Citation: R v Ducharme, 2025 MBCA 85
Date: 20250923
Docket: AR24-30-10086

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Christopher J. Mainella
Madam Justice Lori T. Spivak
Mr. Justice James G. Edmond

B E T W E E N:

	)	***B. Erratt***
HIS MAJESTY THE KING	)	*for the Appellant*
	)	
Respondent	)	***M. Moorthy***
	)	*for the Respondent*
- and -	)	
	)	*Appeal heard and*
KESHAUN DUCHARME	)	*Decision pronounced:*
	)	***September 15, 2025***
(Accused) Appellant	)	
	)	*Written reasons:*
	)	***September 23, 2025***

MAINELLA JA (for the Court):

Introduction

[1] The principal issue in this appeal concerns the parameters of privacy rights; specifically, whether an extended visitor had a reasonable expectation of privacy in their host's residence for the purposes of section 8 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [the *Charter*].

[2] After a trial in the Provincial Court, the accused was convicted of four firearms offences (see *Criminal Code*, RSC 1985, c C-46, ss 92, 95, 117.01(1) (two counts)) arising from the discovery by police of firearms during their response to a 911 emergency gun call at a residence in Winnipeg.

[3] In his appeal, the accused alleged that the trial judge erred in her section 8 *Charter* determinations that he did not have a reasonable expectation of privacy to challenge a warrantless search conducted by police during the 911 call and, in the alternative, if he did have standing, the warrantless search was authorized by the common law powers of police incidental to an arrest.

[4] After hearing the appeal, we dismissed it with reasons to follow, which now do.

Background

[5] On the afternoon of February 7, 2022, the Winnipeg Police Service received a 911 emergency call that a male wearing a black jacket with fur around the hood and armed with a handgun had exited 279 Andrews Street (the residence) and then re-entered the residence. One of the officers dispatched was Constable Rochon (Cst. Rochon).

[6] Cst. Rochon arrived at the residence within three to four minutes. Before arriving, he accessed a police computer. He learned that the accused was associated with the residence, he had an outstanding warrant for his arrest and there was a caution to consider the accused “armed and dangerous”.

[7] Once on scene, Cst. Rochon attended to the rear of the residence to secure the back door. A neighbour told him of hearing screaming from within the residence.

[8] Cst. Rochon then went to the front door of the residence. He could hear screaming from inside the residence. He then began to yell, “Winnipeg Police”, and proceeded to kick in the front door in an attempt to get into the residence. After two kicks, Crystal Coutu opened the door to allow Cst. Rochon and three other officers inside. She had two young children with her who were screaming and crying.

[9] The police officers entered the residence and did a sweep search of the rooms to see if anyone was injured or armed.

[10] The residence is a one-level dwelling with a basement. The residence was leased by Mariah Coutu (Coutu).

[11] The front door of the residence opens into a living room with two couches. Directly behind the living room are the kitchen and the bathroom.

[12] The residence has two bedrooms off the living room and kitchen. The bedroom on the northeast side of the residence was that of Coutu, her partner, Jordan Dawson, and their two children (the northeast bedroom). The bedroom on the residence’s northwest side was that of Shiv Harper (Harper) (the northwest bedroom).

[13] The accused and Harper were in the kitchen.

[14] The police told everyone to lie on the floor with their arms at their sides. The accused and Harper were arrested and taken out of the residence.

Once the two males were out of the residence, Cst. Rochon did another sweep of the northeast bedroom to double-check to make sure no one was hiding in there.

[15] When Cst. Rochon entered the northeast bedroom, he observed a "heaping pile of clothing" in the closet in that room. The photograph filed as an exhibit shows that the clothing was piled several feet high on the floor of the bedroom's closet and spilled out several feet into the bedroom. The pile of clothing was large enough for an adult to hide under.

[16] Cst. Rochon testified that he removed a "chunk" of the clothing to see if anyone was hiding in the pile. Cst. Rochon explained, based on his experience as a police officer, that it is not uncommon for older homes to have crawl spaces accessible by way of a hatch. He said he wanted to make sure there was no one potentially armed with a firearm who was hiding. His evidence was that it would have been "irresponsible" for him to not confirm someone potentially armed with a firearm was not hiding under the pile of clothing.

[17] When Cst. Rochon disturbed the pile of clothing, he exposed two firearms: a loaded .45-calibre semi-automatic (the handgun) and a loaded .357 Magnum revolver (the revolver).

[18] Subsequent police investigation resulted in the identification of the accused's fingerprints on the handgun's magazine. No fingerprints were found on the revolver.

[19] The Crown's theory of the case was that, before the 911 call, the accused was outside the residence. He got into a dispute with men in a Jeep,

brandished a firearm and then went into the residence. Before the police arrived, he hid the firearm, "in haste," in the pile of clothes in the northeast bedroom. According to the Crown, the reasonable inference on the facts was that, if the accused had the handgun, he was also in possession of the revolver because that firearm was found next to the handgun.

[20] The accused testified at the *voir dire* on the admissibility of the firearms.

[21] The accused said he lived in Chatham-Kent, Ontario with his mother but had been visiting Winnipeg and staying at the residence since the beginning of December 2021 with childhood friends, Coutu and Harper.

[22] The accused was not a party to the lease or responsible for utilities for the residence. He did not have a key to the residence save when Coutu or Harper lent him one. On one occasion, he paid approximately $200 to Coutu for staying.

[23] The accused explained that his only possessions in the residence were a suitcase of clothes and a few personal effects. He said he slept on a couch in the living room, unless Harper was away, in which case he slept in the northwest bedroom. Sometimes, the accused's girlfriend would stay with him in the northwest bedroom.

[24] The accused said he, Coutu and Harper were respectful of each other's privacy. He testified that Coutu gave him permission to enter the northeast bedroom "from time to time", but that he did not store anything in that room. He said that it was not his bedroom and he did not want his stuff to be damaged by young children.

[25] The accused explained that his staying at the residence was not a "long term" arrangement as he had minimal privacy there, living primarily on the living room couch. His longer-term plan was to stay in Winnipeg and lease a different home with the others, at which time he would be on the lease, if possible.

[26] The trial judge concluded that the police's entry into the residence to respond to the 911 call fell within their powers at common law to protect life and prevent injury (see *R v Godoy*, 1999 CanLII 709 (SCC)). The accused does not challenge the trial judge's finding of exigent circumstances to justify the entry into a dwelling house without prior judicial authorization.

[27] The trial judge also determined that the accused's arrest inside the residence was lawful based on the circumstances of the 911 call and his outstanding arrest warrant. This aspect of her decision is also not challenged by the accused.

[28] The trial judge addressed the accused's allegation of a breach of section 8 of the *Charter* in relation to Cst. Rochon's search of the northeast bedroom by first determining whether the accused had standing to bring such a claim (see *R v Edwards*, 1996 CanLII 255 (SCC) [*Edwards*]).

[29] In her decision, the trial judge highlighted several facts in determining the accused had not established the objective reasonableness of an expectation of privacy, namely:

> (i) the accused was only an extended visitor with little right of control over the residence;

(ii) the accused admitted he had little in the way of privacy in the residence, given he was usually sleeping on the living room couch;

(iii) the accused contributed little to the upkeep of the residence; and

(iv) the accused said he did not keep anything in the northeast bedroom and it was Coutu who had the ability to regulate access to that bedroom.

[30] The trial judge went on to say that, in the alternative, the accused did have standing to challenge Cst. Rochon's search of the northeast bedroom; in her view, that warrantless search was reasonable for the purposes of section 8 of the *Charter* because it was done for reasons of officer safety incidental to a lawful arrest (see *R v Farrah (D)*, 2011 MBCA 49 at paras 46-51 [*Farrah*]).

Discussion

[31] The first submission of the accused is that the trial judge erred in law by failing to apply the correct legal principles on the question of standing. He says, in reaching her decision, the trial judge failed to consider the principle in *R v Jones*, 2017 SCC 60 [*Jones*].

[32] In *Jones*, the Supreme Court of Canada decided that an accused can rely on the Crown's theory of an accused's guilt for the purpose of establishing their subjective expectation of privacy in the subject matter of the search (see para 19).

[33] The standard of review on whether the correct legal principles were considered by the trial judge is correctness (see *Farrah* at para 7).

[34] We are not persuaded by the accused's argument for three reasons.

[35] To begin, the accused concedes that this is a new issue raised for the first time on appeal. Leave is required to make the submission and such leave will only be granted if there are exceptional circumstances, even in the case of *Charter* arguments (see *R v EGM*, 2004 MBCA 43 at para 12 [*EGM*]). Our next concern—the substance of the accused's *Jones* submission—confirms that, in any event, the accused could not satisfy the Court that a miscarriage of justice would result from a refusal to allow the accused to raise this new issue.

[36] Two reasons were identified in *Jones* as to why an accused can rely on the Crown's theory of guilt for the purpose of establishing their subjective expectation of privacy in the subject matter of the search.

[37] First, the subjective expectation requirement of the standing analysis (see *Edwards* at para 45) is a modest threshold. The core of the standing test is the question of whether an accused's subjective expectation of privacy is objectively reasonable (see *Jones* at paras 19-21).

[38] Second, questions of standing need to be informed by and reconciled with the principle against self-incrimination. As Côté J noted in *Jones*, it is a "dangerous gambit" (at para 22) for an accused to testify on a *Charter voir dire*; that tactical choice has implications for other aspects of the trial. As she put it in *Jones* at para 29:

> [R]equiring an accused to effectively admit Crown allegations as a pre-requisite to making full answer and defence through bringing a s. 8 *Charter* challenge creates a tension with the principle against self-incrimination. Indeed, this tension may well have resulted in Mr. Jones' decision not to lead evidence going to his subjective expectation of privacy.

[39] The "tension" referred to in *Jones* at para 29 has no application to the case at bar, as the accused decided to call evidence at the *voir dire* and testified under oath that he did not store anything in the northeast bedroom. In our view, the accused made a tactical decision to not raise *Jones* before the trial judge because he did not need to as per his testimony at the *voir dire* (see *EGM* at para 12). We see the logic of *Jones* having no application to the case at bar.

[40] Our final concern with the accused's *Jones* submission is it is premised on the illogical assertion that the trial judge, in her standing analysis, should have preferred the Crown theory of guilt over the accused's sworn testimony that he did not store anything in the northeast bedroom. It is difficult to say the trial judge erred when this curious submission was never placed before her to grapple with. Had the argument been raised, in our view, the result would have been the same. The principle in *Jones* does little to assist the accused given his *voir dire* evidence.

[41] The next argument of the accused is that the trial judge erred in her interpretation of the *voir dire* evidence when she summarized the accused's evidence by stating the accused "explained that all of his belongings were in Ontario." The standard of review on this issue is palpable and overriding error (see *Farrah* at para 7). Assuming without deciding that the trial judge misinterpreted the accused's evidence, we are not persuaded such an error

would be overriding. Whether the accused had few or none of his belongings in the residence is a matter of little consequence.

[42] The final contention of the accused on the issue of standing is that the trial judge erred in her application of the relevant legal principles to the facts she found in determining that the accused had not demonstrated standing to challenge the search of the northeast bedroom. The standard of review as to this issue is correctness (see *ibid*).

[43] In cases involving primarily territorial privacy, it is common for courts to conclude that a guest—even a frequent one—does not have a reasonable expectation of privacy to challenge a search of their host's property (see *R v Okemow*, 2019 MBCA 37; *R v Guiboche*, 2004 MBCA 16; *Edwards*). However, this is not an absolute rule.

[44] The analysis of a reasonable expectation of privacy is a "fact and context specific" (*R v Le*, 2019 SCC 34 at para 137 [*Le*]) exercise that focuses on section 8 of the *Charter's* "fundamental concern with the public being left alone by the state, the normative approach to discerning the parameters of privacy rights, and the fact that s. 8 provides protection to those who have diminished or qualified reasonable expectations of privacy" (*Le* at para 137).

[45] A key aspect of this case is that this was a situation of shared living by multiple adults. In such cases, there can be qualifications to reasonable expectations of privacy depending on whether the area searched was a communal area or not (see *R v RMJT*, 2014 MBCA 36 at paras 48-52).

[46] In our view, the northeast bedroom of the residence was not a communal area. However, it was also not a place where we see that it would

be objectively reasonable to conclude that the privacy rights of the accused were engaged.

[47] The accused had no control over the northeast bedroom, either formally by a lease or informally by the person who controlled the space—Coutu. Moreover, the accused testified that it was Coutu, alone, who controlled access to the northeast bedroom and he did not store property in that room.

[48] On a normative level, the northeast bedroom was the bedroom of a family unit that the accused had no connection to other than friendship. The accused's connection to this space is even weaker than in *Edwards*, where the accused, asserting standing, had a romantic relationship with the person in control of the space.

[49] Furthermore, in his evidence, the accused assuaged any concern that his right to be left alone by the state may have been violated. He said the bedroom was controlled by Coutu and he respected her privacy. He did not store anything in that room. He thought that would be a bad idea due to the risk of property being damaged by young children. We see no normative concerns here that favour finding a reasonable expectation of privacy of the accused in relation to the northeast bedroom.

[50] In summary, we are satisfied that the trial judge came to the correct conclusion when she determined that, based on the totality of the circumstances, the accused had not established, on the balance of probabilities, that he had a reasonable expectation of privacy to challenge the warrantless search of the northeast bedroom by Cst. Rochon.

[51] Given our decision on the question of standing, it is unnecessary to review the trial judge's alternative determination that the warrantless search was authorized by the common law powers of police incidental to an arrest.

Disposition

[52] In the result, the appeal was dismissed.

Mainella JA

Spivak JA

Edmond JA