
CANADA / JUDGMENT

R. v. Kim

2020 BCSC 1064

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 1064 R. v. Kim

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Kim,

2020 BCSC 1064

Date: 20200710

Docket: 27841

Registry: Vancouver

Regina

v.

Billie Onare Kim,

Kyle Stephen Latimer

and Jacob Angelo Pereira

Before: The Honourable Madam Justice Devlin

Oral Reasons for Judgment - Brighthouse Way Material

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Place and Dates of Hearing:

Vancouver, B.C.

July 7, 8, 2020

Place and Date of Judgment:

Vancouver, B.C.

July 10, 2020

[1] THE COURT: This decision was delivered in the form of Oral Reasons. The Reasons have since been edited for publication.

Introduction

- [2] The accused, Billie Onare Kim, Kyle Stephen Latimer and Jacob Angelo Pereira, are charged with several offences under the Controlled Drugs and Substances Act, S.C. 1996 c. 19 [CDSA], as well as several weapons offences under the Criminal Code, R.S.C. 1985, c. C-46 [Code]. The charges arise as a result of a search of unit 1204, 5177 Brighouse Way, Richmond, BC on September 14, 2017 ("Brighouse Way").
- [3] The issue before me on this application is whether the accused have standing to challenge the admissibility of the evidence that was obtained from Brighouse Way consisting of still images obtained from the CCTV footage of the parking garage area, and the key fob access records for unit 1204. The applicants submit this issue has already been determined by Madam Justice Ker in *R. v. Latimer*, 2020 BCSC 488 [Latimer] and therefore judicial comity requires this Court to follow that ruling.
- [4] The Crown takes the position that none of the accused have standing to challenge the images or fob records as they did not possess a reasonable expectation of privacy in the materials obtained. The Crown relies on *R. v. Wilson*, 2017 BCCA 327 [Wilson] as authority in support of their position and to distinguish Latimer. I am advised by Crown counsel that they intend to rely on this body of evidence at trial.

- [5] In a ruling indexed as R. v. Kim, 2019 BCSC 2150, [Kim #1], I determined that the applicants had an expectation of privacy in the 12th floor hallway and as such their images captured on the covert camera installed by the police breached their s. 8 Charter rights. Earlier this week, in a ruling indexed as R. v. Kim, 2020 BCSC 1054 [Kim #2], I determined that Mr. Kim and Mr. Pereira have standing to challenge the validity of the search executed on unit 1204, but Mr. Latimer does not.
- [6] In Latimer, Ker J. considered an application brought by Mr. Latimer and Mr. Pereira in the matter proceeding before her. Mr. Kim is not on that Indictment. Madam Justice Ker concluded that both Mr. Latimer and Mr. Pereira had a reasonable expectation of privacy in the materials seized which included CCTV footage and fob records from Brighthouse Way.
- [7] The parties agree that the applicants bear the burden of proof to establish on a balance of probabilities that they had a reasonable expectation of privacy in the materials obtained by a member of the Delta Police department ("DPD").
- [8] The applicants argue the principle of judicial comity applies and therefore I should follow Latimer. They argue there is no sufficient factual distinction to merit an alternate conclusion. The Crown takes the position that Latimer is distinguishable from this case in significant ways. The Crown also argues Latimer is wrongly decided.
- [9] Following my review of the relevant facts I will begin my analysis with a consideration of the principle of stare decisis and a consideration of the applicability of Re Hansard Spruce Mills Ltd., [1954] 4 D.L.R. 590 (B.C.S.C.) [Re Hansard Spruce Mills].

Factual Background

- [10] No evidence was called on this application. In Kim #1 and again in Kim #2, I set out in detail the relevant facts with reference to the Agreed Statement of Facts and submissions of counsel. Therefore, I will not repeat them again other than re-emphasizing facts of particular relevance to this application. The factual background contained in my previous decision should be read together with the facts I set out here.
- [11] In August 2017, members of the DPD identified a suspected drug stash site in a new residential apartment building located at 5177 Brighthouse Way, Richmond, BC. The building was one of six buildings which made up the River Green apartment complex. The apartment complex was located on Brighthouse Way, between River Road and the Fraser River in Richmond, BC.
- [12] The building was a 14-floor residential apartment building, consisting of 458 suites. The building also had a secure two-floor underground parking lot, which serviced the River Green apartment buildings including 5177 Brighthouse. The underground parking lot was only accessible by use of a fob. The elevator bays in the parking lot were accessible to all of the parking lot users of the six River Green apartment complex. The building had a single bay of elevators and a ground floor lobby staffed with a concierge 24-hours per day.

- [13] The building was equipped with closed circuit television surveillance ("CCTV"). The cameras were located in the lobby, the underground parking lot and outside the elevators in the underground parking lot. The CCTV cameras were visible.
- [14] With the assistance of the property manager, the police were able to obtain access fobs, rental documents, CCTV footage, and fob access records. CCTV footage between April 30 and August 23, 2017, captured images of the three accused at different times using the fob associated with unit 1204.
- [15] Mr. John Poon was the property manager for the River Green apartment complex. He authorized the DPD seizure of this material, however, I will discuss later in these reasons the dispute as to exactly what Mr. Poon knew when he made his decision to authorize the seizure of material.

Strata Bylaws

- [16] The River Green strata council enacted bylaws which applied to 5177 Brighthouse Way. The strata bylaws governed use of the property, rental accommodations, common area video surveillance and fob access. The strata bylaws allowed 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.
- [17] The bylaws provided that the strata corporation could collect data obtained from the CCTV surveillance system with respect to the usage of each security fob. The bylaws also permitted video files and/or fob usage records to be used by the strata corporation in relation to preventing, recording, investigating, and obtaining evidence of theft, vandalism, nuisance, or damage caused by any person and to ensure the safety of the owners, tenants, occupants, and visitors. Video files were stored for a period up to one month and fob usage records were to be stored for a period up to five years. The bylaws provided that in certain circumstances the video files and/or security fob usage records could be provided to law enforcement.

The Governing Legal Principles

- [18] Section 8 of the Charter provides that everyone has the right to be secure against unreasonable search or seizure. At paras. 22 to 29 of *Kim #1* I set out the governing legal principles applicable in a s. 8 analysis and I incorporate those paragraphs by reference into this decision. The parties agree that the application is concerned with informational privacy and therefore the analysis discussed in *R. v. Tessling*, 2004 SCC 67 [Tessling], *R. v. Patrick*, 2009 SCC 17 [Patrick], and *R. v. Spencer*, 2014 SCC 43 [Spencer], apply. As observed in *R. v. Craig*, 2016 BCCA 154 [Craig], these cases demonstrate that the format of the totality of the circumstances test requires tailoring depending on the facts of the case and which aspect of privacy interest is engaged (at para. 98). I canvass this concept in detail at paras. 24 - 29 of *Kim #1*.

- [19] In addition, the Crown has referenced a number of cases which consider whether an expectation of privacy in security camera footage from a multi-unit building is reasonable. As these cases demonstrate, when conducting a s. 8 analysis the factors set out in *R. v. Edwards*, [1996] 1 S.C.R. 128 [Edwards] and *Tessling* must be applied to the distinct circumstances of each case. I do not intend to review all of those cases, however they factor into my analysis.
- [20] *Re Hansard Spruce Mills* sets out a prescription for the exercise of judicial discretion respecting matters of stare decisis.
- [21] The "proper discretionary duty of a trial judge" is limited to only "certain limited circumstances" in departing from the decisions of another trial court judge of the same court (at 592). The narrow scope of such an exception avoids unsettling the law, and safeguarding against presenting litigants with "conflicting opinions" that emanate from the same court, the decisions of which command equal legal weight: *R. v. Sipes*, 2009 BCSC 285 [Sipes] at para. 8, citing to *Re Hansard Spruce Mills*.
- [22] Those limited circumstances that may justify a trial judge's departure from the ruling of a fellow trial judge, include the existence of any subsequent decisions that affect the validity of the impugned judgment; where it is demonstrated that some binding authority in case law or statute was not considered in that subsequent decision; or where the judgment was an unconsidered, nisi prius judgment that was rendered amidst the exigencies of a trial "without opportunity to fully consult authority": *Sipes* at para. 8.
- [23] Importantly, *Re Hansard Spruce Mills*' approach to judicial comity is not a rule of law but rather "a wise and prudent prescription for the exercise of judicial discretion" (*Sipes* at para. 10). Importantly, it is "for the Court of Appeal to decide whether a judge of this Court erred, not another judge of the Court" (*Sipes* at para. 10). Nowhere does that prudent prescription advocate blind adherence to another judge's decision; instead, "judges should always be mindful of the interests of justice and ensure that applying *Re Hansard Spruce Mills* will advance those interests in particular circumstances" (at para. 15).

ISSUES

- [24] Is there a sufficient basis, as expressed in *Re Hansard Spruce Mills*, to depart from the findings in *Latimer*?
- [25] If so, have the applicants established they have a reasonable expectation of privacy thus standing to challenge the seizure of the video, photo and fob record?

ANALYSIS

Considering the factors in *Re Hansard Spruce Mills* is there a basis to depart from the findings in *Latimer*?

- [26] I will begin with a summary of the Latimer decision and then proceed to examine the basis upon which the Crown argues it is not binding on this Court.
- [27] In Latimer, Mr. Latimer and Mr. Pereira were charged with two others with several drug offences under the CDSA as well as criminal organization, conspiracy and weapons offences under the Code. The charges arose as a result of a Vancouver Police Department (the "VPD") investigation referred to as Project Territory. Mr. Latimer joined by Mr. Pereira and their co-accused, Csongor Szucs, filed applications which challenged the obtaining of key fob access records and their images from CCTV footage of the common areas (parking garage, parking garage elevator lobby, elevators and front lobby areas) from two different residential locations - the River Green complex at Brighthouse Way and the Pacific Rim Estates on West Cordova St. in Vancouver, BC. The Brighthouse Way location is the same location that is the subject of the application before this Court.
- [28] The materials were obtained by VPD members involved in the Project Territory investigations who requested the information from the concierge at Brighthouse Way. This was the same concierge who provided the materials to the DPD officer. No judicial authorizations in the form of production orders were sought for these materials.
- [29] Two separate voir dres were conducted, one for each location. However, with the agreement of counsel Ker J. issued one ruling dealing with both locations as the analytical framework is the same for each.
- [30] As in this case, the applicants argued that they had a reasonable expectation of privacy such that the state conduct in obtaining the information amounts to a search and seizure which engages their s. 8 Charter right. As the information was obtained in the absence of prior judicial authorization, they argued that the searches and seizures were warrantless and therefore presumptively unreasonable.
- [31] As I stated earlier, Ker J. issued one ruling where she considered two separate applications - one pertaining to the materials seized from Brighthouse Way and another separate application pertaining to the seizure of materials from Pacific Rim Estates in Vancouver. While both sets of materials involve Mr. Latimer and Mr. Pereira, Ker J. conducted her analysis separately. I focus only on her analysis regarding the Brighthouse Way material in my conclusion.

The seizure of material from Brighthouse Way

- [32] As per the VPD investigation on May 5, 2017, Cst. Nielson attended at the Brighthouse Way address to obtain CCTV recordings from the building's security camera. Cst. Nielson met with the on-duty concierge for the residential complex, Marc Villeneuve. At paras. 18 - 25 and 30, Ker J. describes the interaction between Cst. Nielson and the Brighthouse Way concierge as follows:

- [18] Cst. Nielson explained that he was seeking access to the building video from May 4, 2017, and in particular was interested in the arrival of the red Mazda 3 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.
- [19] Mr. Villeneuve was familiar with the vehicle in question as there had been a complaint the previous day that it had accessed the parkade without a key fob when the parkade gate had opened for an exiting vehicle.
- [20] As a result of this request, Mr. Villeneuve found 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, 2017, and also requested access to the fob records so he could determine where the individuals captured in the video came from. Mr. Villeneuve played CCTV footage for Cst. Nielsen that showed where the red Mazda went and what parking stall it pulled into. He also provided Cst. Nielsen with the unit to which the parking stall was associated: suite 1204-5177 Brighthouse Way.
- [21] In addition, Mr. Villeneuve showed Cst. Nielsen a copy of the Form K associated to the suite and parking stall. Cst. Nielsen copied the tenant information from the Form K and learned that the listed tenant was Csongor Szucs. Cst. Nielsen also learned from Mr. Villeneuve that the building had concerns with the number of people using the key fob assigned to unit 1204 and offered to forward to him emails in that regard.
- [22] After Cst. Nielsen completed his attendance at the Brighthouse Way complex on May 5, 2017, he sent an email to Mr. Villeneuve at 12:36 p.m., thus providing Mr. Villeneuve with his email for communications purposes. At 2:42 p.m. that same day, Mr. Villeneuve emailed Cst. Nielsen and attached five different emails with various strings of communications between the concierge services desk and a rental company managing the rental of unit 1204-5177 Brighthouse Way. The content of the emails can be summarized as communications between January 31, 2017 and May 2, 2017, relating to unauthorized use of key fobs associated with unit 1204 as well as violations of the strata policy on exiting and entering the underground parking garage. Included in the emails provided to Cst. Nielsen on May 5, 2017, were a series of photographs of individuals in various areas of the complex (lobby, parkade and elevator lobby in the parkade) as well as a screenshot of fob access records, including for unit 1204.
- [23] Cst. Nielsen could not recall if, on his May 5, 2017 attendance, he received a copy of any of the CCTV footage he viewed with Mr. Villeneuve but conceded he may have received some footage. On May 9, 2017, he returned to the River Green complex and obtained a more complete package of information, including eight video clips of the CCTV footage he had previously viewed (Ex. #8), as well as copies of the Form K and fob access records associated to unit 1204-5177 Brighthouse Way. These materials were sought generally to advance the Project Territory investigation.

- [24] After reviewing the materials, which provided a more complete picture, Cst. Nielsen felt there was some footage missing and so sent an email to Mr. Villeneuve on May 9, 2017 at 6:05 p.m. (Ex. #10) seeking further video footage from three different CCTV cameras for the time frame of 13:00 to 14:25 hrs on May 4, 2017 and also footage from an earlier incident on May 2, 2017. On the evidence adduced, this appears to have been the only official request for materials that Cst. Nielsen submitted to the River Green complex.
- [25] Mr. Villeneuve responded on May 10, 2017 at 9:43 a.m. advising Cst. Nielsen that he had forwarded the request to the strata manager to "make sure we are compliant with the strata property act when we release the surveillance." Further emails were exchanged between the two and on May 11, 2017 at 9:56 a.m. Mr. Villeneuve advised that the strata manager had approved the request.
- [30] Cst. Nielsen acknowledged that his attendance at Brighthouse Way was the first time he had approached a strata building to seek CCTV footage. He approached it the same way he approached other commercial spaces such as a restaurant or bar but acknowledged it was different in the sense that it was a residential space. He was not aware of the strata bylaws addressing privacy issues. Nor did Cst. Nielsen ask Mr. Villeneuve about his authority to provide him access to the CCTV footage and other information. He assumed that Mr. Villeneuve was an employee of the strata corporation and in control of the records.
- [33] As is readily apparent from this summary, the material Cst. Nielson obtained from Mr. Villeneuve is essentially identical to what Cst. Cessford obtained. Both contained images, albeit in different formats, of Mr. Latimer and Mr. Pereira together with the corresponding fob access records for unit 1204.
- [34] Mr. Villeneuve testified at the Latimer voir dire. I will set out the summary of his evidence as it explains the basis for Ker J.'s finding that Mr. Latimer had a tenancy relationship with unit 1204:
- [40] Mr. Villeneuve believed he had obtained authorization from the strata property manager, John Poon, and at least the strata council president, to provide this information that the police sought. He acknowledged that he could not release information to law enforcement in the absence of an official request from the police and the authorization from the strata property manager to release the information.
- [41] When shown the May 9, 2017 email (Ex. #10) from Cst. Nielsen, Mr. Villeneuve said it looked to be an official request but was uncertain if it was the first request. Mr. Villeneuve testified he would not have shown or given information to the police prior to obtaining approval to do so as that would be a breach of strata policy. Mr. Villeneuve did not remember showing anything to the officer prior to obtaining the approval to do so but could not recall the circumstances of the May 5 and 9, 2017 interactions. He conceded it was possible he had provided the information but reiterated it would not have been in line with the strata bylaws and policies at the time.

- [42] Mr. Villeneuve agreed that the May 9 to 11, 2017 email chain between himself and Cst. Nielsen did not contain a request for a copy of the fob access records or the Form K. He could not explain how on May 9, 2017, Cst. Nielsen could have received the fob access records, the CCTV video footage and the Form K for unit #1204-5177 Brighthouse Way prior to the approval being granted by the strata property manager on May 11, 2017 (Ex. #10).
- [43] On May 9, 2017, sometime prior to 5:25 p.m. Mr. Villeneuve emailed a series of photographs to Cst. Nielsen (again prior to authorization being given to do so). At page 7 of the email chain (Ex. #11) is an image of Kyle Latimer, from May 4, 2017 at 9:11 p.m. Mr. Villeneuve advised Cst. Nielsen that this was the person he knew to be Csongor Szucs who had moved into the building. Mr. Villeneuve also agreed that the images contained in Ex. #11, which he had provided to Cst. Nielsen, were outside the time frame requested by Cst. Nielsen in his later email of 6:05 p.m. and conceded that if he provided materials outside the scope of the materials requested and in the absence of authorization to do so, that too would have been in breach of the strata bylaws and policies.
- [44] In August 2017, Mr. Villeneuve met with Cst. Cessford of the Delta Police Department in relation to another investigation into the tenants affiliated with unit 1204-5177 Brighthouse Way. At that time, he pointed out to Cst. Cessford that the male depicted in a still photograph (Ex. #12) from CCTV footage from the elevator lobby in the underground parkade was the man he knew to be Mr. Szucs. The man depicted in Ex. #12 is not Mr. Szucs but in fact is said to be Kyle Latimer.
- [35] It is also important to consider the strata bylaws for the River Green complex as they were considered by Ker J. and the Crown places significant reliance on them in this case. Ker J. described the bylaws at paras. 47-51 of her ruling as follows:
- [47] The River Green strata council enacted bylaws which applied to 5177 Brighthouse Way. The strata bylaws, revised March 28, 2017, outline the duties of owners, tenants, occupants and visitors; the powers and duties of the strata corporation; the strata council; the enforcement of bylaws and rules; and general matters such as noise control, rental and other accommodations, common areas, the use of common area video surveillance and fob access records; and other matters incidental to regulating the running of the multi-unit residential community. Section 40 of 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.
- [48] The bylaws provide that the strata corporation will collect the data obtained from both the CCTV surveillance system (s. 40(1)) and the usage of each security key fob (s. 40(3)).
- [49] Section 40(4) of the strata bylaws also permits video files and/or fob access records to be used by the strata corporation for enumerated purposes, as follows:
- (4) The video files and/or security fob usage records will be used by the Strata Corporation for the following purposes:

- (a) being alerted to the presence of trespassers on the strata plan;
- (b) preventing, recording, investigating, and obtaining evidence of any theft, vandalism, nuisance, or damage caused by any person on the strata plan;
- (c) ensuring the safety of the owners, tenants, occupants, and visitors and the security of the strata plan; and
- (d) enforcing Strata Corporation bylaws and rules which relate to theft, vandalism, nuisance or damage caused by any person on the strata plan.

[50] Video files are stored for a period of up to one month but can be extended for security purposes as required by law enforcement (s. 40(5)) and fob access records are stored for a period of up to five years from the date of the recording (s. 40(6)).

[51] In so far as law enforcement reviewing these materials is concerned, s. 40(7) of the bylaws provides:

(7) The personal information of owners, tenants, or occupants will only be reviewed or disclosed as follows:

(a) to law enforcement in accordance with subsection (4);

[36] Ker J. found that Mr. Villeneuve did not adhere to the strata bylaws and policies in providing information to Cst. Nielson as he had provided the material without first obtaining proper approval from the strata property manager. Therefore, all the material he provided to Cst. Nielson on May 5 and 9, 2017 were "provided contrary to and in clear breach of the strata plan's bylaws and policies" (at para. 56).

[37] I will now turn to consider the reasons the Crown submits provide a basis to distinguish this case from Latimer. As I understand their position, the Crown offers two bases to distinguish Latimer - firstly, they submit there is a significant difference in the evidentiary foundation; and secondly, Ker J.'s legal analysis is flawed as she failed to follow Wilson.

Evidentiary Factors

(1) Status of Mr. Latimer and Mr. Pereira

[38] Madam Justice Ker found that Mr. Latimer resided at unit 1204 "albeit perhaps not continuously" and Mr. Pereira was an invited guest. In Kim #2, I found Mr. Latimer was an invited guest and Mr. Pereira, and Mr. Kim were the only two who regulated access to unit 1204. Indeed, the Crown theory presented before me was that Mr. Latimer did not reside at the unit and had no access.

- [39] While it remains perplexing to me how the Crown could present two different bodies of evidence regarding the same people in relation to the same residential unit and the same type of information, that question does not significantly impact my analysis. Simply put, although my characterization of Mr. Latimer and Mr. Pereira's connection to Brighthouse Way differs from that of Ker J. I do not consider that a reason to depart from Ker J.'s findings. Given the overlap of factors it would be absurd to find otherwise.
- (2) Cumulative value of the Material
- [40] The Crown submits another important distinction is that in this case the police obtained less material both in terms of quantity and quality. The Crown stressed that in Latimer the VPD had obtained eleven clips of video footage for May 4, 2017 and one for May 2, 2017 and some other still images from other days together with the fob access records. They argue the breadth of the information obtained as discussed in Latimer is much greater than the information potentially gleanable from still photos of people associated to unit 1204 received by the DPD.
- [41] I note that in Latimer, Ker J. did not accept the Crown's argument that the CCTV footage and the fob access records "captured nothing more than the movements of the applicants in the common areas of Brighthouse" and "did not provide revealing or intimate details about the applicants" (at paras. 205 - 206). Nor did Ker J. accept the fact that since other people could potentially see them moving about, the visible nature of the surveillance cameras and the bylaws collectively served to detract from any objective reasonable expectation of privacy.
- [42] I accept that the video clips obtained by the VPD are a different form of material than still photos downloaded from the CCTV system. I also accept that the video footage would provide the police with an opportunity to review the footage and catalogue their observations of when an accused arrived in the parkade elevator bay, or describe the items the accused was carrying in and out of the area, who he was with, what he was wearing and how long he spent in a particular place. However, to a certain extent, the still photos also provide the police with similar information particularly when reviewed in conjunction with the fob access records. When couched in the language of assessing an expectation of privacy, the subject matter of the search must be precisely defined. I find the subject matter remains the same on the evidentiary basis before me, as it was before Ker J.: the information ultimately gleaned from the images captured lifestyle information, activities, and patterns of the individuals. Whether the information is gleaned through the review of video footage or still clips, when examined in conjunction with the fob access records for unit 1204, details of the accused's activities including their associations, patterns, descriptions and activity in the area of the elevator leading to the 12th floor are evident. In other words, although the format in which the activities, or information of the accused is captured differs from that which was before Ker J., the nature of the discernible information is no different.

- [43] I do not consider the difference in the form of the material or the amount of material to be of significance. When presented in either form the accused's images and any information that can be studied from these media are equivalently exposed particularly when viewed in conjunction with the fob access records. (There are two photos of Latimer with others, three photos of Pereira and seven photos of Kim, depicting them alone and with others.) The Crown seizes on the mode through which the information that was of greatest concern to the police is digestible, as being the distinctive quality that separates the evidence before me from that before Ker J. This is an artificial approach to the reasonable expectation of privacy analysis. A broader, more purposive approach reveals that the content of information about the observed individuals is no less deserving of a zone of privacy vis-à-vis the state, whether captured in the still photos of the CCTV and assessed with the fob access records, or whether viewable in video footage. "What the police were really after" remains the same (see: *R. v. Marakah*, 2017 SCC 59 at para. 15 [Marakah], citing *R. v. Ward*, 2012 ONCA 660, at para.67).
- [44] The fact that the VPD also obtained similar information from Pacific Rim Estates is not a relevant consideration. Ker J.'s analysis of the Brighthouse Way material was not influenced by the material seized from Pacific Rim and I need not consider it in my analysis.
- [45] In my view, what is critical in this analysis is the nature of the information provided. While the form may differ, the information captured in both forms is essentially the same. The form that the information is presented does not prevail over the nature of the information obtainable that is truly the subject matter of the search when precisely defining the subject of the search, thus anchoring the assessment of the reasonableness of the expectation of privacy.
- (3) Material was obtained by consent of the property manager
- [46] The Crown argues the lack of consent by the appropriate property management authority in Latimer is an important factor distinguishing this case from the facts in Latimer. The Crown argues that the fact that the police spoke to Mr. Poon, the property manager for Brighthouse Way, directly and he then gave Mr. Villeneuve authority to provide the police with material is an important factor that was not present in Latimer. Earlier in these reasons I refer to Ker J.'s finding that the Brighthouse Way concierge had provided material to the VPD in breach of the bylaws and policies of the strata corporation.
- [47] There is no evidentiary foundation to support the Crown's argument. At its best, the evidence establishes that the police spoke to Mr. Poon directly, however, there is no evidence as to what Mr. Poon was told or whether he considered the requirements of section 40(4)(c) or 40(7)(a) of the strata bylaws. Nor is there any evidence that Mr. Poon is the person with the authority to make such a decision.

- [48] In addition, according to the ASF the only permission Mr. Poon provided the police was to enter the building and to speak to the on-site head concierge, Mr. Villeneuve. Mr. Villeneuve provided Cst. Cessford with two all-access fobs but there is no evidence to establish Mr. Poon directed Mr. Villeneuve to provide the fobs nor is there any mention of Mr. Poon discussing access to still photos downloaded from the building's CCTV footage of people who used the fob associated to unit 1204.
- [49] In summary, I find there is no evidence to conclude that the still photos from the building's CCTV system or the access fobs were provided to the police in compliance with the strata bylaws and s. 18(1)(j) of the Personal Information and Protection Act, S.B.C. 2003 c. 63. Accordingly, there is no discernible difference in this case from the manner by which the material was obtained in Latimer.
- [50] In any event, I do not understand the Crown to be suggesting the consent of the strata manager extinguishes one's expectation of privacy. In any case, this is only one factor in the inquiry as to the objective reasonableness of the subjective expectation of privacy in the totality of the circumstances. It cannot be that the assessment of the objective reasonableness of an applicant's expectation of privacy is effectively disposed of at the hands of third parties obtaining the information. Indeed, and in part relying on Marakah and the notion that control and confidentiality is but one factor to be assessed, that is precisely what Ker J. did in her analysis (see para. 212).
- [51] Having considered the Crown's submission on the evidentiary record, I find there is not a sufficient factual distinction to merit me departing from the legal analysis in Latimer.

Legal Analysis

- [52] I see no merit in the Crown's submission that the legal analysis by Ker J. in Latimer is flawed because Ker J. did not follow Wilson, among other arguments the Crown advanced. Ker J. conducted a comprehensive review of the leading authorities dealing with the reasonable expectation of privacy in multi-residential buildings including R. v. White, 2015 ONCA 508 [White]; R. v. Yu, 2019 ONCA 942, leave to appeal ref'd 2020 CanLII 41795 (SCC) [Yu], and R. v. Webster, 2015 BCCA 286, leave to appeal ref'd 2015 CanLII 85037 [Webster]. Indeed, most recently in R. v. Pipping, 2020 BCCA 104 [Pipping], our Court of Appeal held that Mr. Pipping had a reasonable expectation of privacy in the common hallway of his multi-unit residential building. In my view the Crown has misunderstood Ker J.'s analysis. I will explain.
- [53] At para. 131 of Latimer, Ker J. acknowledges that the Court of Appeal in Wilson upheld the decision of Howard P.C.J. in a brief endorsement-style judgment. She properly notes that the Court of Appeal "did not engage in its own analysis of the issues raised by this application" (at para. 131). Ker J.'s observations are correct.
- [54] The Crown suggests that Ker J.'s observation that Wilson pre-dated Marakah was an irrelevant consideration and not a justification for not following Wilson. As Ker J. discussed in her analysis, Marakah expands situations where the information may reveal details of the

claimant's lifestyle (para. 148). The point made by Ker J. is that when conducting an analysis on informational privacy one must consider recent developments in the law as expressed in *Marakah*. In *Marakah*, the Supreme Court recognized that control is not an absolute indicator of a reasonable expectation of privacy, nor is the lack of control fatal to the existence of a privacy interest (at para. 38). This was a critical proposition that did not feature in the trial judge's decision in *Wilson*. Ker J. properly considered developments in the analytical framework since *Wilson*. In my view this is precisely the approach adopted in *Tessling* and *Patrick*, where the Supreme Court of Canada reformulated the test established in *Edwards* to address the circumstances of the particular case. Failing to do so would ignore the purposive and developing framework of the s. 8 analysis, and the requirement to assess reasonable expectations of privacy in the totality of the circumstances.

- [55] The Crown points to para. 136 of *Latimer*, specifically citing that Ker J.'s consideration of the density of the property in the context of objective expectations of privacy is an instance where she improperly criticized *Wilson*. There is no merit in this submission. A proper reading of the judgment reveals that Ker J. was referring to Howard P.C.J.'s comments on *Webster* while making findings in *Wilson*. Ker J. continued with her analysis, reviewing the finding in *White*, which discussed how the level of exclusive occupation of the common area only informs "how diminished the expectation of privacy might be, not whether it extinguishes it" (at para. 137). Moreover, Ker J.'s analysis leading to this conclusion, at para. 136, essentially rests on the finding that individual privacy rights are not tethered entirely to the degree of exclusive occupation of common areas. I find that a proper reading of Ker J.'s analysis does not show any improper criticism of *Wilson*. Instead, her analysis is based upon an accurate, and comprehensive review of the more recent and binding authorities on this subject. The findings in *Wilson*, were not similarly informed.
- [56] Most recently, in *Pipping*, the Court of Appeal found that Mr. Pipping had a reasonable expectation of privacy in the common area of a four-level, 96 unit building with key access to enter but open access once inside and no video surveillance. In conducting their analysis, the Court considered *Edwards*, *Webster*, *White* and *Yu*. The Court noted that the tenor of all these cases focused on the control of public access to the common areas of the building as "key to the assessment of a reasonable expectation of privacy" (at para. 30). There was no consideration of this in *Wilson*.
- [57] In *Pipping*, the Court found *Yu* instructive as did Ker J. in *Latimer*. In the circumstances in *Yu*, the Court found that there was no subjective expectation of privacy in a parking garage in the particular circumstances in the case. The accused in that case had limited control over those parking garages. As Ker J. notes in *Latimer*, the Court in *Yu* was considering physical surveillance in the parking garage and other areas, not CCTV footage. Ker J. concluded "there is a world of difference between fleeting physical surveillance observations and preserved CCTV footage married with fob access records" (para. 141). Ker J. considered *Yu* informative but not determinative of whether any subjective expectation of privacy in the parking garages and common areas in her case were objectively reasonable (para. 141).

- [58] When considering whether an applicant has established a reasonable expectation of privacy, the totality of the circumstances test must be flexible because "individuals have different expectations of privacy in different contexts and with regard to different kinds of information and documents" (Craig, at para. 97). The assessment of an expectation of privacy depends on a consideration of the totality of the circumstances. Privacy is a nuanced concept, and assessed in normative terms. An individual's expectation of privacy may be attenuated in particular circumstances without being eliminated (White at para. 48).
- [59] Madam Justice Ker's legal analysis was comprehensive and well-considered. Having regard to the circumstances of the case before me and the interests of justice to which Sipes alludes, I find there is no basis for me to depart from the Latimer findings regarding Mr. Latimer and Mr. Pereira's expectation of privacy over the Brighthouse Way materials. As set out in Sipes, if the Crown's issue is with Ker J.'s treatment of Wilson (which I note parenthetically is sound), their avenue of redress is an appeal, and not an attack on her findings and analysis through the mechanism of this separate application before me. On the factors in *Re Hansard Spruce Mills*, I do not find a basis to depart from Latimer.

Does Mr. Kim have a reasonable expectation of privacy?

- [60] Adopting the analysis of Ker J. to Mr. Kim's circumstances, I am satisfied that he has established on a balance of probabilities that he has a reasonable expectation of privacy over the Brighthouse Way materials that is objectively reasonable. The majority of the Brighthouse Way material pertains to Mr. Kim. Indeed, Mr. Kim is depicted in seven of the still photos. The fob access records enhance the significance of these photos by revealing more detail about Mr. Kim's activities while at Brighthouse Way. As I did in *Kim #1*, I decline to find that merely because Mr. Kim and the other applicants were aware that there were CCTV surveillance cameras throughout the common areas and that fob access records were compiled, they did not enjoy a subjective expectation of privacy in the information. To do otherwise "would not comport with the proper approach to s. 8": *Kim #1*, at para. 41.
- [61] With respect to whether Mr. Kim's subjective expectation of privacy was objectively reasonable I adopt Ker J.'s comments at paras. 207-217. As I have discussed, while some of the circumstances differ between the two cases the overall substance is the same. In particular, the still photos obtained from the CCTV footage were from when Mr. Latimer, Mr. Kim and Mr. Pereira were in the secure underground parking garage and its elevator lobby as well as the corresponding fob access records for unit 1204. Whether one considers them to be an occasional tenant, a guest or one who facilitates access to others, the analysis applies. I agree with Ker J. that the information contained in the materials - whether it be a video clip or a downloaded photo - together with the fob records, equally provide a significant amount of lifestyle information that the police were able to harvest repeatedly in advancing their investigation (Latimer, at para. 203). It is not the fact that there are still photos that merely depict Mr. Latimer, Mr. Kim, and Mr. Pereira, it is the inferences that may be drawn, and the information that can be synthesized when these photos are considered conjunctively with the fob access records.

- [62] I am guided in my analysis by the comments in White at para. 48, which were considered most recently in Pipping:
- [48] In any event, 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.
- [63] In any event, the engagement of the informational privacy interests in this application is more acute.
- [64] As these cases demonstrate, occupants within multi-unit dwellings do not relinquish their right to privacy over their image simply because they allow themselves to be the subject of video surveillance in common areas. The following observations by Ker J. at para. 161 of Latimer explain precisely why a flexible approach is necessary when considering the totality of circumstances:
- [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.

Conclusion

- [65] I find Mr. Kim, Mr. Pereira and Mr. Latimer have established on a balance of probabilities that they have a reasonable expectation of privacy in the Brighthouse Way materials. Therefore, their application for standing is granted.

"Devlin J."

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