No. 32354

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

RESPONDENT'S FACTUM
HER MAJESTY THE QUEEN

(Pursuant to Rule 362 of the Rules of the Supreme Court of Canada)

PUBLIC PROSECUTION SERVICE OF CANADA
211, 10199 – 101 Street
Edmonton, AB T5J 3Y4
Ron Reimer
Tel.: (780) 495-4079
Fax: (780) 495-6940
ron.reimer@ppsc-sppc.gc.ca

Jolaine Antonio
Tel.: (403) 299-3978
Fax: (403) 299-3966
jolaine.antonio@ppsc-sppc.gc.ca

Counsel for the Respondent

PUBLIC PROSECUTION SERVICE OF CANADA
2215 – 284 Wellington Street
Ottawa, ON K1A 0H8
Francois Lacasse
Tel: (613) 957-4770
Fax: (613) 941-7865
flacasse@ppsc-sppc.gc.ca

Ottawa Agent for the Respondent

RUTTAN BATES
Barrister and Solicitor
711, 237 – 8th Avenue S.E.
Calgary, AB T3G 5C3
Jennifer Ruttan
Tel.: (403) 266-4640
Fax: (403) 266-4606
jr@ruttanbates.com

Counsel for the Appellant

LANG MICHENER LLP
Barristers and Solicitors
300 – 50 O'Connor Street
Ottawa, ON K1P 6L2
Marie-France Major
Tel: (613) 232-7171
Fax: (613) 231-3191
mmajor@langmichener.ca

Ottawa Agent for the Appellant

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PART I
STATEMENT OF FACTS

Overview

1. *Must police conducting a focused investigation of serious crime obtain a search warrant before removing and examining trash abandoned for collection in an outward-facing back alley garbage alcove?* The appellant endangered public safety by manufacturing dangerous drugs in his Calgary home. The waste produced by that crime was inconvenient and unpleasant to store in his home or yard, and, in contrast to the finished drugs which he willingly sheltered there, unbeneficial and therefore needlessly incriminating to keep close at hand. His attempt to distance himself from these waste items by putting them out with the trash in an open garbage stand facing outwards to the back alley was foiled by police, who had already developed cogent grounds for believing that they were hot on the trail of his clandestine drug lab. The police sifted the trash and discovered debris that scientific experts recognized as plain evidence of illicit drug production. A search warrant was obtained and when it was executed (by police wearing protective suits to guard against explosion and chemical fire) abundant evidence was discovered that the appellant had been using his residence to make commercial quantities of MDA, an illicit drug mainly distributed to teenagers passed off as the drug ecstasy (MDMA). The appellant says that the garbage examination was unlawful and he asks this Court to apply s. 8 to impose a

warrant requirement so as to extend the sanctity of his home to encompass a convenient point of access to the concealing anonymity of the municipal waste-management system.

2. The police sifted the trash in reliance upon leading jurisprudence approving examination of garbage plainly abandoned for municipal collection. The police belief that doing so was lawful was affirmed as legally correct in both courts below. The trial judge and a majority of the Alberta Court of Appeal panel hearing this case rejected the allegation of s. 8 violation, ruling that this garbage examination was not a search because it did not intrude upon any reasonable expectation of privacy. The respondent urges this Court to further affirm the legitimacy of police examination of garbage apparently abandoned for collection at the edge of private land.

3. The appellant's principal contention that the garbage examination abridged his legitimate interest in territorial privacy is hollow legalism. The fact that police hands reached briefly and narrowly across an invisible property line into the appellant's theoretic air space to retrieve abandoned garbage did not involve a statutory, common law or criminal trespass. Such undue emphasis on property lines confuses a right to property with a right to privacy. The appellant's heavy reliance on this theoretical trespass ignores this Court's teachings that the reasonableness of an asserted expectation of privacy must be assessed against a multi-factored test that balances the protection of individual rights against the legitimate societal interest in law enforcement. The appellant's outward facing garbage stand used to facilitate abandonment of unwanted items and located on the outermost fringe of his yard is the exact opposite of a private enclave to shelter intimate activities associated with the dwelling house.

4. As to the more relevant matter of informational privacy, the appellant unwisely attempted to conceal evidence by disposing of it easily and conveniently rather than risk stockpiling those items in his private enclave. While he may have hoped for anonymity in doing so, his unwise choice to leave clues about his criminal activities in trash bags abandoned for municipal collection beyond his purview at the outer edge of his backyard belies any subjective expectation of privacy let alone an expectation that is objectively reasonable. Section 8 of the ***Charter*** has not transformed the act of putting out the trash into a privileged and confidential communication between householder and garbage collector. The prospect that police conducting a focused investigation of crime may obtain personal information by looking closely at that which their suspect has clearly abandoned presents no greater threat to the freedom of our society than does

the fact that police conduct visual surveillance or engage in undercover investigations. Garbage examination is on the same order of old-fashioned police foot-work. It does not involve anything like the "very efficacy" of electronic surveillance or a similar "potential, if left unregulated, to annihilate" privacy.[1] The idea that a warrant requirement is necessary to prevent an "Orwellian nightmare" of arbitrary house to house garbage reconnaissance is pure fantasy.

5. At the time of this investigation, the law in Canada uniformly supported the ability of police to collect and examine residential garbage. Indeed, but for one narrow, inapplicable exception, Canadian courts had been consistent in holding that an individual who abandons an item abandons his or her privacy interest in that item and whatever information it contains. The police acted in good-faith reliance on this jurisprudence to take the appellant's garbage. They then acted in good-faith reliance on a properly-issued search warrant to enter the appellant's residence, which turned out to be one of the most significant MDA production labs in the Calgary area. To exclude evidence in this case would bring disrepute to the administration of justice by letting a plainly guilty drug manufacturer go unpunished, while perversely punishing the police for complying with the law.

The clandestine lab investigation

6. On 09 May 2003, police received a tip from a chemical supply company employee regarding the suspicious purchase of some chemicals. The purchaser, known only as "Chris", had bought similar chemicals on three occasions almost a year earlier, always paying with cash or bank drafts.[2] He purported to be buying them on behalf of "Altex Consulting" for use in the oil and gas industry. The day before the informer's call, "Chris" had picked up a special order, two kilograms of sodium cyanoborohydride. He had inquired whether he could pay cash and whether doing so would be "suspicious." [3]

7. The ensuing police investigation found several incriminating holes in "Chris's" cover story. Both "Altex Consulting" and the given mailing address turned out to be non-existent.[4]

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[1] ***R. v. Duarte*** [1990] 1 S.C.R. 30 at p. 44.
[2] Two kilograms of sodium cyanoborohydride for $4772.98 on 19 June 2002; Ten kilograms of ammonium acetate and 2.5 litres of sulfuric acid for $1840.25 on 11 July 2002 and Four litres of sodium sulphate, four litres of methylene chloride for $1184.49 on 11 July 2002: Information to Obtain a Search Warrant, 22 December 2003, sworn by Constable Ryan Smart ("Smart's ITO"), App. R., Tab 5(e), p. 224 at para. 7.
[3] Smart's ITO, App. R., Tab 5(e), p. 224 at para. 7, Statement of Agreed Facts entered at trial ("Agreed Facts"), App. R., Tab 5(a), p. 197-198 at para. 1.
[4] Smart's ITO, App. R., Tab 5(e), p. 224 at para. 8; Agreed Facts, App. R., Tab 5(a), p. 198 at para. 2.

The cellular telephone number he used for contact was real enough and its voice mail was indeed answered in the name of Chris but it was registered to a different name and address, both of which were apparently false.[5] Several of the 48 one-hundred-dollar bills used by "Chris" to purchase the chemical on 08 May 2003 were subjected to ion scanning and registered "high-positive" readings for traces of MDMA (ecstasy) and cocaine.[6]

8. The very chemicals "Chris" had purchased belied his stated explanation for acquiring them and signaled a criminal purpose. Sodium cyanoborohydride and other chemicals purchased by "Chris" are not generally used in the oil and gas industry, particularly in the quantities involved.[7] The chemicals are in fact among the many required to produce the illicit drug MDMA (more commonly known as ecstasy).[8]

9. On 03 June 2003, the chemical supply company employee called the police to report that "Chris" had ordered more chemicals[9] and would soon be attending at their premises to pay for his order.[10] The police set up surveillance and watched "Chris" arrive operating a red mini-van. He went into the chemical supply company premises and paid in cash. Consistent with "Chris's" mode of operation, the van was registered in the name of someone else, but it did lead the police to his true identity. Two years earlier, Dallas Charles Gowing had been ticketed for a traffic infraction operating a vehicle bearing that same license plate.[11] The surveillance officers confirmed Gowing's identity using his driver's license photo. Computerized records led police to believe that Gowing was likely residing at 342 Wascana Crescent in southeast Calgary.[12]

10. On 26 June 2003, the chemical supply company informer told police that chemicals ordered by "Chris" (Gowing) had arrived and that he would be notified that they were available for pick-up. Police attended the chemical supply company, photographed the containers, and

[5] Smart's ITO, App. R., Tab 5(e), p. 226 at para. 14; Agreed Facts, App. R., Tab 5(a), p. 199-200 at paras. 4, 6.
[6] Smart's ITO, App. R., Tab 5(e), p. 225 at para. 11; Agreed Facts, App. R., Tab 5(a), p. 199 at para. 3. All paper currency in Canada is contaminated with some measure of trace residue from illicit drugs, particularly cocaine: Smart's ITO, App. R., Tab 5(e), p. 225 at para. 11(d).
[7] Smart's ITO, App. R., Tab 5(e), p. 232 at para. 33; Agreed Facts, App. R., Tab 5(a), p. 204-205 at para. 20(a).
[8] Smart's ITO, App. R., Tab 5(e), p. 224 and 226 at paras. 9, 13; Agreed Facts, App. R., Tab 5(a), p. 204 at paras. 19-20.
[9] 40 kilograms of ammonium acetate; 20 litres of Formic Acid and 100 litres of Methylene Chloride for a total price of $3078.93: Smart's ITO, App. R., Tab 5(e), p. 227 at para. 16.
[10] Smart's ITO, App. R., Tab 5(e), p. 227 at para. 16; Agreed Facts, App. R., Tab 5(a), p. 200 at para. 7.
[11] Smart's ITO, App. R., Tab 5(e), p. 227 at para. 17; Agreed Facts, App. R., Tab 5(a), p. 200 at para. 8.
[12] Smart's ITO, App. R., Tab 5(e), p. 228 at paras. 19-20, Agreed Facts, App. R., Tab 5(a), p. 201 at para. 11.

marked them for later identification.[13] The following day, police observed Gowing depart from his Wascana Crescent residence, attend at a bank and receive more than $2000 in cash.[14]

11. On 02 July 2003, the appellant surfaced as a second suspect in the investigation. Police conducting surveillance at Gowing's residence saw an unknown male come and go from the area of that residence within the space of about half an hour. The unknown male was operating a red Volvo, bearing personalized license plate WLVRMUL, registered to the appellant with an address, 314 Dalgleish Bay Northwest, which police believed to be that of the appellant's parents.[15]

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12. On 03 July 2003, the informer notified the police that "Chris" would be picking up his chemical order later that day. The police followed Gowing from his residence while he attended at the chemical supply company premises, loaded the chemicals[16] into the same red minivan he had used previously, and drove to a residential area in northeast Calgary. He was lost to surveillance in that area for about ten minutes and then spotted again exiting an alley that serviced houses in the 400 block of 25 Avenue. The police followed him to a separate location where he parked his vehicle. A member of the surveillance team walked by Gowing's parked vehicle and noted that the chemicals were no longer visible in the vehicle. This led police to believe that Gowing had unloaded the chemicals during the brief time while he had been lost to

20 their surveillance.[17]

13. Further surveillance of Gowing that day revealed more suspicious activity and identified a house where he had most likely unloaded the chemicals. Gowing drove back to the area where he had been lost to surveillance and entered the same back alley which he had earlier been spotted exiting. He was seen to park in the rear driveway of a house located at 411-25 Avenue Northeast.[18]

14. A further connection between the appellant and Gowing emerged. The appellants red Volvo was spotted parked about one house away on the front street of 25 Avenue. A search of

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[13] Smart's ITO, App. R., Tab 5(e), p. 228 at para. 22; Agreed Facts, App. R., Tab 5(a), p. 201 at para. 12.
[14] Smart's ITO, App. R., Tab 5(e), p. 228 at para. 23; Agreed Facts, App. R., Tab 5(a), p. 201 at para. 13.
[15] Smart's ITO, App. R., Tab 5(e), p. 228 at para. 24, Agreed Facts, App. R., Tab 5(a), p. 201 at para. 14.
[16] As listed in note 9 above.
[17] Smart's ITO, App. R., Tab 5(e), p. 229-230 at paras. 25(a-h), 26; Agreed Facts, App. R., Tab 5(a), p. 202 at para. 15.
[18] Smart's ITO, App. R., Tab 5(e), p. 230-231 at paras. 25(k-l), 27; Agreed Facts, App. R., Tab 5(a), p. 202 at para. 15.

computerized records revealed that about two years earlier, the appellant had listed 411-25 Avenue Northeast as his residence.[19] Further police investigation determined that 411-25 Avenue Northeast was probably uninhabited in the summer of 2003.[20]

15. Gowing departed by vehicle from 411-25 Avenue Northeast at approximately 3 p.m. on 03 July 2003 and traveled to his own residence on Wascana Crescent, where he was seen to unload a red five-gallon canister bearing a chemical warning label which he then placed in his garage. The canister was different than those he had picked up at the chemical supply company earlier that day.[21]

16. On 07 July 2003, the police saw the appellant's red Volvo arrive at 411-25 Avenue Northeast and then depart about six hours later. Coming and going, the vehicle was occupied by its lone operator, positively identified as the appellant by comparison with his driver's license photo.[22]

17. In view of his apparent connection to Gowing's shadowy activities, the police investigated the appellant's background. They determined that he had graduated from the University of Calgary Faculty of Science in 2002 with a major in Physics. During those years, he had taken three Chemistry courses.[23]

18. In August of 2003, the police received confirmation from a senior Health Canada chemist that all of the chemicals purchased by Gowing could be used in the manufacture of MDMA (ecstasy). The chemist said that he knew of no legitimate use for that grouping of chemicals and believed they were being acquired for the illicit manufacturing of drugs.[24]

19. The investigators also learned some important background facts concerning the process of manufacturing MDMA (ecstasy). Sergeant Trupish, the expert investigator attached to the chemical precursor program, advised that MDMA could be manufactured in as little as 24 to 36 hours but not necessarily continuously such that the process in a clandestine lab might take considerably longer. The investigators also learned that one of the main substances required to

[19] Smart's ITO, App. R., Tab 5(e), p. 230 at para. 25(m-o); Agreed Facts, App. R., Tab 5(a), p. 203 at paras. 15(j), 16.
[20] Smart's ITO, App. R., Tab 5(e), p. 231 at paras. 28-30.
[21] Smart's ITO, App. R., Tab 5(e), p. 230 at para. 25(r-s); Agreed Facts, App. R., Tab 5(a), p. 203 at para. 16.
[22] Smart's ITO, App. R., Tab 5(e), p. 231 at para. 29.
[23] Smart's ITO, App. R., Tab 5(e), p. 232 at para. 32; Agreed Facts, App. R., Tab 5(a), p. 210 at para. 32.
[24] Smart's ITO, App. R., Tab 5(e), p. 233 at para. 36; Agreed Facts, App. R., Tab 5(a), p. 204 at para. 20.

manufacture MDMA was sassafras oil, which smelled like licorice. Importantly, Sgt. Trupish also warned that clandestine MDMA (ecstasy) labs are considered volatile and extremely toxic.[25]

20. During the later summer and through the fall of 2003, the investigation stalled. After 07 July 2003, there were no further observations of Gowing or the appellant at 411-25 Avenue Northeast. The whereabouts of the appellant were unknown.[26] Apart from some further shadowy behavior by Gowing (driving across town to retrieve mail and using a payphone despite having a mobile phone in his hand), there were no developments.[27] While the police remained convinced that they were on the trail of a clandestine drug lab, the trail was getting cold and its precise location remained largely a mystery.

21. In December, events moved swiftly and the mystery was soon unraveled. On 01 December 2003, the chemical supply company informer alerted police that Gowing had ordered more chemicals.[28] The following day, surveillance of Gowing paid off. At 3:15 p.m. police watched as Gowing attended the chemical supply company premises, picked up his order, and departed with the chemical in his vehicle. The police followed Gowing to a back alley servicing the 400 block of 88th Avenue in Southeast Calgary. Gowing's next actions pointed police to the location they had been seeking. After stopping momentarily, Gowing drove around the block (an obvious counter-surveillance move), and returned to park his vehicle in the very same alley. He walked into the back yard of 443-88 Avenue Southeast, carrying the cardboard box believed to contain the chemicals he had acquired less than half an hour earlier.[29]

22. On 04 December 2003, a land titles search revealed the fact that the house at 443-88 Avenue Southeast was owned by the appellant. He had apparently acquired the property about three months earlier.[30]

23. That same day, the police removed a bag of garbage from trash cans set out for pick-up in the back alley behind the residence. In the trash, the police found some mail addressed to the appellant's mother at 314 Dalgleish Bay Northwest. More significantly they found pieces of

[25] Smart's ITO, App. R., Tab 5(e), p. 231-232 at para. 31.
[26] Smart's ITO, App. R., Tab 5(e), p. 231 at para. 30.
[27] Smart's ITO, App. R., Tab 5(e), p. 233-234 at paras. 38-39.
[28] 20 litres of methylene chloride: Smart's ITO, App. R., Tab 5(e), p. 234 at paras. 40-41; Agreed Facts, App. R., Tab 5(a), p. 205 at paras. 21-22.
[29] Smart's ITO, App. R., Tab 5(e), p. 234 at para. 42; Agreed Facts, App. R., Tab 5(a), p. 205-206 at para. 23.
[30] Smart's ITO, App. R., Tab 5(e), p. 234 at para. 44; Agreed Facts, App. R., Tab 5(a), p. 206 at para. 24.

torn-up paper, which when fitted together revealed a chemical reaction formula and part of a diagram. The chemical formula referred to MDP-2P, the common name for a chemical precursor listed in Schedule VI of the ***Controlled Drugs and Substances Act***.[31] In fact, the investigators were told by a chemist, MDP-2P is a precursor of MDMA (ecstasy) manufactured from safrole, an extract of sassafras oil. The reconstructed chemical formula also referred to MeOH (methanol), a solvent commonly used in manufacturing drugs.[32]

24. On 05 December 2003, police observed two vehicles parked in the detached garage at the appellant's residence: the appellant's red Volvo and another vehicle registered to a female, Juliane Job, who was apparently residing with the appellant.[33]

25. On 08 December 2003, police found more clues in another bag of garbage they retrieved from the same back-alley garbage stand. Along with documents addressed to Juliane Job, police found packaging for chemically-resistant rubber "stripping" gloves. Of particular note, they also found discarded paper towels and duct tape, with the licorice-stink of sassafras oil.[34]

26. A further garbage examination on 12 December 2003 added more proof that the police had finally discovered the location of the clandestine drug lab. Significantly, the following items were among the trash: discarded cloth and rubber gloves with unknown residues, including one pair redolent of sassafras oil; a receipt from a hardware store for a purchase of several litres of muriatic acid, a commercial product known to be used in drug manufacturing; and a product card for a vacuum pump commonly used for filtration and evaporation in MDMA (ecstasy) labs.[35]

27. A further garbage examination on 16 December 2003 once again confirmed the obvious fact that the appellant was sheltering a clandestine drug lab in his house. The police found packaging for a digital scale along with a typewritten list of directions for a chemical process. The instructions referred to MDP2P, a precursor of MDMA (ecstasy).[36]

28. On 17 December 2003, lab analysis of suspicious debris retrieved from earlier garbage examination was reported to the investigators and removed any possible doubt that they were

[31] Smart's ITO, App. R., Tab 5(e), p. 234 at para. 43; Agreed Facts, App. R., Tab 5(a), p. 206 at para. 25.
[32] Smart's ITO, App. R., Tab 5(e), p. 236 at para. 49.
[33] Smart's ITO, App. R., Tab 5(e), p. 235 at para. 45.
[34] Smart's ITO, App. R., Tab 5(e), p. 235 at para. 46; Agreed Facts, App. R., Tab 5(a), p. 206-207 at para. 26.
[35] Smart's ITO, App. R., Tab 5(e), p. 235-236 at paras. 47, 49; Agreed Facts, App. R., Tab 5(a), p. 207 at para. 27.
[36] Smart's ITO, App. R., Tab 5(e), p. 236 at paras. 49-50; Agreed Facts, App. R., Tab 5(a), p. 207at para. 28.

onto the right location. Seized items were analyzed and found to contain traces of an amphetamine, commonly known as MDA,[37] a contraband drug listed in Schedule III of the ***Controlled Drugs and Substances Act***. In addition, the lab analysis identified residues of MDP2P, isosafrole, piperanol and safrole, all chemical precursors listed in Schedule VI of the ***CDSA***.[38]

29. On 17 December, 2003, a chemist employed with the Health Canada Drug Analysis Service laboratory offered the investigators the expert opinion that the items found were consistent with the manufacture of MDA, a drug with a similar chemical make-up to MDMA (ecstasy). Significantly, the investigators knew that MDA was commonly sold on the street as a substitute for MDMA (ecstasy).[39]

30. On 22 December 2003, all of the facts summarized in the foregoing paragraphs 6 to 29 above were set forth in detail as the grounds for belief sworn by Constable Ryan Smart in support of an application for a warrant to search the appellant's residence. The warrant was granted and executed over the course of the next day by a multi-discipline search team that included experts in the handling of hazardous material, wearing special apparel to protect themselves from chemical fire and toxic contamination.[40]

31. The appellant was the only person in the residence when the search team entered. The air was pervaded by the licorice odour of sassafras oil. In the course of their search, police uncovered instructions on the manufacture of drugs, scales and packaging for the sale of pills, and chemicals and equipment for producing pills. The production equipment included colouring and dies with star and cross symbols. MDA and MDMA producers often use such dies to appeal to their primary market: twelve- to fifteen-year-olds attending raves and dance parties.[41]

32. Police seized a total of 2,679 pills, pink with a star symbol or blue with a cross symbol.[42] Depending on the quantities in which they were sold, the value of the 2,679 pills would be

[37] The proper chemical name is 3,4-methylenedioxiamphetamine.
[38] Smart's ITO, App. R., Tab 5(e), p. 236-237 at para. 51.
[39] Smart's ITO, App. R., Tab 5(e), p. 236-237 at paras. 51-52.
[40] Trial judge's Written Reasons for Judgment dated 22 September 2005 ("Trial Reasons"), Resp.R., Tab II, p. 5 at para. 7(ii-vii) and pp. 19-20 at paras. 62-64.
[41] Resp.R., Tab IV(d), pp. 65/40-66/4, 72/5-15.
[42] Agreed Facts, App. R., Tab 5(a), p. 206 at para. 24, p. 208-209 at para. 29.

between $8,037 and $40,185.[43]

33. The police also seized a ledger recording drug transactions and costs, meticulously evincing past high-volume pill sales.[44] In the opinion of a drug expert, the evidence demonstrated that the appellant was "very high up the food chain in the City of Calgary and probably one of the upper-level traffickers of MDA or ecstasy in the Calgary area."[45]

The voir dire concerning the propriety of the garbage examination

34. At trial, the appellant sought exclusion of evidence on the basis of various alleged ***Charter*** violations; therefore, all evidence at trial was called in a *voir dire*. Evidence relevant to the garbage issue was given by the following witnesses.

Corporal Audrey Robinson

35. Corporal Audrey Robinson was a member of the team investigating the clandestine drug lab. On 4 December 2003, she and Constable Ryan Smart went to the alley behind the appellant's residence.[46] They found two garbage cans in an open indentation in the rear fence, with no gates or other barriers obscuring sight of or access to the garbage.[47] Corporal Robinson collected a green garbage bag from one of the cans.[48] On 5 December 2003, Corporal Robinson and Constable Smart returned to the alley behind the appellant's residence. They saw that there were no garbage bags in either can.[49]

36. When she collected the one garbage bag on 4 December 2003, Corporal Robinson's hand crossed the plane of the fence into the indentation where the garbage sat in cans.[50] She was aware that police do not have a right to trespass on private property. She was also aware of case law holding "that the garbage was out for disposal." Although in retrospect she agreed that her hand would have passed into private property, at the time she hadn't viewed her act as a search for evidence on private property. She viewed it as a taking of "garbage disposed of in an

[43] Resp.R. Tab V(c), Report prepared by Corporal Anderson, p. 81.
[44] Agreed Facts, App. R., Tab 5(a), p. 206 at para. 24, p. 208-209 at para. 29; Resp.R., Tab IV(d), pp. 68/19-25, 69/18-27, 70/3-72/22, 72/45-73-23; Resp.R. Tab V(c), Report prepared by Corporal Anderson, p. 86.
[45] Resp.R., Tab IV(d), p. 68/30-36.
[46] App.R., Tab 4(a), pp. 92/38-93/7, 97/22-31, 108/37-47.
[47] App.R., Tab 4(a), pp. 94/24-38, 104/29-33; Resp.R., Tab V(a), p. 75, photo no. 40.
[48] App.R., Tab 4(a), pp. 94/7-14.
[49] App.R., Tab 4(a), p. 109/5-27; see also Resp.R., Tab IV(c), pp. 50/44-51/28.
[50] App.R., Tab 4(a), p. 108/31-35.

alley…it's been discarded, it's thrown away." Therefore, she and her team concluded that a warrant was not required to take the garbage.[51]

Constable Peter Hearty

37. After seeing its primary target carrying what appeared to be precursor chemicals into the garage at the appellant's residence, the investigative team decided to implement the "standard practice" of taking garbage from behind the appellant's residence.[52]

38. On 12 December 2003, Constable Peter Hearty, accompanied by Constable Smart, took one of several garbage bags from the outward-facing stand at the alley behind the appellant's house, and replaced it with one taken from behind a neighbouring house.[53] The two officers returned on 17 December 2003 and collected more garbage from that stand.[54]

39. Constable Hearty was familiar with the British Columbia Court of Appeal's judgment in ***R. v. Krist.***[55] He was specifically aware that the judgment on appeal had not distinguished,(as the trial judgment had done) between garbage abandoned on public property and garbage abandoned on private property. Constable Hearty acted on his understanding that "if garbage is left out to be picked up by municipal employees there is no expectation of privacy and police can seize that garbage without warrant."[56]

40. Constable Hearty would not have taken the garbage if it had meant crossing a physical barrier, such as a solid fence or a gate, or if he had needed to "physically go on the property." He was familiar with the case of ***R. v. Kokesch***,[57] in which police officers walked right up to a house to try to smell marihuana. He felt that "the actions of the police in that case were significantly different" from the actions of his team in reaching across an invisible property line into an open garbage stand.[58]

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[51] App.R., Tab 4(a), pp. 112/5-113/5, 121/14-21.
[52] App.R., Tab 4(c), pp. 138/34-139/39, Agreed Facts, App. R., Tab 5(a), p. 205-206 at paras. 21-24.
[53] App.R., Tab 4(c), pp. 134/43-135/33, 146/6-25.
[54] App.R., Tab 4(c), pp. 146/28-45, 148/47-99/13.
[55] ***R. v. Krist*** (1995), 42 C.R. (4th) 159 (B.C. C.A).
[56] App.R., Tab 4(c), pp. 140/2-25, 141/1-6, 149/20-23, 149/30-34, 152/1-41, 152/43-153/3, 155/30-45; App. R., Tab 5(g), Printed page from R.C.M.P. Police Law Digest, p. 242.
[57] ***R .v. Kokesch***, [1990] 3 S.C.R. 3.
[58] App.R., Tab 4(c), pp. 153/5-21, 154/5-155/19; Resp.R., Tab IV(b), p. 36/22-28.

Constable Ryan Smart

41. Constable Smart, the primary investigator, attended the alley behind the appellant's residence on six occasions. On five of those occasions (4, 8, 12, 16, and 17 December 2003), garbage was retrieved and taken back to the R.C.M.P. office.[59] Constable Smart had the unpleasant task of sorting through the garbage for items relevant to his investigation.[60]

42. Constable Smart knew that police cannot trespass on private property. His team would not have gone over the fence or up to the back door to collect garbage. While he could not recall the names of particular case references, he understood that police were able to take garbage without a warrant, because it was abandoned.[61]

The Trial Judge's Reasons

43. Using the same multi-factored assessment template applied by this Court in ***R. v. Tessling***,[62] the trial judge concluded that the police did not breach the appellant's ***Charter*** rights by collecting the garbage that he had put out for disposal.[63] He held that the location of the garbage was a relevant factor, but not a determinative one. By putting the garbage out in a place obviously designated for its ultimate disposal, the appellant abandoned his interest in the garbage and waived any previously existing subjective expectation of privacy.[64]

44. The trial judge further ruled that even if the appellant retained a subjective expectation of privacy in the garbage, such expectation would have been unreasonable in all the circumstances.[65] By disposing of the garbage, the appellant was not trying to protect a biographical core of information, but was clearly indicating that it was no longer of value or importance to him.[66] The police technique was objectively reasonable[67] and was as minimally intrusive as the trial judge could imagine.[68] "The police acquisition of the abandoned evidence is not an unlawful search and seizure and the items were properly and lawfully seized."[69]

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[59] Resp.R., Tab IV(a), p. 34/25-29; Resp.R., Tab IV(c), pp. 37/39-38/5, 50/1-33, 51/21-24, 53/29-55/6.
[60] Resp.R., Tab IV(c), pp. 37/17-38/23, 48/38-50/33, 53/29-55/6.
[61] Resp.R., Tab IV(c), pp. 52/13-25, 57/22-35, 59/24-42, 60/28-47, 61/20-62/45.
[62] ***R. v. Tessling***, [2004] 3 S.C.R. 432.
[63] Trial Reasons, Resp.R. Tab II, pp. 9-17 at paras. 20-49.
[64] Trial Reasons, Resp.R. Tab II, pp. 11-14 at paras. 25-39.
[65] Trial Reasons, Resp.R. Tab II, p. 16 at para. 47.
[66] Trial Reasons, Resp.R. Tab II, p. 15 at para. 44.
[67] Trial Reasons, Resp.R. Tab II, p. 15 at para. 42.
[68] Trial Reasons, Resp.R. Tab II, p. 15 at para. 41.
[69] Trial Reasons, Resp.R. Tab II, p. 17 at para. 49.

The Court of Appeal's Reasons

45. A majority of the Alberta Court of Appeal upheld the trial judge's conclusion that the appellant "maintained no expectation of privacy in the contents of the garbage," regardless of whether the privacy interest was characterized as territorial or informational.[70] It rejected the appellant's argument that the trial judge erred by focussing on informational privacy, when the "predominant privacy interest" was alleged to be territorial. Categorizing a privacy interest is an available analytical tool, but not a determinative one. The central question in this case was whether the appellant had a protected privacy interest in garbage left for pickup by municipal personnel.[71]

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46. In applying the ***Tessling*** factors, the majority reviewed several authorities holding that there is no privacy interest in discarded property. It noted that the cases did not differentiate between garbage set out on one side or the other of a property line; what was important was "the intention to part with what [was] in the bag, not where it [was] put."[72] Since the appellant "enjoyed little or no control over the garbage,"[73] and had essentially no ability to regulate its use,[74] he had no expectation of privacy in the abandoned garbage.[75]

47. In dissent, Conrad J.A. held that the appellant had a reasonable expectation of privacy in the perimeter of his dwelling house and that the police intrusion on the perimeter violated that

20 privacy interest. In the alternative, she held that the appellant had a subjective and a reasonable expectation of privacy in the contents of garbage bags set out in his garbage bin. On either analysis, Conrad J.A. found a breach of s. 8 of the ***Charter***. She would have excluded the evidence under subs. 24(2) and acquitted the appellant of ecstasy production.[76]

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[70] Alberta Court of Appeal Reasons for Judgment ("Appeal Reasons"), App. R. Tab 2(c), p. 47 at para. 44.
[71] Appeal Reasons, App. R. Tab 2(c), p. 40-41 at paras. 12-14.
[72] Appeal Reasons, App. R. Tab 2(c), p. 42-44 at paras. 18-27.
[73] Appeal Reasons, App. R. Tab 2(c), p. 41 at para. 16.
[74] Appeal Reasons, App. R. Tab 2(c), p. 41 at para 30.
[75] Appeal Reasons, App. R. Tab 2(c), p. 46-47 at paras. 38 and 44.
[76] Appeal Reasons, App. R. Tab 2(c), p. 52-53 at paras. 58-62.

PART II
ISSUES

48. The primary question in issue is whether it involves a "search" for purposes of s. 8 of the ***Charter*** when police examine trash that a suspect has abandoned for collection at the edge of his private land.

49. It is the position of the respondent that no search is involved in these circumstances because the impugned police action does not intrude upon any reasonable expectation of territorial or informational privacy. There was no actual trespass or perimeter search. In the totality of relevant circumstances, this police examination of abandoned property in the course of a focused investigation of crime did not intrude upon any reasonable expectation of privacy.

50. If this Court finds that the garbage examination involved a "search," then assuming this Court concludes that the evidence was obtained in a manner that infringed s. 8 of the ***Charter***, the issue becomes whether the appellant has proven that the admission of the evidence would bring the administration of justice into disrepute.

51. It is the position of the respondent that any breach of s. 8 was extremely minor in nature and the result of honest reliance upon prevailing jurisprudence. As the fairness of the trial was not impacted by the admission of the resulting non-conscriptive evidence, there is no justification for excluding key evidence necessary to prove this serious crime.

PART III
ARGUMENT

I. The examination of the appellant's abandoned garbage was not a "search."

52. The respondent urges this Court to uphold the legitimacy of police examination of garbage where, as here, two elements are present: a) the garbage was abandoned for collection, and b) the garbage was near the boundary of private land at the customary or otherwise evident take-away site. Where these elements are present, the police action does not infringe any reasonable expectation of privacy. By its nature, examination of garbage is an unpleasant, time-consuming, manual process to which police resources will only be devoted in the course of focused criminal investigations. Its use is consistent with our basic notion of a free society. In these circumstances, society's necessary interest in law enforcement outweighs any competing individual interest in sanctifying a garbage take-away site and tied garbage bags as protected zones of privacy.

Judged by this Court's multi-factored assessment test, removing and examining the contents of garbage bags abandoned for collection is not a "search."

53. Section 8 of the ***Charter*** is not implicated by police examination of the contents of trash bags that individuals place at the outer boundary of their private land for collection. A person cannot subjectively expect privacy in trash that has been abandoned to other members of the public and to garbage collectors. The weight of considered authority addressing this question supports the conclusion that one's mere hope or anticipation that such trash may become commingled with the trash of others is not a reasonable expectation. When we put out the trash, we assume the risk that scavengers, neighbors, or the trash collector may turn that trash over to the police, may be an agent of the police or may be the police. Given the loss of control inherent in discarding his trash and the risks voluntarily assumed by the appellant, there is no credible basis for concluding that he subjectively expected privacy or that such expectation was objectively reasonable.

54. This Court's leading decisions on the question of whether an impugned investigative technique involves a "search" for s. 8 purposes, mandate a multi-factored assessment test tailored

to fit the circumstances of the particular alleged search.[77] In the present context, the relevant considerations are:

(1) What was the subject matter of the garbage examination?

(2) Did the appellant have a direct interest in the subject matter of the garbage examination?

(3) Did the appellant have a *subjective* expectation of privacy in the subject matter of the garbage examination?

(4). If so, was the expectation *objectively* reasonable? In this respect, regard must be had to:

a. the place where the alleged "search" occurred;

b. whether the subject matter was in public view;

c. whether the subject matter had been abandoned;

d. whether the information was already in the hands of third parties; if so, whether it was subject to an obligation of confidentiality;

e. whether garbage examination involves intrusive surveillance technology;

f. whether garbage examination itself was objectively unreasonable;

g. whether the garbage examination exposed any intimate details of the appellant's lifestyle, or information of a biographical nature.

(1) Informational content of garbage, not property lines, is the real subject matter of this investigative action.

55. There is one "subject matter" in this case: garbage—physical objects placed in specially designated location for removal. The question at issue is privacy expectation re garbage. Many factors will inform that analysis including location and informational content. The appellant is wrong to claim in effect two separate stand-alone subject matters (territory and information). Although the appellant emphasizes his territorial interest, the impugned investigative action in this case, removing garbage bags and examining their contents, like the use of FLIR on the exterior of a dwelling house,[78] is mainly in opposition to the suspect's interest in controlling information about himself rather than his interest in preserving a physical territory in which to shelter private activities.

[77] ***R. v. Tessling***, *supra,* note 62 at para. 32; See also; ***R v. Plant*** [1993] 3 S.C.R. 281 at p. 293; ***R. v. Edwards*** [1996] 1 S.C.R. 128 at pp. 145-146.

[78] As in ***R. v. Tessling***, *supra*, note 62.

(2) The appellant had a direct interest in the garbage examination.

56. The information gleaned from the garbage examination was about the appellant's activities. The police removed the garbage bags from land owned by the appellant. It is conceded that he had a direct interest in the garbage examination.

(3) The appellant's actions did not manifest any subjective expectation of privacy in the subject matter of the garbage examination.

57. The appellant chose not to offer testimony during the *voir dire* assessing the propriety of the garbage examination. Therefore, the record contains no direct evidence of his subjective expectations concerning either the location from which the police retrieved the garbage bags or the information revealed by examination of their contents. Given the fact that the appellant placed clues concerning his involvement in a serious crime in those garbage bags, it would be safe to assume that he was at least hoping that those contents would become commingled with the trash of others thereby concealing any information that might be used to investigate or prosecute him. Suffice it to say at this juncture that such a hope or anticipation is not the same thing as an expectation. By simply putting out the trash and inviting others to take it, the appellant placed its future handling beyond his control and he must have subjectively expected the foreseeable consequence that the information might become known to the police.

58. The appellant took no specific steps that manifested a subjective expectation of privacy. He may have kept the incriminating trash concealed inside his house or yard permanently or at least until he was certain it was about to be collected by his usual garbage collector. He could have shredded or obliterated the contents or contracted with a private waste management company for confidential shredding and destruction. He did none of these things.

(4) In any event, the circumstances belie a reasonable expectation of privacy.

59. Consideration of the relevant circumstances refutes the contention that the appellant reasonably expected privacy in the informational garbage he set out for collection. Strong support for this position can be found in this Court's dicta,[79] in a unanimous consensus among

[79] ***R. v. Tessling***, *supra*, note 62 at paras 40-41; ***R. v. Evans*** [1996] 1 S.C.R. 8, at para. 29; see also ***R. v. Stillman*** [1997] 1 S.C.R. 607 at para. 62.

Canadian appellate courts considering this very issue[80] and in the judgments of the vast majority of American appellate courts considering this question under the 4th amendment to the United States Constitution[81] and under individual state constitutional privacy guarantees.[82] The wisdom of that consensus of eminent jurists is borne out by consideration of the governing criteria for assessing objective reasonableness.

(a) The location where the alleged search occurred does not support a finding of reasonable expectation of privacy.

10 60. Although territorial privacy is not the real subject matter of a garbage examination, it is the main thrust of the appellant's complaint. He says that because the garbage bags were sitting just inside his property line and police hands broke the plane of that line, they infringed his territorial property and committed a trespass and illegal perimeter search which infringed his reasonable expectation of territorial privacy. In fact, the impugned police action was not a perimeter search and did not involve any common law, statutory or criminal trespass. More importantly, irrespective of any notional property infringement, the police action did not intrude upon any expectation of territorial privacy.

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[80] In addition to the decision of the majority in this case, see also: ***R. v. Krist***, *supra*, note 55; ***R. v. Kennedy*** (1996), 95 O.A.C. 321(C.A.).

[81] ***California v. Greenwood*** 486 U.S.35 (1988); Federal circuits considering this question prior to the decision in ***Greenwood*** were unanimous in concluding that warrantless searches of garbage do not violate the 4th amendment: ***United States v. Mustone*** ,469 F.2d 970 (1st Cir. 1972); ***United States v. Terry*** 702 F.2d 299 (2nd Cir. 1981), cert.den. 461 US 931 (sub. nom. Williams); ***United States v. Reicherter*** 647 F.2d 397 (3rd Cir. 1981); ***United States v. Crowell***, 586 F.2d 1020 (4th Cir. 1978), cert.den 440 U.S. 959 (1979); ***United States v. Vahalik*** 606 F.2d 99 (5th Cir. 1979) cert.den. 444 U.S. 1081) (1980); ***Magda v. Benson*** 356 F.2d 111 (6th Cir. 1976); ***United States v. Shelby*** 573 F.2d 971 (7th Cir. 1978), cert.den. 439 U.S. 841 (1978); ***United States v. Biondich***, 652 F.2d 743 (8th Cir. 1981), cert. den. 454 U.S. 975 (1981); ***United States v. Dela Espirella*** 781 F.2d 1432 (9th Cir. 1986); ***United States v. O'Bryant*** 775 F.2d 1528 (11th Cir. 1985). Most state appellate courts considering this question pre ***Greenwood***, *ibid.*, reached the same conclusion: ***People vs. Huddleston*** 347 N.E. 2d 76 (Ill. App. Ct. 1976); ***Smith v. State*** 510 P.2d 793(Alaska 1973); ***State v. Fassler*** 503 P.2d 807 (Ariz. 1972); ***Croker v. State*** 477 P.2d 122 (Wyo. 1970); ***State v. Purvis*** 438 P.2d 1002 (Or. 1968); ***People v. Whotte*** 317 N.W.2d 266 (Mich. Ct. App. 1982) ; ***State v. Oquist*** 327 N.W.2d 587 (Minn. 1982); ***State v. Brown***, 484 N.E. 2d 215 (Ohio Ct. App. 1984); ***State v. Stevens*** 367 N.W.2d 788 (Wis. 1985); ***State v. Schultz*** 388 So.2d 1326 (Fla. Ct. App. 1980); ***Commonwealth v. Chappee*** 492 N.E.2d 719 (Mass. 1986); ***Cooks v. State*** 699 P.2d 653 Okla. Ct. Crim. App. 1985, cert.den. 474 U.S. 935 (1985).

[82] Most state appellate courts have followed ***Greenwood,*** *ibid*, or reached the same conclusion under state constitutions: ***People v. Hillman***, 834 P.2d 1271 (Colo. 1992); ***State v. DeFusco***, 620 A.2d 746 (Conn. Sup. 1993); ***Scott v. State***, 606 S.E.2d 312 (Georgia Ct. App. 2004); ***State v. Donato*** 20, P.3d 5 (Idaho 2001); ***State v. Fortune***, 20 P.3d 74 (Kan. Ct. App. 2001); ***People v. Pinnix***, 436 N.W.2d 692 (Mich. Ct. App. 1989); ***State v. Trahan***, 428 N.W.2d 619 (Neb. 1988); ***State v. Hauser***, 464 S.E.2d 443 (N.C.1995); ***State v. Carriere***, 545 N.W.2d 773 (N.D. 1996); ***State v. Rydberg***, 519 N.W.2d 306 (N.D. 1994); ***State v. Payne***, 662 N.E.2d 60 (Ohio Ct. App. 1995); ***State v. Bell***, 832 S.W.2d 583 (Tenn. Ct. App. 1991); ***State v. Jackson***, 937 P.2d 545 (Utah Ct. App. 1997); ***State v. Sigarroa***, 674 N.W.2d 894 (Wisc. Ct. App. 2003).

There was no "perimeter search."

61. The appellant mischaracterizes the police actions as involving a "perimeter search," as defined by this Court's seminal decision in ***Kokesch***[83] by confusing the perimeter surrounding a plot of land with the perimeter surrounding a dwelling house. The impugned police action in ***Kokesch*** took place well within a private yard and included an attempt to look inside the house.[84]

62. To equate what happened in this case with what happened in ***Kokesch*** or with any of the similarly penetrating intrusions into private yards described in the other cases relied on by the appellant[85] is mistaken. The transient reaching of arms into air space across a property line by police officers standing in a public alley posed no similar threat to the sanctity of the home. To treat what happened here as an unlawful perimeter search would significantly extend the rule in ***Kokesch***,[86] to encompass public areas surrounding private land. The act of standing in the public back alley and retrieving garbage bags did not threaten the appellant's expectation of territorial privacy in relation to either his core dwelling house or any enclave within his yard in which one might be expected to resort to shelter intimate or private activities. The police attendance took place on the exterior of the perimeter surrounding his house in an area that was both excluded from the privacy enclosing fence and directed at public accessibility. The impugned police actions were not directed at trying to see what was going on in the dwelling house; there was no perimeter search.

63. Further, the garbage stand was plainly on the outer boundary of the perimeter surrounding the dwelling house and accordingly an area where the associated expectation of privacy was at its weakest. The appellant's submission fails to differentiate between the ultimate expectation of privacy applicable to the inner sanctum of the dwelling house with the diluted expectation of privacy applicable to the perimeter surrounding the dwelling house,[87] let alone the reality that one's privacy expectation in a particular area of a yard may be further reduced by distance from the dwelling house itself, proximity to public areas and the position and arrangement of sheltering structures such as fences. In the case of the garbage stand, all of those relevant factors further diminished an already diluted expectation of privacy in the perimeter

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[83] *Supra*, note 57.
[84] Ibid at pp. 9-10
[85] ***Grant***, ***Wiley***, and ***Evans*** as discussed at para. 38(2) of the appellant's factum.
[86] *Supra*, note 57.
[87] ***R. v. Tessling***, *supra* note 62, at para. 22

surrounding the house. The stand was situated as far removed from the dwelling house as was possible on that plot of land and adjacent to a public thoroughfare. Most significantly, it was constructed to present a view of its contents to the outside world while shielding them from the purview of those within the dwelling house and yard.

64. The appellant's argument that the police disobeyed the principles in ***R. v. Evans***[88] is equally misconceived. ***Evans*** addressed a narrow question: whether the police committed a search when they "approach[ed] the door to the Evans' home and knock[ed], with the intent of 'sniffing for marijuana' when the occupant opened the door." This Court found that an expectation of privacy existed in what it carefully and consistently called the "approach to the home" or "dwelling." It then found an exception to that expectation of privacy in the form of a "licence to knock" for purposes of facilitating communication with the occupants – a licence that is crafted for and can only apply to the threshold of a dwelling.[89] ***Evans*** pointedly did not consider whether property beyond the "approach to the home" enjoys an expectation of privacy, and therefore did not consider the relative strength of any such expectation, or whether it would be affected by any exceptions. The case cannot be read as holding that, absent an inapplicable licence to knock, any crossing of a property line by a state agent must violate s. 8 of the ***Charter***. The appellant's suggested interpretation of ***Evans***, that it would bar police access to an outward-facing garbage stand, is uniquely unavailable, since this Court suggested that police could have "searche[d] through [Evans'] garbage" as a constitutionally-permissible alternative to a knock-and-sniff search.[90]

65. Fundamentally, before any "licence" exception can apply, there must be an expectation of privacy for it to be applied to. As previously discussed, there is no expectation of privacy in a garbage stand such as the appellant's.

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[88] ***R. v. Evans***, *supra*, note 79.
[89] Ibid, paras. 9, 12-21.
[90] Ibid, para. 29.

No trespass at common law

66. The police action in standing in a public alleyway and reaching into the appellant's air space does not fit within the common law definition of trespass because it did not involve the requirements of "breaking of one's close" by "entry on another's soil."[91] Significantly, the presumption of damage underlying common law trespass, generally pleaded as "the treading down and bruising [of] his herbiage," was absent; the police never set foot on the appellant's land; they did not so much as bend a blade of his grass. They removed the garbage while standing in the public alleyway, an area outside of the appellant's "close" as the garbage stand was by design outside of the area enclosed by his fence.

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67. Although, the notion of trespass into air space above private land is not unknown to the common law, there is no precedent to support the contention that the mere act of briefly reaching into such air space would found an action for trespass. Those cases in which courts found trespass on account of an intrusion into a landholder's airspace all involved situations akin to nuisance in which an overhanging item, be it a tree or a man-made structure, interfered with the landholders usual use and enjoyment of that air space.[92] In this case, the temporary reaching for garbage bags that the appellant had placed in that location for removal by outsiders did not interfere with his peaceful enjoyment but was entirely consistent with his regular use and enjoyment of that tiny part of his property.

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No Statutory Trespass

68. The police actions in this case also did not violate Alberta statutory law governing trespass.[93] The ***Petty Trespass Act*** requires "entry on land," which was absent here. Even if the air space is considered to be "land," other statutory preconditions are not operative. The area of police intrusion (the garbage stand) was not an area marked with any form of notice prohibiting entry. Nor was the area of the garbage stand the type of land for which entry is prohibited without such a notice. It was not a lawn, garden or land under cultivation. It was not surrounded

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[91] Blackstone, Commentaries on the Laws of England Vol. III, University of Chicago Press @ pp. 209-210; See also: ***Entick v. Carrington*** (1765) 2 Wils. K.B. 275, at pg 291.

[92] ***Didow v. Alberta Power Ltd. (Alta. C.A.)(***[1988), 88 A.R. 250 (C.A.), leave to appeal to S.C.C. refused (1989), 94 A.R. 320 (S.C.C.); ***Earle v. Martin*** (1988), 172 Nfld. & P.E.I.R. 105; ***Baron Bernstein of Leigh v. Skyview & General Ltd.*** [1978] 1 Q.B. 479 (Eng.); ***Lacroix v. Canada*** [1954] Ex. C.R. 69 (Can. Ex. Ct.);***Woollerton & Wilson Ltd. v. Richard Costain Ltd.*** (1969), [1970] 1 All E.R. 483 (Eng. Ch. Div.). But see contra: ***Lewvest Ltd. v. Scotia Towers Ltd***. (1981), 19 R.P.R. 192 (Nfld. T.D.), 126 D.L.R. (3d) 239

[93] ***Petty Trespass Act*** RSA 2000 c, P-11 s. 2.1

by a fence; but rather, excluded from the area enclosed by the fence. Finally, it was not enclosed in some other manner indicative of an intention to keep persons off that land. The opposite was the case; the very purpose of the garbage stand was to facilitate the access of outsiders to that tiny segment of the appellant's land.

No Criminal Trespass

69. The evidence did not establish any of the elements of the offense of "trespass by night" contrary to s. 177 of the ***Criminal Code***. The impugned actions while carried out under cover of darkness took place in the morning after 6 a.m. and therefore were not done "at night."[94] By attending briefly to remove some garbage, the police neither "loitered"[95] nor "prowled" and lacked the requisite *mens rea*"[96]—they were after all trying to gather evidence of a serious crime and preserve the lives and property of Calgary residents against the threat of chemical explosion and toxic contamination. Moreover, by standing on the outside of a fenced backyard in a public alleyway, they cannot be said to have been situate "near a dwelling house," as that phrase is understood and applied in criminal trespass cases.[97]

Any notional breach of property rights does not equate to a breach of territorial privacy.

70. There is simply no justification for treating any notional or trivial *property* infringement as infringing the appellant's territorial *privacy* under of the ***Charter***. Section 8 of the ***Charter*** protects people not places (privacy rather than property); the police actions in reaching into the appellant's air space to retrieve garbage bags cannot be said to have intruded upon the appellant's reasonable expectation of territorial privacy. A garbage stand is not a private enclave for sheltering intimate activities associated with the dwelling house. While a garage or shed or even the part of a yard enclosed and sheltered by a surrounding fence may be appropriate places to store private information, carry on private conversation or to act with at least some expectation of privacy, a stand or alcove specifically excluded from the area protected by a surrounding fence is the exact opposite of a private place. Its design and construction encourage public access to facilitate removal of unwanted, as opposed to protected, items. Just as an open front yard is no

[94] See ***Criminal Code*** s. 2.
[95] ***R. v. Heywood***, [1994] 2 S.C.R. 761, at 789
[96] ***R. v. Cloutier*** (1991), 51 Q.A.C 143; See also: ***R. v. Priestap***, (2006) 79 O.R. (3d) 561 (C.A.).
[97] See: ***R. v. Andreoli***, [1969] B.R. 860 (Qc. C.A.) at p. 861.

place to expect private nude sun bathing, an outward facing garbage stand is no place to shield private activity or private items from public consumption. Even a cardboard box with interlaced flaps sitting on a deck or patio signals an intention to retain and conceal contents from the grasp or purview of outsiders. By contrast, garbage bags placed at a site for collection communicate to the world that the householder disassociates himself from those items and desires others to take them.

(b) The fact that the appellant was discarding the garbage bags was on public display.

10 71. This factor cuts in both directions. The contents of the garbage bags were not in plain view. But the presentation of the garbage stand plainly communicated to outsiders that the appellant was discarding those contents.

(c) The appellant had plainly abandoned any privacy interest in the contents of the garbage bags.

72. The appellant's voluntary abandonment of the trash bags refutes the reasonableness of the claimed expectation of privacy. The appellant placed the bags in his garbage take-away spot manifesting an intention to disassociate himself from it and an intention that others take it. By
20 that action the appellant lost control over who might view it. He failed to take obvious measures against its connection to him becoming known. It does not lie in his mouth to now say that he reasonably expected privacy concerning information revealed by examination of the contents.

73. As noted above, on two prior occasions this Court has mentioned garbage put out for collection in the context of considering s. 8. In ***Tessling***, it was mentioned as the paradigm example of abandonment of privacy interest.[98] In ***R. v. Evans***,[99] examining the accused's garbage was referred to as a lawful technique the police should have resorted to. Similarly, other Canadian courts upholding the legitimacy of police examination of garbage set out for collection have all emphasized abandonment as a significant, if not determinative, consideration against
30 finding a reasonable expectation of privacy.[100] Likewise, the vast majority of American appellate courts dealing with this issue have also emphasized abandonment or voluntary exposure to third parties as a principal consideration against treating this investigative action as a search in the

[98] See ***R. v. Tessling***, *supra*, note 62 at para. 40-41.
[99] *Supra*, note 79.
[100] Appeal Reasons, App. R. Tab 2(c), p. 47 at para. 44-45 see: ***R. v. Krist*** supra, note at para. 22-28, ***R. v. Kennedy***, supra note 80 at para. 28-32.

context of the warrant requirement of the 4th Amendment[101] or similar privacy guarantees under state constitutions.[102]

74. The abandonment of privacy expectations inherent in the appellant's actions is distinct from the question of any abandonment of his property interest in those contents. The appellant argues that so long as he retained the ability to retrieve those contents, a finding of abandonment cannot be supported. That submission confuses property law abandonment with constitutional abandonment. The distinction is well explained by an American jurist considering the legitimacy of garbage examination under the 4th Amendment:

> *Under the law of property, the question is whether the owner has voluntarily, intentionally, and unconditionally relinquished his interest in the property so that another, having acquired possession, may successfully assert his superior interest. Under the law of search and seizure, however, the question is whether the defendant has, in discarding the … property, relinquished his expectation of privacy with respect to the property so that neither search nor seizure is within the proscription of the fourth amendment. "In essence, what is abandoned is not necessarily the defendant's property, but his reasonable expectation of privacy therein."*[103]

(d) The appellant's trash bags were available to third parties and not subject to any obligation of confidentiality.

75. The garbage bags examined by the police were not yet in the hands of third parties but that was clearly their destination. Any third party review of the contents was not subject to any confidentiality restrictions. The appellant's garbage bags were set out for municipal collection by employees of the City of Calgary. Moreover, it is well known that trash is subject to examination by a wide variety of third parties, including: bottle and can collectors, homeless persons seeking usable items,[104] Freegans seeking sustenance or useful goods,[105] or even commercial agents analyzing market trends. Not one of those reasonably expected third party examiners is limited by any statutory, commercial or professional obligation of confidentiality. From the standpoint of one's ability to control private information, putting out the trash does not bear the slightest similarity to speaking to one's solicitor or even to disclosing personal financial details to a banker or like fiduciary.

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[101] *Supra*, note 81.
[102] *Supra*, note 82.
[103] ***State v. Oquist*** (1982 Minn.), *supra* note 81, at 589-90.
[104] As discussed in ***Gosselin v. Quebec (Attorney General)***, 2002 SCC 84, [2002] 4 S.C.R. 429, para. 375.
[105] Persons who employ alternative strategies to sustain life, including "urban foraging" for useful food and other goods. See: www.freegan.info at p. 2 "Waste Reclamation".

76. By placing "smoking guns" in his trash in an area accessible to the public for the express purpose of getting rid of it, the appellant courted the very real risk that a third party would see what he put there and then report him to the police and the further risk that the police would assume the guise of those third parties to see for themselves.[106] The appellant's trash included chemical recipes for making illicit drugs, discarded towels bearing unusual residues with a distinctive odor and packaging for equipment that one would not readily associate with ordinary domestic purposes. Any down on his luck scavenger who happened to see those items in the course of looking for other things might well have opted to report what he saw or turn over the contents either directly to police or through the Crimestoppers program in the hopes of a cash reward. Further, the trash may have just as easily have been disturbed and scattered by animals or children or by the garbage collector's clumsiness thus exposing suspicious contents to a public-spirited garbage collector or passing neighbor.

77. The appellant asserts, without authority, that confidentiality should attach to garbage because confidentiality is a necessary prerequisite to preventing negative uses of garbage by, for instance, stalkers, paparazzi, or those who would misuse a competitor's trade secrets. In each of these examples, the wrongful act lies in the *use* of the garbage, not in its taking, and the available remedies are targeted accordingly. For instance, a person who takes residential garbage as part of a pattern of fear-engendering behaviour may face charges of criminal harassment.[107] An entrepreneur who digs a competitor's trade secrets out of its trash and then misuses them may face penalties for improper business practices.[108] But the mere act of taking items from garbage will not attract criminal or civil liability. If it did, then bottle collectors and Freegans would be culpable alongside stalkers and unethical entrepreneurs. An end-use analysis appropriately prevents the malign uses of garbage while permitting the benign ones. Regardless of the end use, garbage is neither descriptively nor normatively confidential.

78. It is stretching to argue, as the appellant has done, that municipal by-laws or ordinances directed at tidiness place any limitations on the access of third parties to his garbage bags. The

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[106] As the police did in ***Plant***, *supra*, note 77, with respect to power company records.
[107] ***R. v. Krushel***, (2000), 31 C.R. (4th) 295 (Ont. C.A.); ***R. v. Hall*** [1997] S.J. No. 776 (Prov. Ct.) (QL).
[108] See. eg., ***R. v. Stewart***, [1988] 1 S.C.R. 963, paras. 21-28, 31-35; ***Telus Communications Inc. v. T.W.U.,*** 2006 CarswellNat 4894 (Canada Arbitration Board) at para. 71.

by-law may require that scavengers go about their business in a tidy way, it may even require that they remove the garbage bags to another location to seek their cans and other treasures, but that is a far cry from statutory protection of personal information. The further idea that the process of municipal waste management is somehow impressed with s. 8 obligations and that the garbage collector (not to mention the bulldozer operator at the landfill site) has become the custodian of our trashed personal secrets is equally far-fetched.

(e) Examination of abandoned garbage does not involve intrusive surveillance technology.

79. It is trite that garbage examination is old fashioned police drudgery. It is decidedly low-tech. It does not engage the particular concerns, expressed by this Court, associated with police use of highly efficient electronic or like surveillance technology that in the absence of a warrant requirement would threaten to obliterate our basic notions of free and private life.

(f) Examination of abandoned garbage in the course of a focused crime investigation is not objectively unreasonable.

80. In spite of the obvious assumption of risk involved in the act of abandoning embarrassing or incriminating secrets in a bag of discarded trash and notwithstanding the obvious lack of individual control that attends this action, unregulated police garbage inspection has its detractors both in Canada[109] and in the United States.[110] The rub, for this small minority of jurists, is a concern about the potential for indiscriminate or improper use of this investigative technique. That concern is also at the root of the dissent in the Court below that brings this appeal as of right before this Court.[111] Curiously, this theme has not been advanced in any significant way in the appellant's factum. Nevertheless, the matter bears some discussion in view of the obvious fact that concerns about indiscriminate use of particular investigative methods and their potential threat to the freedom of our society has been a recurring theme in this Court's seminal jurisprudence concerning s. 8.[112]

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[109] ***R. v. Andrews***, J.E. 2005-1959 (C.Q. crim & pen.); Conrad, J.A. dissenting in the Court below.
[110] See dissenting judgment of Brennan, J. in ***R. v. Greenwood***, *supra*, note 81. See also ***People v. Krivda***, 486 P.2d 1262 (Cal. 1971; ***State v. Tanaka***, 701 P.2d 1274 (Hawaii 1985); ***State v. Goss***, 834 A.2d 316 (N.H. 2003); ***State v. Hempele***, 576 A.2d 793 (N.J. 1990); ***State v. Granville***, 142 P.3d 933 (N.M. Ct. App. 2006); ***State v. Morris***, 680 A.2d 90, 165 Vt. 111 (Vt. 1996); ***State v. Boland***, 800 P.2d 1112 (Wash. 1990).
[111] Dissent judgment App. Rec. Vol I, at paras. 94-95..
[112] ***R. v. Tessling***, *supra*, note 62 at paras. 54-55, ***R. v. Duarte*** [1990] 1 S.C.R. 30 at p. 44, ***R. v. Wong*** [1990] 3 S.C.R. 36 at pp. 43-47.

81. Clearly, the majority of jurists considering this issue have not viewed such fears as having sufficient cogency to treat garbage examination as a search subject to a warrant requirement. That is a consensus of common sense. There is nothing in the examination of abandoned garbage that is akin to the efficacy of electronic surveillance and likewise no realistic concern that its unregulated use would imperil the freedom of our society. The "dirty job" of sifting through soggy cornflakes, discarded coffee grounds and even smellier and more unpleasant domestic detritus looking for tiny, sometimes microscopic, clues is unlikely to appeal to a significant number of law enforcement volunteers. It is an unenviable labor intensive task only undertaken in compelling circumstances when the police have good reason to believe they are investigating an actual crime and have a clear idea that such sifting is a wise use of their resources. It is old fashioned police work much like the tedium of long hours staked out on surveillance or the patient process by which an undercover operative works to gain the trust of a drug trafficker or prime suspect in an unsolved homicide. It is not at all like sitting at a computer and clicking a mouse to surf through a host of intercepted telephone lines or watching umpteen television screens displaying the observations of dozens of video surveillance cameras.

82. From this perspective it is instructive to consider that similarly labor intensive, unpleasant and low-tech investigative mainstays, visual surveillance and undercover investigation, have long been accepted as objectively reasonable despite their potential to reveal intimate lifestyle secrets and core personal biography that an individual might wish to control from dissemination to the state. Both techniques have been implicitly approved by this Court.

83. In ***Wise***[113] this Court implied that the police were not conducting a search by following a suspect's movements in public areas, even if augmented by binoculars as distinct from tracking that same person's movements with a beeper. One can easily imagine how police might learn much personal information that an individual would prefer to keep private, through the simple expedient of following a person closely for an extended period of time aided by binoculars. That endeavor may reveal a catalogue of personal biography including: one's eating and reading tastes, religious or political affiliations, hobbies, interests and intimate contacts.

84. Likewise, police use of undercover operatives has not been treated as a search subject to a warrant requirement in spite of its potential to reveal an individual's most intensely private

[113] ***R. v. Wise*** [1992] 1 S.C.R. 527 at p. 546.

information. It is noteworthy that in both ***Duarte*** and ***Wong*** while this Court concluded that the surreptitious recording and videotaping involved searches subject to a warrant requirement, the investigating officers remained free to report and testify about what they had heard in private conversation in the former case or seen when attending the suspect's hotel room gambling den in the latter case.

85. Our long and satisfactory acquaintance with undercover investigation and visual surveillance unencumbered by warrant requirements ought to allay any fears that unregulated garbage examination threatens any form of Orwellian nightmare. Experience has shown that those analogous techniques that gather evidence from what a suspect exposes to the wider world are largely self-regulating on account of their similarly laborious and resource intensive nature. Despite long experience with these techniques operating without a warrant requirement, neither indiscriminate police surveillance nor arbitrary and improper use of undercover operatives has surfaced as a problem in Canada. In short, these techniques are employed in the course of *bona fide* and focused investigations.

86. Police examination of abandoned garbage is also nothing new. The police have probably been looking for incriminating clues in abandoned trash as long as there has been police and an ability to link abandoned garbage with a criminal suspect. Plainly, the technique has been in use for at least the past 25 years in Canada, given that its unregulated use was judicially approved as conforming to the ***Charter*** in 1984.[114] Through that time there is simply no evidence that police have engaged in any arbitrary or improperly motivated spot-checking of residential trash. Certainly, there has been nothing like troops of house to house garbage police randomly inspecting the virtue of Canadians. As already noted, judicially approved police garbage examination has an even longer history in the United States. There is likewise no evidence to suggest a history of improper or arbitrary employment of this technique in that country. Fears of an Orwellian nightmare in relation to garbage examination would thus seem to be somewhat fantastic.

87. To impose a warrant requirement would be an excessive and unnecessary response to the minimal risk of arbitrary or improper garbage examination. In this case, the police were tracking a dangerous clandestine drug lab and had already acquired cogent grounds for believing that they

[114] ***R. v. Taylor*** [1984] B.C.J. No. 176 (S.C.)(QL), at paras. 36-52.

had discovered its precise location. They examined the appellant's trash seeking confirmation of that belief before proceeding with an application for a warrant to search his house. That is the paradigm of the *bona fide* and focused investigation. Therefore, this case does not provide any context for considering a rule addressing arbitrary or improperly motivated garbage examination and it would be preferable for this Court to leave that question for another day, should the issue ever squarely present itself. Indeed, it may well be the case that existing constitutional rules already serve to discourage such actions. In the undercover context, random virtue testing is prohibited by the entrapment rule.[115] In a proper case, random virtue inspection through garbage examination ("entrashment" if you will) may be found similarly abusive and repugnant to principles of fundamental justice. Likewise, a prosecution started by a garbage examination undertaken for wholly improper reasons such as racial or like discrimination, would clearly be subject to review in terms of whether compelling the accused to stand trial offended those principles of fundamental justice that underlie our community sense of fair play and decency.[116]

88. If this Court should nevertheless find it necessary to place some condition on the use of this technique, the respondent urges this Court not to impose any form of warrant requirement but rather a simple rule that garbage examination may only be undertaken in the *bona fide* pursuit of a focused criminal investigation. A similar approach has been taken in at least one American jurisdiction, where the Court did not consider the investigative action to intrude upon a reasonable expectation of privacy but nevertheless preferred a rule that would discourage indiscriminate garbage examination.[117]

(g) The fact that examination of abandoned garbage may reveal core personal biography is not conclusive of a "search".

89. While it cannot be disputed that examination of abandoned trash may reveal intimate lifestyle details, that fact is not conclusive of a search for s. 8 purposes. What a person knowingly puts on full public display or exposes to a segment of the public is not subject to any expectation of privacy.[118] This Court's jurisprudence also allows that there is no reasonable expectation of privacy in information that we have knowingly exposed to third parties, even

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[115] ***R. v. Mack*** [1988] 2 S.C.R. 903 at pp. 946-966.
[116] ***R. v. Jewitt*** [1985] 2 S.C.R. 128, at pp. 136-137
[117] ***Litchfield v. State***, 824 N.E. 2d 356 (Ind. 2005)
[118] ***R. v. Tessling***, *supra* note 62 at para. 40; See also: ***R. v. Boersma*** [1994] 1 S.C.R. 488; ***R. v. Stillman***, *supra*, note 79, at para 62 per Cory J., and at para. 226, per McLachlin (as she then was) dissenting; ***R. v. Evans***, *supra*, note 79 at para. 50 per Major J. concurring.

though it may be very intimate and detailed personal biography. As mentioned, the situation of undercover investigation is particularly illustrative of this important point. While the ***Duarte***[119] doctrine rejects risk analysis as a complete answer to all s. 8 implications and on that account forbids unauthorized electronic recording, it does not prohibit the undercover state agent from making notes or more importantly repeating what was heard and so recorded either in an application for a search warrant or in testimony supporting a charge.

90. Informational privacy is concerned with "how much information about ourselves and our activities we are entitled to shield from the curious eyes of the state".[120] But s. 8 is only implicated if the source from which the police obtained the information is subject to some element of individual control as opposed to mere wishful thinking. When we put out the trash, we exhibit an intention to disassociate ourselves from it and a desire that others take it. From that point, the contents, however revealing they are of our private affairs, pass into a sphere where access by others is uncontrolled and expectations of privacy are cast away. We may hope that no one will examine the revealing contents but we have put that beyond our control. In this sense, the situation of garbage is just like sharing secrets with those we perceive as our friends. Once we share intimate or private information with a "friend," we risk having it repeated to others including the police or a jury presiding over a criminal trial. Indeed, we run the risk that the "friend" is the police. We may have trusted the "friends" and hoped for their discretion but once they know our secrets, what they do with that information is simply beyond our control. So too with private information we place in the trash.

II. Section 24(2)

91 Any breach of s. 8 that this Court may find was minimally intrusive and yielded non-conscriptive evidence that could not impair the fairness of the trial. Since the police actions resulted from honest reliance upon existing jurisprudence, exclusion would undermine the authority of the courts and would bring disrepute to the administration of justice. There is no justification for excluding the evidence needed to convict a plainly guilty high-end drug producer.

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[119] ***R. v. Duarte***, *supra*, note 112 at pp. 43-49.
[120] ***R. v Tessling***, *supra* note 62, at para. 23.

92 The appellant attempts to manufacture a serious breach by playing on two main themes. He says: (a) the officers acted in bad faith in failing to anticipate that the British Columbia Court of Appeal's decision in ***R. v. Krist***,[121] would eventually be overruled and (b) for purposes of measuring the magnitude of the intrusion on privacy, the garbage gathering must be directly equated with the full search of the appellant's dwelling house. The former argument is directly contrary to this Court's jurisprudence. The latter is flawed both factually and analytically. Applying the appellant's logic to the subs. 24(2) analysis would draw disrepute upon the administration of justice.

Police must not be punished for following the law.

93. The police officers believed that taking garbage from a back-alley garbage stand was not a search. Their belief was not merely reasonable, as the trial judge found.[122] It was the only correct belief available to them, and they should not be punished for holding it.

94. In December of 2003, there were four reported Canadian judgments (including two at the appellate level) on the issue of police collection of residential garbage. All four had ruled that taking residential garbage is not a search within the meaning of s. 8 of the ***Charter***, because there is no privacy interest in abandoned items.[123] In one of these cases, the British Columbia Supreme Court held the same to be true where the officer had to walk onto private property to reach the garbage.[124] Cases on non-residential garbage were nearly as uniform,[125] with only one significant exception: this Court's decision in ***R. v Stillman*** that bodily substances disposed of in a quasi-conscriptive custodial setting may not be seized without warrant. Even there, four justices disagreed on the basis that there is no privacy interest in abandoned items.[126]

95. In the appellant's view, the officers should have adopted a position that the courts had rejected by intuiting that trespass would trump abandonment where garbage gathering was

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[121] *Supra*, note 55.
[122] Trial Reasons, Resp.R. Tab II, p. 8 at para. 19 and page 16 at para. 48.
[123] ***R. v. Krist***, *supra*, note 55; ***R. v. Kennedy*** (1996), *supra*, note 80; ***R. v. Taylor***, *supra*, note 114; ***R. v. Tam***, [1993] B.C.J. No. 781 (S.C.)(QL).
[124] ***R. v. Tam***, *supra* note 123 at paras. 3-5.
[125] ***R. v. Dyment***, [1988] 2 S.C.R. 417 at pp. 434-435; ***R. v. Love*** (1994), 174 A.R. 360 (Alta. Q.B.), aff'd (1995), 102 C.C.C. (3d) 393 (Alta. C.A.), leave to appeal to S.C.C. refused, [1996] 2 S.C.R. viii.; ***R. v. Arp***, [1995] B.C.J. No. 800 (S.C.) at paras. 142, 145, aff'd on other grounds (1997), 92 B.C.A.C. 286 and [1998] 3 S.C.R. 339.
[126] ***R. v. Stillman***, *supra*, note 79, at paras. 55-63, 172, 193, 222-231, 273-275.

concerned.[127] Contrary to the appellant's argument, the officers did not cavalierly disregard the territorial limits of their powers: they would not have gone into the yard or through a physical barrier to take the garbage.[128] They did factor trespass into their decision, but, like the British Columbia Supreme Court, they came to a different conclusion than that now urged by the appellant.

96. This Court has held that police officers will not be permitted to use ignorance as a convenient shield for ***Charter*** abuses.[129] In this case, however, the officers are not being accused of ignorance. They are being accused of a failure of prescience. Given the uniformity of the extant jurisprudence, to reach the conclusion urged by the appellant the officers would have needed first to predict that a controversy may arise, and then to predict its outcome.

97. Police officers are not expected to predict possible changes to their powers, and their failure to do so will not constitute bad faith.[130] Where, as here, police have relied in good faith on the constitutionality of a search power, a subsequent finding of invalidity will not render evidence inadmissible.[131] Section 24(2) must operate in this manner to prevent the absurdity of punishing the police for learning and following the law.

Automatic excision is irreconcilable with the purposes of subs. 24(2).

98. As the trial judge found, "[i]t is hard to imagine how there could be a less 'intrusive' technique than what occurred here."[132] The police infringed only on the outermost bounds of the appellant's property, outside his fence, outside his regular control, where his privacy interest was

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[127] The Appellant appropriately does not argue that the police should have intuited the impact of informational privacy, since this court's judgment in ***R. v. Tessling,*** *supra,* note 62, had not been released at the time of this investigation.
[128] App. R., Tab 4(c), pp. 153/5-21, 154/5-155/19; Resp.R., Tab IV(b), pp. 34/22-28; Resp.R. Tab IV(c), pp. 52/13-25, 57/22-35, 60/28-47, 61/20-62/45.
[129] See: ***R. v. Buhay*** 2003 SCC 30, [2003]1 S.C.R. 631 at para. 59; ***R. v. Kokesch***, *supra*, note 57 at pp. 33-34.
[130] ***R. v. Kokesch***, *supra*, note 57 at p. 34.
[131] ***R. v. Simmons***, [1988] 2 S.C.R. 495 at pp. 534-535; see also ***R. v. Evans***, *supra*, note 79 at para. 30; ***R. v. Jacoy***, [1988] 2 S.C.R. 548 at p. 559-560; ***R. v. Sieben***, [1987] 1 S.C.R. 295 at p. 299; ***R. v. Hamill***, [1987] 1 S.C.R. 301 at pp. 307-308; ***R. v. Duarte***, *supra*, note 112 at p. 59; ***R. v. Grant***, [1993] 3 S.C.R. 223 at p. 258-259; ***R. v. Wijesinha*** [1995] 3 S.C.R. 422 at p. 446; ***R. v. Colarusso***, [1994] 1 S.C.R. 20 at p. 76; ***R. v. Plant***, *supra*, note 77 at p. 300; ***R. v. Kokesch***, *supra*, note 57 at pp. 23, 31-33. This is particularly true where the officers' misunderstanding involved law outside the criminal-constitutional realm: ***R. v. Colarusso***, [1994] 1 S.C.R. 20 at paras. 117, 119; ***R. v. Kenny; R. v. Mercer*** (1992), 52 O.A.C. 70 (C.A) at para. 32. Where the law is open to interpretation, neither a finding of good faith reliance nor of flagrant disregard will be supported: ***R. v. Lauda***, 1999 CanLII 970 (ON. C.A.) at para. 88, ***R. v. Smith*** 2005 BCCA 334 at para. 61.
[132] Trial Reasons, Resp.R. Tab II, p. 15 at para. 41.

greatly diluted relative to the inner sanctum of his house.[133] The police only took garbage clearly abandoned for disposal, containing items of which the appellant wanted to divest himself. Any intrusion on the appellant's minimal privacy interest was commensurately minimal.[134]

99. The appellant employs the following chain of reasoning to magnify the degree of intrusion. First, he says, the facts gleaned from the garbage must automatically be excised from the information to obtain the search warrant ("ITO"). Without those facts, the search warrant "could not have been granted." Therefore the police committed a significantly intrusive warrantless search of the appellant's dwelling-house.[135] This erroneous conclusion is the result of two errors in the appellant's reasoning: one factual and one analytical.

100. It is factually dubious to claim that the warrant *could not* have been granted without the garbage information. Because of the officers' caution, this claim was never tested before a justice or the trial judge. The police reasonably believed that Gowing had brought ecstasy precursors into the appellant's yard,[136] but they were not yet certain that the clandestine ecstasy lab was operating in the appellant's house.[137] Rather than orchestrate a full-scale residential search while some question of the appellant's moral blameworthiness remained, the officers chose to check his garbage to confirm their suspicion. They had solid objective grounds to believe that Gowing was operating a clandestine lab, that the appellant was associated with it, and that on 02 December 2003 precursor chemicals could be found on the appellant's property.[138] Issues of the officers' subjective belief aside, the appellant's claim that a warrant to search for evidence *could not* have been granted is a rash one.

101. It is analytically unsound to claim that facts obtained by a constitutionally impermissible search must automatically be excised from an ITO. The appellant's theory on this point derives from a puzzling passage in ***R. v. Grant***. There, this Court purported to rely on ***R. v. Garofoli*** for the proposition that a trial court, having found that some facts in an ITO were improperly obtained, must consider whether the warrant could have been issued if those facts had been

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[133] ***R. v. Tessling***, *supra*, note 62 at para. 22; ***R. v. Lauda***, *supra*, note 131 at paras. 91-92.
[134] ***R. v. Belnavis***, [1997] 3 S.C.R. 341 at para. 40; ***R. v. Buhay***, *supra*, note 129 at para. 65.
[135] Appellant's Factum at paras. 90-92.
[136] Smart's ITO, App. R., Tab 5(e), p. 234 at para. 42; Agreed Facts, App. R., Tab 5(a), p. 205-206 at para. 23.
[137] Resp.R., Tab IV(c), p. 58/12-19.
[138] Smart's ITO, App. R., Tab 5(e), pp. 224-234 at paras. 7-42; Resp.R., Tab IV(c), pp. 59/ 44-60/15.

excised. The proffered rationale for this proposition was that the state should be "prevented from benefiting from the illegal acts of police officers."[139]

102. No such proposition appears in ***R. v. Garofoli***.[140] That case addressed the treatment of wiretap authorizations based on affidavits containing facts that were unreliable or that could compromise informant privilege. The court concluded that unreliable facts must be excised from an affidavit, and that if the remaining facts did not meet the "reasonable grounds" threshold, the authorization was unlawful. There was no occasion to resort to subs. 24(2), since the ***Criminal Code*** wiretap provisions rendered the intercepted communications automatically inadmissible.

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103. ***Garofoli*** does not stand for automatic excision of unconstitutionally obtained fact from an ITO. First, the case did not deal with facts obtained in breach of the ***Charter***. Second, its result of automatic exclusion of intercepted communications under the ***Criminal Code*** bears no relationship to a principle of automatic excision of fact under subs. 24(2) of the ***Charter***. Since ***Garofoli***, the ***Criminal Code*** rule of automatic inadmissibility has been repealed; now "any remedy resulting from a finding of unconstitutionality must be determined in accordance with subs. 24(2) of the ***Charter***."[141]

104. This Court has rejected automatic exclusion of evidence as being incompatible with the
20 wording and the purpose of subs. 24(2).[142] Automatic excision of fact is equally incompatible, and should equally be rejected, as this case clearly illustrates.

105. ***Grant's*** assertion that the police must not benefit from unlawful acts is irreconcilable with the principle that subs. 24(2) must not be used to punish the police.[143] But supposing for the moment that it were appropriate to excise fact from an ITO to prevent the police from "benefiting from [their] illegal acts," what were the illegal acts in this case? At the relevant time, garbage gathering was constitutionally permissible and entirely legal. Automatic excision fails to account for any of the ***Collins*** factors, including good faith reliance on existing law.

30 106. The subs. 24(2) analysis in ***Grant*** contained an additional troubling point. Even after excising the improperly obtained facts from the ITO, and having found that the search warrant

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[139] ***R. v. Grant***, supra, note 131 at pp. 251-252.
[140] ***R. v. Garofoli*** [1990] 2 S.C.R. 1421 ("*Garofoli*").
[141] ***R. v. Pires; R. v. Lising***, 2005 SCC 66, [2005] 3 S.C.R. 343 at para. 8; see also paras. 12-13.
[142] ***R. v. Collins***, [1987] 1 S.C.R. 265 at pp. 275, 280 ("*Collins*").
[143] ***R. v. Collins***, *supra*, note 142 at pp. 275, 281.

was valid without them, the court went on to consider whether subs. 24(2) would be engaged because the fruits of the warrant were "obtained in a manner" flowing from the pre-warrant ***Charter*** breach. This has the effect of double-counting the breach. If excision must be automatic, it should also be final. Excised facts should not be resurrected to see if they may aggravate a search that could legally have been executed without them.

107. In ***R. v. Kokesch***,[144] this Court employed an analysis consistent with its approach to the threshold of subs. 24(2), by directly considering the strength of the connection between the original breach (a perimeter search) and the evidence ultimately obtained under warrant. Without the analytical interruption of automatic excision, the court was able to assess the ***Collins*** factors appropriately and fully. It weighed the *fides* and intrusiveness of the perimeter search, not the fictitious seriousness of a residential search made retroactively "warrantless." Where the initial technique was employed in good faith, leading to the issuance of a warrant the police believed was valid, bad faith cannot follow. "If a person armed with [a court] order cannot assume he or she is acting lawfully, who can?"[145]

108. The Respondent urges this Court to over-rule the automatic-excision doctrine established by ***Grant*** and to replace it with a rule based on the approach followed by the majority in ***Kokesch***. By this approach, all *reliable* information set forth in an ITO would be available to support the validity of the warrant upon review. There would be no double-counting of ***Charter*** breaches. By this approach, the applicant would, nevertheless, retain the ability to exclude the evidence in a proper case. If the applicant could demonstrate a sufficient nexus between the original ***Charter*** breach and the evidence ultimately secured by warrant, then the relevant subs.24(2) factors would be considered in relation to that breach alone with no unfair snowballing effect.

109. Here, the police collected garbage in good-faith reliance on existing jurisprudence, and then searched the appellant's residence in good-faith reliance on a judicial authorization. Automatic excision and its snowball effect on seriousness should not be used to punish the police for their intended ***Charter*** compliance.

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[144] ***R .v. Kokesch***, *supra*, note 57 at pp. 19, 22-23, 25-26, 29-30.
[145] ***R. v. Garofoli***, *supra*, note 140 at p. 1477 (per McLachlin J.).

Excluding the evidence would undermine judicial decisions.

110. Excluding the evidence in this case would bring disrepute to the administration of justice in the eyes of a dispassionate, informed observer,[146] since that observer likely would have interpreted the law just as Corporal Robinson, Constable Hearty and Constable Smart did. There is little risk of admission being viewed as condonation of police misconduct[147] since there was no "misconduct" to condone.

111. The 2,679 MDA pills, production paraphernalia designed to make the pills attractive to children, and records of high-volume past sales are all real, non-conscriptive evidence of a very serious crime.[148] By contrast, any breach arising from the collection of garbage was not serious, since it was minimally intrusive and committed in good faith. The evidence is crucial to the Crown's case, and its exclusion would result in the acquittal of "one of the upper-level traffickers of MDA or ecstasy in the Calgary area."[149]

112. Typically, a subs. 24(2) analysis must balance the interests of truth against the integrity of the justice system.[150] Here, both interests mandate admission of the evidence. The appellant is plainly guilty. Exclusion would punish the police for having followed the law and obtained judicial authorization. In effect, exclusion would undermine the authority of the courts at the potential risk of discouraging police from accepting and obeying their judgments.

113. To preserve the integrity of the justice system, the evidence must be admitted and the appellant's conviction upheld.

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[146] ***R. v. Collins***, *supra*, note 142 at p. 282.
[147] ***R. v. Kokesch***, *supra*, note 57 at pp. 14, 27; ***R. v. Buhay***, *supra*, note 129 at para. 70.
[148] ***R. v. Russell***, 2000 BCSC 27, 45 W.C.B (2d) 74 at paras. 31-36; ***R. v. Bouaban***, 2002 ABQB 128, 309 A.R. 325 at paras. 19-20; ***R. v Hoang***, [2002] O.T.C. 229 (Sup. Ct.) at paras. 35-37; ***R. v. S.D.S.***, 2006 BCSC 678, 69 W.C.B. (2d) 398 at paras. 7-8; cf. ***R. v. Plant***, *supra*, note 77 at p. 301.
[149] Resp.R., Tab IV(d), p. 65/30-36.
[150] ***R. v. Simmons***, *supra* note 131 at p. 534.

PART IV
COSTS

114. The respondent makes no submissions with respect to costs.

PART V
ORDER SOUGHT

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115. The respondent respectfully requests that this appeal be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Edmonton, Alberta, this 1st day of April, 2008.

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Ron Reimer	Jolaine Antonio
Counsel for the Respondent	Counsel for the Respondent

PART VI
TABLE OF AUTHORITIES

Other References	
Blackstone, Commentaries on the Laws of England Vol. III, University of Chicago Press	**66**
Freegan Website www.freegan.info at p. 2 "Waste Reclamation".	**75, 77**

PART VII
STATUTE / REGULATION / RULE

***CRIMINAL CODE. R.S., c. C-34, s.* 2; 177**

2. "night" means the period between nine o'clock in the afternoon and six o'clock in the forenoon of the following day;

177. Every one who, without lawful excuse, the proof of which lies on him, loiters or prowls at night on the property of another person near a dwelling-house situated on that property is guilty of an offence punishable on summary conviction.

2. "nuit" La période comprise entre vingt et une heures et six heures le lendemain.

177. Quiconque, sans excuse légitime, don't la preuve lui incombe, flâne ou rôde la nuit sur la propriété d'autrui, près d'une maison d'habitation située sur cette propriété, est coupable d'une infraction punissable sur déclaration de culpabilité par procedure sommaire.

CONTROLLED DRUGS AND SUBSTANCES ACT S.C., 1996, c.19

Schedule III
(Sections 2 to 7, 29, 55 and 60)

1. Amphetamines, their salts, derivatives, isomers and analogues and salts of derivatives, isomers and analogues including:

. . .

(5) 3,4–methylenedioxyamphetamine (MDA) (a–methyl–1,3–benzodioxole–5–ethanamine)

. . .

1996, c. 19, Sch. III; SOR/97-230, ss. 7 to 10; SOR/98-173, s. 1; SOR/2000-220, s. 1;SOR/2003-32, ss. 2, 3, 4(F), 5; SOR/2003-412; SOR/2005-235, s. 2.

1. Les amphétamines, leurs sels, dérivés, isomères et analogues, ainsi que les sels de leurs
dérivés, isomères et analogues, notamment:

. . .

(5) méthylènedioxy–3,4 amphétamine (MDA) (a–méthyl benzodioxole–1,3 éthanamine–5)

. . .

1996, ch. 19, ann. III; DORS/97-230, art. 7 à 10; DORS/98-173, art. 1; DORS/2000-220, art. 1; DORS/2003-32, art. 2, 3, 4(F) et 5; DORS/2003-412; DORS/2005-235, art. 2.

Schedule VI

(Sections 2, 6, 55 and 60)

PART 1
CLASS A PRECURSORS [1]

. . .

7. Isosafrole (5-(1-propenyl)-1,3-benzodioxole)

. . .

9. 3,4-Methylenedioxyphenyl-2-propanone (1-(1,3-benzodioxole)-2-propanone)

. . .

14. Piperonal (1,3-benzodioxole-5-carboxaldehyde)

. . .

17. Safrole (5-(2-propenyl)-1,3-benzodioxole) and any essential oil containing more than 4% safrole

. . .

[1] Each Class A precursor includes synthetic and natural forms.

PART 3
PREPARATIONS AND MIXTURES

1. Any preparation or mixture that contains a precursor set out in Part 1, except items 20 to 23, or in Part 2.

1996, c. 19, Sch. VI; SOR/2002-361, s. 2; 2005-364, ss. 1, 2, 3(F), 4.

Annexe VI

(articles 2, 6, 55 et 60)

PARTIE 1
PRÉCURSEURS — CATÉGORIE A [1]

. . .

7. Isosafrole (propényl-1)-5 benzodioxole-1,3)

. . .

9. Méthylènedioxyphényle-3,4 propanone-2 ((benzodioxole-1,3)-1 propanone-2)

. . .

14. Pipéronal (benzodioxole-1,3 carboxaldehyde-5)

. . .

17. Safrole ((propényl-2)-5 benzodioxole-1,3) et les huiles essentielles qui en contiennent plus de 4 %

. . .

[1] Sont compris parmi les précurseurs de catégorie A les formes synthétiques et naturelles de ceux-ci.

PARTIE 3
PRÉPARATIONS ET MÉLANGES

1. Toute préparation ou tout mélange qui contient l'un des précurseurs visés à la partie 1, à l'exception des articles 20 à 23, ou à la partie 2.

1996, ch. 19, ann. VI; DORS/2002-361, art. 2; DORS/2005-364, art. 1, 2, 3(F) et 4.

THE CONSTITUTION OF THE UNITED STATES OF AMERICA
Bill of Rights
Amendment IV

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.