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R. v. Kang

2020 BCSC 1616

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2020 BCSC 1616 R. v. Kang

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Kang,

2020 BCSC 1616

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Registry: Vancouver

Regina

v.

Sameet Kang, Gary Kang, Manveer Braich, Kristoffer Ghuman and Jitesh Vagh

RESTRICTION ON PUBLICATION: Ban on Publication 648(1) C.C.C.

Before: The Honourable Justice Winteringham

Ruling on Charter application - Voir dire #3 - Reasonable Expectation of Privacy -- Fob Records and CCTV Footage for 5177 Brighthouse Way

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S. Wright

Place and Date of Hearing:

Vancouver, B.C.

October 6-7, 2020

Place and Date of Judgment:

Vancouver, B.C.

October 30, 2020

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I. OVERVIEW

[1] Manveer Braich claims he had a reasonable expectation of privacy in CCTV footage the police obtained, without warrant, from a condominium complex where Mr. Braich was neither a resident nor tenant. The CCTV footage depicts Mr. Braich in a vehicle driving into the parking garage, parking in a stall for several minutes and having some limited interaction with two individuals. In another proceeding, those two individuals had successfully claimed a reasonable expectation of privacy in the same CCTV footage.

[2] I have concluded that Mr. Braich has not established a reasonable expectation of privacy in the material at issue. My reasons follow.

II. EVIDENCE ON THE VOIR DIRE

- [3] The parties rely on an Agreed Statement of Facts which constitutes the evidence on this voir dire.
- [4] Very briefly by way of background[1], five accused are jointly charged on a direct indictment and are alleged to be members of a group referred to on this application as the "Kang group", an alleged criminal organization. These charges were brought following an eighteen-month investigation conducted by Project Territory, an investigation into the alleged drug trafficking activities of two different groups - the Kang group and the Latimer group. The first indictment charges individuals believed to be members of the Kang group, including Mr. Braich, and contains a number of counts related to criminal organization, drug-trafficking and firearms offences. The second indictment charges five men alleged to be members of the Latimer group, including Kyle Latimer, Craig Latimer, Jacob Pereira, Anduele Pikientio and Csongor Szucs - with a number of offences that relate to criminal organization, drug-trafficking and firearms offences.
- [5] During the investigation, the Project Territory investigators learned about certain buildings that they believed were being used as drug stash houses. It is one of those buildings that is at issue on this application.
- [6] 5177 Brighthouse Way is a 14-floor condominium strata building in Richmond, BC. It is part of a building complex which consists of six residential towers at the addresses of 5111, 5131, 5151, 5171, 5177 and 5199 Brighthouse Way (known collectively as the "River Green complex"). As set out in the Agreed Statement of Facts, the River Green complex is described as follows:

There are approximately 454 residential units in total in the River Green complex.

The River Green complex has a ground floor lobby which is staffed with a concierge 24 hours per day.

Beneath the complex is a two-floor underground parking garage, which services all of the River Green towers, including 5177 Brighthouse Way. Individual units have individual parking stalls assigned to them. The underground parking garage is accessible only by way of an electronic key fob ("fob").

In addition to the parking garage, the complex contains other common areas which residents can access by fob, including elevators, club houses, a gym and certain common hallways. All of the residential floors require fob access and residents can only access their own residential floor with their fob. A fob is also required to gain access to a suite.

Each key fob is assigned for use only by a registered resident or owner of a suite in the building. Non-registered individuals are not permitted to use the fobs.

Staff members working in the complex are also assigned fobs that are programmed to grant them access to common areas of the complex.

Each key fob bears a unique serial number. When a key fob is used to open a door to a common area of the complex, the building's key fob computer system creates an electronic record of the entry. The electronic record identifies which common area door was opened, the serial number of the fob that was used to open the door, the unit number to which the fob is assigned, and the date and time the fob was used to open the door. When a key fob is used to access an elevator, the computer system records the fact that the elevator was accessed using the particular fob, but does not record what floor the elevator went to.

- [7] The River Green strata council enacted bylaws. The strata bylaws applied to 5177 Brighthouse Way and specified the duties of owners, tenants, occupants and visitors. Relevant to this application, the strata bylaws allow for CCTV monitoring throughout the common areas of the building including all levels of the parkade, the elevator lobbies and select corridors on levels two and three of the building.
- [8] The bylaws provide that the strata corporation will collect the data obtained from both the CCTV surveillance system and the usage of each security key fob.
- [9] The strata bylaws permit video files and fob access records to be used by the strata corporation for specified purposes primarily connected to security such as monitoring for trespassers, preventing property damage and theft, and ensuring the safety of owners, tenants, occupants and visitors.
- [10] The strata bylaws allow for video files to be stored for a period of up to one month. Storage can be extended for security purposes as required by law enforcement. Fob access records are stored for a period of up to five years from the date of the recording.
- [11] The personal information of owners, tenants or occupants can be reviewed or disclosed to law enforcement in accordance with the strata bylaws.
- [12] At the material time, Marc Villeneuve, an employee of First Service Residential (a property management company) was the head concierge at the River Green complex.
- [13] In 2017, the River Green complex had security video cameras in common areas of the building, including at the gate to the underground parking garage, throughout the parkade, and in the elevator lobby area in the parkade. The cameras captured video images only and did not record audio.
- [14] On May 4, 2017, the police were conducting surveillance of Mr. Braich, a person believed to be a drug trafficker associated with the Kang group. Surveillance members observed Mr. Braich leave his home in Surrey driving a rental car, a red Mazda 5, to 1221 Bidwell Street, Vancouver. At 1:09 p.m., the VPD saw him leaving 1221 Bidwell and driving to Richmond. Surveillance officers followed him to the secure underground parkade of the River Green complex and the officers made the following observations:
 - a) At approximately 1:30 p.m., Mr. Braich drove the red Mazda into the secure underground parkade;

- b) Approximately 15 minutes later, Mr. Braich left the underground parkade driving the red Mazda with an unknown male, later identified as Mr. Pereira, in the front passenger seat;
 - c) For approximately 24 minutes, the red Mazda was observed driving around the surrounding area, entering briefly a nearby parking lot at Brighthouse Park and then another parking lot at the corner of Granville Avenue and No. 3 Road; and
 - d) The red Mazda was driven back to the River Green complex, re-entered the parking garage and, moments later at 2:19 p.m., the red Mazda exited the parking garage again with Mr. Braich as the sole occupant, driving the vehicle.
- [15] On May 5, 2017, Cst. Nielsen, a Project Territory investigator, went to the River Green complex wanting to obtain CCTV footage of Mr. Braich's attendance from the previous day. Cst. Nielsen met with Mr. Villeneuve, identified himself as a police officer, and requested CCTV footage from May 4, 2017. Cst. Nielsen stated he was interested in video of the arrival of the red Mazda in the underground parkade. He wanted to know where the Mazda had gone, who met with the driver of the vehicle, and what might have occurred in the parkade.
- [16] Mr. Villeneuve already knew about the red Mazda because of its reported "fobless" entry into the parking garage the previous day.
- [17] The exchange between Cst. Nielsen and Mr. Villeneuve was described in the Agreed Statement of Facts as follows:

Mr. Villeneuve found some of the video that Cst. Nielsen was looking for and played it for him in the concierge office. Cst. Nielsen asked Mr. Villeneuve to play additional CCTV footage from May 4 and also requested access to the fob records so that he could identify additional footage showing where the individuals captured in the video came from. Mr. Villeneuve played CCTV footage that showed where the red Mazda went and what parking stall it pulled into [#353]. He also provided Cst. Nielsen with the unit number to which that parking stall was assigned: Unit 1204 of 5177 Brighthouse Way.

Mr. Villeneuve showed Cst. Nielsen the Form K associated to the Unit, and Cst. Nielsen copied the tenant information from the Form K: the tenant was listed as Csongor Szucs.

...

Cst. Nielsen also learned from Mr. Villeneuve that the building had concerns that non-registered individuals had been using key fobs assigned to Unit 1204. Mr. Villeneuve offered to forward Cst. Nielsen emails in that regard.

- [18] Mr. Villeneuve later forwarded email communications from January 31, 2017 to May 2, 2017 to Cst. Nielsen. The emails reflected a concern about unauthorized use of key fobs associated with Unit 1204, as well as violations of strata policy on entering and exiting the parking garage. Attached to some of the emails were photographs of individuals (none were of Mr. Braich) in common areas of the complex who had used key fobs associated with Unit 1204 as well as a screen shot of related fob access records.
- [19] Cst. Nielsen returned to the River Green complex on May 9, 2017 and obtained the following:
- a) Eight video clips of the CCTV footage he had viewed on May 5, 2017;
 - b) Copy of the Form K associated to Unit 1204; and
 - c) Copy of fob access records associated to Unit 1204.[2]
- [20] Later on May 9, 2017, Cst. Nielsen sent an email requesting additional video footage for (1) the timeframe between 1:00 p.m.-2:25 p.m. on May 4, 2017; and (2) an incident on May 2, 2017. Cst. Nielsen picked up this additional material on May 11, 2017. The material thus consisted of the May 4, 2017 CCTV footage, fob access records, email communication referred to at para. 18, Form K for unit 1204-5177 Brighthouse and the CCTV footage for May 2, 2017 (collectively the "Brighthouse Material").
- [21] Investigators did not obtain production orders for the Brighthouse Material. The Crown conceded in its written submission that
- ... on the available evidence, Mr. Villeneuve provided the [Brighthouse Material] on May 5 and May 9, 2017 in breach of the disclosure policy requiring [the strata property manager's] advance approval.
- [22] The CCTV footage consists of video clips from three CCTV cameras capturing the entrance to the parking garage, the elevator lobby of the parking garage and the part of the parkade showing several parking stalls including stall #353. The parties agreed that the fob records and video clips depict the following:
- a) At 12:14 p.m., Mr. Pereira used fob UN2269 to open the gate to the parking garage and then drove into the parkade driving a black Mercedes and parked in stall #353;
 - b) At 12:15 p.m., Mr. Pereira using fob UN2269, went from the parking garage into the elevator lobby and boarded an elevator;
 - c) At 1:28 p.m., the red Mazda[3] arrived at the exterior gate of the parking garage, waited outside of the closed gate until it was able to enter the garage when the gate was opened by an exiting car. The driver of the exiting car confronted Mr. Braich as he entered the parkade. After a brief exchange, Mr. Braich made a U-turn and exited the parkade;

- d) At 1:32 p.m., Mr. Pereira and Mr. Latimer got off an elevator into the elevator lobby of the parking garage and entered the parkade. The elevator had been activated using fob UN2269. Mr. Pereira was holding a black boutique style bag. Mr. Latimer had nothing in his hands;
- e) Mr. Latimer waited at parking stall #353 while Mr. Pereira walked towards the parking garage gate.
- f) At 1:33 p.m., Mr. Pereira opened the parking garage gate using fob UN2269 and walked out of the parkade. Seventeen seconds later, Mr. Pereira used fob UN2269 to open the gate again, allowing the red Mazda to enter. Mr. Pereira then re-entered the parking garage walking alongside the red Mazda;
- g) At 1:34 p.m., the red Mazda parked in parking stall #353. Very little of the interaction between Mr. Latimer, who had been standing at stall #353, and Mr. Braich is captured by the CCTV because there was a concrete wall that blocked most of the camera's view of the parking stall. At 1:37 p.m., Shirley Poon, a concierge, approached the parking stall and then walked away a short time later. At 1:42 p.m., Mr. Latimer appears to exit the red Mazda holding a bag. Mr. Latimer and Mr. Pereira then walked away from the red Mazda towards the elevator lobby. Mr. Pereira did not have the black boutique style bag he had been carrying earlier;
- h) At 1:43 p.m., Mr. Pereira and Mr. Latimer entered into the elevator lobby from the parkade. Mr. Pereira used fob UN2269 to open the elevator lobby door and then used the fob again to activate an elevator. This would have permitted Mr. Latimer to access certain floors which fob UN2269 was permitted to access, including the 12th floor. Mr. Pereira did not get in the elevator and instead returned to the parking garage;
- i) At 1:44 p.m., Mr. Pereira went to stall #353 and sat in the front passenger seat of the red Mazda;
- j) At 1:45 p.m., the red Mazda exited the parking garage with Mr. Pereira in the front passenger seat. Fob UN2269 was used to open the parking garage gate;
- k) At 2:18 p.m., the red Mazda returned to the parking garage. Mr. Pereira, still in the front passenger seat, used fob UN2269 to open the gate, allowing the red Mazda to enter. The red Mazda made a U-turn and headed back toward the parking garage exit. Mr. Pereira got out of the vehicle, walked away from it and towards the elevator lobby. Fob UN2269 was used to open the gate for the red Mazda;
- l) At 2:19, the red Mazda left the parking garage;
- m) At 2:21 p.m., Mr. Pereira entered the elevator lobby of the parking garage and then boarded an elevator, using fob UN2269;
- n) At 3:23 p.m., Mr. Pereira left the parkade in a black Mercedes, using fob UN2269 to open the parking garage gate; and

- o) At 6:55 p.m., Khaadim Coddett, Pamala Cadrain and an unidentified male entered the elevator lobby of the parking garage and used fob UN2220 to board an elevator. Cst. Nielsen was familiar with Mr. Coddett from a prior unrelated drug trafficking investigation.
- [23] The Delta Police Department executed a search warrant on September 14, 2017 at Unit 1204-5177 Brighthouse Way. Mr. Latimer and Mr. Pereira were found inside the unit and were arrested. During the search, the Delta Police discovered heroin, fentanyl, cocaine, marihuana and crystal methamphetamine, firearms and cash. Mr. Latimer and Mr. Pereira, as well as others believed to be members of the Latimer group, were charged in relation to these seizures. These charges are separate from the charges referred to in paragraph 4 of these reasons.
- [24] For the Project Territory investigation, Cst. Nielsen, in writing the various Informations to Obtain judicial authorizations, included a summary of the Brighthouse Material and made reference to that material.
- [25] Based on the evidence tendered on this voir dire, the following can be said about Mr. Braich and his association to the River Green complex:
 - a) He was present on one occasion at the River Green complex on May 4, 2017, though not continuously, from approximately 1:30 p.m. to 2:19 p.m.;
 - b) During that 49-minute time period, Mr. Braich left the parking garage for approximately 24 minutes, driving around the surrounding area with Mr. Pereira;
 - c) Mr. Braich's presence at the River Green complex was in the parking garage only and he appears to have stayed in the red Mazda - the video clips do not show him outside of the red Mazda while in the parking garage;
 - d) Mr. Braich first entered the parking garage without using a fob by entering when the gate was raised by an exiting vehicle;
 - e) The fobless entry seemed to cause the driver of the exiting vehicle to confront Mr. Braich and the red Mazda is then seen leaving the parking garage;
 - f) Moments later, Mr. Braich entered the parking garage after Mr. Pereira used his fob to let him in;
 - g) Mr. Braich did not use a fob to enter or exit the parking garage;
 - h) Mr. Pereira used a fob associated to Unit 1204-5177 Brighthouse;
 - i) Mr. Pereira is not the registered owner or tenant of Unit 1204-5177 Brighthouse;
 - j) The Form K (Strata Property Act) for Unit 1204-5177 Brighthouse lists Csongor Szucs as the tenant;

- k) On earlier occasions, Kyle Latimer had introduced himself as Csongor Szucs to the River Green complex's concierge staff;
- l) Parking stall #353 is connected to Unit 1204-5177 Brighthouse;
- m) In the eight CCTV clips, Mr. Pereira is observed using fob UN2269. Mr. Pereira used fob UN2269 to let Mr. Braich into the parking garage (two times) and out of the parking garage (two times);
- n) Mr. Braich stayed in the parking garage - he did not enter the elevator lobby in the parking garage or go anywhere else in the River Green complex; and
- o) Mr. Braich did not have a connection to any unit in the River Green complex.

III. POSITIONS OF THE PARTIES

- [26] Mr. Braich takes the position that he has standing to challenge the search and seizure of the Brighthouse Material including all of the CCTV footage, the fob access records, Form K and email correspondence. Mr. Braich submits that there is no basis upon which to distinguish this application from the one already decided in *R. v. Latimer*, 2020 BCSC 488 (where Justice Ker found that Mr. Latimer resided at Brighthouse "albeit perhaps not continuously" and Mr. Pereira was an invited guest) and *R. v. Kim*, 2020 BCSC 1064 (where Justice Devlin found that Mr. Latimer was an invited guest while Mr. Pereira and Mr. Kim were the only two who regulated access to unit 1204). In *Latimer* and *Kim*, both Ker J. and Devlin J. concluded that a reasonable expectation of privacy exists in relation to these very materials. Mr. Braich submits that judicial comity requires a finding that he had a reasonable expectation of privacy in relation to the same materials, and the warrantless search was therefore a breach of his rights under s. 8 of the Charter.
- [27] The Crown disputes Mr. Braich had a reasonable expectation of privacy and advances three bases for why this is so.
- [28] First, the Crown takes the position that Ker J. decided this point against Mr. Braich on an almost identical evidentiary record. Justice Ker found that Mr. Pereira, Mr. Latimer and Mr. Szucs had standing regarding the River Green search based on the strength of their connection to the complex. Though not before her at the time, Ker J. raised concerns about the other accused's standing (including that of Mr. Braich) because their connection to the River Green complex was tenuous.
- [29] The Crown's second submission is somewhat connected to the first. That is, Mr. Braich's limited attendance to the River Green complex's parking garage is insufficient to ground a reasonable expectation of privacy. He was not even in the position of an invited guest, the Crown submits, and had virtually no connection to the River Green complex except for this one attendance to the parking garage for a brief moment in time to deliver something to Mr. Latimer and Mr. Pereira.

- [30] Finally, the Crown suggests respectfully that there are a number of reasons why it is that I should not follow or defer to the decisions in Latimer and Kim.
- [31] Because I have determined Mr. Braich's application based on the second ground advanced by the Crown, I decline to resolve the Crown's deference submission. Rather, I am satisfied that the evidence establishes a very tenuous connection to the River Green complex such that I am not satisfied Mr. Braich has a reasonable expectation of privacy in the Brighthouse Material.
- [32] I agree with Mr. Braich that his application for standing was not decided by Ker J. because he did not participate in the application before her. In particular, he had no opportunity to persuade the court, either by tendering evidence or making submissions, that his connection to the River Green complex warranted consideration.

IV. LEGAL FRAMEWORK

- [33] Particularly in the context of one's reasonable expectation of privacy, the parties have received several rulings setting out the legal principles guiding the s. 8 Charter analysis. I will not repeat those legal principles here except to note that I am guided by the authorities summarized in *R. v. Kang*, 2020 BCSC 1474 at paras. 83-106. I do wish, however, to spend some time on (1) third party rights in the context of Charter litigation; and (2) standing to assert a Charter claim in relation to parking garages in multi-resident building.

A. Third Party Rights

- [34] In any determination of a s. 8 challenge, it is of fundamental importance to remember that the privacy right allegedly infringed must, as a general rule, be that of the accused person who makes the challenge: *R. v. Edwards*, [1996] 1 S.C.R. 128 at para. 34. In *R. v. Kang*, 2020 BCSC 1151, Ker J. addressed third party rights at paras. 158 and 159:
- [158] . . . Vickerson [*R. v. Vickerson*, 2018 BCCA 39] decides that an accused cannot challenge events relating to police dealings with third parties and searches of items in which the accused has no personal interest. The corollary to this is that excision will not be available to excise information obtained in breach of Charter rights not personal to the accused.
- [159] The accused in the current application are in similar circumstances to the appellant in Vickerson. In Vickerson, the appellant had standing to challenge the validity of the search warrant issued in respect of his home. Here the accused have standing to challenge the validity of the authorization - P5 - because their private conversations were intercepted. However, as in Vickerson, some of the accused do not have standing to challenge the circumstances of certain searches that made their way into the affidavit in support of the authorization as they have no privacy interest in the place searched; e.g. the seven accused on the two Kang indictments are in no way connected and have nothing to do with the strata properties at Brighthouse Way and Pacific Rim Estates where warrantless seizures were made in respect of CCTV surveillance footage and fob access records [this was the subject

of the Latimer 488 ruling]. The rights of these seven accused were not violated in the searches and seizures conducted at these two locations. Rather they, as well as Craig Latimer on the Latimer Indictment and Pashminder Bopari on the fourth indictment, are merely persons aggrieved by inclusion of damaging information in the affidavit in support of the authorization.

- [35] In Vickerson, the Court confirmed that the framework set out in Edwards, as modified in R. v. Tessling, 2004 SCC 67, and R. v. Patrick, 2009 SCC 17, should be used to determine if a person has standing to advance a Charter claim: R. v. Holmes, 2019 BCCA 138 at para. 24.
- [36] At this stage of the s. 8 Charter analysis, the court's determination of reasonable expectation of privacy must be assessed in accordance with their individual privacy interests - not whether the police infringed the Charter rights of someone else.

B. Standing and Common Areas of Multi-Resident Buildings (Parking garages)

- [37] The Latimer and Kim rulings decide that a Charter claimant may have a reasonable expectation of privacy in common areas of multi-unit buildings. The analysis is contextual and demands a purposive and normative approach to privacy having regard to the totality of the circumstances. Whether they are residents of the building or control access within the building may be relevant factors but they are not necessarily determinative in the overall analysis.
- [38] In Latimer, Ker J. described the nature of the privacy interest in this way at paras. 159-161:
- [159] While CCTV cameras and key fobs enhance the security and safety of those living and working within a residential complex, they do not, in my view, extinguish the residual expectation of privacy - the right to be left alone by the state - such that the information they record is there for the taking by state agents upon a simple request. Indeed, given the seeming mandatory nature of these devices in multi-unit residential settings, passive acquiescence or resignation by the occupants or their guests to the inevitable and ubiquitous private surveillance ought not to mean that they have entirely relinquished their expectation of privacy in the images and information contained therein, especially where the state is concerned.
- [160] The notion that common areas in multi-residential units are "privacy free zones" is inconsistent with the broad conceptions of the right to privacy. As the Ontario Court of Appeal noted in White:
- [48] . . . the 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.

...

- [51] There is nothing "perverse" about providing a measure of privacy protection to the many Canadians who live in multi-unit dwellings. They, no less than those who live in detached homes, are entitled to the protection against unreasonable search and seizure the Charter provides. In any event, it is not an all or nothing choice. A balance must be struck between law enforcement objectives and privacy in modern urban life. Cases such as *Laurin and Thomsen* demonstrate that the police have considerable ability to investigate crime in multi-unit buildings. But they do not have *carte blanche*.
- [161] Certainly, individuals can continue to make choices about whether they will enter truly public spaces such as shopping malls, bars, hotels, airports, train stations and the like notwithstanding the presence of CCTV surveillance cameras. However, owners and tenants of multi-unit residential buildings, and their guests visiting them, have no choice but to travel through common areas - crossing lobbies, using elevators, accessing hallways and parking their vehicles in secure parking lots. Although they may implicitly consent, or acquiesce, to the surveillance of their movements for the sake of the security of the building and the other occupants, it does not mean that they have consented to or waived their residual privacy interest in their movements, images and information vis-à-vis the state. In an era when the trend in residential living is rapidly moving away from detached family homes and towards multi-unit residences, the legal concept of privacy must be flexible and adaptive in order to ensure that it is not being "videoed" out of existence.

[*Italic emphasis in original; underline emphasis added.*]

- [39] Here, Ker J. recognizes that in certain circumstances, owners and tenants of multi-unit residential buildings and their guests may be required to enter common areas where video surveillance is authorized for legitimate security concerns relating to the building and other occupants. However, as noted by Ker J., that does not mean that there has been a waiver of their residual privacy interests in their movements, images and information with regards to the state.
- [40] In *Latimer*, Ker J. considered CCTV footage capturing images in the same parking garage at River Green. However, Mr. Latimer and Mr. Pereira's connections to the River Green complex were greater than Mr. Braich's. That is, the CCTV footage showed that Mr. Latimer and Mr. Pereira had access to more than just the parking garage. Mr. Latimer was observed using an elevator that allowed him access to the 12th floor (it is not known whether that is where Mr. Latimer actually went). Additionally, Ker J. found him to have a resident-like status in the building and he had identified himself to the concierge staff as the tenant occupying unit 1204. Mr. Pereira was in control of one of the two fobs connected to unit 1204. Mr. Pereira was observing using the fob to access the parking garage, elevator lobby, elevator and 12th floor.

- [41] Because Ker J. dealt with a scope broader than the parking garage, I turn to some of the authorities focusing more limitedly on privacy interests in common areas of multi-resident buildings, including parking garages.
- [42] I start with *R. v. Wilson*, 2017 BCCA 327. Wilson is a short oral judgment dismissing Mr. Wilson's appeal from conviction. In that case, the police had searched a suite, which the trial judge found to be a stash site. Relevant to the discussion here, Mr. Wilson asserted that the trial judge erred in ruling that Mr. Wilson did not have a reasonable expectation of privacy in the common areas of the condominium complex or in the video surveillance footage of those common areas.
- [43] Justice Fenlon, writing for the Court, dismissed the appeal, finding that the trial judge made no material error in reaching her verdict. In her findings of fact, the trial judge noted that as a tenant of a 150-unit residential condominium complex, Mr. Wilson did not have an ownership interest in the common areas or the video monitoring system. While access to the building was controlled by security measures, the trial judge did not find this to be determinative.
- [44] Relying on *R. v. Webster*, 2015 BCCA 286, the trial judge noted that the issue is not how secure the building was but how exclusive occupation of the common area was. She concluded that the CCTV footage fell short of constituting intimate details about Wilson's lifestyle, or information of a biographical nature finding:
- ... The clips consist of very brief glimpses of [Wilson's] movements in the visitor parking area and in the elevator that he took to go to the 5th floor. Standing by themselves, the videos reveal nothing that would come close to impacting upon [Wilson's] "dignity, integrity or autonomy". In other words, the information contained in the video clips is not information in which [Wilson] had an objectively reasonable expectation of privacy such that it would be subject to the protection of s. 8 of the Charter.
- [45] In *R. v. Drakes*, 2009 ONCA 560, the Ontario Court of Appeal rejected the appellants' contention that the trial judge erred by concluding that they did not have a reasonable expectation of privacy with respect to their use of a spot in an underground parking garage in the condominium building. The police had used their knowledge of this information to obtain information about the unit occupied by the appellants in the building. In dismissing this ground of appeal, the Court found, at para. 18, that the trial judge had correctly applied the test in *Edwards*
- ... noting that the appellants shared the parking garage with 440 other units, that they had limited control over it and that management (who did not have control over the garage) consented to the police gaining access to it for the purposes of their investigation. . .

- [46] In *R. v. Yu*, 2019 ONCA 942, the Ontario Court of Appeal held that the accused had a reasonable expectation of privacy in the residential floor hallways of two multi-unit buildings but did not have a reasonable expectation of privacy in a parking garage. In assessing reasonable expectation of privacy in common areas, Justice Tulloch noted, for the Court, at paras. 68-69:
- [68] . . . [In *R. v. White*, 2015 ONCA 508, the] court laid out the following factors that are relevant to the level of expectation of privacy in common areas of multi-unit buildings:
- Degree of possession or control exercised over the common area by the claimant;
 - Size of the building: the larger the building, the lower the degree of reasonable expectation of privacy in common areas;
 - Security system or locked doors that function to exclude the public and regulate access; and
 - Ownership of the property.
- [69] In my view, these factors lead to different conclusions depending on the type of common area accessed by the police, which in this case relates to the parking garage and the hallways. I conclude that the appellants did not have a reasonable expectation of privacy in the parking garages, but they did have such an expectation of privacy in their hallways, albeit a diminished one . . .
- [47] And at para. 79, Tulloch J.A. specifically addressed parking garages, stating:
- [79] In *Drakes*, this court upheld the finding of Epstein J. (as she then was) that condominium unit owners did not have a reasonable expectation of privacy with respect to the use of a spot in the underground parking garage. It reasoned that the unit owners shared the parking garage with 440 other units and had limited control over it, and that management consented to the police gaining access (at para. 18). In short, to put it in terms of the factors set out in *Spencer*, unit owners could not have an objectively reasonable expectation of privacy in a garage shared with so many other owners and over which they had very little control.
- [48] In *R. v. Pipping*, 2020 BCCA 104, the B.C. Court of Appeal upheld the trial judge's finding that Mr. Pipping had a reasonable expectation of privacy in the hallway outside his suite in a multi-unit condominium complex. Though not an owner or tenant, Mr. Pipping possessed a key to the suite and possibly had exclusive possession of the unit. From this, it was inferred that he had the ability to regulate who attended the unit and, to a lesser extent, ability to regulate access to the building generally. Justice Garson, after reviewing the case law, concluded at para. 30:
- [30] In my view, *Edwards*, *Webster*, *White* and *Yu* are consistent in their focus on the manner in which the control of public access to common areas of a building is key to the assessment of a reasonable expectation of privacy. The focus is on "the ability to regulate access, including the right to admit or exclude others from the place": *Edwards* at para. 45 as cited in *White* at para. 31. Other important factors include the exclusivity of occupation, the size of the

building, whether property management or a condominium board has consented to the police presence, the breadth of the observations being made by the police, the ownership of the property, and the frequency with which a particular area is used.

- [49] Though not specifically a case dealing solely with parking garages, Pipping is a recent comment by our Court of Appeal about the assessment of a reasonable expectation of privacy in common areas of condominium complexes.

V. ANALYSIS

- [50] Mr. Braich frames the analysis as one engaging his informational privacy rights (not territorial or personal privacy). Considering the totality of the circumstances, I address each line of inquiry in assessing Mr. Braich's informational privacy claim.

A. What is the subject matter of the "search"?

- [51] In the informational privacy analysis, the court must not identify the subject matter of a search "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": *R. v. Ward*, 2012 ONCA 660 at para. 65. The question I am to ask is "what the police were really after": *R. v. Marakah*, 2017 SCC 59 at para. 15.
- [52] The Crown takes the position that the subject matter of the search is the CCTV footage of Mr. Braich in the parking garage and the associated fob data for a fob used by Mr. Pereira. On this application, the Crown also agrees that, as held in *Marakah*, at para. 20, this subject matter includes "any inferences about associations and activities that can be drawn from that information."
- [53] In *Latimer*, Ker J. defined the subject matter of the Brighthouse Material broadly, stating at para. 172:
- [172] What the police were really after was the information captured by the video recordings, including who was meeting at the vehicle, what they were carrying to and from the vehicle, who was affiliated with suite 1204, the identity of the individuals and other investigative inferences and conclusions they could draw from extensive review - and play backs - of the video recordings. The value of the captured movements and associations was potential circumstantial evidence of illicit activity conducted in connection with the occupants and guests of suite 1204 and the activities at the parking stall connected to that suite. It was not simply any activity or movement in the parking lots or the elevators that the police were interested in obtaining but, rather, the specific movements and associations of individuals affiliated with suite 1204: *Yu* at para. 77. Thus, I find the subject matter of the search in respect of the Brighthouse materials to be information about the identities, associations, and the 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.

[54] In my view, the evidentiary record before me and, more importantly, the available inferences that can be drawn from it, is different as between Mr. Braich, Mr. Latimer and Mr. Pereira. Indeed, Ker J. found in Latimer at para. 207:

[t]he place where the alleged search occurred was a residential premise where Mr. Latimer resided, albeit perhaps not continuously, and where Mr. Szucs appears to have said he was a tenant. Mr. Pereira was an invited guest.

[55] Justice Ker carefully delineated the basis for her finding that Mr. Latimer, Mr. Pereira and Mr. Szucs had a reasonable expectation of privacy in the Brighthouse Material, in part because of their association to the building.

[56] Mr. Braich is not similarly situated to those three. Rather, his connection to 5177 Brighthouse is limited to his attendance at parking stall #353 on May 4, 2017 for an interrupted 49 minutes and in circumstances where he was admitted into the parking garage by someone with a fob connected to Unit 1204. Mr. Braich's solitary attendance in the circumstances presented do not permit the same inferences to be drawn as those that could be drawn for Mr. Latimer and Mr. Pereira.

B. Did Mr. Braich have a direct interest in the subject matter of the search?

[57] The Crown agreed, as do I, that Mr. Braich had a direct interest in his own images.

C. Did Mr. Braich have a subjective expectation of privacy in the subject matter?

[58] Despite the low hurdle, the Crown submits that "it is difficult to see how Mr. Braich could meet even the low threshold on the facts of this case". The Crown submits that the evidence tends to undermine Mr. Braich's subjective expectation of privacy, "given his lack of connection to the building, his entry to the building without a fob in breach of building security policies, his confrontation by the exiting resident, and the fact a concierge attended to his vehicle while it was parked in the garage."

[59] A subjective expectation of privacy can be presumed or inferred in the circumstances in the absence of direct evidence from the accused (R. v. Jones, 2017 SCC 60 at para. 21; see also Tessling at para. 38 and R. v. Patrick, 2009 SCC 17 at para. 37).

[60] I accept the Crown's submission here, particularly when I consider Ker J.'s conclusion on this line of inquiry in Latimer at para. 192 where she stated:

[192] I find that the applicants had a reasonable subjective expectation of privacy in the CCTV footage from the common areas, secure parking garages and elevators for both Brighthouse Way . . . ; the fob access records . . . ; and, the Form K for Brighthouse Way. While the expectation of privacy may well be attenuated when compared to the level of privacy within a suite, it most certainly is not extinguished.

[61] It is also worth mentioning that Ker J.'s conclusion was based on a cumulative analysis of the factors she considered. When taking into account those accumulated factors, Mr. Braich's subjective expectation of privacy would be even further attenuated than that of Mr. Latimer and Mr. Pereira.

D. Was the subjective expectation of privacy objectively reasonable in the totality of the circumstances?

[62] Even if I found Mr. Braich had a subjective expectation of privacy, I am not satisfied that he has established that it would have been objectively reasonable in the totality of the circumstances - in relation to the state or otherwise.

[63] Based on the evidence tendered, Mr. Braich's only connection to the River Green complex was his solitary May 4, 2017 attendance to a parking garage (accommodating the occupants of 454 residential units) that could be seen to be occupied by a large number of individuals at any given time during the playing of the CCTV footage. There was no evidence that Mr. Braich was connected to any suite or, in particular to unit 1204 except for the fact that he was let into the parking garage by Mr. Pereira who was connected to unit 1204 by virtue of the fact that he was in possession of a fob associated to unit 1204.

[64] Mr. Braich was not able to regulate access to the building or exclude others from the building. He did not use a fob to enter the secure parking garage. His inability to enter the secure area of the River Green complex caused one person to interfere with Mr. Braich's efforts to enter the parking garage.

[65] The evidence also supports the Crown's assertion that the video footage and fob records themselves were stored on a computer and not in public view. However, the information that they documented (activities within the parking garage) was generally in plain view of members of the public, including residents, visitors to the building, tradespeople and the concierge staff.

[66] I pause to address the evidence that Mr. Villeneuve gave the Brighthouse Materials to the police without the consent of the property manager. For someone in Mr. Braich's position, at most a guest of a guest, it seems untenable that Mr. Braich could assert a breach of his privacy rights because of Mr. Villeneuve's failure to obtain the necessary consent. This conclusion may very well be different for someone found to be a resident or tenant or invited guest, in the totality of the circumstances.

[67] Finally, the Brighthouse Material did not reveal any core biographical data or intimate details about Mr. Braich, even taking into account the inferences that could be drawn from the information. The scope was limited and the CCTV footage of Mr. Braich was limited in duration and quality. For the most part, it is difficult to identify that the person in the red Mazda is Mr. Braich.

VI. CONCLUSION

[68] Based on the reasons set out above, I find that Mr. Braich has not established on a balance of probabilities that he had a reasonable expectation of privacy in the subject matter of the search, being the Brighthouse Material. As such, I make the following order:

- a) The application of Manveer Braich seeking a finding that the police breached his right to be free from unreasonable search and seizure under s. 8 of the Charter in relation to fob records and CCTV footage searched without a warrant from 5177 Brighthouse Way, Burnaby is dismissed.

"Winteringham J."

[1] I most recently summarized the background to the investigation in R. v. Kang, 2020 BCSC 1474. For background information, those reasons should be read with these.

[2] There were two key fobs assigned to Unit 1204 bearing the following unique serial numbers: UN2220 and UN2269.

[3] Surveillance officers identified Mr. Braich as the driver.

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