against state intrusion on an individual's privacy: *R. v. Plant*, [1993] 3 S.C.R. 291 at para. 16. However, this protection is only engaged where an accused had a reasonable expectation of privacy in "the object or subject matter of the state action and the information to which it gives access": *R. v. Cole*, 2012 SCC 53. Whether an accused had a reasonable expectation of privacy must be assessed in the totality of the circumstances.

[48] In considering the totality of the circumstances, four "lines of inquiry" guide the court's analysis:

- a) What was the subject matter of the alleged search?
- b) Did the claimant have a direct interest in the subject matter?
- c) Did the claimant have a subjective expectation of privacy in the subject matter?
- d) If so, was the claimant's subjective expectation of privacy objectively reasonable?

See: R. v. Marakah, 2017 SCC 59 at para. 11, citing R. v. Spencer, 2014 SCC 43 at para. 18; R. v. Patrick, 2009 SCC 17 at para. 27; and R. v. Tessling, 2004 SCC 67 at para. 32.

[49] Only if the answer to the fourth inquiry is "yes"--the accused's subjective expectation of privacy was objectively reasonable--will the accused have standing to assert a s. 8 violation. The onus of establishing this rests with the accused.

[50] Whether a particular expectation of privacy is reasonable must be assessed in light of societal norms. As the Court recognized in Tessling at para. 42, "expectation of privacy is a normative rather than a descriptive standard".

[51] The privacy interests protected by s. 8 include personal privacy (bodily integrity), territorial privacy (places) and informational privacy (personal information). In any given case, these privacy interests may overlap: Tessling.

[52] Over the years, courts have referred to various factors that may assist in determining whether it was reasonable to expect privacy in different settings. In R. v. Edwards, [1996] 1 S.C.R. 128, for example, the Court identified a number of factors that may inform that determination in the context of the search of a physical place, 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; and the historical use of the property.

[53] 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.

[54] In *R. v. Pipping*, 2020 BCCA 104, 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.

[55] 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.

[56] As for informational privacy, the Court in *Tessling* described it in these terms in *Tessling* at para. 23:

[23] Beyond our bodies and the places where we live and work, however, lies the thorny question of how much information about ourselves and activities we are entitled to shield from the curious eyes of the State (*R. v. B.* (S.A.), [2003] 2 S.C.R. 678, 2003 SCC 60 (S.C.C.)).

Informational privacy has been defined as "the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others": A.F. Westin, *Privacy and Freedom* (1970), at p. 7. Its protection is predicated on:

[T]he assumption that all information about a person is in a fundamental way his own, for him to communicate or retain ... as he sees fit.

(Report of a Task Force established jointly by Department of Communications/Department of Justice, Privacy and Computers (1972), at p. 13)

[57] The Court identified the following factors as relevant to an assessment whether an applicant had a reasonable expectation of informational privacy:

- a) The place where the alleged search occurred;
- b) Whether the subject matter was in plain view;
- c) Whether the subject matter had been abandoned;

- d) Whether the information was already in the hands of third parties; if so, whether it was subject to an obligation of confidentiality;
- e) Whether the police technique was intrusive in relation to the privacy interest;
- f) Whether the use of the police technique was itself objectively unreasonable; and
- g) Whether the results of the search exposed any intimate details of the accused's lifestyle or information of biographical nature.

[58] With respect to factor (g), in *R. v. Latimer*, 2020 BCSC 488 at paras. 147-148, Ker J. noted that the Supreme Court in *Marakah* at para. 24 referred to "details of the claimant's lifestyle or information of a biographic nature" (omitting the word "intimate"), thus expanding the scope of the private nature of the subject matter being assessed. The subject matter being assessed in *Marakah* was an electronic conversation between two people through text messages.

Recent BC Decisions

[59] A series of recent decisions from this Court have considered whether a reasonable expectation of privacy exists in relation to CCTV video and fob records seized from multi-unit residential buildings. They include *R. v. Kim*, 2019 BCSC 2150 (this ruling was principally about a police-installed covert hallway camera), *Latimer*, *R. v. Kang*, 2020 BCSC 1474 [Kang #2], *R. v. Kang*, 2020 BCSC 1616 [Kang #3], *R. v. Abo Zead*, 2020 BCSC 2145 and *R. v. Ali*, *Boparai & Malonga-Massamba*, 2021 BCSC 74. As each decision necessarily turns on its precise facts, there is limited value in reviewing them in any detail here. As Ehrcke J. observed in *Ali* in relation to the defence submission that the outcome of the application before him was a foregone conclusion in light of *Latimer* and certain other of these rulings (at para. 78):

The principle of comity discussed in *Re Hansard Spruce Mills Ltd.* is designed to ensure a consistent application of the law by all judges of the same court. Where, however, the issue in question is one that is highly contextualized and dependent on the totality of the circumstances, consideration of previous rulings by other trial judges may be of limited utility, and there may be little scope for the application of the principle of comity.

[60] He went on to indicate that in determining the s. 8 issue before him, he was guided instead by the jurisprudence from the Supreme Court of Canada and the Court of Appeal.

[61] In a similar vein, Sharma J. wrote as follows in *Abo Zead* in relation to the defence submission that she was bound, or at least ought to be persuaded, to follow the analytical framework and reasoning in *Latimer* (at para. 47):

I return to basic principles. Assessing whether s. 8 is engaged is a highly fact-specific, nuanced analysis that requires the court to look at the totality of circumstances. Accordingly, no matter how eloquent or considered any particular judgment may be, ultimately the similarity of the underlying facts will be the most relevant factor in determining the degree to which that judgment ought to impact my analysis.

[62] She found the factual underpinnings to Ker J.'s analysis in Latimer to be sufficiently dissimilar to the facts before her that the decision was distinguishable. At para. 67, she wrote:

In my respectful view, as the preceding discussion demonstrates, one cannot conclude that Latimer stands for a categorical proposition that there is always some degree of reasonable expectation of privacy in common areas of multi-unit dwellings, notwithstanding the broad nature of the wording in some passages in Latimer. Thus, to the extent that defence counsel argued that portions of Latimer are either binding or persuasively supportive of his position, with respect, I disagree. More to the point, I do not regard Latimer as articulating an analytical framework for assessing an assertion of reasonable expectation of privacy in common areas of multi-unit dwellings that is a marked departure from prior case law.

[63] I share the view that Latimer is not determinative of the outcome on the present application given the factual differences between them. They include the applicant's lack of residency or tenancy status in the building; the broad authority granted to the police by the strata council to access the computers in the security room for CCTV and fob records; and, the more limited range of materials accessed by the police as compared to Latimer, where the breadth of information seized by police (in excess of 93 video clips over 18 days of CCTV footage spanning 8.5 months) "creat[ed] a virtual picture of what was going on inside the suites" (Latimer at para. 176). Whether the applicant has a reasonable expectation of privacy in the materials in question must be determined having regard to the totality of the circumstances.

POSITIONS OF THE PARTIES

The Applicant

[64] The applicant claims both a territorial privacy interest in CP Towers and an informational privacy interest in the materials. On this basis he submits that he had a reasonable expectation of privacy and, therefore, standing to challenge the police seizure of CCTV images and fob records.

[65] With respect to territorial privacy, the applicant relies on the theory of the Crown that he and Mr. Ley had exclusive access to unit 1209 during the month leading up to April 23, 2012. Only one fob for the unit was used during that period and the CCTV footage did not reveal anyone else accessing the unit. Possession of the key and fob gave him the ability to admit or exclude others from the space. The applicant says there is no evidence that he was not authorized to use the fob, to access the common areas of CP Towers or to access the suite.

There is a pattern of consistent attendances (10) on his part at CP Towers over the short period of time he was surveilled by police. That he used a unit owned by someone else in a large building with many suites may reduce his expectation of privacy but it does not extinguish it.

- [66] The applicant argues that the consent to police access given by property management was not informed, as the original consent was given to the RCMP in relation to an unrelated drug trafficking investigation. Further, when the VPD eventually sought its own access and Det. Dykman met with Mr. Foo, he did not provide an explanation of the offence being investigated, the purpose for seizing the materials or how they would be used. The strata council did not put any limitation on the police with respect sharing the information they seized.
- [67] In arguing that he had an informational privacy interest in the materials seized, the applicant defines the subject matter of the search as information about his lifestyle, activities, patterns, movements and associations. He says that he clearly had a direct interest in the subject matter of the search, and that the Court can infer from the circumstances a subjective expectation of privacy in the seized information. Citing *Latimer*, the applicant submits that the failure of CP Towers to have bylaws in place to regulate the disclosure of personal information or to protect privacy does not negate an individual's expectation of privacy. Similarly, the visibility of security cameras and personal awareness of being filmed also do not erase an expectation of privacy, as occupants and guests have no option but to be captured on surveillance video.
- [68] The applicant further contends that his subjective expectation of privacy was objectively reasonable, again relying heavily on *Latimer* and *R. v. Kim*, 2020 BCSC 1064. He says the materials were stored on a password protected computer within a locked room that was only accessible to a few people; they were not in public view. The CCTV footage cross-referenced with the fob records exposed details of the applicant's life. The information was in hands of Gateway and the strata council, which failed to have in place bylaws regulating the operation of video surveillance and monitoring systems and disclosure of the information they collect, as urged in the Privacy Guidelines for Strata Corporations and Strata Agents published by the Office of the Information and Privacy Commissioner. The applicant further submits that there is no evidence that seizure of the materials by police was in compliance with s. 18(1)(j) of the Personal Information Protection Act, S.B.C. 2003, c. 63.
- [69] Finally, the applicant says that the investigative technique in question - uninhibited police access to CCTV footage and fob records within a residential apartment complex - was intrusive. To permit the police to have blanket and unrestricted access to such information is outside the normative values of Canadian society.

The Crown

- [70] The Crown responds that in the totality of the circumstances, the applicant could not have reasonably expected that images and records of his comings and goings at CP Towers, kept by the property management company charged with maintaining the safety and security of the premises, would not be shared with the police investigating crime.
- [71] With respect to territorial privacy, the Crown says that as an unauthorized occupant with no ownership or tenancy rights in unit 1209, let alone the common areas of the building, the applicant had no ability to regulate access, which weighs against an expectation of privacy. Tower 2 consisted of 21 floor with 196 units, and the authorities generally recognise that large multi-unit buildings afford a lower expectation of privacy in common areas than buildings with fewer units. The breadth of observations made by the police were brief and unobtrusive. Moreover, the police had the consent of the strata council to access the materials in question.
- [72] With respect to the four lines of inquiry, the Crown says that the subject matter of the search in this case is nuanced, and that the Court should take care not to characterize "what the police were after" on the basis of what they hoped for in a best-case scenario rather than what they were actually able to obtain, given the limited amount of information that can be realistically obtained from CCTV footage and fob records. The Crown concedes that the applicant had a direct interest in the subject matter of the search. However, the Crown strongly disputes that he had a subjective expectation of privacy in the materials the police obtained from CP Towers since his access to unit 1209 was unauthorized. The onus is on the applicant to establish standing, and here he has failed to establish how he was able to gain access to unit 1209 although that information would clearly have been within his means of knowledge.
- [73] The Crown maintains that any subjective expectation of privacy would not have been objectively reasonable in the circumstances. The lobby area of Tower 2 was heavily trafficked and the applicant's movements would have been visible to anyone else in the same area at the time. The fob records were not accessible to the public though they were to property management and the strata council. The information from the CCTV and fob systems were both in the hands of third parties. The Crown says that the strata council, and Gateway acting at its discretion, did not owe the applicant a duty of confidentiality in respect of sharing the information provided to police about his movements and fob usage. Not only was there no strata by-law in place restricting their ability to share the information with the police but there is also no basis upon which it can be reasonably inferred that he was authorized to have the fob. The Crown says the police technique was minimally invasive since the security systems were both pre-existing and obvious.
- [74] The Crown submits that it is important to the analysis that the applicant was not using unit 1209 as a home in the traditional sense but, rather, as a storage area or safe house. The CCTV cameras only captured information in common areas of the building, not a private

residence. Moreover, police obtained little information beyond the unit number that they could not obtain from physical surveillance on the street. It is also significant, says the Crown, that the strata council, which acts on behalf of the owners, was happy to have the police on the premises and accessing the CCTV and fob records for their investigative purposes.

DISCUSSION

- [75] The narrow issue to be decided is whether the applicant had a reasonable expectation of privacy in the CCTV images of him in the common areas of Tower 2 of CP Towers and in the fob records associated to unit 1209. As recognized in *Latimer and R. v. Kim*, 2019 BCSC 2150, this issue engages a blend of territorial and informational privacy interests, though the latter is the primary consideration here. Justice Winteringham also noted the same point in *R. v. Kang*, 2020 BCSC 1474 at para. 111, and followed the analytical framework set out in *Latimer*, which entailed "an assessment of the totality of the circumstances within the Tessling analytical framework".
- [76] I observe at the outset that it is appropriate, in my view, to consider the CCTV footage and fob records together in the analysis. The fob records provide information about the time and location a fob was used and the unit to which it was assigned. While that information may not, standing alone, reveal core biographical details about a person, it can when it is cross-referenced with CCTV video. As Ker J. observed in *Latimer* (at para. 154):
- [154] The key fobs record the movements of the fob associated to an owner or tenant of the complex. The fob access records contain data regarding the time, date and area accessed by a registered fob, and thus capture a significant amount of information about the fob user's movements. That information is even more powerful when cross-referenced with CCTV footage of the areas accessed, and collectively they can establish a comprehensive record of lifestyle choices within the residential complex - who went where when, with whom, and what they were carrying, wearing and doing.
- [77] The fact that the police in this case sought both types of information and not just one or the other underscores that it is the combined effect of the materials that the police were after.
- [78] Fundamental to the Crown's position here on the applicant's expectation of privacy is its submission that the applicant accessed the suite without lawful authority; that he was an unlawful occupant. I will comment upon it first.

Nature of the Applicant's Access

- [79] Citing *R. v. Jones*, 2017 SCC 60, the applicant relies upon the Crown's theory of the case that he and Mr. Ley had exclusive access to unit 1209 during the month leading up to April 23, 2012, the date of the execution of the general warrant. He says that only one fob for the unit was ever used during that time, and the CCTV footage did not show anyone other than the applicant using a fob for the unit for that period. Moreover, the fob had obviously not been

deactivated and there is no evidence to suggest it had been reported stolen or lost. Thus, the applicant submits, there is no evidence that he was not authorized to use the fob, access the common areas of CP Towers and access the suite.

- [80] The Crown answers that even accepting the exclusivity of the applicant's and Mr. Ley's access to unit 1209, it is also the Crown's theory that the applicant used the unit as a safe house for storing evidence of the murder and murder conspiracy. There is nothing in the Crown's theory that attributes lawful possession of the fob to the applicant. Furthermore, the exclusivity pertains to the suite and not to the common areas of Tower 2, which include the lobby and elevator. The Crown additionally submits that there is a complete absence of evidence with respect to how the applicant came to be in possession of the fob and the key to the suite. He was not authorized by the owner, Mr. Badyal, and there is no evidence that Mr. Pham provided such authorization. While the applicant argues there is no evidence that he was an unauthorized user, the Crown says he has that backwards as the onus is on him to establish that he was authorized.
- [81] I agree that the applicant has not established that he was authorized to use the fob and key, and access the common areas of CP Towers and unit 1209.
- [82] The owner of the suite, Mr. Badyal, testified that he rented the unit to Mr. Pham as the sole tenant. At no time did Mr. Pham ever request Mr. Badyal's permission, in writing or orally, to assign or sublet the unit to someone else, and Mr. Badyal never granted such permission to Mr. Pham. Mr. Badyal does not know the applicant, did not recognize him in photographs or in the courtroom (via a video feed), and he did not authorize him to use his fob or key to access the suite.
- [83] Although the applicant was in possession of a fob to the building and a key to unit 1209, there is no evidence with respect to how he came to possess them. It has been admitted that in the month preceding the execution of the search warrant the applicant was the only person to use a fob associated to the suite; thus, Mr. Pham was apparently not living there during this period. Nor, it appears, was the applicant, as not only did he have a residence elsewhere but the pattern of his visits to CP Towers was not consistent with his living there. According to Justice Bowden's reasons for judgment convicting the applicant of firearms offences arising out of the search of suite 1209 (as well as another location), the unit "was sparsely decorated and it did not appear to be lived in by anyone": *R. v. Wiwchar*, 2015 BCSC 973 at para. 34. This description was borne out by photographs taken during the execution of the general warrant on April 24, 2012, which showed no clothes hanging in the closet and only a few articles of clothing with tags still on them on the floor; the bedroom had two mattresses on the floor but no covers apart from two sheets; there were few items in the kitchen beyond drink and water containers and a used pizza box; and the en suite contained only mouthwash, toothpaste, and a few other toiletry items.

- [84] There is no evidence that the applicant sublet unit 1209 from Mr. Pham or had any other arrangement with Mr. Pham regarding the use of his suite. Indeed, there is no evidence that he even knew Mr. Pham. On the state of the evidence, it is as possible that Mr. Ley was the one who had an arrangement with Mr. Pham to sublet or otherwise use his suite. Or that someone else entirely did so. Without some evidence on the point, I am not prepared to infer from the applicant's possession of the fob and key and his periodic attendance at CP Towers that his presence in the building and the suite was authorized by Mr. Pham; it clearly was not by Mr. Badyal.
- [85] Nevertheless, the applicant's lack of ownership or tenancy status with respect to the suite is not determinative as to whether he had a reasonable expectation of privacy in the CCTV and fob records. As observed in various authorities, including *Kang #2* at para. 136 and *Kim* at para. 46, occupancy status is a relevant factor in the analysis but should not preclude consideration of other factors that may give rise to a reasonable expectation of privacy.
- [86] With that in mind, I turn now to consider the four lines of inquiry that inform whether the applicant had a reasonable expectation of privacy in the materials, starting with the subject matter of the search.

Subject Matter of the Search

- [87] The Supreme Court has emphasized the importance of properly defining the subject matter of the search when considering expectation of privacy. In *Marakah*, McLachlin C.J.C. said the following (at para. 15):
- [15] The subject matter of a search must be defined functionally, not in terms of physical acts, physical space, or modalities of transmission. As Doherty J.A. stated in *R. v. Ward*, 2012 ONCA 660, 112 O.R. (3d) 321 (Ont. C.A.), at para. 65, a court identifying the subject matter of a search must not do so "narrowly in terms of the physical acts involved or the physical space invaded, but rather by reference to the nature of the privacy interests potentially compromised by the state action". In *Spencer*, at para. 26, Cromwell J. endorsed these words and added that courts should take "a broad and functional approach to the question, examining the connection between the police investigative technique and the privacy interest at stake" and should look at "not only the nature of the precise information sought, but also at the nature of the information that it reveals". The court's task, as Doherty J.A. put it in *Ward*, is to determine "what the police were really after" (para. 67).
- [88] This functional approach has been subsequently applied in numerous cases similar to the present. At issue in *R. v. Yu*, 2019 ONCA 942, for example, was whether warrantless entries by police into the common areas of several condominium buildings, with the consent of property management, to make observations, including in the parking garages, hallways and stairwells, engaged s. 8 of the Charter.

- [89] Justice Tulloch said the following in identifying the subject matter of the search (at paras. 76-77):
- [76] 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.
- [90] In *Kim*, Devlin J. considered whether the accused had standing to challenge the admissibility of evidence obtained from a covert hallway camera installed by the police. She cast the subject matter of the search as "all activity by the accused in the hallway in connection to unit 1204" (at para. 37).
- [91] In *Latimer*, where police access to CCTV footage and fob records was at issue, Ker J. described the subject matter of the searches as "information about the identities, associations, and activities of the accused as well as their movements in the elevator lobby and secure underground parking area in relation to suite 1204 and its designated parking stall #353" (at para. 172-173).
- [92] In the present case, Det. Dykman testified that the police were initially after the unit number of the suite that the applicant and Mr. Ley were accessing in order that they could obtain a search warrant and Part VI authorization. Insp. Lymburner's email to S/Sgt. Paradis on April 4, 2012 asked him to ascertain whether there was information to determine where in the building the applicant and Mr. Ley went, whose fob was used, and whether that fob had been previously or subsequently used and by whom. It appears the VPD was ultimately after more than that since they continued accessing CCTV images and fob records after it had been ascertained on April 7 that the unit number of the suite was 1209. Indeed, Det. Dykman testified that the police were also interested in such things as what the applicant was wearing, what bags he was carrying, what floor he was going to, whether he was using his phone, and who he was with. They were investigating a murder and were interested in gathering as much information as they could about their suspect.

[93] The Crown cautions that it is too simplistic to characterize the subject matter of the search as whatever the police could find out about the applicant, given the limitations as to what they could ever realistically find out from common area surveillance video and fob records.

[94] In the circumstances, I find that the subject matter of the search was the unit number of the suite the applicant was accessing, ownership and use of the fob in the applicant's possession, and his movements, activities and associations in the building.

Direct Interest in the Subject Matter

[95] The Crown concedes, and I find, that the applicant had a direct interest in the subject matter.

Subjective Expectation of Privacy in the Subject Matter

[96] A subjective expectation of privacy is not a "high hurdle" and the evidentiary foundation necessary to establish it is modest, reflecting the notion that s. 8's normative import transcends an individual claimant's subjective expectations. A subjective expectation of privacy may be presumed to exist or may be inferred from the circumstances in the absence of direct evidence from the claimant: *R. v. Jones*, 2017 SCC 60 at paras. 20-21.

[97] The applicant did not testify on the voir dire. Nevertheless, he submits that the Court should infer that he had a subjective expectation of privacy in the common areas of CP Towers. Notwithstanding that the CCTV cameras were visible and the evidence suggests he was aware he was being recorded since the video stills show him concealing his face with a hat and facing away from the cameras, the applicant, relying on *Latimer*, says that should not preclude an inference that he had a subjective expectation of privacy. In *Latimer*, Ker J. wrote as follows on this issue (at para. 186):

[186] Even if the applicants were aware that they were subject to video surveillance throughout the common areas of the River Green complex and were aware of the strata bylaws about when such materials could be provided to law enforcement, that does not negate a subjective expectation of privacy in the circumstances. As in *Kim* (at para. 41), an individual's awareness of the potential for being monitored and the resulting diminished expectation of privacy does not support the conclusion that the individual did not have a subjective expectation of privacy in the circumstances, especially vis-à-vis the state. The jurisprudence eschews a categorical "all-or-nothing" approach to the reasonable expectation of privacy in respect of both the subjective and objective assessments.

[98] She went on apply the same reasoning to a search for CCTV and fob records in a different strata building that did not have bylaws governing the use of such information, reasoning that failure of the strata to have bylaws or policies to safeguard and manage the disclosure of such personal information could not negate a subjective expectation of privacy.

[99] At para. 191, Ker J. stated:

the reality is that owners, tenants and guests, including the applicants, have no choice but to submit to surveillance as they transit through these areas to access their suites and secure parking spaces. Similarly, they have no option but to use key fobs for access to the various areas of the buildings. The absence of choice in this regard does not militate in favour of finding that they have no subjective expectation of privacy in relation to state agencies.

[100] While acknowledging that subjective expectation of privacy is not a high hurdle, the Crown maintains that it cannot be automatically presumed and that there must be some evidence from which a reasonable inference to that effect can be drawn. It says there is no evidence from which it can be inferred that the applicant was authorized to use the fob or access the unit. Accordingly, it cannot be reasonably inferred that he had a subjective expectation of privacy in a CCTV and fob system, the purpose of which, in part, was to keep unauthorized persons out of the complex.

[101] I agree with the Crown. As I have concluded that the applicant has not established that he was authorized to use the fob or access the unit, I am not prepared to infer that he had a subjective expectation of privacy in the subject matter of the search. Nevertheless, since the authorities do not place much reliance on this factor in the totality of the circumstances analysis, I will go on to consider whether any such expectation of privacy would have been objectively reasonable.

Objectively Reasonable Expectation of Privacy

[102] In *Tessling*, the Supreme Court identified a number of factors that assist in assessing whether an expectation of privacy was reasonable in the circumstances. Although they were set out earlier, I repeat them here for convenience:

- a) The place where the alleged "search" occurred; in particular, did the police trespass on the appellant's property and, if so, what is the impact of such a finding on the privacy analysis;
- b) Whether the informational content of the subject matter was in public view;
- c) Whether the informational content had been abandoned;
- d) Whether such information was already in the hands of third parties; if so, was it subject to an obligation of confidentiality;
- e) Whether the police technique was intrusive in relation to the privacy interest;
- f) Whether the use of this evidence gathering technique was itself objectively reasonable; and
- g) Whether the information content exposed details of the claimant's lifestyle or information of a biographical nature.

- [103] Considering these factors in the context of the facts at hand, the place searched was the common areas of Tower 2 captured by the CCTV images. Although the applicant argues that the place searched was the computer within the security room, I do not agree with that characterization. In *Ali, Boparai & Malonga-Massamba*, Ehrcke J. described the place of the search as the common areas of the condominium building that were viewed from the CCTV footage.
- [104] While the CCTV and fob records were stored on a computer and not in public view, the information they documented (the applicant's movements) was in plain view of anyone in the common areas of Tower 2, 196-unit building, at the same time, be they residents of the building, their guests, property management staff or tradespeople. The applicant had no ability to regulate the access of others to the common areas.
- [105] The evidence of Ms. Purser, the strata council president at the material time, was that the council was unanimously supportive of police efforts to investigate crime in the complex, and that the police essentially had blanket permission to access CCTV and fob records as required. Thus, not only was there nothing akin to trespass but the strata council, acting on behalf of owners, welcomed the police involvement.
- [106] Ms. Purser further testified that the strata council had no concerns with police liaising and sharing the information with other police agencies. This answers the applicant's submission that the consent to police access was not informed, as the original consent had been given to the RCMP in regards a separate investigation. The VPD was entitled to rely on the permission obtained by the RCMP as authority to obtain the CCTV images and fob records for the purposes of their own investigation.
- [107] As for whether the information was in the hands of a third party and whether it was subject to an obligation of confidentiality, the CCTV footage and fob records were in the possession of the strata council and Gateway, acting at its direction. The strata bylaws had no provisions governing access to common area CCTV surveillance or fob records. The applicant refers to the Privacy Guidelines, which recommend that strata corporations have in place bylaws or privacy policies in relation to video surveillance and monitoring systems. This is because, the Guidelines explain, "strata owners, tenants and guests have the right to feel and be secure in their daily lives, but they also have the right to be free from excessive and unwarranted intrusion." To whatever extent the Privacy Guidelines could inform the expectation of privacy analysis, they do not assist the applicant who was neither owner, tenant nor guest.
- [108] The applicant contends that there is no evidence that the disclosure of the materials to the police in this case complied with s. 18(1)(j) of PIPA. That provision provides:
- 18 (1) An organization may only disclose personal information about an individual without the consent of the individual, if

- (j) the disclosure is to a public body or a law enforcement agency in Canada, concerning an offence under the laws of Canada or a province, to assist in an investigation, or in the making of a decision to undertake an investigation,
- (i) to determine whether the offence has taken place, or
- (ii) to prepare for the laying of a charge or the prosecution of the offence;

[109] In *Latimer*, it was the Crown who had sought to rely on s. 18(1)(j) as providing the requisite authority for the strata corporation in question to provide the CCTV and fob records to police. Justice Ker held that disclosure under the provision was not for any law enforcement purpose but was limited to the purposes set out, and that retention of the agency's request and accompanying authorization would be a necessary prerequisite to determining whether the request satisfied the parameters of the provision. She further found that while a factor to weigh in the totality of the circumstances analysis, the section did not neutralize any expectation of privacy an individual might have in personal information provided to police by a third party record holder. While it was relevant with respect to the ability of the police to request information from third parties, it was not dispositive of a Charter challenge.

[110] In *Ali*, Ehrcke J. held that PIPA did not assist in the analysis since the legislation did not define what information was constitutionally protected, and that by its own terms in s. 2, was subject to what "a reasonable person would consider appropriate in the circumstances".

[111] Given that the question before the Court is whether the applicant has standing to challenge the admissibility of the CCTV and fob records, I am similarly of the view that whether the strata council and Gateway complied with s. 18(1)(j) of PIPA does not assist in the analysis.

[112] The police technique employed by the police was to request access to the computers that logged CCTV and fob activity (or, before Det. Dykman obtained a fob on April 12, to request the RCMP access same). The data accessed consisted of CCTV images of the applicant on five days between March 28 and April 17, as well as fob activity in relation to unit 1209 for those dates and the April 11 through 18 period. The CCTV images mainly captured the applicant and Mr. Ley entering and exiting Tower 2 and taking the elevator to the 12th floor. The police seized only still images of the applicant, not video. These were limited observations, unlike in *Latimer*, which was a very different situation than the case here. In *Latimer*, police seized almost 100 video clips over 18 days of CCTV footage spanning an eight month period. I find nothing objectively unreasonable about the police technique here.

[113] The CCTV images and fob records captured the applicant's movements in common areas of the complex to which other residents and their guests had access. They did not reveal any information about activities inside unit 1209. Thus, no information was exposed that could be described as intimate details of the applicant's lifestyle or information of a biographical nature.

[114] Accordingly, I find that any subjective expectation of privacy the applicant may have had in the CCTV and fob records would not have been objectively reasonable.

conclusion

[115] Applying the totality of the circumstances test, I am satisfied that the applicant did not have a reasonable expectation of privacy in the CCTV and fob records obtained by the police in this case. Accordingly, he lacks standing to challenge the admissibility of these materials.

"Maisonville J."

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