

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA)

BETWEEN:

RUSSELL STEPHEN PATRICK

APPELLANT

AND:

HER MAJESTY THE QUEEN

RESPONDENT

AND:

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ATTORNEY GENERAL OF BRITISH COLUMBIA
ATTORNEY GENERAL OF ALBERTA
CANADIAN CIVIL LIBERTIES ASSOCIATION
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TABLE OF CONTENTS

	<u>Page</u>
PART I: STATEMENT OF FACTS	1
Overview	1
Facts	2
PART II: INTERVENER'S POSITION ON POINTS IN ISSUE	2
PART III: ARGUMENT	3
Section 8 is only engaged when an accused establishes that his or her expectation of privacy was reasonable in light of the totality of the circumstances	3
The invasiveness of the technique in relation to the purported privacy interest.....	8
Conclusion	9
PART IV: SUBMISSIONS ON COSTS	10
PART V: NATURE OF ORDER REQUESTED	10
PART VI: LIST OF AUTHORITIES	11
PART VII: LEGISLATION	12

PART I: STATEMENT OF FACTS:**Overview:**

1. The Attorney General of British Columbia (“AGBC” hereinafter) intervenes in this appeal following an order made under Rule 59 of the *Rules of the Supreme Court of Canada*.

2. The question that arises in this case is whether it is constitutionally permissible for the police to search garbage set out for collection during an investigation, without first obtaining a warrant. The AGBC says that the answer to this question is “yes”. Once garbage is placed for collection, a citizen no longer enjoys a reasonable expectation of privacy in its content and s. 8 of the ***Charter of Rights and Freedoms*** has no application.

3. Search and seizure jurisprudence centers on privacy expectations and reasonableness considerations: ***R. v. Edwards***, [1996] 1 S.C.R. 128 at [33]. In ***A.M.***, 2008 SCC 19, Justice Binnie noted that under s. 8 of the ***Charter*** an appropriate balance must be struck between the state’s need to search (whether the need be public safety, routine crime investigation or other public interest) against the invasion of privacy which the search entails, including the disruption and prejudice that may be caused to law-abiding members of the public: at [5]. In each case, 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. Reasonably held privacy interests will vary with the nature of the matter sought to be protected, the circumstances in which and the place where the state intrusion occurs, and the purposes of the intrusion: ***A.M.*** at [55].

4. The AGBC submits that the ‘reasonableness line’ should be drawn in this case at the time the garbage was placed for collection and therefore abandoned, in the sense that the individual relinquished control over it, has no intention of reclaiming it, and could not prevent it from being discovered. For this reason, there is no privacy infringement in the present case. Privacy worthy of **Charter** protection is one the citizen subjectively believes ought to be respected by the government *and* that society is prepared to accept as reasonable. The police seizure was non-invasive and occurred in the course of an investigation. Abandoned garbage has been exempted from constitutional regulation or protection by the United States Supreme Court and many Canadian courts¹ with good reason. The AGBC invites this Court to reach the same conclusion. The AGBC intervenes only for the purpose of addressing the s. 8 issue in this case, and makes no submissions relating to s. 24(2). The AGBC agrees with the position taken by the Prosecution Service of Canada, but presents additional unique submissions in relation to the interpretation and meaning to give to the concept of abandonment.

Facts:

5. The AGBC takes no issue with the facts as set out by the parties in their factums and relies upon the facts as summarized in the judgment on appeal and trial judgment.

PART II: INTERVENER’S POSITION ON POINTS IN ISSUE:

6. The Respondent Public Prosecution Service has framed the issue on appeal this way:

Is there a search for purposes of s. 8 of the **Charter of Rights and Freedoms** when police examine trash that a suspect has abandoned for collection at the edge of his private land?

¹ **California v. Greenwood**, 486 U.S. 35 (1988); **R. v. Krist** (1995), 100 C.C.C. (3d) 58 (B.C.C.A.). **R. v. Kennedy** (1996), 95 O.A.C. 321 (C.A.); **R. v. Taylor**, [1984] B.C.J. No. 176 (S.C.) (QL); **R. v. Tam**, [1993] B.C.J. No. 781 (S.C.) (QL); **R. v. Love** (1995), 102 C.C.C. (3d) 393 (Alta.C.A.) – All cases in Respondent’s Book of Authorities

7. The AGBC agrees with this framing of the issue, which recognizes that the central factor for consideration in this appeal is whether the Appellant Patrick had a reasonable expectation of privacy in the garbage. The AGBC says that when an individual puts his trash out for collection he abandons the ability to exercise control over the garbage, and more fundamental to the issue in this case, he abandons any reasonable basis to believe that it will remain private. The right to be “left alone” does not include a “right to have your garbage left alone”.

PART III: ARGUMENT:

Section 8 is only engaged when an accused establishes that his or her expectation of privacy was reasonable in light of the totality of the circumstances.

8. The right to privacy as protected by section 8 of the **Charter** is not absolute and not every investigatory technique used by police will trigger the application of this provision – only those where a person’s reasonable expectation of privacy is interfered with: **R. v. Evans**, [1996] 1 S.C.R. 8 at [10]-[12]. This threshold issue is fundamental to the resolution of the present appeal. Is it reasonable to expect privacy in residential garbage put out for collection? The AGBC submits that an individual’s privacy is not invaded when a third party looks at what has been thrown out with the expectation that it will be taken away – and this is so regardless of whether the third party is a scavenger, a trash collector or a police officer. British Columbia says that no reasonable expectation of privacy attaches to abandoned garbage.

9. The AGBC agrees with the Respondent Public Prosecution Service (PPS) that if there is a privacy interest it should be conceptualized as informational, and not territorial. As stated by the PPS at paragraphs 60 to 69 of its factum, any notional or trivial property infringement by the act of a police officer reaching in the airspace over the Appellant’s property line, to recover garbage left to be picked up in almost the identical manner by garbage collectors does not infringe a territorial privacy interest.

As Ritter J.A. noted for the majority in the Court of Appeal: What is important is the intention to part with what is in the bag, not where it is put: para. [18]. The police did not have to physically intrude on the Appellant Patrick's property to get the garbage and there was no actual interference with the Appellant's real property. Also, the police could just have easily taken the garbage from the collectors, discussed in greater detail later.

10. This Court developed a non-exhaustive list of factors to assist in making the determination of whether an expectation of privacy is objectively reasonable in **Edwards** at [45], and **R. v. Tessling**, [2004] 3 S.C.R. 432 at [32], summarized recently by Deschamps J. in **Kang-Brown**, 2008 SCC 18 at [140] and **A.M.** at [128]. As in any contextual analysis, not all the factors will be relevant in a given case and no particular factor "trumps" any other factor. The materiality of each factor depends on the exigencies of the specific case before the Court.

11. Nonetheless, the AGBC submits that the factor at the forefront in this appeal is the physical act of abandonment or relinquishment of control, and will focus its submission on these concepts as they apply in the reasonable expectation of privacy framework. Although it is not determinative, it is highly relevant to a privacy analysis that an individual is claiming privacy over something (garbage) that he overtly placed in a location designated as a place to put items that he no longer wants, and placed with the intention that they be removed and forever taken away.

12. Garbage is by its very nature abandoned property; as stated by Ritter J.A., all garbage has one thing in common – the donor no longer wants to keep the item: at [28]. Quite simply, the AGBC's position is that proprietary abandonment in property equates to privacy relinquishment under s. 8 of the **Charter**. The owner of the garbage has renounced any privacy interest in it.

13. This approach is consistent with existing jurisprudence, both in relation to general s. 8 principles developed by this Court and in relation to particular “garbage cases” decided by appellate courts in this country. As stated by this Court in **Tessling**: “a person can have no reasonable expectation of privacy in what he or she knowingly exposes to the public, or to a section of the public, or abandons in a public place”: at [40]. Garbage is not private, and it is unreasonable to expect it would be, because it is accessible in the public domain, and the individual cannot effectively exercise control or prevent it from being discovered. Because of this reality, it cannot be reasonably expected that the information contained within a garbage bag will remain confidential or not be susceptible to observation or detection by others, including the state.

14. The contrary view, expressed by Conrad J.A. in dissent is that the Appellant did not abandon his garbage by putting it out for collection, but in fact “intended to maintain his privacy interest” because the only people entitled to take and deal with his garbage were municipal garbage collectors who would mangle or destroy the property and protect the Appellant’s privacy by rendering it anonymous or hard to find: at [61], [99], [105], [106], [115]. The AGBC submits that this approach to abandonment is in error. Abandonment to one is abandonment to all.

15. Abandonment in the context of this case should be defined as the voluntary relinquishment of all right, title, claim and possession, with the intention of never again reclaiming it: **Black’s Law Dictionary**, (8th ed.) St. Paul, Minn.: West Publishing Co. 2004. This includes both the intention to abandon and the external act by which the intention is carried out.

16. To conclude otherwise, and apply this “abandoned but only for one purpose or to only one person” approach would mean that garbage (residential or otherwise) is never abandoned, or that an individual always has a reasonable expectation of privacy in it, *as long as it is placed in a receptacle for garbage* since the intention is

the same – this being that it will be taken away by garbage collectors, become anonymous, mingled and lost or hard to find. The AGBC submits that this interpretation of abandonment would seriously limit the ability of police to search garbage cans at crime scenes where criminals often throw away the tools of their trades (or fruits of their crimes).

17. The AGBC submits that when evidence of a crime is thrown away and control of it is transferred from the individual to the public domain, there is no longer an objectively reasonable expectation of privacy. Reasonable expectations of privacy are inextricably linked to the ability to maintain control over information. Therefore the act of giving up control - *without any assurances of confidentiality* from the intended recipient - significantly detracts from the existence of a *reasonable* expectation of privacy.

18. In discarding, the suspect does not limit the exposure of his garbage to collectors because there is no such confidential relationship. The situations in which this Court has concluded that an individual has limited his exposure following disclosure of information are very different. For instance, in **R. v. Mills**, it was held that an individual maintains an expectation of privacy, despite the records being disclosed to a third party (the Crown) because “Privacy interests in modern society include the reasonable expectation that *private information* will remain *confidential* to the persons to whom and restricted to the purposes for which it was divulged” (emphasis added by the Intervener AGBC): [1999] 3 S.C.R. 668 at [108]. Or, in **R. v. Dymont**, the police took a sample of blood from Mr. Dymont for medical purposes, “subject to the well-founded expectation that it was to be kept private” due to the doctor-patient relationship: **R. v. Dymont**, [1988] 2 S.C.R. 417 at [30]. And in **Tessling** the subjective expectation of privacy for individuals who fear interception of their private communications was contrasted to the “person who puts out the garbage [and who] has no reasonable expectation of privacy in it”: at [42].

10 19. There is a fundamental distinction between confidential records, intercepted communications, confidential relationships such as doctor-patient, and household garbage. The latter is compiled because it has no value, and for the specific purpose of being placed in the public domain and never returned. There is no confidentiality contract with garbage collectors. For these reasons, the AGBC submits that to categorize privacy interests in garbage based on the manner and location that the discarder may believe the garbage to be ultimately disposed of and destined, and not on the fact that the discarder relinquishes control over the garbage, is a line drawing exercising that the Court should not engage in.

20 20. This position is consistent with the idea that it is control over the dissemination of information that is at the heart of informational privacy interests. As recognized in **R. v. Plant**, informational privacy relates to information the individual “would wish to *maintain and control* from dissemination”: **Plant**, [1993] 3 S.C.R. 281 at [20]. Where control is forsaken there is no reasonable expectation of privacy to it. And once control is lost, it is lost for good. Garbage is not reasonably considered to be private because the individual knowingly exposes it to third parties, by leaving it out for collection.

30 21. Furthermore, a mere intention or desire to maintain either confidentiality or control over dissemination of information will be insufficient to establish a reasonable expectation of privacy where the individual reasonably ought to know, in the circumstances, that the information may be observed by the public. As stated in **Tessling**, “not all information an individual may wish to keep confidential necessarily enjoys section 8 protection”: at [26]. An expectation of privacy must be objectively reasonable. It will not meet this test if there is no effective ability to maintain control over the subject matter and when there is no confidentiality attached to it. It is respectfully submitted that garbage, once placed for collection, falls within this category.

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22. For the purpose of section 8 as it relates to garbage, defining the threshold for a reasonable expectation of privacy at the point where the individual has abandoned the information with no intention to retrieve it is a workable standard. This acknowledges that the individual has relinquished any interest in the property and furthers the effective investigation of criminal activity by permitting the police to seize evidence that has been discarded by the criminal.

The invasiveness of the technique in relation to the purported privacy interest

23. This Court has already held, in the context of a s. 24(2) analysis, that evidence that was unconstitutionally obtained could have been discoverable through the lawful means of searching through a suspect's garbage: **R. v. Evans**, [1996] 1 S.C.R. 8 at [29] per Sopinka J. Likewise, this Court has held that police seizure of a discarded tissue does not infringe any constitutional guarantees, while acknowledging that whether an accused has abandoned an item or relinquished a privacy right still depends on the facts of each particular case: **R. v. Stillman**, [1997] 1 S.C.R. 607 at [62].

24. It is, in the submission of the AGBC, entirely reasonable and non-invasive for the police to search garbage bags in the course of an investigation. This is not a case about indiscriminate or random searches of garbage, and it is apparent from the case law that the police do not search garbage unless there is some valid investigative purpose behind doing so (in addition to the cases listed in footnote 1, reference can be made to **R. v. Erickson**, [2003] B.C.J. No. 2982 (B.C.C.A.) at [27] (QL); **R. v. Kylo**, [1999] B.C.J. No. 717 (B.C.S.C.) at [80] (QL); appeal allowed on other grounds, [2001] B.C.J. No. 1902 (C.A.) (QL); **R. v. Allender**, [1993] B.C.J. No. 2127 (B.C.S.C.) at [15], [50] (QL); appeal dismissed on other grounds, [1996] B.C.J. No. 224 (C.A.)).

25. The ability of the police to discover information about a crime through something as simple and non-intrusive as picking through garbage when it has been left out for collection militates against a finding of a reasonable expectation of privacy. There was no unique equipment or special skill used by the police to seize the garbage or look through it. They could just have easily have taken it from the collectors.

26. Alternatively, should this Court conclude that the Appellant has met the threshold question, and established that there is an objectively reasonable expectation of privacy over residential garbage that has been abandoned for collection, the AGBC submits that the state's intrusion upon it in this case was authorized by common law police powers and reasonable in accordance with the principles recently articulated by this Court in **Kang-Brown** at [21] – [25] and **A.M.** at [7] – [14] The search was appropriately based upon objectively supportable reasonable suspicion that the targeted individual was possibly engaged in some criminal activity. This search standard, lower than that required for a warrant, is responsive to the low expectation of privacy in garbage and the minimally intrusive nature of a search of it.

Conclusion:

27. As mentioned previously, many Courts have endorsed the right of the police to seize abandoned garbage in the course of an investigation. It is a simple and effective way to investigate crime that should not be subjected to a warrant requirement. The AGBC says that an appropriate balance between individual interests and society's interest in effective law enforcement is achieved by defining the reasonable expectation of privacy under s.8 of the **Charter** in a way that does not extend it to information over which the individual has relinquished control. The balance suggested by the AGBC will not diminish the amount of privacy or freedom to an

extent inconsistent with the standards of Canadian society. It is not necessary to extend constitutional shelter to garbage generated from inside a house where it is suspected that drugs are being made when that garbage has been abandoned outside for collection.

PART IV: SUBMISSIONS ON COSTS:

28. The AGBC does not seek any order as to costs.

PART V: NATURE OF ORDER REQUESTED:

29. In the result, the AGBC respectfully submits the appeal be dismissed. The AGBC respectfully requests permission to present oral argument at the hearing of this appeal in support of the positions advanced in its factum.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

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June 27th, 2008
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PART VI: TABLE OF AUTHORITIES:

		Paragraph No. and Location of Case in Books
	<i>California v. Greenwood</i> , 486 U.S. 35 (1988)	4 Respondent's Book, Tab 38
10	<i>R. v. Allender</i> , [1993] B.C.J. No. 2127 (B.C.S.C.) (QL); appeal dismissed on other grounds, [1996] B.C.J. No. 224 (C.A.) (QL)	24 Intervener AGBC's Book, Tab 1
	<i>R. v. Dymont</i> , [1988] 2 S.C.R. 417	18 Respondent's Book, Tab 26
	<i>R. v. Edwards</i> , [1996] 1 S.C.R. 128	3, 10 Respondent's Book, Tab 28
	<i>R. v. Erickson</i> , [2003] B.C.J. No. 2982 (B.C.C.A.) (QL)	24 Intervener AGBC's Book, Tab 2
	<i>R. v. Evans</i> , [1996] 1 S.C.R. 8	8, 23 Respondent's Book, Tab 30
20	<i>R. v. Kang-Brown</i> , 2008 SCC 18	10, 26 Intervener AGBC's Book, Tab 3
	<i>R. v. Kennedy</i> (1996), 95 O.A.C. 321 (C.A.)	4 Respondent's Book, Tab 50
	<i>R. v. Krist</i> (1995), 100 C.C.C. (3d) 58 (B.C.C.A.)	4 Appellant's Book, Tab 53
	<i>R. v. Kylo</i> , [1999] B.C.J. No. 717 (B.C.S.C.) (QL); appeal allowed on other grounds, [2001] B.C.J. No. 1902 (C.A.) (QL)	24 Intervener AGBC's Book, Tab 5
	<i>R. v. A.M.</i> , 2008 SCC 19	3, 10, 26 Intervener AGBC's Book, Tab 6
30	<i>R. v. Love</i> (1995), 102 C.C.C. (3d) 393 (Alta.C.A.)	4 Respondent's Book, Tab 60
	<i>R. v. Mills</i> , [1999] 3 S.C.R. 668	18 Intervener AGBC's Book, Tab 7
	<i>R. v. Plant</i> , [1993] 3 S.C.R. 281	20 Respondent's Book, Tab 70
	<i>R. v. Stillman</i> , [1997] 1 S.C.R. 607	23 Respondent's Book, Tab 87
	<i>R. v. Tam</i> , [1993] B.C.J. No. 781 (B.C.S.C.) (QL)	4 Respondent's Book, Tab 88
	<i>R. v. Taylor</i> , [1984] B.C.J. No. 176 (B.C.S.C.) (QL)	4 Respondent's Book, Tab 90
40	<i>R. v. Tessling</i> , [2004] 3 S.C.R. 432	10, 13, 18, 21 Respondent's Book, Tab 23

Other References:

Black's Law Dictionary, 8th ed. St. Paul, Minn.: West Publishing Co. 2004 "abandonment"

PART VII: LEGISLATION:**Charter of Rights and Freedoms:**

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

8. Chacun a droit à la protection contre les fouilles, les perquisitions ou les saisies abusives.

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