
CANADA / JUDGMENT

R. v. Ley and Wiwchar

2014 BCSC 2108

COURT

Supreme Court of British Columbia

DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Ley and Wiwchar,

2014 BCSC 2108

Date: 20141027

Docket: 26437-6

Registry: Vancouver

Her Majesty the Queen

v.

Philip Juan Ley and Dean Michael Wiwchar

Before: The Honourable Mr. Justice Bowden

Oral Ruling on Voir Dire #1

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Place and Date of Trial/Hearing:

Vancouver, B.C.

October 16, 17, 20, 21 and 22, 2014

Place and Date of Judgment:

Vancouver, B.C.

October 27, 2014

Introduction

- [1] Mr. Wiwchar has applied for a ruling that his rights under s. 8 of the Canadian Charter of Rights and Freedoms have been breached by police conduct in obtaining video photographs of certain text messages displayed on his wireless handheld device, a Blackberry, while he was in a casino in Vancouver.
- [2] At this stage of the proceedings, if a breach is established, the applicant is seeking the excision of certain parts of ITO-P3 which was sworn in support of the issuance of a general warrant used as authority to search an apartment in Surrey. Based on certain admissions made by the applicant in writing, the Crown has agreed that he has standing to challenge the issuance of the general warrant.

Background

- [3] On March 25, 2012, members of the Vancouver Police Department followed the applicant into the Edgewater Casino in Vancouver. The police attended the video monitoring area of the casino to continue the surveillance of the applicant. That area is used by casino staff to monitor the casino premises, except the washrooms, using a number of cameras placed throughout the facility, some of which have pan, tilt and zoom capabilities. The resulting images are viewed on screens in the room and recorded for future reference.
- [4] Constable Berceanu testified that he directed a camera operator to follow the applicant. He testified that he observed the applicant sending and receiving multiple text messages on his Blackberry. On two of those occasions PC Berceanu directed the operator to zoom in on the Blackberry and was able to read the words on the screen. He said that he did this to gather "intel", which I take to mean intelligence, by seeing what the applicant was saying on his phone. He also said that he observed text on the screen from someone responding to the applicant. He said that he could not have seen the readable text messages without the use of the zoom feature on the cameras. Other members of the Vancouver Police Department subsequently obtained the footage containing the recorded images of the applicant and the Blackberry from the casino.

- [5] The applicant was specifically targeted by a camera operator under the direction of the police for a period of about five hours. Although he used a Blackberry at a gaming table from time to time, the video recording does not show the applicant using it while he is engaged in a game. The Crown relies on photographs of messages typed by the applicant on his Blackberry at 00:14 hours and 00:50 hours. On the second occasion it appears that he was standing at a counter, away from the gaming tables. Those messages are specifically referred to in ITO-P3.
- [6] On March 29, 2012, the police obtained a General Warrant under s. 487.01 of the Code to allow them to use the video cameras at the Edgewater Casino to covertly read the messages being sent and received by the applicant. The police did not have a judicial authorization to read the images of text messages displayed on the applicant's Blackberry on March 25, 2012.
- [7] The police also obtained a production order on March 29, 2012, that required the casino to provide the footage of the video recordings from their surveillance of the applicant in the casino on March 25, 2012. It is agreed by the Crown that the footage was seized by the police before the production order was obtained.
- [8] I consider the issues in this voir dire to be as follows:
- a) Did the applicant have a reasonable expectation of privacy while using his Blackberry in the casino?
 - b) If he had a reasonable expectation of privacy while using his Blackberry in the casino, was it violated by the police conduct?
 - c) Did the use of the casino cameras to read text messages on the applicant's Blackberry constitute an interception of a private communication contrary to Part VI of the Criminal Code?
- [9] The evidence shows that a high level of security is necessary in a casino to detect cheating, theft, money laundering, loan sharking, threats to public safety, abandoned children, self-excluded gamblers and "undesirable patrons". A sign is posted at the entrance to the casino that patrons are subject to 24 hour video surveillance. Camera domes are also visible throughout the facility. There is no sign indicating that handheld devices or text messages may be observed in the casino. The evidence is that the primary purpose of the video surveillance is to detect cheating by patrons in the casino.
- [10] The person in charge of security at the Edgewater Casino, Mr. Thomas Plante, testified that because of a concern that there may be collusion among persons in the casino they forbid the use of cell phones at a gaming table. A sign to this effect is posted in the casino. However, he testified that casino staff do not use the video cameras to observe text messaging by patrons unless they are asked to do so by the police. He also said that casino staff would only view a patron's handheld device if he or she were participating in a game.

- [11] It is apparent from the video recording, which is Exhibit "F" in the voir dire, that the applicant was observed while he was sending and receiving messages on his Blackberry. On some occasions he was hunched over his Blackberry at a counter, away from a gaming table, with the Blackberry held close to his body, and no one else appeared to be near him. At other times he was observed using the Blackberry while at a gaming table but not while he was involved in a game.
- [12] I find that when the video recording shows the applicant typing text messages on his Blackberry screen he was in the process of creating and sending a text message. It is also apparent that he was accessing a program or application requiring a password to cause the message to be encrypted as it was sent. I do not take the Crown to say that the messages recorded by the casino cameras were not sent as they rely on the messages in the ITO on the basis that they were sent by the applicant. It is apparent from ITO-P3 that the police considered that they observed the applicant sending a text message on his cellular phone. I refer to paragraph 170 of ITO-P3 as an example.

Applicant's Position

- [13] The applicant's position is that his informational privacy interest was at stake while he was in the casino and he had a reasonable expectation of privacy in the information on his Blackberry. Referring to *R. v. Cole*, 2012 SCC 53, he argued that, subjectively, he had an expectation of privacy which can be inferred from the way he used the Blackberry and the fact that the messages he sent were encrypted. He submits that privacy is measured from the perspective of a reasonable person "who is concerned about the long-term consequences of government action for the protection of privacy", referring to *R. v. Spencer*, 2014 SCC 43.
- [14] The applicant argued that the nature of a privacy interest can vary depending on the circumstances. It is not an all or nothing proposition. (*R. v. Buhay*, [2003] 1 S.C.R. 631). An expectation of privacy may be more limited, such as at a border crossing, but Charter protection is engaged once the court decides that a reasonable expectation of privacy exists.
- [15] The applicant also argues that by their actions of directing the video recording of his text messages, the police intercepted private communications within the meaning of those words in s. 184 of the Code without the required authorization under s. 186.

Crown's Position

- [16] The Crown's position is that there can be no expectation of privacy in a casino in British Columbia. The Crown bases this position on the undisputed fact that there is a high level of surveillance in a casino and such surveillance would be known to a reasonable, well-informed person entering a casino. In considering the totality of the circumstances the Crown argues that because the applicant was in a public place where a high degree of video surveillance is expected, he cannot have an expectation of privacy. Once the activity in question is visible and in public the police are entitled to use cameras and videos to observe

it. The Crown says further that anyone staring over the applicant's shoulder could have seen what the police observed with the use of the cameras.

- [17] Referring to *R. v. Tessling*, [2004] 3 S.C.R. 432, the Crown submits that in considering whether an individual has a reasonable expectation of privacy, a court should take a contextual approach and consider such things as the place where the information was obtained, the manner in which it was obtained, and the seriousness of the crime being investigated, to balance society's interest in protecting individuals from intrusion by the state with effective law enforcement. In this context the Crown argues that there is no good reason in law or policy that the police's ability to conduct surveillance should be less in a casino than on a public street.
- [18] The Crown says that even if the applicant had a reasonable expectation of privacy, the search of his text messages was carried out in a reasonable manner because the video surveillance used was authorized under the Gaming Control Act of B.C., and the reasonability of that regulatory scheme has not been challenged.
- [19] The Crown submits that Part VI of the Code does not apply because the video recording of a text message in this case was not an interception of a private communication within the meaning of Part VI.
- [20] The Crown says that the decision of the Supreme Court of Canada in *R. v. Telus Communications Co.*, 2013 SCC 16, has no application where text messages are obtained outside the transmission process and independently of the service provider. The Crown argues that what the police did is more akin to overhearing one person speaking on a telephone than to intercepting a telephone call and capturing an entire conversation.
- [21] The Crown also relies on *R. v. Giles*, 2007 BCSC 1147, in arguing that an interception means "an acquisition in transit by a device" or, referring to *R. v. McQueen* (1975), 26 C.C.C. (2d) 262, that an interception suggests that there must be an interference between the place of origination and the place of destination of the communication. The Crown says that the applicant's communications were not intercepted between the sender and a receiver while they were passing from their source to their destination. Rather, the Crown argues, what was observed either occurred before the communication took place, namely the typing of the message by the applicant or after a communication was received, namely, when he read a received message. By the time that the applicant touched the "send" button, his communication had already been captured by a camera.
- [22] The Crown uses the analogy of a fax. If a fax message is intercepted as it is transmitted through the telephone lines it is a Part VI interception. However, they say, if the police see the contents of a piece of paper sitting on a fax machine, that is not an interception.
- [23] The Crown says that in this case the police were observing a person communicating outside the transmission process and therefore it was not an interception under Part VI.

- [24] Even if the police actions in the casino constituted an interception, the Crown says that Part VI does not apply because what they observed was not a "private communication". The Crown submits that it would not be reasonable to expect that no one would look at their Blackberry as they type on it when what is shown on the screen will be captured by one of the cameras in the casino.

Analysis

- [25] I will first consider whether the applicant had a reasonable expectation of privacy in the casino.
- [26] The police frequently use surveillance techniques, including cameras with a zoom function, to follow and photograph suspects. An example is found in *R. v. Bryntwick*, 2002 CanLII 10941 (Ontario Superior Court), where the police surreptitiously videoed an accused walking from the front door of his residence to the garage. The court held that did not infringe his s. 8 rights.
- [27] The case before me is different. I do not consider that the applicant had an expectation of privacy in the casino with regard to his personal appearance including such things as his visage, his posture, his gait and the clothing that he wore. Nor did he have an expectation of privacy in relation to his actions while participating in a game.
- [28] Unlike *Bryntwick*, the surveillance in this case was not to obtain a likeness of the applicant. Nor was it to determine if he was cheating at a game. Rather, it was to observe any text messages that he might send or receive on his Blackberry.
- [29] In *R. v. Spencer*, [2014] S.C.J. No. 43, Cromwell J. said at para. 44:

The mere fact that someone leaves the privacy of their home and enters a public space does not mean that the person abandons all of his or her privacy rights, despite the fact that as a practical matter, such a person may not be able to control who observes him or her in public.

- [30] As to whether the applicant abandoned his privacy rights by entering a casino, knowing that he would be under extensive camera surveillance, I refer to the decision of our Court of Appeal in *R. v. Siniscalchi*, 2010 BCCA 354, where transcripts of telephone calls by the accused while in pre-trial custody were admitted into evidence by the trial judge. Signage in the jail made it clear that all telecommunications other than those to privileged parties were recorded and could be listened to. Nevertheless, the Court held that the accused had a reasonable expectation of privacy in his telephone calls sufficient to found a right under s. 8 of the Charter, that there was a violation of his rights and the evidence ought to have been excluded. The Court of Appeal went on to conclude that in the circumstances of that case the trial judge's use of the improperly admitted transcripts did not amount to a reversible error.

[31] If a prisoner in pre-trial custody has an expectation of privacy in relation to his phone calls with full knowledge that they are being recorded, then in my view it should follow that the applicant in this case, while present in a casino, would have a reasonable expectation of privacy in relation to his communications by way of text messaging.

[32] I find further support for this conclusion in *Telus Communications Co.*, where, at para. 1, Abella J. wrote:

For many Canadians, text messaging has become an increasingly popular form of communication. Despite technological differences, text messaging bears several hallmarks of traditional voice communication: it is intended to be conversational, transmission is generally instantaneous, and there is an expectation of privacy in the communication.

[33] In light of the findings of the Court of Appeal in *Siniscalchi* and the Supreme Court in *Telus Communications Co.*, I do not find it necessary to consider all of the tests in *R. v. Edwards*, [1996] 1 S.C.R. 128, in determining whether the applicant had a reasonable expectation of privacy.

[34] I have considered the approach of the Supreme Court of Canada in *R. v. Cole*, [2012] 1 S.C.R. 34, and am satisfied that the applicant had a reasonable expectation of privacy. The subject matter of the search was his written words. He had a direct interest in his words. He demonstrated a subjective expectation of privacy by the way he used his Blackberry in a manner that would tend to keep it from the view of other persons, as well as his apparent use of an encryption program in relation to the messages he sent and received. Lastly, I am of the view that his expectation of privacy was objectively reasonable. Reasonable persons even with the knowledge of extensive surveillance in a casino would not expect their private telecommunications to be secretly recorded while they were present.

[35] While the Supreme Court of Canada in *Tessling* said that a person cannot have a reasonable expectation of privacy in what he or she knowingly exposes to the public, I do not think that a person abandons his or her right to privacy in respect of communications with their handheld device when they are in public or, for that matter, in a casino.

[36] I do not accept the Crown's argument that another person could have seen the screen of the applicant's Blackberry in the same way as the casino cameras. To begin with, Constable Berceanu said that the text messages in question could not have been read without a zoom camera. Further, the video recording shows that even with a close-up of the screen of the Blackberry some messages were not readable. There is no evidence to suggest that a person standing close to the applicant could have read the messages. Even if that were possible, in view of the applicant's subjective expectation of privacy he would have been in a position to protect the privacy of his messages.

Conclusions

- [37] I have concluded that the applicant had a reasonable expectation of privacy in respect of the telecommunications on his Blackberry made while he was inside the casino.
- [38] As to whether the search involving the photographs of the applicant's text messages was unreasonable or the police conduct violated his expectation of privacy, the circumstances are different than the search of a residence, as in *Edwards*, or the search of garbage bags as in *R. v. Patrick*, 2009 SCC 17. In measuring the police conduct it seems to me that there were only two ways the police could have surreptitiously observed the text messages of the applicant. Firstly, by taking photographs from a distance using a zoom lens as they did, or by going to the service provider used by the applicant and obtaining copies of the text messages that he sent and received during the period of time that he was in the casino. If they had chosen the latter method then, based on *Telus Communications Co.*, they would have required an authorization. In my view, by using the means that they did, the police violated the applicant's reasonable expectation of privacy.
- [39] If I am wrong in that conclusion I have also concluded that the use of the casino's cameras to photograph the messages on the screen of the applicant's Blackberry constituted an interception of a private communication contrary to Part VI of the Code.
- [40] With reference to s. 184 of the Code, for the same reasons that I have concluded that the applicant had a reasonable expectation of privacy in relation to the text messages on his Blackberry, it is my view that it was reasonable for him to expect that his message, which is a form of telecommunication as defined in the Interpretation Act, R.S.C. 1985, c. I-21, s. 35 as amended, S.C. 1993, c. 38, s. 87, would not be intercepted by any person other than the person intended by him to receive it. Accordingly, I consider his text messages to be private communications.
- [41] This view of the meaning of "private communications" is supported by the decision in *Telus Communications Co.* where, at para. 12, Abella J. wrote:
- In my view, text messages are private communications and, even if they are stored on a service provider's computer, their prospective production requires authorization under Part VI of the Code.
- [42] This comment by Abella J. makes it clear that text messages are private communications, whether or not they are stored on a service provider's computer.
- [43] I do not agree with the Crown that the messages in this case were obtained outside the transmission process. As I have said, the affiant of ITO-P3 describes the police observing the applicant sending a text message. In my view, the applicant's private communications were acquired in the course of the communication process as they were about to enter the transmission stream and the device used to intercept them was a camera with a zoom lens.

[44] The circumstances in *Giles* were different. In that case, emails of an accused were retrieved from the memory chip of a Blackberry rather than in the course of the communication process. I also consider that the outcome of *Giles* might be different today in light of the reasoning of the Supreme Court of Canada in *Telus Communications Co.*.

[45] I do not think that an overly technical approach should be taken in the interpretation of the term "intercept" in Part VI. As Abella J. said at para. 32:

The issue then is how to define "intercept" in Part VI. The interpretation should be informed not only by the purposes of Part VI, but also by the rights enshrined in s. 8 of the Charter, which in turn must remain aligned with technological developments. In *R. v. Wong*, [1990] 3 S.C. R. 36, this Court found that "the broad and general right to be secure from unreasonable search and seizure guaranteed by s. 8 [of the Charter] is meant to keep pace with technological development, and, accordingly, to ensure that we are ever protected against unauthorized intrusions upon our privacy by the agents of the state, whatever technical form the means of invasion may take" (page 44). A technical approach to "intercept" would essentially render Part VI irrelevant to the protection of the right to privacy in new, electronic and text-based communication technologies, which generate and store copies of private communications as part of the transmission process.

[46] In the last sentence of para. 34, Abella J. states:

A narrow or technical definition of "intercept" that requires the act of interception to occur simultaneously with the making of the communication itself is therefore unhelpful in addressing new, text-based electronic communications.

[47] While Abella J. was concerned with that part of the communication process involving the storage of text messages by a service provider, she said that the level of protection should not depend on whether the state acquires a copy of the private communication that is being transmitted or a copy that is stored by a service provider. (para. 40)

[48] Moldaver J. in *Telus Communications Co.* concluded that the investigative technique used in that case was substantially equivalent to an intercept under Part VI and in my view the same can be said about the technique of using zoom cameras in the casino. Rather than seeking a disclosure of the messages sent by the applicant from the service provider, the police chose to read them in the process of being sent with the use of a camera. That, in my view, is substantially equivalent to an intercept under Part VI.

[49] As I have said, I am not aware of another way that a copy of text messages can be surreptitiously obtained from someone's handheld communication device other than by photographing the messages or by obtaining a copy from the service provider. Based on *Telus Communications Co.*, an authorization under Part VI would be required for the latter and should be required for the former.

[50] There was no evidence to suggest that the police could not have obtained a copy of the video footage taken of the applicant after it had been recorded by obtaining a production order, nor was there evidence to suggest that they could not have obtained copies of the text

messages sent and received by the applicant during the time that he was at the casino, from the service provider. By instead choosing to photograph the applicant's messages and retain the recorded footage the police bypassed the authorization requirement that, in my view, would otherwise have been necessary.

Summary of Conclusions

- [51] Considering the totality of the circumstances in this case, I have concluded that the applicant's rights under s. 8 of the Charter were violated by the use by the police of surveillance cameras in the casino to photograph messages on his Blackberry. If I am wrong in that conclusion, then in my view an authorization under Part VI of the Code was required because the actions of the police amounted to an interception of the applicant's text messages.
- [52] As a result, an order is made excising the references to the text messages of the applicant in ITO-P3.

"Bowden J."

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