

CANADA / JUDGMENT

R. v. Lye

2026 ONCA 188

COURT

Court of Appeal for Ontario

DECIDED

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R. v. Lye

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COA-24-CR-0830

Judges

Tulloch, Michael H.; Dawe, Jonathan; Pomerance, Renee M.

Subject

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COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Lye, 2026 ONCA 188

DATE: 20260316

DOCKET: COA-24-CR-0830

Tulloch C.J.O., Dawe and Pomerance JJ.A.

BETWEEN

His Majesty the King

Respondent

and

Rimzan Lye

Appellant

Ricardo Golec and Hedieh Kashani, for the appellant

Deborah Krick, for the respondent

Heard: July 4, 2025

On appeal from the convictions entered by Justice Riun Shandler of the Ontario Court of Justice, on January 25, 2023.

Pomerance J.A.:

I. OVERVIEW [1] Cross-examination has been described as the engine of truth. However, the right to cross-examine is not absolute. When an accused challenges a search warrant at trial, she or he must apply for leave to cross-examine the police officer who prepared the underlying documents (the “affiant”). The accused must demonstrate that “cross-examination will elicit testimony tending to discredit the existence of one of the preconditions to the authorization, as for example the existence of reasonable and probable grounds”: *R. v. Garofoli*, [1990] 2 S.C.R. 1421, at p. 1465; *R. v. Dalia*, 2025 ONCA 772, at paras. 11-12; *R. v. Sadikov*, 2014 ONCA 72, 305 C.C.C. (3d) 421, at para. 39. The test for leave is modest, but important. It guards against unmeritorious fishing expeditions, and improper expenditure of judicial resources.

[2] On the other hand, when the test for leave is met, it is critical that cross-examination be permitted. Denial of leave, when the test is met, can impede the accused’s ability to meaningfully advance a Charter claim. That is what happened here.

[3] The police obtained two search warrants: one for the appellant’s condominium unit and one for his vehicle. They discovered and seized firearms and ammunition. The appellant was charged and ultimately convicted of possession of a prohibited firearm, possession of a restricted firearm, possession of a loaded firearm, possession of a prohibited device, and two counts of possession of a prohibited device contrary to a weapons prohibition order.

[4] The appellant challenged the validity of the warrants at trial. He sought leave to cross-examine the affiant and relevant sub-affiants on various matters, including the police surveillance of the appellant in the underground garage of his condominium building. The observations gleaned from this surveillance were used in the information to obtain (“the ITO”) to corroborate information received from confidential informants (the “CIs”).

- [5] The appellant wanted to explore whether the surveillance, conducted without warrant, violated his rights under s. 8 of the Charter. He also wanted to explore why certain details about the surveillance were omitted from the description in the ITO. The trial judge denied leave to cross-examine, holding that these were issues for argument, rather than cross-examination. The Garofoli hearing continued and, in his second ruling, the trial judge concluded that the warrants were valid and that the ITO did not contain any information obtained through breach of s. 8 of the Charter.
- [6] I agree with the appellant that he ought to have been permitted to cross-examine the affiant and relevant sub-affiants on issues relating to the garage surveillance, and the description of that surveillance in the ITO. This is not to say that cross-examination would necessarily have exposed unconstitutional conduct. It is only to say that the appellant was entitled to explore these issues in support of his Charter application.
- [7] I will explain this conclusion in the reasons that follow.

II. BACKGROUND AND EVIDENCE 1. The ITOs and the Search Warrants [8] The police obtained two search warrants under s. 487 of the Criminal Code, R.S.C. 1985, c. C-46, based on two ITOs which were essentially identical. The ITO contained information from two CIs and information about steps the police took to verify that information.[1] The first CI told the police that a man named Baba Lye lives in a condo at 31 Tippet Road (which is at Wilson and Allen Road), drives a white Ford with a plate ending in 114, and has a firearm. The second CI told the police that a man named Baba Lye lives in a new condo near Wilson and Allen Road, and drives a white Ford.

[9] As it was put in the ITO:

- [CI #1] informed of knowing a male.
- He goes by nickname Baba Lye.
- He is male brown, 30 years old, medium build, with long shoulder length hair, and has tattoos on arm.
- He lives in a condo at 31 Tippet Road.

He is in possession of firearm.

- He drives a white Ford car with the last numbers of 114.
- [CI #1] was shown a picture of Rimzan Baba LYE and the [CI #1] confirmed that is the same person.
- [CI #2] advised of knowing a male Baba LYE.
- He is male brown, 25 to 30 years of age, long hair, medium build, tattoo on arms.
- He lives in a new condo near Wilson and Allen Road.
- He is driving a white Ford car.

- [CI #2] was shown a picture of Rimzan Baba LYE and [CI #2] confirmed that is the same person.
- [10] A check of CPIC indicated that the appellant had many aliases, including Baba Lye. A PARIS check confirmed that licence plate CRJW 114 was registered to a white Ford.
- [11] The ITO stated that, on April 8, 2021, police went to 31 Tippet and observed a white Ford with that plate number in the underground parking lot, and that a male matching the CIs' description of Lye entered it. The ITO also reported that "[t]he driver of the vehicle, used the FOB registered to apartment 315, to exit the underground".
- [12] The surveillance conducted at 31 Tippet Road was described in full in the ITO as follows:
- (a) White Ford motor vehicle, license plate CRJW 114 was parked in the underground at P2 — B7.
 - (b) At approximately 02:24 pm, a male and female were observed exiting the elevator on P2 level and entering into the white Ford motor vehicle, license plate CRJW 114, which was parked at P2 — B7.
 - (c) The driver of the motor vehicle, used the FOB which is registered to apartment 315, to exit the underground.
 - (d) Note: The male is described as male, brown, medium build, tattoo on right arm wearing black t-shirt with white writing on front, black track pants, black mask which covered the hair and face.
 - (e) The female is described as female, black, long black afro hair, wearing black hoodie, black tights, carrying black purse.
 - (f) Note: There are no cameras located in hallways and in the elevators.
 - (g) 31 Tippet Road, is a new condominium building, located near the intersection of Allen Road and Wilson Avenue, Toronto.
- [13] The ITO did not provide any details about the manner in which police conducted surveillance of the parking garage at 31 Tippet Road. It appeared from the description in the ITO that police had physically attended in the garage, observing events as they unfolded. The ITO did not specify who, if anyone, had granted authority to the police to access the garage and make the observations.
- [14] After the appellant filed his Charter application, the Crown disclosed the notes of the officer who had conducted the garage surveillance. Those notes are summarized in the trial judge's ruling as follows:

Officer Dhillon was the officer who conducted the investigation of 31 Tippet Road on April 8, 2021. His notes were summarized by the Crown as follows:

On April 8, 2021 Officer Dhillon #10290 went to the location of 31 Tippet Road. Officer Dhillon attended this location and found a white Ford Taurus with Ontario license plate CRJW 114 parked in the underground garage P2 level spot B7. Officer Dhillon spoke to security and reviewed CCTV footage from P2 elevator lobby and observed on that footage that at 2:24 pm a male and female exited elevator at P2 level and walked to the white Ford Taurus CRJW 114. The motor vehicle was seen exiting P2 level. Security advised Officer Dhillon that driver of this vehicle used a fob to exit and this fob was registered to unit 315-31 Tippet Road. Officer Dhillon also noted a description of the male and female and was advised by security that there were no cameras in elevators and hallways.

- [15] The notes revealed, among other things, that the police watched security surveillance video of the garage, a fact omitted in the ITO. In addition, the notes said that the officer was granted access by “security”. However, there was no identification of who “security” was; what position that person held; whether they were part of property management; or whether they had lawful authority to permit access.
2. The Appellant Seeks Leave to Cross-Examine [16] The appellant sought leave to cross-examine the officer who swore the ITO (the affiant) and any sub-affiants on how it was that police were able to observe the activities in the underground garage of a secure building. The appellant wished to explore whether the entry into the parking garage resulted in a violation of s. 8 of the Charter, such that the information obtained should be excised from the ITO.
- [17] After the Crown disclosed the notes of the officer who attended at the building, the appellant had a further basis on which to cross-examine. The notes said that the officer “spoke to security” and that the observations were made during a review of “CCTV footage from P2 elevator lobby”. The notes also said that “security” advised the officer that the driver of the vehicle used a fob to exit the garage and that the fob was registered to unit 315 in the building. It was not clear who the “security” person was that gave the officer access to the video and the fob information. It was also unclear why the description of the surveillance in the ITO was as vague as it was, omitting details that were set out in the officer’s notes.
- [18] The appellant sought to cross-examine on why the details in the notes were not included in the ITO. It was the defence theory that the affiant and sub-affiant were aware of case law governing police access to common areas of multi-unit buildings. The defence posited that the affiant intentionally omitted details from the ITO in order to conceal an infringement of the Charter.
- [19] Finally, the defence wished to cross-examine on the fact that the surveillance video of the garage, viewed by police, was no longer available and could not be reviewed by the defence.

3. The First Ruling [20] The trial judge denied the request for leave to cross-examine the affiants and sub-affiants. He found the appellant had “failed to demonstrate any reasonable likelihood that cross-examination would undermine the basis for the authorization”. The trial judge went on to find:

While I agree that it would have been preferable for the affiant to have set out more detailed information as to the identification of the officer and the source of his information, the information was presented fairly and without any misleading information. There is no basis to cross-examine the affiant or sub-affiant on any attempt to mislead or on the basis of a lack of reasonableness or honesty of belief in the information.

That leaves the issue of the legality of the police actions. Mr. Lye relies on *R. v. White* [2015 ONCA 508] to assert that the police engaged in “warrantless and Charter-non compliant actions.” As noted by the Crown, however, our Court of Appeal made significant changes in the law regarding reasonable expectation of privacy in common areas in *R. v. Yu* [2019 ONCA 942] particularly as it relates to underground parking lots. To whatever extent Mr. Lye has demonstrated issues in the affiant’s authority to engage in warrantless investigations, they do not entitle him to cross-examination but rather are matters for argument on the s. 8 application itself.

4. The Garofoli Hearing Continues [21] Following the ruling on cross-examination, the Garofoli hearing continued, with the Crown advising that it intended to rely on step six of the Garofoli procedure. The trial judge was given a copy of the unredacted ITO that was before the issuing judge. The trial judge reviewed the Crown’s editing of the ITO and a judicial summary was provided to the defence.

[22] The appellant advanced several arguments on the challenge. He made three arguments in respect of excision. First, he claimed that police were not entitled to enter the condominium building and perform a search without either prior judicial authorization or consent from property management. The appellant called an articling student to testify, who described the limited public right of access to 31 Tippet Road. The student attended at the property where he spoke to the property manager and assistant property manager. He asked for access to the underground parking lot, advising that he was not a resident of the building. Management denied him access. He asked whether he could see information linking parking spaces and unit numbers as well as information linking fobs with unit numbers. He was again denied access. He was also not permitted to look at any security camera footage.

[23] Second, the appellant argued that the affiant failed to make full, frank, and fair disclosure of the warrantless entry that was misleading to the issuing judge.

[24] Third, he argued that the failure to make full, frank, and fair disclosure resulted in lost evidence, depriving the defence of an opportunity to test the information relied on by the affiant.

[25] The appellant also argued that the ITO revealed insufficient corroboration of the CIs' information, and that there was a subversion of the pre-authorization process as a result of deliberate non-disclosure by the affiant.

5. The Second Ruling [26] The trial judge found that there was no violation of s. 8 of the Charter. He found that the appellant did not have a subjective expectation of privacy in relation to either his municipal address or his use of a spot in the underground parking lot. Even if the appellant had a subjective expectation of privacy, the trial judge would have found that it was not objectively reasonable. He concluded that "the police were not acting unlawfully and they did not violate s. 8 by conducting the single entry into the underground parking garage and obtaining the associated fob data from security."

[27] On the question of whether the ITO contained misleading or insufficient detail, the trial judge observed that the description in the ITO "was done without detail as to the manner of the police entry, its duration or what permission, if any, the police had to enter the premises". He found that the affiant "additionally failed to make any reference to the viewing of video surveillance". The trial judge stated, about the failure of the affiant to detail the investigative steps at 321 Tippet Road: "I agree that this information should have been summarized by the affiant in the ITO". However, he went on to find that the omission was not material, because the police were engaged in "acceptable investigative techniques".

[28] As he put it:

| agree that this information should have been summarized by the affiant in the ITO. [Its] omission, however, is not necessarily material.

It would have been clear to the issuing judge that the police engaged in a warrantless search and entered the underground parking lot at 31 Tippet Road where they made observations that included seeing a white Ford vehicle with license plate CRJW 114, seeing an individual not inconsistent with the description of Mr. Lye enter that vehicle and exit the parking lot using a fob. It would also have been clear to the authorizing justice that the police were provided the information that linked the fob to apartment 315. The authorizing justice would have reasonably inferred that this information came from property management and/or building security.

The information that would not have been clear to the issuing justice, due to its omission by the affiant, was that the police watched video surveillance of the parking elevator lobby and lot that captured the two individuals entering the target vehicle.

The extent to which the fact of the video surveillance was material, however, and the extent to which its omission [misled] the authorizing judge is, in my view, dependent on the legality of the police actions. As I have already found, the police were engaged in acceptable investigative techniques.

- [29] The trial judge also dismissed the appellant's lost evidence argument, finding that "there was no duty to preserve and disclose video surveillance evidence that related only incidentally to the critical information being sought by police."
- [30] The trial judge considered the content of the unredacted ITO, which was provided to him pursuant to step six of the Garofoli procedure. He found, relying on the unredacted ITO, that the nature of the information provided by the CIs was compelling, in that it was "detailed, has an appropriate degree of recency, and is largely based on information that is neither conclusory nor second-hand". He also found that the unredacted ITO revealed "a basis upon which the issuing justice could have been satisfied of the CIs credibility".
- [31] Ultimately, on the issue of whether there were sufficient grounds to issue the warrant, the trial judge found that the garage surveillance offered sufficient corroboration to justify reliance on the information from the CIs. He saw, as significant, "the fact that the individual was getting into a vehicle linked by the CIs to Mr. Lye that was parked in the underground lot of the building where the CIs said Mr. Lye was living".
- [32] As a result of his findings, the trial judge did not find any deliberate non-disclosure, bad faith, deliberate deception or fraudulent misrepresentation by the affiant which would suggest subversion of the pre-authorization process.

III. ISSUES [33] The resolution of the appeal hinges on the following issues:

- (2) Did the trial judge err in denying the appellant leave to cross-examine the affiant who swore the ITOs to obtain the search warrants?
- (3) Did the trial judge err in finding that the search warrants were valid under step six of Garofoli?
- (4) Did the trial judge err in denying the appellant's lost evidence application?

IV. ANALYSIS 1. Leave to Cross-Examine a. Standard of Review [34] A trial judge's decision to permit or deny leave to cross-examine an affiant is discretionary and is entitled to deference. A trial court must be at liberty to control its process by limiting pointless, irrelevant or insignificant questioning during a Charter voir dire. The trial judge is in a privileged position to assess the material, the submissions of counsel and the evidence, if any, in the context of the particular voir dire and trial. An appellate court is not to simply substitute its view for that of the trial judge. The need for a deferential standard of appellate review was recognized in Garofoli, where Sopinka J. stated that "[t]he discretion of the trial judge should not be interfered with on appeal except in cases in which it has not been judicially exercised": at p. 1465; see also R. v. Pires; R. v. Lising, 2005 SCC 66, [2005] 3 S.C.R. 343, at para. 46.

- b. General Principles [35] The threshold for leave to cross-examine an affiant is not particularly demanding or onerous: Pires; Lising, at para. 40. The defence must establish a reasonable likelihood that cross-examination will elicit evidence that may assist in determining whether there was a basis upon which the authorizing judge could issue the warrant. The

defence need not demonstrate that cross-examination will be successful in discrediting a pre-condition for authorization. It is enough to show that it is reasonably likely to assist the court in determining a material issue: Pires; Lising, at para. 40.

- [36] Cross-examination may be directed at various issues, including but not restricted to: the level of detail in the ITO, the credibility of the affiant or sub-affiant or informant, and the question of whether the legal test for issuance has been made out: Pires; Lising, at paras. 41, 43-44. Cross-examination may also be appropriate where, as here, the accused alleges that an investigative step, relied upon in the ITO, gave rise to a Charter infringement.
- c. The Proposed Cross-Examination was Not Pointless [37] The appellant sought to cross-examine on (1) the circumstances of the garage surveillance and whether that surveillance violated the Charter; (2) the vague description of the surveillance in the ITO and whether there was deliberate concealment of information; and (3) the sub-affiants' knowledge and awareness of the state of the video surveillance.
- [38] The information derived from the garage surveillance was important to investigators. Among other things, it corroborated aspects of the information received from CIs. CIs are an integral source of information for law enforcement officers, and informer privilege must be vigilantly protected: *R. v. Leipert*, [1997] 1 S.C.R. 281, at pp. 289-92. However, a tip from an informer, standing alone, will usually be insufficient to establish reasonable grounds. Nor is it enough for a drafting officer to baldly assert his or her own opinion that the informant is reliable. When police rely on CI information, they must provide the issuing judge with the necessary information to permit an independent assessment of reliability. This is done by addressing three questions: 1) whether the information from the CI is compelling; 2) whether the CI is credible; and 3) whether the tip has been confirmed or corroborated through independent investigation: *R. v. Debot*, [1989] 2 S.C.R. 1140, at p. 1168. It is not necessary that all three criteria be satisfied. Deficiencies in one area may be made up for by strengths in another: *Debot*, at p. 1168; *R. v. Jones*, 2023 ONCA 106, at paras. 12-13.
- [39] In this case, the police set out to confirm the information obtained from the CIs by attending the underground garage in the building linked to the appellant. Through this exercise, they confirmed that the appellant was staying at the address identified by the CIs, and that he drove a vehicle similar to that described by the CIs. The surveillance also gave police a critical piece of information that they did not have, namely, the unit number associated with the appellant's fob. Without that information, police would not have known which of the many units in the building was occupied by the appellant.
- [40] The defence sought to explore whether the attendance in the underground garage implicated and infringed the appellant's rights under s. 8 of the Charter. This line of inquiry was, by no means, pointless or an improvident use of judicial resources. To the contrary, were the appellant able to show that the surveillance was carried out in violation of the Charter, the information obtained by way of the surveillance would be excised from the ITO. It has long been understood that police cannot profit from unconstitutional conduct, and

that evidence obtained by way of a Charter breach must be excised from the grounds sworn in support of a warrant: *Garofoli; R. v. Araujo*, 2000 SCC 65, [2000] 2 S.C.R. 992, at para. 52; see also *R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253; *R. v. Zacharias*, 2023 SCC 30, 431 C.C.C. (3d) 421, at paras. 2, 26, 30, 107.

- [41] Excision of the garage surveillance details from the ITO would have removed what little corroboration of the CIs was in existence. It would also have impacted the ability of police to identify the unit number associated with the appellant's residence.
- d. There was a Foundation for the Charter Issues [42] The trial judge found in his second ruling that the appellant did not have a reasonable expectation of privacy in the underground garage, or the information acquired by police. He further held that the police had engaged in an acceptable investigative technique. However, these conclusions begged the very questions that the appellant sought to explore in cross-examination. The evidence on the *voir dire* – the ITO and the notes of Officer Dhillon – raised, as a live issue, the question of whether the appellant's Charter rights had been infringed.
- i. Standing [43] Of course, the appellant could only invoke the Charter if he had standing to do so. The question of standing is co-extensive with an inquiry into whether the appellant enjoyed a reasonable expectation of privacy in the location searched, or the information seized, such that the surveillance impinged on his constitutional rights. This question is determined by reference to the totality of circumstances, grouped into four broad categories: (1) the subject matter of the search; (2) the claimant's interest in the subject matter; (3) the claimant's subjective expectation of privacy; and (4) whether the subjective expectation of privacy was objectively reasonable: *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432; see also *R. v. Spencer*, 2014 SCC 43, [2014] 2 S.C.R. 212, at para. 18; *R. v. Marakah*, 2017 SCC 59, [2017] 2 S.C.R. 608, at paras. 10-12; *R. v. Bykovets*, 2024 SCC 6, 489 D.L.R. (4th) 1, at para. 31.
- [44] In this case, the Crown took no issue with the appellant's standing to raise a claim relating to the residence or the motor vehicle. That served as an acknowledgement that the appellant could claim a reasonable expectation of privacy. The trial judge accepted this concession in his first ruling, finding that he was "satisfied that Mr. Lye has demonstrated a reasonable expectation of privacy based on the Crown theory that he was the occupant of the condominium unit and the operator of the motor vehicle in question".
- [45] However, in the second ruling, the trial judge came to a different view, finding that the appellant had neither a subjective, nor objectively reasonable expectation of privacy in either the use of a spot in the underground parking garage, or the information acquired by police (i.e. his municipal address). The trial judge noted that it was not clear whether the appellant was an owner of the unit, a tenant or a guest. The trial judge reasoned that because "this was a 12-storey condo building with common areas" the appellant's "comings and goings would be observed by others." Relying on *R. v. Saciragic*, 2017 ONCA 91, he further found that the appellant did not have a reasonable expectation of privacy in his

municipal address, which was the information gleaned by police from the surveillance.

- [46] With respect, I am of the view that the trial judge erred in his assessment of the appellant's reasonable expectation of privacy. There was a sufficient basis on which the appellant could claim a reduced, yet reasonable, expectation of privacy in the parking garage. More specifically, as I will explain, the appellant had a reasonable expectation that outsiders to the building, including police, would not gain entry or access without permission from an authorized building official.
1. The Claimant's Interest in the Subject Matter of the Search [47] In this case, the surveillance implicated privacy in both the place of the search – the garage – and the content of the surveillance – the observations made by the police. Hence, it impinged on two zones of privacy: territorial and informational: see *Spencer*, at para. 35; *Tessling*, at para. 24. First, entry into a garage, or viewing surveillance of a garage implicates territorial or spatial privacy: privacy in a particular location or area: see *R. v. Dymont*, [1988] 2 S.C.R. 417, at pp. 428-29. The question is whether the claimant can assert a privacy interest in the place of the search: see *Tessling*, at para. 24. The second zone concerns informational privacy: "This notion of privacy derives from the assumption that all information about a person is in a fundamental way his own, for him to communicate or retain for himself as he sees fit": *Dymont*, at p. 429. This zone is concerned with the subject matter of the search.
 - [48] These zones of privacy find their correlates in elements of the standing test: the place of the search, and the subject matter of the search: see *Marakah*, at para. 24; *Tessling*, at para. 32; *R. v. Edwards*, [1996] 1 S.C.R. 128, at para 45. I will deal with each of these in turn when discussing whether the expectation of privacy was objectively reasonable.
 2. Subjective Expectation of Privacy [49] The trial judge found that the appellant did not have a subjective expectation of privacy in the garage or his municipal address. In addressing the subjective expectation, the trial judge considered factors that are more typically reserved for the objective assessment. The appellant did not testify that he had a subjective interest, but that is by no means fatal. A subjective expectation of privacy is often established through the operation of a presumption or inference: *R. v. Campbell*, 2024 SCC 42, 498 D.L.R. (4th) 195, at para. 45. The burden to establish a subjective expectation of privacy does not pose a significant hurdle. There is nothing in the record in this case to suggest that the appellant did not maintain a subjective privacy interest in the location of the garage, and the information acquired by Officer Dhillon.
 3. Objectively Reasonable Expectation of Privacy [50] Of course, the subjective expectation of privacy is only one part of the constitutional equation. The subjective expectation of privacy must be one that society would view as objectively reasonable. This turns on the place of the search, the content of the information acquired (whether it engages biographical core) and the level of control over the subject matter (which is no longer a determinative factor): *Marakah*, at para. 24.

a. The Place of the Search: Territorial Privacy

[51] The place of the search in this case is, from a territorial perspective, the parking garage. That is the location in which the appellant's activities were recorded by the building and ultimately observed by police. The question is whether the appellant had a reasonable expectation of privacy in a shared-use parking garage in the underground of his condominium building.

[52] Various cases have considered whether individuals can reasonably claim privacy in common areas of multi-unit buildings. There is no categorical answer to this question: *R. v. White*, 2015 ONCA 508, 127 O.R. (3d) 32, at para. 41; *R. v. Yu*, 2019 ONCA 942, 151 O.R. (3d) 244, leave to appeal refused, [2020] S.C.C.A. No. 38 at paras. 69, 81. As with many constitutional queries, it is fundamentally context and fact specific. Common areas, accessible by multiple tenants or occupants, attract less privacy than do residential units, but occupants do not lose all semblance of privacy the moment that they leave their residence. Locations such as garages, hallways, and other common areas outside of private units can attract constitutionally significant privacy interests: *Yu*, at para. 84. This is so even though this court has recognized that an underground parking garage is a common area to which a resident's right to a reasonable expectation of privacy would not ordinarily attach: *R. v. Salmon*, 2024 ONCA 697, *Yu*, at paras. 78-80, and *R. v. Drakes*, 2009 ONCA 560, 252 O.A.C. 200, at para. 18, leave to appeal refused, [2009] S.C.C.A. No. 381. A host of factors are relevant to the determination.

[53] In one of the early cases to consider this question, *White*, at paras. 47-48, Huscroft J.A. observed the nuanced and highly contextual nature of this inquiry. He found that there was an expectation of privacy in the common hallway of a small building. From the stairwell, the police could overhear what was happening in the respondent's unit. He offered that:

Although the respondent did not have absolute control over access to the building, it was reasonable for him to expect that the building's security system would operate to exclude strangers, including the police, from entering the common areas of his building several times without permission or invitation and investigating at their leisure. It was reasonable for him to assume that although access to the building's storage area was not regulated, it was not open to the general public. And it was reasonable for him to assume that people would not be hiding in stairwells to observe the comings and goings and overhear the conversations and actions within his unit.

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.

- [54] Since *White*, courts have applied various factors that bear on the question of privacy in common areas. These include: (1) degree of possession or control exercised by the claimant over the common area in question; (2) the size of the building; (3) security measures in place in the building; (4) ownership of the property; (5) whether the subject matter was in public view; (6) the intrusiveness of the police conduct; and (7) whether the information exposed intimate details of the claimant's lifestyle or information of a biographic nature: see *R. v. Unrau*, 2025 ABCA 239, 449 C.C.C. (3d) 408, at para. 30; *White*, at para. 45; *Yu*, at para. 68; *R. v. Boaheng*, 2024 ONSC 781, 548 C.R.R. (2d) 329, at para. 96.
- [55] One important factor is the extent to which the area in question is generally accessible to the public. For example, some parking garages are above ground and publicly visible, such that persons on the street can observe the area. Other garages may be underground, but have visitor parking areas that are freely accessible to the public. Visitors may have free access to the entire garage, or they may be able to observe the garage from their vantage point. If a garage can be entered by any random member of the public, at will, it will be difficult for the accused to claim that he or she expected privacy in that location: see e.g. *R. v. Nguyen*, 2025 ONCA 609, 6 C.R. (8th) 164, at paras. 24, 26, 34; *Yu*, at para. 80.
- [56] The evidence in this case established that the public could not freely come and go from the underground garage as it pleased. The entrance to the building was enhanced by a fob-gated door, which also prevented general public access to the garage area. This was established through the testimony of Mr. Wickham, the defence articling student, who also testified that his requests for access to the garage, or to video surveillance of the garage, were denied because he was not a resident. This evidence was not dispositive of the privacy issue, but it did tend to rebut the notion of public access.
- [57] In finding no reasonable expectation of privacy, the trial judge considered the fact that the appellant could be seen by others as he went about his business in the underground garage as it was a 12-storey building. This is a factor, but it is by no means dispositive of the privacy issue. First, privacy is not "all or nothing". The fact that someone cannot expect complete privacy does not mean that they have lost all privacy. For constitutional purposes, the assessment depends on who is doing the looking, and why. The question is not whether an individual reasonably expected the subject matter of the search to remain private vis-à-vis the world, what matters is whether the individual reasonably expected it to remain private vis-à-vis state intrusion: *R. v. Jarvis*, 2019 SCC 10, [2019] 1 S.C.R. 488, at para. 57; *R. v. Duarte*, [1990] 1 S.C.R. 30, at p. 46; *R. v. Wong*, [1990] 3 S.C.R. 36, at pp. 43-44, 47-48; *R. v. Plant*, [1993] 3 S.C.R. 281, at p. 291-93; *Tessling*, at para. 18; *Marakah*, at paras. 40-45.
- [58] It follows that individuals can enjoy a semblance of privacy in places frequented or occupied by others, including public places: *Jarvis*, at para. 37. The fact that a person knows she will be observed by others, including by strangers, does not negate the right not to be subject to certain types of observations or recordings: *Jarvis*, at para. 61. The appellant risked being observed by other occupants of the building when he entered the garage, if other occupants happened to be present when he was. He may or may not have been aware that his activities

were being monitored or recorded by video. In any event, it remains the case that the risk of being seen by an uninterested stranger is very different than the risk of being watched by a very interested police investigator. To reiterate the principle stated in *White* at para. 48, “[i]t 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.”

- [59] Third, while the appellant was unable to control access to the garage, control is no longer a definitive factor in defining the scope of privacy. The majority in *Marakah* clarified that privacy can exist, and persist, in the absence of control. As McLachlin C.J. emphasized at para. 38: “control is not an absolute indicator of a reasonable expectation of privacy, nor is lack of control fatal to a privacy interest”: see also *R. v. Reeves*, 2018 SCC 56, [2018] 3 S.C.R. 531, at para. 37.
- [60] Fourth, a finding that there is an expectation of privacy in an underground garage does not mean that police cannot access such areas for investigative purposes. Nor does it necessarily mean that police require a warrant to enter or view video surveillance from a common area. What it does mean is that the police may require some type of lawful authority for warrantless access. Depending on the location and the information to be acquired it will usually suffice for police to obtain valid consent from an authorized building official: *Yu*, at paras. 70-75, 90, 94-96, 102; *Salmon*, at paras. 20-23. Whether a person has the authority to control access to a condo building, and to respond to police inquiries, is fundamentally a question of fact: *Salmon*, at para. 24; see also *Yu*, at paras. 98-99. To the extent that the authorities recognize the need for valid third-party consent, the law implicitly recognizes that some degree of privacy can attach to these locations.
- [61] This also defines the nature of the reasonable expectation. Occupants in buildings with restricted access cannot expect that they will not be observed by others. What they can reasonably expect is that any strangers to the building – be they workmen, guests, or police investigators – will only enter if they are authorized to do so, if permission is granted by someone with the requisite authority: see e.g. *Yu*, at para. 87. Guests may enter with other occupants. Workmen may have to sign in and register their presence. When the strangers to the building are police, they will generally be required to obtain permission to enter by a property manager or other similarly situated official.
- [62] Thus, in this case, the identity of the “security” person who granted Officer Dhillon access to the garage surveillance was directly relevant to the appellant’s Charter claim. The defence ought, at a minimum, have been entitled to cross-examine to discern how Officer Dhillon got access, and by whom he was authorized to do so.
- b. The Subject Matter of the Search: Informational Privacy
- [63] I will now turn to the subject matter of the search. It is here that the zone of informational privacy is engaged.

- [64] The trial judge found that no privacy attached to the information acquired by police through the garage surveillance, because it amounted to nothing more than the appellant's municipal address. That is one way of looking at the information. However, it is a narrow approach and one that takes an impoverished view of the extent to which the surveillance in these circumstances was capable of impinging on the biographical core.
- [65] Since cases such as *Spencer* and *Marakah*, Canadian courts have adopted a functional approach when defining the subject matter of a search. It is not defined in narrow or formalistic terms. The question, rather, is "what the police were really after": *Marakah*, at para. 15. This entails looking at what inferences can be drawn, and what is the potential or tendency of the information to disclose intimate details and lifestyle choices of the individual. Thus, in *Spencer*, the Supreme Court affirmed that it is wrong to characterize subscriber information, obtained from an internet service provider, as nothing more than name, address and telephone number. It is name and address, but it is also much more. "[By] tending to link particular kinds of information to identifiable individuals, [subscriber information] may implicate privacy interests relating not simply to the person's name or address but to his or her identity as the source, possessor or user of that information": *Spencer*, at para. 47.
- [66] More recently, in *Bykovets*, the Supreme Court extended this principle to the IP address itself. An IP address is not just a string of numbers, though it is that. It is a key that potentially unlocks access to a host of internet activities and therefore has the potential to disclose intimate details and lifestyle choices of the individual. The court endorsed the proposition, offered many times before, that privacy is to be viewed as "normative", not descriptive: *Bykovets*, at para. 7. In accordance with this aspirational approach, the analysis under s. 8 of the Charter must address all the information this IP address "tends to reveal" and, therefore "by reference to the nature of the privacy interests potentially compromised by the state action": *Bykovets*, at para. 42, citing *Spencer*, at para. 27, and *Marakah*, at para. 15. As the court put it at para. 53:

Thus, a reasonable expectation of privacy, as s. 8's operative component, cannot be assessed according to only one particular use of the evidence. Nor can its reach be determined according to the police's specific intention in seeking the information. Rather, the purpose of s. 8, appreciated normatively, requires that we ask what information the subject matter of the search tends to reveal. Because this analysis seeks to determine "whether people generally have a privacy interest" in the subject matter of the state's search, we consider not only the information that police seek to uncover in a particular case, but all the information that the subject matter may tend to uncover. [Citations omitted.]

- [67] In this case, the police reported that their intention in conducting the garage surveillance was to confirm information from the CIs about where the appellant lived and the car that he drove, and once that information was confirmed, the police sought to determine the particular unit the appellant was occupying. However, these statements neither defined the breadth of the appellant's rights under s. 8 of the Charter, nor the gravity of the intrusion.

The court must consider, not only what the police were after, but what they did in order to obtain it. To use an extreme example, if police enter a home, without a warrant, in order to find out who lives there, it is no answer for the Crown to say that the police were only interested in the person's name and address. The entry of the home is a serious invasion of privacy, even if the police were only interested in so-called neutral information.

- [68] So too, in this case, there must be consideration of how the police obtained the “municipal address” of the appellant. They did not discover this information by scouring public websites or checking government records. Instead, the police obtained access to a video that depicted the appellant's activities in the building in which he lives, albeit in a location shared with other occupants. The surveillance had the potential or tendency to reveal more invasive information than the appellant's municipal address. He was seen to enter the area at a particular time of day, with a female companion, enter a particular vehicle, and leave the premises: see e.g. Yu, at para. 77. The appellant had a reduced expectation of privacy in this location, but “[a] reasonable though diminished expectation of privacy is nonetheless a reasonable expectation of privacy, protected by s. 8 of the Charter”: R. v. Cole, 2012 SCC 53, [2012] 3 S.C.R. 34, at para. 9.
- [69] It is important not to overshoot the extent to which such information has the potential to reveal core biographical information. For example, as was held by George J.A. in Nguyen, at para. 28, observations of activities in an underground parking area will not generally disclose what is taking place inside a residential unit. However, observations of comings and goings may impinge on a reasonable expectation of privacy, depending on the circumstances: Yu, at paras. 76-77, Nguyen, at para. 28. The observations in this case went beyond mere disclosure of a municipal address.
- [70] Thus, the subject matter of the search, properly construed, also suggests that the appellant had a reasonable expectation of privacy in the information revealed by the garage surveillance.
- ii. Description in the ITO [71] The appellant was also entitled, in my view, to cross-examine the affiant on why the garage surveillance was described in a cursory and opaque fashion in the ITO. The description in the ITO was frugal, at best. It did not identify which officer attended at the garage; it did not disclose that there was a warrantless entry into an area with restricted access; and did not disclose that officer viewed a video rather than making firsthand personal observations.
- [72] The notes of the officer who conducted the surveillance contained several details omitted from the ITO. One might presume that the affiant either spoke to Officer Dhillon, or had access to his notes. Either way, it is open to inference that the affiant likely knew more about the circumstances than he chose to disclose to the issuing judge. If he did not know, he arguably had an obligation to inquire.

- [73] As part of his argument, the appellant theorized that the affiant had deliberately curated information about the surveillance. The affiant had been involved in a similar case in which the defence raised Charter issues about surveillance of a garage. Whether or not that theory was borne out, the discrepancy between the details disclosed in the notes, and the lack of detail in the ITO offered fertile ground for cross-examination. Such questioning might have cast doubt on the affiant's discharge of his duty of full, fair and frank disclosure.
- [74] Again, this is not to say that cross-examination would have necessarily established deliberate non-disclosure or other forms of bad faith. There may have been an explanation for the omissions in the ITO. However, absent cross-examination, the trial judge did not have enough information to resolve that question.
- [75] Ultimately, the trial judge found that the disclosure in the ITO was sufficient as "it would have been clear to the issuing judge that the police engaged in a warrantless search and entered the underground parking lot at 31 Tippet Road". However, this was less than clear on the face of the ITO. The grounds referred to observations made in an underground garage, but there was no indication of whether or not the garage was open to the public. The trial judge further found that "the authorizing justice would have reasonably inferred that [the information from the fob] came from property management and/or building security". However, it is not clear how the issuing judge would have drawn this inference, given the paucity of detail in the ITO and the fact that the identity of the person who granted access is still unknown.
- [76] The trial judge acknowledged, in his final ruling, that details of the garage surveillance should have been summarized in the ITO. This was one of the bases on which the defence had earlier sought to cross-examine. While finding that the ITO was lacking in detail, the trial judge found that the omitted details were not material. He found that the ITO did not mention that the officer accessed video surveillance rather than making in-person, live observations. He saw this as immaterial, given his finding that the police were engaged in "acceptable investigative techniques". However, that finding begged the very question at the heart of the Charter voir dire. The acceptability of the investigative technique was the very issue the defence sought to explore in cross-examination.
2. Garofoli Step Six [77] In this case, the Crown invoked Garofoli step six, whereby the Crown presented the trial judge with an unredacted copy of the ITO. On the basis of the unredacted document, the trial judge concluded that the information offered by the two CIs was compelling in its detail. The trial judge also found that the unredacted document permitted a finding by the issuing judge that the CIs had some credibility. However, the trial judge also relied on the corroboration of the CI information offered through the garage surveillance. Were the garage surveillance to be excised from the ITO, that would remove what little corroboration there was to support the reliability of the CI tips. It cannot be known whether the ITO could survive scrutiny in the complete absence of such corroboration. In the circumstances, the ruling on the validity of the warrants cannot stand and a new trial must be ordered.

3. Lost Evidence [78] The appellant raises, as an additional argument, that the failure to preserve the surveillance video of the garage violated his rights under s. 7 of the Charter according to *R. v. La*, [1997] 2 S.C.R. 680. The defence argued that the failure to preserve the video prevented the defence from reviewing this evidence, and further, that the failure to mention the video in the ITO prevented the defence from knowing that it existed. I agree with the trial judge that the appellant failed to establish that the police had a duty to preserve and disclose the surveillance video in these circumstances. The trial judge considered the fact that the video was “never in the possession of the Crown or the police” and that it “related only incidentally to the critical information being sought by the police”. I would add to this the fact that the video was not itself being introduced as evidence of guilt at the appellant’s trial. It was accessed as part of an investigative step, that led to a judicial order, that led to the police seizing evidence from the appellant’s residence. It is not clear what defence access to the surveillance video would accomplish. There is no basis for believing that it did not depict what it was said to depict. The appellant has failed to demonstrate that he suffered any prejudice by virtue of the non-preservation of the video and is accordingly not entitled to a remedy on this basis.

V. DISPOSITION [79] For the above reasons, I find that the appellant was improperly denied leave to cross-examine the affiant, and possibly, sub-affiants in connection with the warrant to search his vehicle and the condominium unit. The appellant asks this court to find that the police surveillance violated s. 8 of the Charter, and to conduct a s. 24(2) analysis to determine if the evidence should have been admitted. This is not something which this court can undertake. The fact remains that there simply is not enough information in the record to permit a full constitutional analysis. The appellant cannot on the one hand assert that he was deprived of the ability to make a constitutional case, while on the other hand, arguing that he did so and that this court should grant a remedy on that basis.

[80] For all of these reasons I would allow the appeal, quash the convictions and order a new trial.

Released: March 16, 2026 “M.T.”

“R. Pomerance J.A.”

“I agree. M. Tulloch C.J.O.”

“I agree. J. Dawe J.A.”

- [1] The trial judge addressed the two ITOs as one because they were so identical.

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