

Court of Appeal for British Columbia

R. v. Bichel

Date: 19860620

The judgment of the court was delivered by r.

MACFARLANE J.A.:—The appellant submits that a zoning by-law is inconsistent with s. 8 of the *Canadian Charter of Rights and Freedoms* and, therefore, is of no force and effect under s. 52(1) of the *Constitution Act, 1982*, because it permits a warrantless search of residential premises.

The by-law authorizes a building inspector to enter at all reasonable times upon any property or premises to ascertain whether the regulations and provisions of the by-law are being, or have been, complied with. It is unlawful under the by-law for any person to prevent or obstruct or seek, or attempt to prevent or obstruct, the entry of the building inspector.

A Provincial Court judge held that the provisions of the by-law were of no force and effect. After hearing argument on a stated case, Mr. Justice Dohm held that the Provincial Court judge had erred. This appeal is from that decision which was pronounced on June 26, 1985.

The stated case does not reveal the facts which are necessary for the determination of this appeal. But the argument before the Provincial Court judge, the Supreme Court judge, and before us proceeded on the basis of these facts:

1. The appellant was at all material times the owner and occupant of a private residence which an inspector of the District of North Vancouver sought to inspect.
2. The inspector was attempting to ascertain whether the premises contained a suite which was not in compliance with the zoning by-law.
3. The building inspector went to the premises on three separate days, namely, March 26, April 5, and June 1, 1984. He asked for permission to enter the premises for the purpose of ascertaining whether the zoning by-law was being complied with, and the appellant refused to permit him to enter. The ground of refusal was that the inspector did not have a search warrant.
4. On July 17, 1984, an information was sworn charging the appellant with three counts of unlawfully preventing a District of North Vancouver building inspector from entering the premises. The charge was laid pursuant to Part II, s. 1102(2) of the District of North Vancouver Zoning By-law 3210.

5. Notice having been served upon the Attorney-General of British Columbia and upon the Attorney-General of Canada pursuant to the *Constitutional Question Act*, R.S.B.C. 1979, c. 63, s. 8, the matter came before a Provincial Court judge on November 21, 1984. No plea was entered and no evidence was heard. After argument, the Provincial Court judge held that ss. 1101 and 1102(2) of the by-law were inconsistent with s. 8 of the *Canadian Charter of Rights and Freedoms* and, therefore, of no force and effect. The provincial Attorney-General asked that a case be stated.

The question which was posed in the stated case was:

Did I err in law in determining that s. 1101 and s. 1102(2) of the District of North Vancouver Zoning By-Law are inconsistent with s. 8 of the Canadian Charter of Rights and Freedoms and of no force and effect pursuant to s. 52(1) of the *Constitution Act, 1982*?

The relevant provisions of the District of North Vancouver Zoning By-law were set out in the stated case as follows:

PART II ENFORCEMENT

1101 *Inspection*

The Chief Building Inspector, or any Building Inspector employed by the Municipality, is hereby authorised to enter at all reasonable times upon any property or premises to ascertain whether the regulations and provisions herein contained are being or have been complied with.

1102 *Violations*

(1) It is unlawful for any person to cause, suffer or permit any building or structure to be constructed, reconstructed, altered, moved, extended or used or land to be used in contravention of this By-law or otherwise to contravene or fail to comply with this By-law.

(2) It is unlawful for any person to prevent, or obstruct, or seek or attempt to prevent or obstruct the entry of any Building Inspector, authorised under Section 1101.

1103 *Remedial Powers*

The Council may, in accordance with the provisions of the Municipal Act, authorise the demolition, removal, or the bringing up to a standard specified in this By-law of any building, structure or thing, in whole or part,

1104 *Penalties*

Any person convicted of an offence against this By-law shall be liable to a maximum penalty of five hundred dollars and costs, or imprisonment for a period not exceeding sixty days, and every day such offence continues shall be deemed to constitute a separate offence.

Section 8 of the Charter provides:

8. Everyone has the right to be secure against unreasonable search or seizure.

The Provincial Court judge held that ss. 1101 and 1102(2) did not meet the minimum standards nor provide any of the safeguards considered necessary and appropriate by the Supreme Court of Canada in *Hunter et al. v. Southam Inc.* 1984 CanLII 33 (S.C.C.), (1984), 14 C.C.C. (3d) 97, 11 D.L.R. (4th) 641, [1984] 2 S.C.R. 145, and, therefore, infringed s. 8 of the Charter. Mr. Justice Dohm held that *Hunter v. Southam Inc.* did not have any application in these circumstances and that, given the purposes of the by-law and the provision that entry was limited to "all reasonable times", there was no infringement of s. 8. He held that if there was an infringement of s. 8 that it would be justified under s. 1 of the Charter. He did not think that the by-law was inconsistent with the Charter because it did not provide for pre-authorization by an impartial arbiter having the duty to balance the individual right to privacy against the rights of the municipality to enforce its bylaws.

The appellant, while conceding that the enforcement of zoning by-laws is a valid governmental objective, and that inspections are a necessary part of enforcement procedures, submits that an assessment of the constitutionality of such a provision must focus on its reasonable or unreasonable impact on the subject of the search or seizure. It is not enough to focus only on the governmental objective. The appellant submits that in respect to his dwelling-house, an individual has a right to a reasonable expectation of privacy. The appellant relies upon what was said in *Hunter v. Southam*, at p. 109 C.C.C., p. 653 D.L.R., p. 160 S.C.R., by Dickson J. (now C.J.C.), namely, that the purpose of s. 8 is 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 ... can only be accomplished by a system of *prior authorization*, not one of subsequent validation.

The appellant submits that the by-law is invalid because it does not provide for prior authorization of an inspection by an impartial arbiter. It is submitted that entry into a private residence ought not to be authorized in the absence of proof that there is a sufficient reason for the particular inspection, and that, on balance, that reason is sufficiently important to the municipality in the enforcement of its by-laws to justify the intrusion upon the right of the individual owner and/or occupant to privacy.

The appellant relies upon *R. v. Sheppard* [reflex](#), (1984), 11 C.C.C. (3d) 276, 46 Nfld. & P.E.I.R. 189, 11 C.R.R. 10 (Nfld. C.A.). In that case, a person was charged with a breach of the *Wild Life Act*, R.S.N. 1970, c. 400, in that he had unlawfully in his possession big game, to wit: moose, in violation of s. 52(3) of the *Wild Life Act* regulations. A wildlife officer had seized moose meat from the home of the accused without having first obtained a search warrant. A question arose as to the admissibility of that evidence, it being contended that the search and seizure was an infringement of s. 8 of the *Canadian Charter of Rights and Freedoms*.

The seizure was made pursuant to power contained in s. 10(2) of the *Wild Life Act* which provides:

10(2) Any wild life officer who has reasonable cause to suspect that there is in or upon any house, shop, store, building, wharf, premises, or place, vehicle, speeder, caboose, or railway car, aircraft, vessel, boat, or raft, wild life taken, killed, or dealt with contrary to any of the provisions of this Act or of the regulations may, without warrant, therein or thereon enter and search and for such purpose may stop any such vehicle, speeder, caboose, railway car, aircraft, vessel, boat, or raft.

The trial judge held that s. 8 was not infringed and admitted the evidence. The accused was convicted and he appealed his conviction. The Court of Appeal held that there had been an unreasonable search and seizure and an infringement of s. 8 of the Charter. In reaching that conclusion, the court said, at p. 281:

It is common ground that a peace officer and other public officials, armed with a judicially authorized search warrant, may search a dwelling-house within the confines of his warrant and such a search would not be unreasonable within the meaning of s. 8 of the Charter. But would the search of a dwelling-house without a warrant, even though authorized by statute, be considered reasonable within the meaning of s. 8 of the Charter? The answer can only be in the affirmative if it can be said that such a search "can be demonstrably justified in a free and democratic society". (s. 1 of the Charter.) In our view, it cannot be said that a search of a dwelling-house, without a warrant, for wildlife illegally obtained can be so justified and must be construed as a violation of one's right to be secure against unreasonable search and seizure, guaranteed by s. 8 of the Charter.

The Ontario Court of Appeal has held that administrative searches without a warrant do not violate s. 8 and has distinguished searches in the course of criminal investigations from inspections or audits under a regulatory process. The cases, however, deal with business premises and not with residential premises. In *Re Belgoma Transportation Ltd. and Director of Employment Standards* [reflex](#), (1985), 20 D.L.R. (4th) 156, 51 O.R. (2d) 509, 85 C.L.L.C.

para. 14,033, the issue before the court was whether s. 45 of the *Employment Standards Act*, R.S.O. 1980, c. 137, under which section an employment standards officer may enter upon business premises and require the production of certain documents and remove them for copying, contravene s. 8 of the Canadian *Charter of Rights and Freedoms*. Section 45 of the *Employment Standards Act* provides in part as follows:

45(1) An employment standards officer may, for the purpose of ensuring that the provisions of this Act and the regulations are being complied with,

(a) subject to subsection (2), enter in or upon the lands or premises of a person at any reasonable time or times without a warrant for the purpose of carrying out an inspection, audit or examination;

(2) No employment standards officer shall enter any room or place actually being used as a dwelling without the consent of the occupier except under the authority of a search warrant issued under section 142 of the *Provincial Offences Act*.

The Divisional Court had concluded that the person being investigated under the statute was in a position similar to a person served with a *subpoena daces tecum*, and that the section could not be categorized as providing for "search or seizure". The Court of Appeal declined to decide that question but said, at p. 158 D.L.R., p. 511 O.R.:

Assuming, without deciding, that s. 45 does provide for search or seizure within the true meaning of those words, we are all of the view that for the purposes and under the circumstances of this Act the alleged search or seizure is not unreasonable.

MacKinnon A.C.J.O., speaking for the court, went on to say at p. 159 D.L.R., p. 512 O.R.:

The Act and its regulations impose minimum requirements of employment conditions upon an employer in favour of an employee. The director and his officers are appointed to administer the Act. The headings of the various parts of the Act indicate its concerns: homeworkers; hours of work; minimum wages; overtime pay; public holidays; vacation with pay; equal pay for equal work; benefit plans; pregnancy leave; termination of employment, and administration. Section 45 (the section under consideration here) falls under the part of the Act dealing with administration. The last part of the Act covers offences and penalties.

The standards to be applied to the reasonableness of a search or seizure and the necessity for a warrant with respect to criminal investigations cannot be the same as those to be applied to search or seizure within an administrative and regulatory context. Under the *Employment Standards Act*, there is no

necessity that the officer have evidence that the Act has been breached. In the course of carrying out administrative duties under the Act, what is commonly called a "spot audit" may be carried out, which helps ensure that the provisions of the Act are being complied with. The limited powers given for this purpose as set out in the section are not unreasonable. The "search" or "seizure" in the instant case, if such it is, is not aimed at detecting criminal activity, but rather, as indicated, in ensuring and securing compliance with the regulatory provisions of the Act enacted for the purpose of protecting the public interest.

So far as the citizen is concerned, there is protection afforded to him with regard to his dwelling under s. 45(2). As can be seen, this subsection prohibits an employment standards officer from entering a room or place used as a dwelling without the consent of the occupier, except under the authority of a search warrant. As stated, it does not appear to us to be unreasonable to permit such an officer to enter business premises and require production for inspection and copying of certain records, which request or demand can, of course, be refused without any search taking place or any documents or records being seized.

Re Belgoma was followed in *R. v. Quesnel* 1985 CanLII 165 (ON C.A.), (1985), 24 C.C.C. (3d) 78, 53 O.R. (2d) 338. In that case a person had been charged with failing, upon request of an inspector of a marketing board, to permit the inspector to enter the lands and premises of the accused for the purpose of ascertaining whether there had been compliance with the *Farm Products Marketing Act*, R.S.O. 1980, c. 158.

The legislation authorized the board to appoint persons to:

(ii) enter on lands or premises used for the producing of any regulated product and measure the area of land used to produce the regulated product or perform a count of the regulated product;

There was no requirement for a search warrant and the inspector did not have one when he asked to enter the premises of the accused. The trial judge held that the inspection was not a search or seizure and that the inspection did not contravene the Charter. The Court of Appeal upheld that decision. At p. 83, Finlayson J.A. said:

The distinction between criminal proceedings and provincial regulatory schemes is emphasized in *R. v. Rao* (1984), 46 O.R. (2(1) 80, 9 D.L.R. (4th) 542, 12 C.C.C. (3d) 97. Mr. Justice Martin, speaking for the Court, distinguishes between statutes conferring on designated officials the right to enter and inspect premises without a warrant, which are licensed or in which a business is being carried on that is subject to regulation by statute, on the one hand, and the position at common law, on the other hand, where there is no power to search premises without a warrant (or with a warrant except for stolen

goods) save as an incident to lawful arrest. At p. 96 O.R., p. 558 D.L.R., p. 112 C.C.C., he states:

"In my view, however, a clear distinction must be drawn between a general power to enter private premises without a warrant to search for contraband or evidence of crime and a power conferred on designated officials to enter premises for inspection and audit purposes and to seize records, samples or products in relation to businesses and activities subject to government regulation."

It would appear from the above quoted authorities, that when acting under a statute which sets up a regulatory scheme, the distinction between an inspection and a search or seizure is academic except as to remedy. An inspector who is denied permission to enter premises cannot insist on doing so but must be content to lay a complaint under his authorizing statute: see *Belgoma, supra*.

In the case at bar, we are dealing with a regulated product and those who engage in the production of same. I would find on the basis of *Belgoma* that there was not here an unreasonable search and seizure within the meaning of the Charter and, therefore, this objection to the charge must fail. There was an "inspection" as contemplated by the legislation and it was permissible whether stigmatized as a "search or seizure" or not.

I agree that a distinction must be drawn between searches in the course of a criminal investigation, and inspections in the course of ensuring that there is compliance with building or zoning by-laws. In the former, a warrant procedure is appropriate, as was the case in *R. v. Sheppard*. In the latter, such a procedure is inappropriate as indicated in *Re Belgoma* and *R. v. Quesnel*.

The appellant has also relied upon American authorities, principally, *Camara v. Municipal Court of City and County of San Francisco*, 18 L. Ed. 2d 930. The facts of that case are similar to those in the case at bar. Mr. Camara was charged with three counts of refusing to permit building inspectors to inspect his residence without a warrant under a municipal ordinance that provided that: "Authorized employees of the City departments or City agencies, so far as may be necessary for the performance of their duties, shall, upon presentation of proper credentials, have the right to enter, at reasonable times, any building, structure, or premises in the City to perform any duty imposed upon them by the Municipal Code."

The United States Supreme Court, in a 6-3 decision, held that the municipal ordinance was unconstitutional, and that administrative searches of the kind at issue were significant intrusions upon the interest protected by the Fourth Amendment of the United States Constitution, which provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The *Camara* case involved a reconsideration and the overruling of the earlier decision of the U.S. Supreme Court in *Frank v. Maryland*, 359 U. S. 360 (a 5-4 decision). But the court in *Frank v. Maryland*, and both the majority and minority in *Camara* agreed that constitutionality depended upon reasonableness, and that, generally, administrative inspections were reasonable.

The majority in *Camara* held that in the case of an administrative search it is unnecessary for an inspector to show that he or she has probable cause to believe that a particular dwelling contains violations of the minimum standards prescribed by the code being enforced (*Camara*, p. 938).

The majority in *Camara*, while agreeing that the only effective way to seek universal compliance with minimum health and safety standards is through routine periodic inspections of all structures, held that the reasonableness of a particular situation must be left to an independent judicial official to determine. In their view, a warrant procedure was necessary to satisfy the requirements of the Fourth Amendment.

The basis for that view was expressed in the majority judgment of Mr. Justice White (at p. 937, 18 L. Ed. 2d):

Under the present system, when the inspector demands entry, the occupant has no way of knowing whether enforcement of the municipal code involved requires inspection of his premises, no way of knowing the lawful limits of the inspector's power to search, and no way of knowing whether the inspector himself is acting under proper authorization. These are questions which may be reviewed by a neutral magistrate without any reassessment of the basic agency decision to canvass an area. Yet, only by refusing entry and risking a criminal conviction can the occupant at present challenge the inspector's decision to search. And even if the occupant possesses sufficient fortitude to take this risk, as appellant did here, he may never learn any more about the reason for the inspection than that the law generally allows housing inspectors to gain entry. The practical effect of this system is to leave the occupant subject to the discretion of the official in the field. This is precisely the discretion to invade private property which we have consistently circumscribed by a requirement that a disinterested party warrant the need to search. See cases cited, p. 935, supra. We simply cannot say that the protections provided by the warrant procedure are not needed in this context; broad statutory safeguards are no substitute for individualized review, particularly when those safeguards may only be invoked at the risk of a criminal penalty.

Mr. Justice Clark, in a vigorous dissent, analyzed the majority view, and rejected it (pp. 952-3). He said.

The Court then addresses itself to the propriety of warrantless area inspections. The basis of "probable cause" for area inspection warrants, the Court says, begins with the Fourth Amendment's reasonableness requirement; in determining whether an inspection is reasonable "the need for the inspection must be weighed in terms of these reasonable goals of code enforcement." It adds that there are "a number of persuasive factors" supporting "the reasonableness of area code-enforcement inspections." It is interesting to note that the factors the Court relies upon are the identical ones my Brother Frankfurter gave for excusing warrants in *Frank v. Maryland, supra*. They are: long acceptance historically; the great public interest in health and safety; and the impersonal nature of the inspection — not for evidence of crime — but for the public welfare. Upon this reasoning, the Court concludes that probable cause exists "if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling." These standards will vary, it says, according to the code program and the condition of the area with reference thereto rather than the condition of a particular dwelling. The majority seem to hold that warrants may be obtained after a refusal of initial entry; I can find no such constitutional distinction or command. These boxcar warrants will be identical as to every dwelling in the area, save the street number itself. I daresay they will be printed up in pads of a thousand or more — with space for the street number to be inserted — and issued by magistrates in broadcast fashion as a matter of course.

I ask: Why go through such an exercise, such a pretense? As the same essentials are being followed under the present procedure, I ask: Why the ceremony, the delay, the expense, the abuse of the search warrant? In my view this will not only destroy its integrity but will degrade the magistrate issuing them and soon bring disrepute not only upon the practice but upon the judicial process. It will be very costly to the city in paperwork incident to the issuance of the paper warrants, in loss of time of inspectors and waste of the time of magistrates and will result in more annoyance to the public. It will also be more burdensome to the occupant of the premises to be inspected. Under a search warrant the inspector can enter any time he chooses. Under the existing procedures he can enter only at reasonable times and invariably the convenience of the occupant is considered.

I prefer the minority view in *Camara*.

I turn now to consider what was said by Dickson J. (now C.J.C.) in *Hunter v. Southam, supra*, at pp. 108-9 C.C.C., pp. 652-3 D.L.R., pp. 159-61 S.C.R.:

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.

The question that remains, and the one upon which the present appeal hinges, is how this assessment is to be made. When is it to be made, by whom and on what basis? Here again, I think the proper approach is a purposive one.

(A) *When is the balance of interests to be assessed?*

If the issue to be resolved in assessing the constitutionality of searches under s. 10 were whether *in fact* the governmental interest in carrying out a given search outweighed that of the individual in resisting the governmental intrusion upon his privacy, then it would be appropriate to determine the balance of the competing interests *after* the search had been conducted. Such a *post facto* analysis would, however, be seriously at odds with the purpose of s. 8. 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 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.

A requirement of prior authorization, usually in the form of a valid warrant, has been a consistent prerequisite for a valid search and seizure both at common law and under most statutes. Such a requirement puts the onus on the State to demonstrate the superiority of its interests to that of the individual. As such it accords with the apparent intention of the Charter to prefer, where feasible, the right of the individual to be free from State interference to the interests of the State in advancing its purposes through such interference.

I recognize that it may not be reasonable in every instance to insist on prior authorization in order to validate governmental intrusions upon individuals' expectations of privacy. Nevertheless, where it is feasible to obtain prior authorization, I would hold that such authorization is a pre-condition for a valid search and seizure.

Section 8 protects two rights: the right to personal privacy, and the right to be protected from an overzealous use of official power in the search for evidence to support a criminal prosecution. The latter right involves an element of protection against self-incrimination. (An analysis of those related concerns is found in *Frank v. Maryland*, supra, at p. 381.) Greater care must be exercised when personal liberty is jeopardized, as is the case where entry is sought during a criminal investigation but, nevertheless, the right of an individual to personal privacy must be carefully protected.

Although it is desirable that a consistent standard be applied to identify the point at which the interests of the State prevail over those of the individual (*Hunter v. Southam*, p. 114 C.C.C. , p. 658 D.L.R., p. 167 S.C.R.), in the end the standard is one of reasonableness.

The standard proposed in *Hunter v. Southam* involves prior authorization by a judicial officer based upon proof of reasonable and probable grounds justifying intrusion. It is reasonable that such a standard be applied in a criminal investigation, or when a search is being made of the type contemplated by the *Combines Investigation Act*. That type of search involves intrusion without notice, whether it be convenient or inconvenient. It may involve a serious invasion of privacy, for instance a search through personal property. It may involve a deprivation of personal property. A police raid inevitably involves personal stigma. The search warrant procedure is needed and applies well in that type of situation.

Different considerations apply to administrative inspections. Under the North Vancouver Zoning By-law, the inspection is limited to "reasonable times." The householder may refuse entry if the inspector comes at an inconvenient time. In this case, the inspectors returned on three separate occasions, endeavouring to find a time which best suited the householder. The householder may demand that the inspector produce identification, and may ask why the inspection is being undertaken. The householder, if not satisfied, may ask the inspector to return another day, and may make appropriate inquiries of the municipality concerning the inspector, and the proposed inspection. I do not think any of those steps would be characterized as *preventing* or *obstructing* entry of a building inspector so as to constitute an offence under s. 1102(2) of the by-law. An inspection involves a minimal intrusion into the privacy of a person, if conducted at a reasonable time. It does not involve a search or a seizure of personal property. It involves looking at construction, wiring, plumbing and heating, and at things which may affect health or safety. There is no stigma attached to the inspection. It is something that may be reasonably expected by all members of the community, in whose interest it is to maintain health and safety standards. Once it is recognized that such inspections must proceed on a routine basis, area by area, without proof in advance of an infraction by any particular householder, then it would be an empty and futile gesture, in my opinion, to have an independent official hear the reasons why a search is to be made and give a prior authorization. The fact that an infraction may be discovered, and a penalty imposed, does not persuade me that a cumbersome and ineffective procedure should be put in place. It would not protect the individual violator from being discovered. Nor is it in the public interest that he should be so protected.

I agree with the minority in *Camara* that if such a system of inspection is reasonable, then it cannot be characterized as an unreasonable search and seizure. The majority in *Camara* appear to have concluded that the procedure was reasonable, but that the constitutional requirement that there be a warrant must prevail. We do not have any such rigid constitutional requirement in Canada.

Hunter v. Southam holds that prior authorization is a precondition for a valid search and seizure if it is feasible and reasonable to insist upon prior authorization. In my opinion, it would not be reasonable to insist upon prior authorization of administrative inspections, which could only be an expensive, routine measure incapable of providing any real protection to the householder.

I have concluded that the by-law is not inconsistent with s. 8, and would affirm the judgment of Mr. Justice Dohm.

I would dismiss the appeal.

Appeal dismissed.

[ScanLII Collection]