C.A.C. No. 104861

NOVA SCOTIA COURT OF APPEAL

Cite as: R. v. Kouyas, 1994 NSCA 244
Hallett, Chipman and Freeman, JJ.A.

BETWEEN:

HER MAJESTY THE QUEEN	)	Kenneth W.F. Fiske, Q.C.
	)	for the Appellant
Appellant	)	
	)	
- and -	)	
	)	Ralph W. Ripley
	)	for the Respondent
SPYRO KOUYAS	)	
	)	
Respondent	)	Appeal Heard:
	)	December 2, 1994
	)	
	)	
	)	Judgment Delivered:
	)	December 19, 1994
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THE COURT: Appeal allowed and a new trial ordered per reasons for judgment of Hallett, J.A.; Chipman and Freeman, JJ.A. concurring.

HALLETT, J.A.:

This is an appeal from a decision finding that a police officer for the Town of Stellarton had infringed the respondent's **Charter** right to be secure from unreasonable search and seizure.

Facts

Corporal Muir was investigating a complaint respecting a rowdy gathering of youths drinking and using drugs on King Street opposite the respondent's premises known as the King Street Games Room. The Games Room is located in the basement of a building; it contains pool tables, video games and pinball machines. Corporal Muir observed two persons leaving the Games Room in a hurry and his suspicions were aroused.

Corporal Muir testified that he did not go into the Games Room to investigate complaints about gaming activity. In reciting the facts the learned trial judge stated:

> " Corporal Muir went into the Games Room to check and see if there was any drinking or drugs and wanted to generally see who was out and about that evening."

The evidence shows that Corporal Muir upon entering the premises walked to the back and observed a number of devices which he thought were illegal gambling machines. The evidence is clear that he had no prior knowledge of the presence of these machines on the premises. After obtaining confirmation some 15 minutes later, through the attendance of another police officer, that the machines were clearly illegal the machines were seized and removed from the premises.

The respondent was charged with one count of keeping devices for gambling contrary to **s. 202(1)(b)** of the **Criminal Code**, R.S.C. 1985, c. C-46 and one count of keeping a common gaming house contrary to **s. 201(1)** of the **Code**. He pleaded not guilty to both charges.

Following a motion made by counsel for the respondent the learned trial judge ruled that the warrantless search and seizure was unreasonable and infringed the respondent's **s. 8 Charter** right. As a remedy he ordered the exclusion of the evidence of the machines under **s. 24(2)** of the **Charter**. The Crown offered no further evidence; on a motion by counsel for the respondent for a directed verdict the learned trial judge acquitted the respondent.

The Trial Judge's Decision

In his decision the learned trial judge reviewed the jurisprudence that has developed with respect to **s. 8** of the **Charter** and in particular **Hunter et al v. Southam Inc.**, (1984) 2 S.C.R 145. The operative part of the trial judge's decision is as follows:

> " Once the accused has demonstrated that the search was a warrantless one, the Crown has the burden, on a balance of probabilities to show that it was reasonable. A search will be reasonable if it is:
>
> (1) authorized by law;
>
> (2) if the law itself is reasonable and
>
> (3) if the manner in which the search was carried out was reasonable. R. v. Collins, [1987] 1 S.C.R. 265 at Page 278.
>
> A discussion of the plain view doctrine is found at Page 555 of R. v. Nielson (supra). The authorities appear to be consistent in that the police officer in the "plain view" cases had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused.
>
> I come to the conclusion that the plain view doctrine does not apply in the circumstances found in this case before the Court and the result is I find that there is no authority in the common law for the first phase of this warrantless search."

The trial judge apparently concluded that as there was no prior justification (a search warrant) for Corporal Muir to enter the respondent's premises and as he was of the

opinion there was no authority in the common law for Corporal Muir being on the premises he decided the plain view doctrine had no application. I would infer he decided it was an unlawful entry. Therefore, he found there was an unreasonable search and seizure.

Grounds of Appeal

The grounds of appeal are as follows:

> "1. That the trial judge erred in law in ruling the respondent's right to be secure against unreasonable search or seizure guaranteed by ss. 1 and 8 of the **Canadian Charter of Rights and Freedoms** had been infringed or denied by members of the Stellarton Police Department.
>
> 2. That the trial judge erred in law in excluding under s. 24(2) of the **Charter** the evidence of the gambling devices seized by the police from the premises of the King Street Games Room,"

Disposition of the Appeal

The appeal ought to be allowed. The principle or interest underlying the guarantee of **s. 8** of the **Charter** is the protection of a person's privacy, more particularly, a person's reasonable expectation of privacy. The leading case on **s. 8** continues to be **Hunter et al. v. Southam Inc.** (1984), 14 C.C.C. (3d) 97 (S.C.C.) where the Supreme Court of Canada, speaking through Dickson J., in considering the nature of the interest **s. 8** is meant to protect stated at p. 108:

> " The guarantee of security from *unreasonable* search and seizure only protects a *reasonable* expectation. This limitation on the right guaranteed by s. 8, whether it is expressed negatively as freedom from "unreasonable" search and seizure, or positively as an entitlement to a "reasonable" expectation of privacy, indicates that an assessment must be made as to whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement."

Dickson J. further stated at p. 109:

> " That purpose is, as I have said, to protect individuals from unjustified State intrusions upon their privacy. That purpose requires a means of *preventing* unjustified searches before they happen, not simply of determining, after the fact, whether they ought to have occurred in the first place. This, in my view, can only be accomplished by a system of *prior authorization*, not one of subsequent validation."

In **Hunter et al v. Southam Inc.** the Supreme Court of Canada accepted the proposition that a search conducted without a warrant is presumptively unreasonable.

The question in this appeal is whether the respondent's right to a reasonable expectation of privacy was infringed when Corporal Muir entered the premises without warrant, saw the four devices in question and subsequently seized them. The premises Muir entered housed a commercial enterprise to which to any member of the public was impliedly invited to enter and spend his or her money. It was open for business at the time Muir entered. He was looking for under age drinkers and generally to see who was about that evening. His entry was as a result of his investigation of the rowdy behaviour on King Street across from the respondent's premises.

I agree with counsel for the appellant that the respondent enjoyed no reasonable expectation of privacy from entry by the police in relation to the public areas of the games room during business hours. As it was open to the public Corporal Muir was lawfully in the premises just as he could be lawfully in the customer area of an open Tim Horton's or a Sobey's Store.

Counsel for the respondent relies on the following statement made by Sopinka J. in **R. v. Baron** (1993), 78 C.C.C. (3d) 510 (S.C.C.) to support his argument that this was an unreasonable search and seizure:

> " Physical search of private premises (I mean private in the sense of private property, regardless of whether the public is

> permitted to enter the premises to do business) is the greatest intrusion of privacy short of a violation of bodily integrity."

At issue in the **Baron** case was whether or not s. 231.3(3) of the Income Tax Act, S.C. 1970-71-72, c. 63 violated **s. 8** of the **Charter**. The Supreme Court of Canada held that it did violate **s. 8** because the section did not leave the judicial officer charged with the duty of issuing warrants with any discretion whether or not to issue the warrant. The Court held the power to refuse to issue a warrant is a fundamental aspect of the scheme of prior authorization of search warrants.

In **Baron** warrants had been issued under the Income Tax Act to authorize searches of the taxpayer's home and business offices as well as the offices of his lawyer and accountants. In the course of the reasons Sopinka J. stated at p. 530-531:

> " Section 231.3 contemplates and authorizes the physical entry and search, against the will of the occupant, of private premises, even those occupied by innocent third parties against whom no allegation of impropriety is levelled. The purpose of the search is to provide evidence to be used in the prosecution of ITA offences. Physical search of private premises (I mean private in the sense of private property, regardless of whether the public is permitted to enter the premises to do business) is the greatest intrusion of privacy short of a violation of bodily integrity. It is quite distinct from compelling a person to appear for examination under oath and to bring with them certain documents, under a *subpoena duces tecusm (Thomson Newspapers, supra)*, or to produce documents on demand (*McKinlay Transport, supra*). Both Justices La Forest and L'Heureux-Dubé acknowledged in *Thomson Newspapers, supra*, at pp. 486 and 544 C.C.C., pp. 280 and 288 D.L.R., respectively, that the power to search premises is more intrusive of an individual's privacy than the mere power to order the production of documents.
>
> The intrusive nature of a physical search has been acknowledged by this court on various occasions: see, for example, *Canadian Broadcasting Corp. v. New Brunswick (Attorney-General), supra*. Warrants for the search of any premises constitute a significant intrusion on the privacy of an

> individual that is both upsetting and disruptive. Confidences, unrelated to the offence being investigated, may be subject to scrutiny by strangers. One should not lose sight of the fact that s. 231.3 allows for the search not only of business premises of innocent third parties. Moreover, the premises but also of the homes of the taxpayers as well as the premises of individuals whose relationship with the impugned taxpayer may be subject to professional privileges and whose offices may also contain confidential information regarding other individuals might also be subject to a search.
>
> Given the intrusive nature of searches and the corresponding purpose of such a search to gather evidence for the prosecution of a taxpayer, I see no reason for a radical departure from the guidelines and principles expressed in *Hunter, supra*. The effect of any lessened expectation of privacy by reason of the character of the *ITA* will no doubt affect the exercise of discretion by an authorizing judge but cannot justify elimination of it."

The remarks of Sopinka J. must be considered in the context of the fact situation of that case. In the appeal we have under consideration a police officer walked into a business that was open to the public; his purpose was not to search for evidence against the operator of the business but to see who was about and if there were underaged persons who had been drinking alcohol. There is nothing in the action of the police officer that intruded on the privacy interest of the respondent. The entry of the police officer into the public areas of the Games Room cannot be equated with tax officials rummaging through taxpayers' files either at his home or place of business or files in law offices and accountants' offices without the consent of the taxpayer or without a search warrant. As a general rule a client as well as his lawyer and accountant have a reasonable expectation that the police will not, unless authorized by warrant, have the right to enter their offices and search files seeking information. Although the lawyer and accountant's offices are open for business they are not open to the public in the same sense as premises which are controlled by persons in which a drug store, a grocery store or a games room is located. The latter cannot expect that police officers will not enter the premises from time to time as the premises are open to the public

who are impliedly invited to come in and do business. There is no expectation that police would never enter such premises in search of persons suspected of possible criminal or statutory violations. However, as a general rule, the police could not, without warrant, access private areas on such premises as those in control of such premises would have a reasonable expectation of privacy with respect to the non-public areas of their businesses.

Counsel for the respondent also relies on a decision of the Supreme Court of Canada in **R. v. Wong** (1990), 2 C.R.R. (2d) 277 to support his position that this was an unreasonable search and seizure. Counsel states in his factum:

> " The Supreme Court of Canada in R. v. Wong (1990) 2 C.R.R. (2d) 277 (S.C.C.) reviewed a situation in which notices had been distributed with respect to gaming activities that were to take place in a particular hotel room booked by the appellant. Video surveillance was set up by police. The video surveillance evidence was excluded at trial, the Ontario Court of Appeal allowed the appeal. It appears from a review of the evidence that flyers or notices were distributed to the general public with respect to an invitation to the gaming activities. One of the questions on appeal to the Supreme Court of Canada was the expectation of privacy. Justice LaForest for a majority (concurred with by six of the seven justices) determined that even in those circumstances, there was a reasonable expectation of privacy. Justice LaForest stated at page 287 of the decision that:
>
> > More over, R. v. Duarte reminds us that unless the question posed in the preceding paragraph is answered in neutral terms as I have suggested, it falls not only that those who engage in illegal activity in their hotel rooms must bear the risk of warrantless video surveillance, but also that all members of society when renting rooms must be prepared to court the risk that agents of the state may choose, at their sole discretion, to subject them to surreptitious surveillance . . .
> >
> > Nor, with respect, can I attach any importance to the fact that in the circumstances of this case the appellant may have opened his door to strangers, or circulated invitations to the gaming sessions. I am simply unable to discern any logical nexus between these factors and the conclusion that the police should have

> been free to video tape the proceedings in a hotel room at their sole discretion. It is safe to presume that a multitude of functions open to invited persons are held every week in hotel rooms across the country. These meetings will attract persons who share a common interest, but who will often be strangers to each other. Clearly persons who attend such meetings can not expect their presence to go unnoticed by those in attendance. But by the same token, it is no part of the reasonable expectations of those who hold or attend such gatherings, that as a price of doing so, they must tacitly consent to allowing agents of the state unfettered discretion to make a permanent electronic recording of the proceedings.
>
> We must be prepared to live with the first risk, but in a free and open society, need not tolerate the spectre of the second.
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> The Respondent submits, as a result, that there was a reasonable expectation of privacy of those who occupied the King Street Games Room. It is pointed out that the devices in question were behind a closed in area, not clearly visible to others entering. The fact that the King Street Games Room was open to the public does not derogate from the occupier's rights to be free from the eyes of the state. It is submitted in the circumstances that a breach of s. 8 of the Canadian Charter of Rights and Freedoms has been made out."

With respect, what was intrusive in the **Wong** case and what infringed the reasonable expectation of the privacy was the surreptitious video surveillance. This cannot be equated with a police officer with his eyes open entering the public area of the respondent's premises which include the area where the machines in question were located. I would note that in the **Wong** case the majority of the Supreme Court of Canada were of the opinion that the video evidence obtained was admissible notwithstanding it was unconstitutionally obtained.

I reject the argument of the respondent's counsel that unless Corporal Muir had a reasonable and probable grounds to suspect that a criminal was in the premises or that a crime or statutory offence was being committed therein he had no right to enter the premises;

the Games Room was open to the public. In my opinion there was no expectation of privacy from police entry into the public areas of the respondent's business on this occasion given the circumstances and the nature of the business. Therefore, **s. 8** of the **Charter** was not infringed.

Although it may not be necessary to consider the plain view doctrine in view of my finding that **s. 8** of the **Charter** was not infringed by Corporal Muir's entry, I am satisfied that the police activity came within the parameters of that doctrine. With respect to this doctrine, which was imported from the United States, the New Brunswick Court of Appeal had the following to say in **R. v. Belliveau & Losier** (1986), 30 C.C.C. (3d) 163 at p. 174:

> " ...that before the plain view doctrine will permit the warrantless seizure by police of private possessions, three requirements must be satisfied. First, the police officer must lawfully make an "initial intrusion" or otherwise properly be in a position from which he can view a particular area. Secondly, the officer must discover incriminating evidence "inadvertently", which is to say, he may not "know in advance the location of [certain] evidence and intend to seize it", relying on the plain view doctrine only as a pretext. Finally, it must be "immediately apparent" to the police that the items they observe may be evidence of a crime, contraband, or otherwise subject to seizure. These requirements having been met, when police officers lawfully engaged in an activity in a particular area perceive a suspicious object, they must seize it immediately."

In that case the New Brunswick Court of Appeal was quoting from a decision of the Supreme Court of the United States in **Texas v. Brown** (1983), 75 L. Ed. 2d 502 in which the Court held that: (i) a police officer's initial intrusion was lawful as he had lawfully stopped an automobile as part of a routine license check; and (ii) that there had been a valid seizure of a narcotic in plain view. Rehnquist J. said at p. 512:

> " [O]ur decisions have come to reflect the rule that if, while lawfully engaged in an activity in a particular place, police officers perceive a suspicious object, they may seize it immediately . . . This rule merely reflects an application of the

> Fourth Amendment's central requirement of reasonableness to the law governing seizures of property.
>
> . . . . .
>
> The general public could peer into the interior of Brown's automobile from any number of angles; there is no reason [the officers] should be precluded from observing as an officer what would be entirely visible to him as a private citizen. *There is no legitimate expectation of privacy . . . shielding that portion of the interior of an automobile which may be viewed from the outside the vehicle by either inquisitive passers-by or diligent police officers.* In short, the conduct that enabled [the police officer] to observe the interior of Brown's car . . . was not a search within the meaning of the Fourth Amendment."

In my opinion the requirements of the plain view doctrine have been met in this case. Corporal Muir was lawfully on the premises as they were open to the public and he was lawfully investigating possible infractions of the Liquor Control Act by members of the public who may have been on the premises. Secondly, it is clear that the incriminating evidence was inadvertently found as he had no knowledge, in advance of entering the premises, that gambling machines were on site. Thirdly, the evidence supports the finding that it was immediately apparent to Officer Muir that the machines might be evidence of a crime or otherwise subject to seizure; the decision in **R. v. Belliveau & Losier**, supra, does not require that the officer be certain .

This was not a search and seizure within the ambit of **s. 8** of the **Charter**. The learned trial judge erred in excluding at trial the evidence of the four gambling machines. The appeal ought to be allowed and a new trial ordered.

Hallett, J.A.

Concurred in:

Chipman, J.A.

Freeman, J.A.

C.A.C. No. 104861

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

- and -

SPYRO KOUYAS

Respondent

REASONS FOR JUDGMENT BY: HALLETT, J.A.