

Date: 20011210
Docket: C. R. No. 173312

CANADA
PROVINCE OF NOVA SCOTIA

IN THE SUPREME COURT OF NOVA SCOTIA
[Cite as: R. v. Bagnald , 2001 NSSC 182]

HER MAJESTY THE QUEEN

against

IAN BAGNALD
JEFFREY STEVEN KEDDY
GRANT WILFRED MacDONALD

D E C I S I O N
SECTION 8 and 24(2) CHARTER APPLICATION

HEARD: At Halifax, Nova Scotia, before the Honourable Justice C.
Richard Coughlan, on October 31st, 2001

DECISION: December 10th, 2001

COUNSEL: Monica G. McQueen, for the Crown
Joel E. Pink, Q.C., for Mr. Bagnald
Kevin G. Coady, for Mr. Keddy
Tanya G. Nicholson, for Mr. MacDonald

COUGHLAN, J.:

[1] This is an application to exclude evidence pursuant to s. 8 and s. 24(2) of the **Canadian Charter of Rights and Freedoms.**

[2] The facts are as follows:

[3] On May 6th, 2000, Constables David Boon and Jason Reid of the Halifax Regional Police were on uniformed patrol. They responded to a complaint at 5518 Atlantic Street, Halifax, Nova Scotia at approximately 9:45 p.m. They were met by the complainant, Mr. Ashkan, who told Constable Boon he had called the police because of a strong smell of marijuana being smoked coming from one apartment adjacent to the laundry room for the building. Mr. Ashkan stated in the past he had received complaints from the tenants that the laundry they left in the laundry room smelled of marijuana. He stated he had observed traffic coming in and out of the driveway going to the back of the building, staying for twenty to thirty seconds, then leaving; and his vehicle, which was parked in the rear of the building, had been slightly damaged several times. Mr. Ashkan had previously called the police, but nothing had been done. He stated there was a strong smell of marijuana that night coming from the apartment again and he wanted something done.

- [4] Constable Boon responded he would provide the information to members of the Department's Drug Section. Mr. Ashkan became upset, stating he had made complaints before and nothing was done. Mr. Ashkan stated he lived in the building and looked after the building. Mr. Ashkan asked if the officers wanted to be let into the laundry area. Mr. Ashkan said the area inside the exterior door was the laundry area for the apartment building.
- [5] At this time, Constable Boon decided he would ascertain the identity of the people living in apartment 5, the apartment in question, and report the names to the Drug Section. Constable Boon stated he considered, based on what Mr. Ashkan told him, that there may or may not be drug activity and he would get information for the Drug Section.
- [6] The two officers went to the back of the building to the exterior door (shown in exhibit 49, photograph 1). The door had the number 5 on it and a doorbell next to it. There was glass in the door. The washer and dryer were visible through the glass. Constable Boon rang the doorbell and the accused, Ian Bagnald, came out of the interior door and opened the exterior door. Constable Boon asked if he lived there and Mr. Bagnald responded, "yes". Constable Boon stated he wished to speak to all persons living there. Mr.

Bagnald turned and went through the interior door. Constable Boon followed Mr. Bagnald to the interior door without being invited.

[7] Constable Boon stated he considered the area between the interior and exterior doors was the laundry room for the apartment building. There is no evidence before the court as to who had access to the laundry area. Mr. Ashkan had told Constable Boon the area between the doors was the laundry area for the apartment building.

[8] At the open interior door, Constable Boon had a view of a portion of the living room and the kitchen. In the living room Mr. Bagnald spoke to the accused, Jeffrey Steven Keddy. Mr. Bagnald had his back to Constable Boon and blocked Mr. Keddy's view of Constable Boon. Messrs. Bagnald and Keddy spoke for a short time. Mr. Keddy then saw Constable Boon. Mr. Keddy then made a move to the interior of the apartment. Constable Boon saw Mr. Keddy had a plastic bag in his hand that had something in it. While at the interior door, Constable Boon smelled a strong smell of marijuana and saw smoke in the air. Constable Boon concluded there had been recent smoking of marijuana in the apartment.

[9] Considering what he had been told by Mr. Ashkan, what he observed, and Mr. Keddy's action, Constable Boon concluded Mr. Keddy had evidence he

was going to destroy and Constable Boon entered the interior door in pursuit of Mr. Keddy. Constable Boon concluded he had authority to preserve evidence. Constable Boon followed Mr. Keddy into the bedroom. Mr. Keddy went into the closet, Constable Boon grabbed him and Mr. Keddy dropped the plastic bag. Constable Boon advised Mr. Keddy he was under arrest, handcuffed him and seized the plastic bag (exhibit 1).

[10] Constable Boon brought Mr. Keddy from the bedroom. The other persons present were arrested. Those under arrest were searched and pagers, cell phones, some narcotics, pills and tablets were found on the person of some of those searched. There were numerous knives and weapons around the living room. The officers determined those arrested were safe and had no weapons on them. The various items present, located in the living room, were collected and placed in the kitchen.

[11] The Police Watch Commander was called and attended at the site. An unsuccessful attempt was made to reach a member of the Drug Section. Constable Reid took the arrested individuals to the police van and then the Police Station. Even though the police were in the apartment approximately three hours, at no time did the officers have a search warrant, nor did they at

any time during their presence in the apartment attempt to obtain a search warrant.

[12] Constable Reid did not know why Constable Boon quickly entered the interior door, but followed his partner and stopped in the living room. He observed Grant MacDonald kicking a bag under a futon. He obtained the bag (exhibit 14). After the persons arrested were searched, Constable Reid took them to the Police Station.

[13] Considering all the evidence, I find the evidence shows the items were seized, as follows:

ITEMS SEIZED

PRELIMINARY EXHIBIT NO.	DESCRIPTION OF ITEM SEIZED AND TIME OF SEIZURE
	ITEMS SEIZED AT THE TIME OF MR. KEDDY'S ARREST:
1	23 Packages of marijuana and \$190.00 in cash
2	Sample of above - Health & Welfare Envelope # H1381659
3	Sample of above - Health & Welfare Envelope # H1381660
4	Sample of above - Health & Welfare Envelope # H1381661
14	55 Clear capsules containing white powder
15	Sample of above - Health & Welfare Envelope # H1381668
16	Sample of above - Health & Welfare Envelope # H1381669
17	Sample of above - Health & Welfare Envelope # H1381670
14	10 Red Ziplock bags with 10 tablets each
18	Sample of above - Health & Welfare Envelope # H1381671
14	6 Pills
19	Sample of above - Health & Welfare Envelope # H1381672
14	6 Ziplock bags with cannabis resin
20	Sample of above - Health & Welfare Envelope # H1381673
	ITEMS SEIZED AT THE TIME OTHER ACCUSED ARRESTED, SEARCHED AND STILL IN APARTMENT:
11	19 Packs organic substance; 8 Ziplock bags marijuana (8.8 grams)
12	Sample of above - Health & Welfare Envelope # H1381666
11	11 Bags of psilocybin (11.54 grams)
13	Sample of above - Health & Welfare Envelope # H1381667
21	Loose marijuana 3.75 grams
23	13 Green tablets in three Ziplock bags

24	Sample of above - Health & Welfare Envelope # H1381675
23	10 Clear capsules containing beige powder
25	Sample of above - Health & Welfare Envelope # H1381676
23	10 Beige tablets in Ziplock
26	Sample of above - Health & Welfare Envelope # H1381677
27	9 Capsules in pill bottle
28	Sample of above - Health & Welfare Envelope # H1381681
27	25 Beige tablets in pill bottle
29	Sample of above - Health & Welfare Envelope # H1381682
30	2 Pink tablets in foil
31	1 Hit blotter LSD
32	14 Hits blotter LSD in pill bottle
27	13 Ziplock bags with u/k powder
33	Sample of above - Health & Welfare Envelope # H1381685
34	12 Clear capsules with beige powder
35	Sample of above - Health & Welfare Envelope # H1381686
34	25 Beige tablets
36	Sample of above - Health & Welfare Envelope # H1381687
37	14 Red tablets
38	Sample of above - Health & Welfare Envelope # H1381688
37	Clear empty capsules and empty Ziplock bags
46	1 Braun Grinder (white)
46	1 Grey oval shaped pager, serial # 9039433
46	1 Silver NIXXO pager, serial # 679141534
46	1 Black pager, serial # 1403185
46	1 Calculator
46	1 Purple hash pipe
46	1 Audiovox cell phone, serial # 17407111553
46	1 Audiovox digital cell phone, serial # 0995501820
46	1 Royal DB90 electronic organizer
46	1 Black address book/day planner

	ITEMS SEIZED AFTER ACCUSED REMOVED FROM APARTMENT:
5	Loose marijuana in Ziplock - 111.7 grams
6	Sample of above - Health & Welfare Envelope # H1381662
7	65 Clear capsules with beige powder
8	Sample of above - Health & Welfare Envelope # H1381663
9	Sample of above - Health & Welfare Envelope # H1381664
10	Sample of above - Health & Welfare Envelope # H1381665
22	Mail in name of Ian Bagnald
22	Cable bill in name of Jeffrey Keddy
39	BRN bottle with 153.79 grams white powder
40	Sample of above - Health & Welfare Envelope # H1381689
39	13 Ziplock bags cannabis resin
41	Sample of above - Health & Welfare Envelope # H1381690
42	Ziplock bag 2.23 grams u/k powder
45	Scales (1 Tanita Electronic Scale Model 1479)
	ITEMS SEIZED AT POLICE STATION
43	\$225 Cash
44	\$335 Cash

STANDING:

[14] A person seeking relief under s. 24(2) of the **Charter** must show he or she is a person whose rights have been infringed. Section 24(1) of the **Charter** provides:

24.(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

[15] The right to challenge the legality of a search depends on the accused establishing his or her personal rights to privacy have been violated. Have the accused the reasonable expectation of privacy? Cory, J. discussed factors to be considered in determining whether an accused has the reasonable expectation of privacy in **Edwards v. The Queen** (1996), 104 C.C.C. (3d) 136 (S.C.C.) at p. 150:

6. The factors to be considered in assessing the totality of the circumstances may include, but are not restricted to, the following:

- (i) presence at the time of the search;
- (ii) possession or control of the property or place searched;
- (iii) ownership of the property or place;

- (iv) historical use of the property or item;
- (v) the ability to regulate access, including the right to admit or exclude others from the place;
- (vi) the existence of a subjective expectation of privacy; and
- (vii) the objective reasonableness of the expectation.

[16] Messrs. Bagnald and Keddy were residents of apartment 5 and had a reasonable expectation of privacy. The question remains: Did Grant MacDonald have a reasonable expectation of privacy? He was not a resident of the apartment. There is no evidence of his relationship to the occupants of the apartment. The only evidence is that Mr. MacDonald was present in the apartment at the time of the incident. There is no evidence of any possession or control of the apartment, historical use of the apartment, or any ability to regulate access, including the right to admit or exclude others from the apartment.

[17] Considering all of the evidence, I find Grant MacDonald has not demonstrated he had an expectation of privacy in apartment 5 and, therefore, he has no standing to bring this application.

DID THE POLICE CONDUCT A SEARCH?

- [18] The officers went to the door and rang the doorbell to satisfy the complainant and to learn the identity of the residents of the apartment to report their names to the Drug Section. The officers stated they did not have any intention other than to determine the names of the occupants.
- [19] As set out in **R. v. Evans**, [1996] 1 S.C.R. 8, the occupier of a residential dwelling is deemed to grant the public permission to approach the door and knock. There was no problem with the police knocking on the door to speak to the occupants.
- [20] The police, without invitation, contrary to the expressed direction, “wait a moment and I will get him”, or words to that effect, followed Mr. Bagnald from the exterior door to the interior door. The exterior door had the number 5 on it and a doorbell. The police did not know whether the exterior door was locked or not. There was no evidence as to who had access to the area between the doors. The complainant, Mr. Ashkan, had told the police it was the laundry room for the building. The area between the doors had a washer and dryer in it.
- [21] Based on the fact the door had the number 5 on it and a doorbell, and the lack of evidence as to who had access to the area between the doors, I find the exterior door was the entrance to apartment 5 and when the police

entered the apartment without invitation they conducted a “search” of the residence.

WAS THE SEARCH REASONABLE?

[22] A warrantless search is **prima facie** unreasonable. In order to rebut the presumption of unreasonableness, the Crown must establish three things:

- 1) that the search was authorized by law;
- 2) that the law authorizing the search was reasonable; and
- 3) the manner in which the search was carried out was reasonable.

[23] The search was not authorized by law. The conduct of the police was, therefore, a “search” which was unreasonable and contrary to s. 8.

SECTION 24(2) OF THE CHARTER:

[24] As Sopinka, J. stated in **R. v. Evans, supra**, at p. 25:

The test for determining whether or not evidence obtained in breach of the *Charter* must be excluded under s. 24(2) was set out by this Court in *Collins, supra*, and summarized in the following passage from *R. v. Jacoy*, [1988] 2 S.C.R. 548, at pp. 558-59:

First, the court must consider whether the admission of evidence will affect the fairness of the trial. If this inquiry is answered affirmatively, “the admission of evidence would tend to bring the administration of

justice into disrepute and, subject to a consideration of other factors, the evidence generally should be excluded” [*Collins, supra*] (p. 284). One of the factors relevant to this determination is the nature of the evidence; if the evidence is real evidence that existed irrespective of the *Charter* violation, its admission will rarely render the trial unfair.

The second set of factors concerns the seriousness of the violation. Relevant to this group is whether the violation was committed in good faith, whether it was inadvertent or of a merely technical nature, whether it was motivated by urgency or to prevent the loss of evidence, and whether the evidence could have been obtained without a *Charter* violation.

Finally, the court must look at factors relating to the effect of excluding the evidence. The administration of justice may be brought into disrepute by excluding evidence essential to substantiate the charge where the breach of the *Charter* was trivial. While this consideration is particularly important where the offence is serious, if the admission of the evidence would result in an unfair trial, the seriousness of the offence would not render the evidence admissible. [Emphasis in original.]

[25] In this case, I find that the admission of the impugned evidence would not render the applicants’ trial unfair. The evidence in question is real evidence that existed irrespective of a **Charter** violation.

[26] Dealing with the seriousness of the **Charter** violation, I would not characterize the initial violation of s. 8 in the instant case as particularly grave. The police thought the area between the exterior and interior doors was the laundry room for the building. They had been told so by the complainant. It was at the interior door Constable Boon encountered the strong smell of marijuana and saw the smoke. It was also where he saw Mr. Keddy with a plastic bag with something in it make a bolt and Constable

Boon thought evidence was about to be destroyed. Constable Boon thought he had authority to preserve evidence.

[27] The officers were acting in good faith at the time of Mr. Keddy's arrest and also at the time of the arrest of the other persons and their search after arrest. One of the main purpose of a search incidental to arrest is to ensure the safety of the police and public. There were knives and other weapons in the living room. The officers determined the arrested persons were safe and had no weapons on them.

[28] There is a problem after the initial search and the search after the arrest of the persons present and their removal from the apartment. The police did not have a search warrant and, even though in attendance at the apartment for approximately three hours, no attempt to obtain a search warrant was made. There was no urgency or need to prevent the loss of evidence. The evidence could have been obtained without a **Charter** violation. There is a high expectation of privacy in a person's residence. The breach of the **Charter** rights, after the initial search and the search incidental to the arrest, is sufficiently serious to justify exclusion of the evidence so obtained.

[29] The third factor the Court must look at is whether the administration of justice may be brought into disrepute by excluding evidence essential to

substantiate the charge where the breach of the **Charter** was trivial. In this case, considering the seriousness of the offences and the circumstances of the search, I find it would bring the administration of justice into disrepute to exclude the items seized at the time of Mr. Keddy's arrest and at that time the other persons present were arrested and searched. However, considering the matters as set out above, it would bring the administration of justice into disrepute to admit into evidence the items seized after the accused were removed from the apartment.

[30] The items seized by Constable Reid at an unknown time are admitted as they were seized before he left the apartment with the accused following their arrest. The items seized by Constable Boon at an unknown time are excluded as they could have been seized after the accused were removed from the apartment.

[31] The items seized from the accused at the Police Station by Constable Lane are admitted.

[32] Therefore, the following items will be admitted into evidence: preliminary exhibits 1, 2, 3, 4, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 23, 24, 25, 26, 27, 28, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 43, 44 and 46.

[33] The following items will be excluded from evidence: preliminary exhibits

5, 6, 7, 8, 9, 10, 22, 39, 40, 41, 42 and 45.

[34] In conclusion, the application is allowed in part as set out above.

C. Richard Coughlan, J.