

CANADA / JUDGMENT

R. v. Latimer

2020 BCSC 1958

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 1958 R. v. Latimer

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Latimer,

2020 BCSC 1958

Date: 20200929

Docket: 27798

Registry: Vancouver

Regina

v.

Kyle Latimer

Craig Latimer

Csongor Szucs

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Before: The Honourable Madam Justice Ker

Oral Ruling on Application #58 re s. 8 privacy interests

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J. Narwal

Counsel for the Accused Craig Latimer:

R. Mansoori-Dara

Counsel for the Accused Csongor Szucs

D. Jevning

Place and Date of Hearing:

Vancouver, B.C.

September 28, 2020

Place and Date of Judgment:

Vancouver, B.C.

September 29, 2020

- [1] THE COURT: This is a ruling on Application Number 58, an application by Kyle Latimer for a determination on the extent to which excision is available for the breach of s. 8 Charter rights as found in an earlier ruling at R. v. Latimer, 2020 BCSC 488 (the "Brighthouse Ruling"), in light of a subsequent ruling found at R. v. Kang, 2020 BCSC 1151 (the "Excision Ruling"). Both the Brighthouse Ruling and the Excision Ruling inform my assessment of the current application. As such, the reasoning in those two rulings is incorporated into this current ruling without the need to repeat them.
- [2] In the Brighthouse Ruling, I found that Mr. Latimer, Jacob Pereira, and Csongor Szucs had each established a reasonable expectation of privacy in their images in CCTV surveillance footage and the related fob access records that the Vancouver Police Department (the "VPD") Project Territory investigators had obtained from two different strata corporations, Brighthouse and Pacific Rim.[1] The VPD obtained this information without a warrant or production order. The materials were also obtained contrary to the privacy provisions of the strata corporations' bylaws and privacy policies.
- [3] On this application, counsel for Mr. Latimer contends that Mr. Latimer's s. 8 rights extend beyond the raw data of his images, his tenancy with respect to Suite 1204, and the fob records for that suite that cross-reference to his images. Mr. Latimer asserts that the Brighthouse Ruling extends his s. 8 Charter rights and privacy interests to inferences about his associations with the other individuals and their connection to Suite 1204 as guests or other occupants.

- [4] Essentially, Mr. Latimer contends that his informational privacy interests intersect and are co-extensive with Mr. Pereira's informational privacy interests, such that references in subsequent information to obtain search warrants ("ITOs") to Mr. Pereira's images and associations ought to be excised from the ITO as against Mr. Latimer.
- [5] Accordingly, Mr. Latimer seeks a broad conception of his s. 8 privacy rights and asserts that the state action that breached Mr. Pereira's s. 8 rights by obtaining Mr. Pereira's images from CCTV footage and fob access records from his Brighthouse attendances is also state action that breached Mr. Latimer's s. 8 rights. This is so, says Mr. Latimer, because the state action consisted of lifestyle surveillance that collected information about associations and activities that necessarily involved surveillance of others. And so, on the defence thesis, the images and association information about multiple persons bleeds over into and becomes part of each individual's own privacy interests and s. 8 Charter rights.
- [6] The Crown disagrees with the position advanced by Mr. Latimer. The Crown contends that the Brighthouse Ruling and the Excision Ruling make it fundamentally clear that Mr. Latimer's s. 8 Charter rights tie only to his images and information about him gleaned through the use of the CCTV surveillance footage and the related fob access records, as well as the evidence that ties Mr. Latimer to Suite 1204 at Brighthouse.
- [7] The Crown argues that what Mr. Latimer is trying to do is expand the notion of s. 8 rights to become group rights, something completely inconsistent with and foreign to the approach to s. 8 Charter rights. I agree.
- [8] Counsel for Mr. Latimer grounds his expanded conception of his client's s. 8 rights in language from the Brighthouse Ruling that addresses the subject matter of the search, the first factor considered in the contextual standing assessment for determining whether an accused has a reasonable expectation of privacy in material said to have been obtained contrary to s. 8 of the Charter.
- [9] In the Brighthouse Ruling, I found the subject matter of the search to be much broader than the Crown's overly narrow conception of it. At that stage of the analysis, the question was to determine what information the police were really after: Brighthouse Ruling at paras. 162-166, 169-171.
- [10] I found the subject matter of the search, again what the police were really after, to be broad, stating:
- [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 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.

- [11] Respectfully, however, the subject matter of the search does not suddenly transmogrify what it was that Mr. Latimer had a reasonable expectation of privacy in. The content of his privacy interests remains the same: his images and information about him that can be gleaned from the CCTV surveillance footage and the related fob access records, as well as his identity and information that gave him a territorial privacy interest in Suite 1204 at Brighthouse. To accede to Mr. Latimer's conception of an expansive role for informational privacy that includes the activities and imagery of his guests, whose own rights were breached in the obtaining of their images and personal information, would result in me contradicting myself and creating an inconsistency with the Excision Ruling.
- [12] In the Excision Ruling, I was clear--the defence argument that "excision for all" ought to be the approach for excision of established Charter breaches was rejected.
- [13] Counsel for Mr. Latimer relies upon two comments in the Excision Ruling at paras. 237 and 239, writing in his supplementary written argument at para. 2:

In the Excision Ruling, this Court held that "in order for an accused to have information, said to have been unconstitutionally obtained, excised from an ITO at a Garofoli review into the sufficiency of the authorization, there needs to be a link between the accused and the information sought to be excised." As a result, to have information excised from an ITO, the Applicant must show that their Charter rights were infringed by the state's conduct in collecting that information. [Footnotes omitted.]

- [14] While it is true those two propositions are found in the Excision Ruling, counsel for Mr. Latimer overlooks the rest of that section of the Excision Ruling. Those two passages are found in a section of the Excision Ruling entitled, "L. Excision for one or excision for all?" That section, found at paras. 234-241, makes it clear that an accused can only seek excision for breaches of their own Charter rights, not breaches of a co-accused's Charter rights.
- [15] The Brighthouse Ruling found breaches of the s. 8 Charter rights of Mr. Latimer, Mr. Szucs, and Mr. Pereira, in that each person's images and/or personal information captured in the CCTV footage, the related fob access records, and the Form K information, was obtained without a warrant and constituted an unreasonable search and seizure. However, that finding does not mean that Mr. Latimer's informational privacy rights includes the lifestyle surveillance information that was developed through putting his imagery and fob access record information together with similar information about Mr. Pereira's, which was obtained in breach of Mr. Pereira's own s. 8 Charter rights.

- [16] To put it another way, the state action that infringed Mr. Latimer's s. 8 rights was the police obtaining the CCTV footage of him, the related fob access records that led the police to those images, and the information that suggested Mr. Latimer was the tenant of Suite 1204. The state action that infringed Mr. Pereira's s. 8 rights was the same, but in respect of the images and information about him. However, that information does not become part of Mr. Latimer's s. 8 privacy rights simply because Mr. Pereira was possibly Mr. Latimer's guest.
- [17] To accede to counsel for Mr. Latimer's thesis that his client's s. 8 rights were breached by the obtaining of information specific to Mr. Pereira's s. 8 rights would be to bestow "herd immunity" onto the scope of s. 8 Charter rights. However, there is no such thing as a group s. 8 privacy interest. The jurisprudence on this is clear, and has been since the inception of the Charter and the courts interpreted the scope of s. 8 rights.
- [18] There are two concepts that are foundational pillars of s. 8 Charter rights: first, the Charter protects people, not places; and second, Charter rights are personal to the accused, available only to the person whose particular liberty interest has been violated: *R. v. Cheung* (1997), 119 C.C.C. (3d) 507 (B.C.C.A.) at para. 68.
- [19] The thesis advanced by counsel for Mr. Latimer appears to be that his s. 8 privacy rights have been breached by the collection of his former co-accused's images, because the police were able to draw inferences about Mr. Latimer through his association with Mr. Pereira. I agree with the Crown that this thesis must be rejected. It artificially and improperly expands the foundational pillar that Charter rights are personal to the accused. It seeks to make breaches of a co-accused's s. 8 privacy rights a breach of the applicant's rights because the parties are affiliated or associated.
- [20] The subject matter of the search criteria and the standing analysis, as I outlined in the Brighthouse Ruling at para. 162, is simply one factor in the contextual analysis in determining whether an accused has established a reasonable expectation of privacy over items seized, such that they can challenge the search and seizure of those items as violating their s. 8 Charter rights.
- [21] Significantly, in the context of the Brighthouse Ruling, Mr. Latimer argued that he had a reasonable expectation of privacy in connection with his images in the CCTV footage that Project Territory investigators obtained from the property manager at the Brighthouse complex without a warrant. The investigators obtaining his images through the warrantless seizure of the CCTV footage constituted the breach of his s. 8 rights. I agreed, and I also included the fob access records as a s. 8 breach because the records were inextricably bound to the CCTV footage of Mr. Latimer. On their own, the fob access records are meaningless. When cross-referenced to the CCTV footage, the fob access records delivered the accused's images to the investigators.

- [22] Thus, the personal s. 8 rights of Mr. Latimer that were in issue on the Brighthouse Ruling were in relation to the images of Mr. Latimer. The evidence on the voir dire established a territorial privacy interest in respect of Mr. Latimer and suite 1204, based on Mr. Villeneuve's evidence that he believed Mr. Latimer was Mr. Szucs, the named tenant on the Form K. What the police were really after, or the subject matter of the search, does not define the parameters of the personal s. 8 rights of an accused.
- [23] The Brighthouse Ruling does not and cannot be construed as providing Mr. Latimer with an expanded s. 8 right such that he gains a direct privacy interest in the images or movements of another individual, to wit, Mr. Pereira.
- [24] As I stated in the Excision Ruling, "excision for one" is the approach. Excision relates to established Charter breaches specific to the rights of the individual accused. Mr. Latimer's privacy interest and s. 8 Charter rights do not include or encompass the imagery of Mr. Pereira or arguably anybody else. His privacy interest remains personal to Mr. Latimer and the information germane specifically to him--that is his images, and his movements. Mr. Latimer's s. 8 rights end at his personal information. They do not expand to include those who visited him or the images of the individuals who visited him.
- [25] Association alone does not support the expansion of the privacy sphere or "privacy bubble" around an individual to include imagery of others where the individual does not appear at all. Because Charter rights are personal to the accused, an accused's privacy interests do not extend to the images of others simply because they are associated.
- [26] The state action that resulted in a breach of Mr. Pereira's s. 8 rights or Mr. Szucs' s. 8 rights does not constitute a breach of Mr. Latimer's s. 8 rights. Mr. Latimer's application to have his s. 8 privacy interests construed to include the breach of others' s. 8 rights is dismissed.
- "Ker J."
- [1] Mr. Pereira was a co-accused on Indictment VA 27798 but pleaded guilty in July 2020 and is no longer a co-accused in these proceedings.

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