Court File No. 29670

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

HER MAJESTY THE QUEEN

Appellant
(Respondent)

and

WALTER TESSLING

Respondent
(Appellant)

RESPONDENT'S FACTUM

Walter Tessling, Respondent

(Rule 42(1), Rules of the Supreme Court of Canada)

PART I: FACTS

1. This appeal raises for the first time in this Court the issue of whether the warrantless use of an infrared detector (referred to as a FLIR) violates Section 8 of the Canadian Charter of Rights and Freedoms. The Respondent concedes that the FLIR may be employed without violating s.8 if authorized by a warrant. The case under appeal deals with the use of the FLIR on the exterior of a dwelling but the Respondent does not concede that the warrant requirement in the use of the FLIR is limited to dwellings.

2. A search warrant was obtained by the police after the use of the FLIR. The warrant would not have been obtained without the information from the

FLIR. In the event that the use of the FLIR was an unreasonable search for s.8 purposes, then that evidence must be excised and the balance of the evidence in the Information to Obtain the Warrant examined to determine its sufficiency. In this case, the Appellant concedes that the residue of the evidence would have been insufficient to support the warrant. This concession leads to the conclusion that, in the event the warrantless use of the FLIR is an unreasonable search, the warrant was invalid and any search under it, unreasonable [1]. In that event, s.24(2) would be engaged. As well, the close temporal and causal relationship between the warrantless use of the FLIR and the subsequent search of the Respondent's home with the search warrant results in the evidence being obtained as a result of a s.8 breach even if the residue of evidence was sufficient to support the warrant[2].

3. Additionally, the Appellant raises the issue of whether the Court of Appeal ought to have excluded the evidence under s.24(2) thereby acquitting the Respondent.

4. While the Respondent answers the arguments of the Appellant, it is the position of the Respondent that the reasons for judgment in the Court of Appeal are correct.

The form of the trial

5. The Appellant's Factum refers to the "Evidence at Trial". This requires some explanation.

6. The Respondent was convicted of the offences set out in the Notice of Appeal at a trial held on the 4th and 5th of December, 2000. The trial proceeded in the form of, first, an application in which the question of the exclusion of evidence found in the course of the execution of a search warrant

[1] Regina v. Grant, [1993] 3 S.C.R. 223 at pp. 251 to 252
[2] Regina v, Grant, note 1, supra, at pp. 254 to 255

at the Respondent's residence was determined. The application took the usual form of a determination as to whether there was evidence obtained by a breach of s.8 of the Charter and, if so, whether that evidence ought to be excluded.[3] The issue of exclusion having been determined against the Respondent on the basis that the evidence had not been obtained in violation of s.8 of the Charter, the Respondent admitted the balance of the elements of the offences set out in each of the 13 counts in the Indictment save and except for whether the Respondent possessed the substance referred to in Count 2 for the purposes of trafficking[4]. The Respondent did not plead guilty but admitted all the other essential facts and conceded on 12 of the 13 Counts on the admitted evidence that findings of guilt should be made on the evidence admitted. The evidence called with respect to the purpose of the possession of the marijuana was sufficient to satisfy the learned trial judge and the Respondent was found guilty on that count as well[5].

7. The evidence heard by the trial court on December 4, 2000 was in the course of the application under s.24(2) of the Charter and was the *viva voce* testimony on a '*Garofoli* application'[6] brought to demonstrate that the evidence in the Information to Obtain the Search Warrant was insufficient after it had been amplified by the testimony of the police officer who swore the information[7]. The informant (Constable Robichaud) was called as the witness by the accused. The trial judge then ruled against the Respondent on the application under s.24(2) of the Charter and the evidence was not excluded.[8]

8. The Crown then called evidence relevant to Count 2 on the Indictment on December 5, 2000. The court found the Respondent guilty of that count as

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[3] Transcript of December 4, 2000, p. 9, line 7 to page 10 to line 27; Respondent's Record Tab 3

[4] Ruling on voir dire of Mr. Justice G.I. Thompson, Appellant's Record, Tab 2, page 17, line 7 to line 33

[5] Judgment in the Superior Court of Justice, Appellant's Record, Tab 3,

[6] See R. v. Araujo, [2000] 2 S.C.R. 992 at p.1016 para. 51 to p.1018, para. 52; p.1020, para. 57

[7] Transcript of December 4, 2000, p. 9, line 7 to page 10 to line 27; Respondent's Record Tab 3

[8] Ruling on Voir Dire in the Superior Court of Justice, Appellant's Record, Tab 2

well. The evidence heard on December 5, 2000 does not touch on the issues relevant to appeal[9].

9. Stripped to its essentials, the trial consisted of a s.24(2) application upon which the evidence was not excluded, followed by the dispensation by way of admission of the proof of that which was about to be tendered as proof of 12 of the 13 Counts on the Indictment and the trial of the one live issue.

10. The "Evidence at Trial" referred to in the Appellant's Factum is the *viva voce* evidence heard on both the Charter application (the evidence of December 4, 2000) and the trial proper (the evidence of December 5, 2000). In this '*Garofoli*' application, the trial judge also had before him evidence in the form of the Information to Obtain the Search Warrant[10] that was being assessed as to its facial and sub-facial sufficiency. This Court must therefore take as evidence the contents of the Information to Obtain the Search Warrant.

Respondent's Position With Respect to the Statement of Facts

11. The Respondent makes a general objection to the Facts found in paragraph 3, 4, 10, 11, and 12 of the Appellant's Factum. The Appellant in those paragraphs minimizes the power of the FLIR as an investigative tool. In the Information to Obtain the Search Warrant[11] the Police represented the FLIR as having far more power to predict the presence of marijuana growing operations than the Appellant now asserts[12]. The Appellant in its statement as to the facts repudiates the position it took in obtaining the search warrant and a trial with respect to the intrusive qualities of the FLIR and attempts to do so by mere assertions of fact in its Factum. This Court should have regard only to those facts found in the record. The Appellant has made a serious effort to repudiate its position at trial and to improperly introduce fresh evidence on this appeal.

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[9] Evidence of Sergeant Pearson, Transcript of Evidence of December 5, 200, Appellant's Record, Tab 7

[10] Transcript of December 4, 2000, p. 10, line 11;Appellant's Record Tab 6. The Information to Obtain was made Exhibit 1 on the application and is at Tab 9 of the Appellant's Record

[11] Information to Obtain; Tab 9 of the Appellant's Record

12. The Respondent objects to the presence of the following facts in the Appellant's Statement of the Facts on the basis that these facts are not found in the evidence:

(a) Paragraph 2 in its entirety

(b) Paragraph 3: the first sentence

(c) Paragraph 4: to the extent that it asserts as a fact the Appellant's speculation as to the thinking process of the Court of Appeal

(c) Paragraph 10: the first sentence

(d) Paragraph 11: except for the last sentence

(e) Paragraph 16: the last sentence

(f) Paragraph 35

(g) Paragraph 36

(h) Paragraph 79: the first sentence

(i) Paragraph 88

13. To the extent that it is a factual issue, the Respondent disagrees with the assertion of the Appellant in paragraph 19 of the Appellant's Factum that the Ontario Court of Appeal found that the Police acted in good faith. The Ontario Court of Appeal only concluded that the Police did not act in 'bad faith'[13]

14. The Respondent accepts as correct the statements of fact contained in the following paragraphs

(a) Paragraph 9

(b) Paragraph 12

(c) Paragraph 13

(d) Paragraph 14

15. Paragraphs 5 to 7 are not statements of fact but merely the Appellant's views of the decisions below

The Respondent's Statement of additional facts

[12] Information to Obtain; Tab 9, paragraph 19. Contrast with the assertions in paragraphs 2 and 3 in the Appellant's Factum.

[13] Reasons for Judgment, Ontario Court of Appeal, para. 77; Appellant's Record, Tab 4

16. At trial, the Appellant conceded the Respondent had a privacy interest in the residence that was searched[14]. The Respondent relies upon this admission.

17. As was presented to the Justice of the Peace who issued the search warrants, the result of the F.L.I.R. search is described in the following manner:

> "At 00:20 a.m. the aircraft flew to the property at 619 Malo in Kingsville owned by Walter Tessling, where an examination of the residence indicated an unusual amount of heat escaping from the basement area of the house. This excessive heat source from the basement area enforces the information that marijuana is being grown inside the residence.
> As a result of using this aircraft and its camera system an indication of a heat source was detected in basement area of the residence located at 2584 Meighen St in Windsor Ontario. On April 30th 1999 Cst. Spratt of the Windsor Police Service Drug Squad requested and obtained a search warrant for the Meighen address. As a result of the search a large marijuana grow operation was located in the exact location indicated by the aircraft system. Several persons were arrested and charges were laid. The case is now before the courts."[15]

18. The examination of the Respondent's residence referred to in the Information to Obtain the Search Warrant was conducted by means of the F.L.I.R from a fixed-wing aircraft flying at an altitude of approximately 6000 feet. The residence at 619 Malo, Kingsville was targeted and ground observation near to that property was used to direct the aircraft to the place to be examined. After the target was identified, the operator of the camera did the examination of the residence in a fly past taking probably less than a minute.[16]

19. P.C. Robichaud essentially conceded that without the confirmation provided by the F.L.I.R., he did not regard the evidence in the Information to Obtain the Search Warrant as sufficient to support the issuance of a search warrant.[17]

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[14] Transcript of Proceedings on Voir Dire, Page 9, line 22 to line 29 Respondent's Record, Tab3

[15] Information to Obtain a Search Warrant, Appellant's Record, Tab 9, page 158

[16] Transcript of Evidence of December. 4th, 2000, p.46, line 18 to p. 50, line 32, Appellant's Record, Tab 6

[17] Transcript of Evidence of December. 4th, 2000, p. 62, line 13 to p. 63, line 12, Appellant's Record, Tab 6

20. P. C. Robichaud did not testify that he relied upon any existing judicial or statutory authority that purported to authorize a warrantless infrared examination of a dwelling house in the decision to proceed with the use of the F.L.I.R.

The ruling of the trial judge

21. The learned trial judge did not have the benefit of the decision of the *Kyllo* decision. He reasoned that the use of the FLIR was no different from ordinary naked-eye surveillance from a public place.[18] For this reason the learned trial judge found no violation of s.8 of the Charter.

22. The learned trial judge made an alternative finding that had he found a breach, the admission would not have been justified under s.24(2). The learned trial judge found that the breach was serious but that its seriousness was mitigated by the good faith of the police. The learned trial judge assessed good faith on the basis that the police thought that they were using a lawful technique when employing the FLIR and were acting with a valid search warrant. [19]

Judgment of the Ontario Court of Appeal

23. The Ontario Court of Appeal found that the warrantless use of the FLIR was a search for the purposes s.8 of the Charter[20]. The Court then concluded that, as there was no law authorizing such a search, there had been a violation of s.8 by the use of the FLIR[21]. The Court recognized that when the evidence obtained by the FLIR was excised from the Information to Obtain the Search Warrant, the residue was (as admitted by the Appellant [22]) insufficient to support the search warrant.

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[18] Ruling on voir dire in Superior Court of Justice, page 13

[19] Ruling on voir dire in Superior Court of Justice, page 15 to 17, Appellant's Record, Tab 2

[20] Reasons for Judgment of the Ontario Court of Appeal, Appellant's Record, Tab 4, para. 33 to para. 70

[21] Reasons for Judgment of the Ontario Court of Appeal, Appellant's Record, Tab 4, para. 71

[22] Reasons for Judgment of the Ontario Court of Appeal, Appellant's Record, Tab 4, para.25

24. The Court of Appeal went on to make a s.24(2) analysis based on its s.8 finding. It accepted the findings of fact with respect to the seriousness of the breach[23] and, while it did not find good faith on the part of the police, made a finding that there was no bad faith[24]. The serious nature of the breach caused the Court of Appeal to exclude all of the evidence seized by the police and acquit the Respondent[25]

25. The Court focused on two reasons why the use of the FLIR engages s.8. First, the Court reasoned that the FLIR provides information about activities inside the home[26] rejecting the Crown's contention that the FLIR revealed nothing significant. Secondly, the Court concluded that there is an important distinction between observations made by the naked eye even with enhancing aids and the observations that are the product of technology[27]rejecting the Crown's contention that the heat observed by the FLIR disclosed nothing more than what was observable with the naked eye. In coming to the conclusion that there was a violation of s.8, the Court of Appeal carefully reviewed the law relating to privacy and carefully analysed the nature of the FLIR in light of the principles. The central conclusion drawn by the Court of Appeal was that:

> "The FLIR represents a search because it reveals what cannot be otherwise seen and detects activities inside the home that would be undetectable without the aid of sophisticated technology. Since what is technologically tracked is the heat generated by activity inside the home, albeit reflected externally, tracking information through FLIR technology is a search within the meaning of s. 8 of the Charter"[28]

PART II: RESPONSE TO APPELLANT'S ISSUES

26. The Respondent takes the position that:

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[23] Reasons for Judgment of the Ontario Court of Appeal, Appellant's Record, Tab 4, para.76
[24] Reasons for Judgment of the Ontario Court of Appeal, Appellant's Record, Tab 4, para.77

[25] Reasons for Judgment of the Ontario Court of Appeal, Appellant's Record, Tab 4, para.81
[26] Reasons for Judgment of the Ontario Court of Appeal, Appellant's Record, Tab 4, para. 61; para 66
[27] Reasons for Judgment of the Ontario Court of Appeal, Appellant's Record, Tab 4, para. 63; para. 65

[28] Reasons for Judgment of the Ontario Court of Appeal, Appellant's Record, Tab 4, para. 68

a) The use of the FLIR in the present situation was a search for purposes of s.8 of the Charter.

b) The search was an unreasonable search for purposes of s.8 of the Charter.

c) The Court of Appeal did not err in excluding the evidence under s.24(2) of the Charter

PART III: ARGUMENT

Issue One: Does the use of a device that measures and records the exterior surface heat of a private residence without 'seeing into' the residence constitute a search within the meaning of Section 8 of the Charter?

27. The Respondent takes the position that the use of the FLIR is a search for the purposes of s.8 of the Charter.

Section 8 searches defined: the purposive approach

28. A search for the purposes of s.8 of the Charter takes place where state examinations constitute an intrusion upon some reasonable privacy interest of individuals. Only where a person's reasonable expectations of privacy are somehow diminished by an investigatory technique that s.8 of the Charter comes into play[29]. A search for the purposes of s.8 must be defined by reference to the reasonable expectation.

29. The determination of whether a person has a reasonable expectation of privacy in a given situation is to be determined by attempting to assess whether, by the standards of privacy that persons can expect to enjoy in a free and democratic society, the state agents were bound to conform to the requirements of the Charter when effecting the intrusion in question. This involves asking whether the persons whose privacy was intruded upon could legitimately claim that in the circumstances it should have been open to the state agents to act as they did without prior judicial authorization. That is, whether the right protected by s.8 of the Charter should be seen as imposing

[29] Regina v. Evans and Evans, [1996] 1S.C.R. 8 at pp. 15 to 16

on the state the obligation to seek prior judicial authorization before engaging in infrared surveillance or whether the state should be free to conduct such surveillance in their absolute discretion on all members of society for such times as the state in its unfettered discretion deems fit for whatever purpose it desires.[30]In the context of infrared surveillance, the interest of the state is not in the radiation but in the activities in the structure. It is incorrect to divorce the fact that the emanations are what is observed from the purpose of the examination[31]

30. The assertion that an expectation of privacy is reasonable is to be determined on a case-by-case basis having regard to all the surrounding circumstances including but not restricted to the following:

(i) presence of the accused at the time of the search:
(ii) possession or control of the property or the place searched:
(iii) ownership of the property or place;
(iv) historical use of the property or item;
(v) the ability to regulate access, including the right to admit or exclude others from the place;
(vi) the existence of a subjective expectation of privacy;
(vii) the objective reasonableness of the expectation.[32]

The facts of this case meet the test. The Appellant takes issue only with the existence of the subjective expectation of privacy and the reasonableness of the expectation. In any event, the Appellant conceded an expectation in his home. The Appellant argues he had no expectation of privacy in the infrared radiation.

31. A search for the purposes of s.8 of the Charter takes place where state examinations constitute an intrusion upon some reasonable privacy

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[30] Duarte v. The Queen, [1990] 1 S.C.R 30 at pp. 42 to 44; Regina v. Wong, [1990] 3 S.C.R. 36 at pp. 44 to 48: Melvin Gutterman " A Formulation of the Value and Means Models Of the Fourth Amendment in the Age of Technologically Enhanced Surveillance" 39 Syracuse Law Review 647 (1988)

[31] United States v. Cusumano 67 F. 3d 1497 (10th Cir. 1995) at pp. 1501 to 1502

[32] Regina v. Edwards, [1996] 1 S.C.R. 128 at para. 45; Regina v. Lauda (1999), 136 C.C.C. (3d) 358 at p. 376

interest of individuals. Only where a person's reasonable expectations of privacy are somehow diminished by an investigatory technique does s.8 of the Charter come into play[33].

32. Constitutional issues of privacy impacted by advances in the technology of police surveillance must not simply be analysed by way of analogy to technologically unaided surveillance methods which seek to obtain the same information in the course of investigations. The impact on the legitimate expectations of privacy of the warrantless and surreptitious electronic observation or recording of private words or acts is such that these technologically-aided forms of police surveillance create a threat to privacy which is on an entirely different plane than analogous forms of police surveillance unaided by electronic devices.[34]

33. The Court, in assessing whether the warrantless use of a technical device is a violation of s.8 of the Charter, must determine the critical differences between the technologically-unaided method of surveillance and the method as permitted by the technology in question as this relates to the reasonable expectation of privacy protected by s.8 of the Charter. [35]In the case of the FLIR, the differences are obvious: unaided observation cannot detect the emanations at all and cannot identify the heat differentials on a surface. The FLIR detects heat emanations just as a wiretap bug detects energy in the form of sound waves. For the purposes of analysis, the difference between the two only relates to the quality of the information obtained from the search[36]

34. The question put in the previous paragraph requires this court to assess whether giving their sanction to this particular form of unauthorized examination would see the amount of privacy and freedom remaining to citizens diminished by a degree inconsistent with the aims of a free and open society. The empirical and historical evidence suggests that the type of

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[33] Evans and Evans v. The Queen, [1996] 1 S.C.R. 8 at para. 9 to para. 12

[34]Duarte v. The Queen, supra; Regina v. Wong, supra

[35] Regina v. Wong, supra at pp. 44 to 48

[36] United States v. Cusumano 67 F. 3d 1497 (10th Cir. 1995) at pp. 1504 to 1509; United States v. Kyllo, 533 U.S. 27 (2001) at pp. 36 to 37

'peeping-tom' activity akin to the police use of a FLIR is not tolerated in a free and democratic society [37]. It must be recognized that modern methods of electronic surveillance available to the state have the potential to annihilate individual privacy if left uncontrolled by a prior judicial determination that the state interest in a valid state objective overrides the individual's interest in privacy[38]

35. The heat measured from the exterior is only being used to identify the activities in the home and in respect of which the Appellant had a reasonable expectation of privacy. The individual has a reasonable expectation of privacy in relation to activities in the home and to the extent that thermal imaging is used to provide to state agents information which could not otherwise be obtained without an intrusion into the home, the examination is a search for the purposes of s.8 of the Charter and if warrrantless, is unreasonable there being no positive law which authorizes the search absent judicial authorization.[39] The requirement in *Kyllo* that the device be a surrogate for presence in the home is, however, not necessary given the recognition in *Plant* that there is an expectation of privacy in the information if it merely tends to disclose the activity in the structure. Under the *Plant* test, the device would subject to s.8 control if it disclosed far less than is required under the American 'functional equivalent' test.

36. The infrared examination of the surface of a dwelling is a search because the individual has a reasonable expectation of privacy in the activities in the dwelling. The information gleaned from the heat signatures on the exterior tends to reveal activities inside the dwelling[40] even if it cannot

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[37] Christopher Slobogin, "Peeping Techno-Toms and the Fourth Amendment: Seeing Through Kyllo's Rules Governing Technological Surveillance" (2002) 86 Minnesota Law Review 1393 at pp. 1419 to 1425; Christopher Slobogin, "Technologically-Assisted Physical Surveillance: The American Bar association's Tentative Draft Standards" (1997), 10 Harvard Journal of Law and Technology 383 at pp. 447 to 449; pp. 460 to 463

[38] Regina v. Wong, supra, at pp. 44 to 48

[39] Pennsylvania v Gindelsperger, [1999] PA-QL 4458 (Pa. Sup. Ct.) at para. 47; United States v. Cusumano 67 F. 3d 1497 (10th Cir. 1995) at pp. 1504 to 1509; People v. Deutsch, [1996] CA-QL 2861 (Ca. App. 1996) at pp. 369 to 370; Kyllo v. United States, 533 U.S. 27 (2001) at p. 34

[40] United States v. Cusumano 67 F. 2nd 1497 (1995) (10th Cir.) at p 1501; Kyllo v. The United States, note supra, at pp.35 to 38.

predict the nature of these with any accuracy. It does not lie in the mouth of the Appellant to assert that the FLIR does not tend to reveal the existence of private activities in the Respondent's home given the evidence placed before the Justice of the Peace on the application to obtain the search warrant. Moreover, the question of whether a particular form of surveillance is or is not a search cannot be made to depend upon whether the device provides precise or imprecise information: in fact, the provision of imprecise information is more insidious

37. All information about a person[41] and all information about activities in a dwelling are confidential[42] and merit the protection of s.8.

38. This Court has already concluded that for s.8 purposes, all electronic surveillance by the state is a search[43]. There is no reason to depart from this general proposition in the case of infrared surveillance.

39. This general proposition enunciated by this Court is not premised on the sophisticated nature of the electronic or whether the device is readily available to the public: in Duarte, the device was a simple tape recorder; in Wong, it was a commonplace videotape recorder. Rather, the concern of the Court was with the unregulated use of the device by the state in such a fashion that it endangers individual privacy by reducing the individual's expectation of privacy to an unacceptable level[44]

The Appellant's arguments on whether the use of the FLIR is a search

40. The Appellant argues that the Ontario Court of Appeal failed to address the threshold issue of whether the use of the FLIR in the circumstances of the case amounted to a search for the purposes s.8 of the Charter. The reasons

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[41] S.A. B. v. The Queen (2003), 178 C.C.C. (3d) 193 (S.C.C.) at para. 48; Regina v. Dore (2002), 166 C.C.C.(3d) 225 (Ont.C.A.) at para.52 to para. 53; Regina v. Dyment, [1988] 2 S.C.R. 417 at pp. 429 to 430: Regina v. Law, [2002] 1 S.C.R. 227 at para. 16

[42] Kyllo v. United States 533 U.S 27 (2001) at p.37

[43] Regina v. Duarte [1990] S.C.R. 30, [1990] at pp. 42 to 43; Regina v. Wong, [1990] 3 S.C.R. 36 at p.p. 43 to 44; pp. 47 to 48; Regina v. Wise, [1992] 2 S.C.R. 527 at pp. 577 to 558 (per Laforest, J., dissenting in the result on a point not dealt with by the majority)

[44] Regina v. Duarte S.C.R. 30, [1990] at pp. 43 to 44

of the Court of Appeal deal almost exclusively with this issue as it was the core issue of the Appeal as it was argued[45].

41. The Appellant argues that the dicta of this Court in *Plant*[46] limits constitutional protection only to such 'information' as is "of a personal and confidential nature which would reveal intimate details of the lifestyle and personal choices of the individual". Rather than contract the ambit constitutionally protected informational privacy as the Appellant suggests, *Plant* greatly expanded it.

42. There are two distinct holdings in the *Plant* decision dealing with informational privacy: the first determines how a Court is to decide whether there is an expectation of privacy in information[47]; the second identifies what factors are to be used in determining the relevant nature of the information in deciding whether that supports or militates against a finding that there is a claim to the protection of s.8 in that information.[48]

The expectation of privacy in information

43. In *Plant*, this Court did not, as asserted by the Appellant, limit the type of information protected by s.8 to any specific type. The Court held that the confidential or private nature of the information was merely one factor in a contextual examination of whether a state's inspection or search of information engages s.8[49]. In *Plant*, only after considering the entire context did this Court conclude that the warrantless dissemination by a public utility of the non-private and non-confidential information relative to a serious charge was not protected by s.8 of the Charter[50]. Critically, this Court did not apply a

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[45] Reasons for Judgment of the Ontario Court of Appeal, Appellant's Record, Tab 4, para. 25 to para. 31

[46] Regina v. Plant, [1993] 3 S.C.R. 281

[47] Regina v. Plant, note 13, supra, at pp. 292 to 293

[48] Regina v. Plant, note 13, supra, at p293

[49] Regina v. Plant, note 13, supra, at pp. 293 to 294: The totality of circumstances test to determine whether there is an expectation of privacy in information has always been applied subsequent to Plant. See: Jarvis v. The Queen,[2002] 3 S.C.R. 757 at para. 70 to 71 and ,for example: Regina v. M.R.B. (1998), 125 C.C.C.(3d) 336 (B.C.C.A.) at par. 7 to para. 16: Regina v. Lamirande and Guimond (2002), 164 C.C.C. (3d) 299 (Man. C.A.) at para. 27 to para. 30; Regina v. Spidell (1996), 107 C.C.C.(3d) 348 (N.S.C.A.) at pp. 357 to 359: Regina v. D'Amour (2002), 166 C.C.C.(3d) 477 (Ont.C.A.) at para. 53 to para. 56:

[50] Regina v. Plant, note 13, supra, at pp. 295 to 296

per se test and conclude that the failure of the information to reveal intimate details of the individual's life was dispositive[51]

44. The test is a balancing. The societal interests in protecting individual dignity, integrity and autonomy are balanced with effective law enforcement. The factors to balance in this contextual test include:

(a) the nature of the information itself;

(b) the nature of the relationship between the party releasing the information and the party claiming its confidentiality;

(c) the place where the information was obtained;

(d) the manner in which the information was obtained;`

(e) the seriousness of the crime being investigated[52]

The nature of confidential information

45. In *Plant*, the issue was whether a "… police check of computerized information in the possession of a public institution constitutes a search"[53] The passage relied upon by the Appellant purportedly limiting s.8 protections to a narrow class of information must be read in that context[54].

46. The principle holding in *Plant* on this issue is:

> " While I do not wish to be taken as adopting the position that commercial records such as cancelled cheques are not subject to s. 8 protection, I do agree with that aspect of the Miller decision which would suggest that in order for constitutional protection to be extended, the information seized must be of a 'confidential and personal' nature. In fostering the underlying values of dignity, integrity and autonomy, it is fitting that s. 8 of the Charter should seek to protect a biographical core of personal information which individuals in a free and democratic state would *wish* to maintain and control from *dissemination* to the state. This would *include* information which *tends* to reveal intimate details of the lifestyle and personal choices of the individual"[55]

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[51] Regina v. Plant, note 13, supra, at pp. 293 to 296
[52] Regina v. Plant, note 13, supra, at pp. 292 to 293
[53] Regina v. Plant, note 13, supra, at p. 285
[54] [54] Reasons for Judgment of the Ontario Court of Appeal, Appellant's Record, Tab 4, para. 40 to 42

[55] Regina v. Plant, note 13, supra, at p. 293

(emphasis added)

The above passage makes it clear in relation that:

(a) the concern of the Court in *Plant* is with what third parties give to the state (hence the use of the word 'dissemination') not what the state takes from the person concerned. Different considerations govern the taking of the information from a person to whom the information relates. Logically, the person concerned having shared the information or, at least, acquiesced in the acquisition by the third person of the information, the expectation of privacy of information in the hands of such third parties is less than that in information that the individual has chosen to keep secret[56];

(b) the content of a 'biographical core of personal information' includes more than 'information which tends to reveal intimate details of the lifestyle and personal choices of the individual'[57];

(c) the information which is shielded from the state is defined by the 'wishes' (as opposed to the expectations, subjective or otherwise) of persons living in a free and democratic state as to what to maintain and control from non-consensual disclosure to the state;

(d) the information shielded from the state by s.8 includes not only the actual intimate details but information from which inferences as to the protected intimate details can be made (hence the use of the word 'tend');

47. The construction that the Appellant would have this Court place upon *Plant* is the reverse of the proper interpretation. The Appellant argues that *Plant* restricts constitutionally protected information to a very narrow compass and leaves all other information fair game to warrantless state examination regardless of the location of that information. The Appellant's argument would cause this Court to find that the state would be free to enter a dwelling house

[56] Regina v. Dyment, [1988] 2 S.C.R. 417 at pp. 429 to 430: Regina v. Law, [2002] 1 S.C.R. 227 at para. 16

[57] Regina v. Fry (1998), 142 C.C.C. (3d) 166 (Nfld. C.A.) at para. 39

without a warrant so long as it sought only information that does not reveal actual intimate details. Presumably, the state having been allowed by the decision in Plant to enter to observe non-intimate details, the 'plain view' doctrine would allow for the admission into evidence the evidence of observations of intimate details inadvertently observed.

48. The Appellant argues that the use of the FLIR in the instant case was used to obtain information and, as such, this Court's decision in *Plant* applies. This is not a case of the state obtaining information. It is a case about the police searching a dwelling house. What was searched for and found was in the form of physical observations of the condition of the exterior of the house that, because of the way in which it was found, was not physically seized. This does not make this an "information search case" any more than *Evans and Evans*[58] (involving the search and seizure in the form of a smell) or *Kokesch*[59] (involving a search by making observations of the exterior of a house).

The Appellant's definition of search

49. The Appellant argues that the conduct of the police in the instant case was 'no search' for s.8 purposes. This is the core of the Appellant's argument. If the use of the FLIR is a search there was neither warrant nor law to justify it, and, hence it was constitutionally unreasonable. If the use of the FLIR was 'no search' then s.8 has no application. The Appellant's argument is premised on the twin propositions that the FLIR reveals no confidential information and that the information revealed is exposed to the public. From these premises, the Appellant argues that the use of the FLIR is 'no search'.

Section 8 searches defined: the inapplicability of a dictionary definition

50. The Appellant cites a dictionary definition of 'search' ignoring the constitutional requirement that the rights in the Charter, including s.8, be defined must be construed in a purposive manner[60]. The purpose of the

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[58] Regina v. Evans and Evans, [1996] 1S.C.R. 8
[59] Regina v. Kokesch, [1990] 3 S.C.R. 3
[60] Regina v. Dyment ,[1988] 2 S.C.R. 417 a p. 426 (per Laforest, J.and Dickson, C.J.) [60] Hunter v. Southam, [1984] 2 S.C.R. 145 at p. 155

protection in s.8 is to protect privacy[61]. It is from this proposition that the definition of 'search' must flow.

51. The 'dictionary definition' is inadequate for a second reason. The Appellant concludes that the search requires an antecedent act of concealment. This approach is inconsistent with the privacy doctrine underlying s.8 that privacy is a right[62] that requires no assertion by concealment but rather is innate in all areas that the individual wishes to keep private[63] subject to a deliberate act of revelatory behaviour[64] or defeasance by reasonable law or prior judicial determination[65]

Public exposure

52. The Appellant argues that, in accordance with its definition of search, there is 'no search' in what is exposed to the public's view.

53. The 'public exposure' doctrine is premised on a deliberate decision to make information available to the public and to accept the risks to privacy in doing so. This doctrine, as it applies to electronic surveillance, is inconsistent with the existence of the meaningful privacy interest protected by s.8[66]. This Court has rejected the 'risk theory' that underlies the 'public exposure' doctrine as a basis of determining when government conduct amounts to a search[67]. The 'public exposure' doctrine is no valid basis to argue that the use of surreptitious electronic surveillance is 'no search' for s.8 purposes.

54. The use of the 'public exposure' doctrine in the context of electronic (and other police surveillance) as a justification for a finding that there was no

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[61] Hunter v. Southam, note 24, supra, at pp. 154 to 160
[62] Regina v. O'Connor, [1995] 4 S.C.R. 411 at para. 110 to para. 118
[63] Hunter v. Southam, note 24, supra, at pp.154 to 160; Regina v. Dyment, [1988] 2 S.C.R. 417 at pp. 42 6 to 430
[64] Regina v. Law, [2002] 1 S.C.R. 227 at para. 16 to para. 20; Regina v. Stillman, [1997] 1 S.C.R. 607 at pp. 644 to 648
[65] Regina v. Edwards, [1996] 1 S.C.R 128 at para. 23
[66] Gutterman, note 31, supra, at pp.682 to p.687; James J. Tomkovicz " Technology and the Threshold of the Fourth Amendment: A Tale of Two Futures" (2002) 72 Mississippi Law Journal 317 at p. 359 to p. 381; T. Wade McKnight "Passive, Sensory-Enhanced Searches: Shifting the Fourth Amendment 'Reasonableness Burden" (1999), 59 Louisiana Law Review 1243 at p. 1255 to 1256; Omar Ortega "Thermal Imaging Devices: how the Government Privately Repealed the Fourth Amendment" (1997), 46 Drake Law Review 173 at p.189; United States v. Cusumano 67 F. 2nd 1497 (1995) (10th Cir.) at p
[67] Regina v. Duarte, [1990] 1 S.C.R. 30 at pp. 47 to 49; Regina v. Wong, [1990] 3 S.C.R. 40 at pp. 45 to 48

expectation of privacy and hence 'no search' has been criticized on a number of bases:

(a) The technology employed in police surveillance inevitably increases what is exposed to the 'public' (that is, the police). To allow what is exposed to the police to be dictated by advances in technology would allow the ambit of privacy to be reduced to a level unacceptable to a free and democratic society[68]

(b) In the context of infrared surveillance, the 'public exposure' doctrine cannot operate to justify the conclusion that the failure to prevent the emission of infrared radiation amounts to a 'public exposure'. The dissipation of heat is an inevitable result of heat production and does not require a deliberate act to disclose it nor is it preventable in the same way that one can prevent snow melting on a roof. The laws of thermodynamics dictate that no matter how much one insulates, heat will still escape[69]

(c) There is a qualitative difference between what is knowingly exposed to other members of the public who may observe it in the ordinary course of life and what is knowingly exposed to intensive and surreptitious police surveillance using technological devices[70]

55. The Appellant argues that the detection of heat differentials on exterior walls is analogous to the observation of, for example, snow melting. This is the same type of argument rejected by this Court in *Wong*[71] and *Duarte*[72]. The argument ignores the fundamental differences in the two observations. The risk of the observation of snow melting on a roof is of an entirely different order of magnitude from the risk that agents of the state may with a technological device in their absolute discretion clandestinely observe invisible emanations from a structure making a permanent record of them by way of videotape.

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[68] Anthony Amsterdam, " Perspectives on the Fourth Amendment" (1974) 58 Minnesota Law Review 349 at pp. 402 to 403; Regina v. Wong, [1990] 3 S. C.R. 36 at p. 45

[69] State v. Segal, [1997] MT-QL 27, 934 P2d 176 (Montana Sup. Ct.) at para. 87; United States v. Cusumano 67 F. 3d 1497 (1995) (10th Cir.) at p, 1508

[70] California v. Ciraolo 476 U.S. 207 per Powell dissenting at pp. 223 to 225; Regina v. Wong, supra, at p. 51

[71] [1990] 3 S.C.R. 36 at p. 48

[72] {1990] 1 S.C.R. 30 at p. 48

Issue Two:

If the use of the FLIR was a search, was it unreasonable?

56. The Respondent takes the position that the Ontario Court of Appeal was correct. The Ontario Court of Appeal employed the jurisprudence of this Court to come to a principled conclusion. While the Appellant takes issue with certain aspects of the reasons, none of these disputes arise from any assertion that the Ontario Court of Appeal misapplied any of this Court's jurisprudence or disregarded its own prior findings. The argument as to the search issue need not be repeated here.

57. The Appellant ascribes four fundamental errors to the Ontario Court of Appeal. The Respondent disagrees with all of these asserted errors.

58. The Appellant, while arguing that the Ontario Court of Appeal erred in determining whether the use of the FLIR is a reasonable search does not address the basic issue of when a search is reasonable. For a search to be reasonable it must be (a) authorised by law: (b) the law itself must be reasonable; and (c) the manner in which the search was carried out must be reasonable[73]. The Appellant does advance any law that authorises a warrantless search by means of a FLIR and hence, fails to concede that the issue is decided by the finding that the determination treat the use of the FLIR as a search[74] it follows that the Appellant's argument fails.

First error: Court of Appeal grossly exaggerated the capacity of the FLIR.

59. The Appellant ascribes findings to the Ontario Court of Appeal that it claims are speculative. The three statements complained of by the Appellant are taken out of context [75] and in the manner in which the Appellant sets them

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[73] See: (most recently) S.A. B. v. The Queen, supra, at para. 36

[75] The first fragment comes from paragraph 61 of the Tessling reasons. The Court of Appeal correctly viewed the information as being dependent upon the inference to be drawn from the infrared examination. See
The second is from paragraph 68. The Appellant omits the first part of the sentence "The FLIR represents a search because it reveals what cannot otherwise be seen and …."
The final fragment is from paragraph 69 is a completely misleading quote. The Ontario Court of Appeal said: " It seems to me, therefore, that before the state is permitted to use

out, misleading. The evidence in support of each of these conclusions was drawn by the Ontario Court of Appeal from the record of the trial court[76]. The evidence before the Justice of the Peace who issued the search warrant was to the effect that the FLIR was a powerful tool capable of predicting the presence of marijuana grow operations. The Appellant is in no position before this Court to contradict the evidence that it placed before the Justice of the Peace in obtaining the warrant by, in effect, saying that the warrant was valid even though the police in the Information to Obtain the Warrant may have oversold the predictive power of the FLIR.

60. The balance of this argument is premised on factual assertions made only by way of argument and ought to be disregarded. The Appellant faults the Court of Appeal for drawing proper inferences from the record by improperly injecting new facts into this Appeal.

61. The factual inferences on this point in the reasons of the Ontario Court of Appeal are proper[77]. The reasoning from these inferences is logical and compelling.

62. The Appellant's argument ignores the dicta of this Court that the *per se* rule that all existing and future means by which the state can electronically intrude on the privacy of the individual of electronic surveillance are searches for s.8 purposes regardless of the level of sophistication of the device[78].

63. Rather than a justification to allow the unauthorized use of the FLIR, the inability of the FLIR to discriminate among heat sources is a compelling reason that the unauthorized use of the FLIR should be a violation of s.8. The FLIR is an intrusive device because it is indiscriminate in registering entirely innocent activities in the home[79] The imprecision of the results of the FLIR is obnoxious because it created the danger that entirely innocent persons will be

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technology that has the capacity for generating information which permits public inferences to be drawn about private activities carried on in a home, it should be required to obtain judicial authorization to ensure that the intrusion is warranted"

[76]Transcript of December 4, 2000, p. 54, line 10 to 59, line 11; Appellant's Record Tab 6. Information to Obtain (Exhibit 1 on the application) Appellant's Record Tab 9, at pp. 158 to 159 of the Record; para. 19 to 14 of the Information to Obtain, Appellant's Record, Tab 9

[77] Reasons for Judgment Ontario Court of Appeal, Appellant's Record Tab 2, at pp.8 to 11

[78] Regina v. Wong. [1990] 3 S.C.R. 36 at pp. 43 to 44

[79] People v. Deutsch, [1996] C.A.-QL 2681 (California Court of Appeal) at para.15

subjected to more intrusive searches based upon suspicions created by the observations of infrared caused by entirely innocent activities[80]

64. When the 'imprecision' of the FLIR in mind, the lack of a warrant requirement for the use of the FLIR and the ability of the FLIR to examine the exterior of a building in about a minute leaves the police with the power to randomly or systematically search every structure in a neighbourhood to determine if any of the structures disclose a suspicious heat signature[81] The Orwellian vision of the police adding a FLIR device to the standard equipment of a car and cruising up and down residential streets in search of tell-tale heat signatures is, it is submitted, the type of scenario that this Court has regarded as unacceptable in our society[82] The danger is not that the FLIR will identify only those who are involved in the indoor growing of marijuana but rather that it will cast suspicion upon and possibly cause further investigation of innocent persons and will result in the search of places in which there are no illegal activities. This last risk would chill the enjoyment of innocent but heat-generating activities by individuals lest they court the attention of the police with the embarrassment that would entail if, for example, an otherwise unsupported tip coupled with a FLIR search showing a heat source would cause a warrant to be executed upon a place containing nothing more sinister than a pottery kiln or a sauna.

Error two: The Court of Appeal erred in failing to evaluate the use of the FLIR as a stand-alone technology and instead evaluated its effect when used in conjunction with other information.

65. The Respondent disagrees; the Court of Appeal clearly evaluated the FLIR for itself[83].

66. To appreciate the significance of the technology, its use had to be placed in the context of its utility in the ultimate goal of the state that was to

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[80] Commonwealth of Pennsylvania v. Gindlesperger, [1999] PA.-QL 4458 (Pennsylvania Sup Ct.) at para. 38 to 39; State v. Segal, [1997] MT-QL 27, 934 P2d 176 (Sup. Ct.) at para. 93 to 98

[81] State v. Segal, [1997] MT-QL 27, 934 P2d 176 (Montana Sup. Ct.) at para. 120

[82] See, for example, the comments in Regina v. Evans and Evans, [1996] 1 S.C.R. 8 at p.21

[83] Reasons for Judgment of the Ontario Court of Appeal, Appellant's Record, Tab 4, para. 61 to para. to para. 68

obtain an authorisation to search the place. It was presented to the Justice of the Peace in the form of an inference drawn by the deponent as to activities inside the Respondent's home[84].

Error three: The Ontario Court of Appeal, in determining that the FLIR was subject to a warrant requirement, failed to take into account the seriousness of the crime investigated and the resulting compelling government interest in investigating and prosecuting it.

67. The Court of Appeal concluded that the assessment is to be made exactly in the manner required by our law: by application for a search warrant. The Appellant would have this Court find that the warrant requirement would not apply to the use of the FLIR even after a finding by this Court that the use is a search for s.8 purposes. The reason advanced for this is that the seriousness of the offence is such that a 'search' may not be a 'search' for the purposes of s.8 of the Charter simply because the offence is a serious one. The Appellant advanced the same argument in *Hunter v. Southam*[85] and it was rejected by this Court and continues to be rejected.

68. In *Plant*,[86] the dicta of the Court indicates that the seriousness of the offence as a factor in determining whether there exists a privacy interest. This dictum may have been overtaken by subsequent cases and is no longer a correct statement of the law even in respect of information searches in the context of criminal investigations[87]. In any event, it is confined to information in the hands of third parties

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[84] Information to Obtain (Exhibit 1 on the application) Appellant's Record Tab 9, at pp. 158 to 159 of the Record; para. 19 to 14 of the Information to Obtain

[85] Hunter v. Southam, [1984] 2 S.C.R. 145, at pp. 153 to 154

[86] Plant, supra, at pp.295 to 296

[87] Attorney General of Canada v. Schreiber (1997), 114 C.C.C. (3d) 97 (F.C.A.) at p 120; appeal allowed on other grounds [1998] 1 S.C.R. 841 see the comment by Lamer C. J. at para. 21): The seriousness of the offence was not included in the list of factors in Regina v. Edwards, [1996] 1 S.C.R. 128 at pp. 145 to 146 nor is it included as a factor in any subsequent case of this Court dealing with criminal law searches. It is referred to in Regina v. Jarvis, [2002] 3 S.C.R. 757 in the context of an audit search of business records fro tax purposes where, at para. 95 to 96, the distinction between criminal and regulatory investigations for Charter purposes is drawn and in respect of which, the Court suggests that once a search is in the context of Criminal investigation, the warrant requirement is the norm. It is a proposition inconsistent with the dicta of Lamer, C.J. in Regina v. Wong (1990), 60 C.C.C. (3d) 460 at p.466

69. The assessment as to when in a particular situation the public's interest in being left alone must yield to the state's interest in law enforcement generally requires prior judicial authorisation by an impartial decision-maker capable of balancing the interests of the state and the individual[88]. The only exception to prior judicial authorisation is feasibility[89]. This is the manner in which this Court has always maintained the balancing of the interests of the state in law enforcement against those of the individual in being left alone.

70. Before an authorisation for a search can issue, the impartial arbiter empowered to authorise it must be satisfied on oath that there is cause to grant the state the right to intrude [90].

71. The Appellant ignores both of these requirements. It asks this Court to ignore its own precedent and legislate a warrantless search power that the Charter denies to Parliament . The Ontario Court of Appeal by mandating a warrant for the FLIR search recognised the balancing of the competing interests would be done as in all cases. Rather than err, the Ontario Court of Appeal simply followed the law.

Error four: The Court of Appeal erred in following and relying on *Kyllo v. The United States*.

72. The Appellant argues from the premise that the findings of the United States Supreme Court were contrary to the factual record of the lower court. The Appellant provides no proof of this fact. It is not before this Court. Even if it were, it provides no basis to impeach the reasons of that Court.

73. The *Kyllo* result is a proper application of the test in *Katz*. The majority in that decision properly applied its own precedent. The reasons in dissent are inconsistent with *Katz*[91].

74. The reasons of the majority in *Kyllo* are entirely consistent with this Court's s.8 jurisprudence[92]. Indeed, it may be said that *Kyllo* is more closely

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[88] S.A.B. v. The Queen supra, at para. 38: Hunter v. Southam, supra at pp. 160 to 161

[89] Hunter v. Southam, supra, at p. 161

[90] Hunter v. Southam, supra, at p. 161 and pp. 167 to 168

[91] Simmons,"From Katz to Kyllo" (2002), 53 Hastings Law Journal 1303 at pp. 1310 to 1304; 1312 to 1316; 1320 to 1321. Stephen A. LaFleur "Kyllo v. The United States: something Old, Nothing New; Mostly Borrowed, What to Do?" (2002), 62 Louisiana Law Review 930 at pp. 930: pp. 942 to 946.

premised on the same doctrines that have animated the reasoning of this Court in dealing with the issue of what is protected by s.8 rather than it is on the historical precedent of the United States Supreme Court[93]

75. The essence of the reasoning of the majority in *Kyllo* is a recognition that the state's ability to employ technology to obtain information about private individuals will, if left unchecked by the requirement of prior authorisation, destroy privacy.[94] The Court in *Kyllo* reasoned that, at least under the Fourth Amendment, the individual has an interest to privacy in his home that is so great that to allow any unauthorised infringement would be to reduce personal privacy to an unacceptable level.[95] The Court in Kyllo rejected the argument that the use of the FLIR is not a search but rather an inference since it does not disclose actual details. The Court essentially ruled that as long as the information gives evidence as to activities in the home, it is a search for constitutional purposes.[96]The Court reasoned that the nature or quality of the information obtained is irrelevant[97]. These core findings are entirely consistent with this Court's decisions and philosophy.

The Appellant identifies three 'guiding principles' in Section 8 litigation. The Respondent takes the position these are unknown to our law

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[92] As will be developed, possibly more consistent than with the American Fourth Amendment jurisprudence.

[93] For the analysis of Kyllo in the context of privacy see for example, the articles prepared for the Symposium on Fourth Amendment Sponsored by the National Center for Justice and the Rule of Law, collected in (2002), 72 Mississippi Law Journal especially : Morgan Cloud, "Rube Goldberg Meets the Constitution: The Supreme Court, Technology and the Fourth Amendment" at pp. 43 to 48 (Professor Cloud is Charles Howard Chandler Professor of Law, Emory University): Kathryn Urbonya "A Fourth Amendment 'Search' in the Age of Technology: Post-Modern Perspectives" at pp. 493 to 494; pp. 512 to 524(Ms. Urbonya is Professor of Law at the College of William and Mary) : Thomas K. Clancy "Coping with Technological Change: Kyllo and the Proper Analytical Structure to Measure the Scope of Fourth Amendment Rights" at pp. 547 to 564 ;(Professor Clancy is Director, National Center for Justice and the Rule of Law and Professor, University of Mississippi School of Law) [93] Simmons,"From Katz to Kyllo" (2002), supra, at pp. 1316 to 1321; pp. 1343 to 1348

[94] Kyllo v. The United States, at pp.33 to 36

[95] The rational behind restricting the analysis to privacy to a home is explored in Richard H. Seamon, "Kyllo v. United States and the Partial Ascendance of Justice Scalia's Fourth Amendment" (2001), 79 Washington University Law Quarterly 1013 especially at pp. 1024 to 1030

[96] Kyllo v, The United States 533 U.S. 27 (2001) at pp. 36 to 37

[97] Kyllo v, The United States 533 U.S. 27 (2001) at p.37

Only core biographical information is protected

76. The crux of the Respondent's argument is that only 'core biographical information of a personal and confidential nature that tends to reveal intimate details about one's lifestyle or personal choices' is entitled to constitutional protection. The position of the Respondent with respect to this proposition is set out in paragraphs 27 to 48, supra and will not be repeated here.

A subjective expectation is necessary

77. The determination of whether there is a reasonable expectation of privacy so as to attract s.8 protection is to be determined on a case-by-case basis having regard to all the surrounding circumstances including but not restricted to the following only one of which is the subjective expectation of privacy.[98]

78. The existence of a subjective expectation of privacy[99] is not a necessary condition to the claim of the protection of s.8[100]. It is merely another factor for the Court to consider in the determination of the issue of whether there exists a subjective expectation of privacy. The Appellant's assertion that the existence of a subjective expectation of privacy is a necessary condition flies in the face of this court's precedents.

79. The interpretation of *Katz* which makes the existence of a subjective expectation of privacy a necessary condition to a finding that there is a reasonable expectation of privacy has been criticized as ultimately destructive of the protection against unreasonable searches and seizures[101]. Simply put, the subjective expectation requirement destroys constitutionally protected privacy by allowing the state to dictate what is protected as private by announcing that it will intrude.

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[98] Regina v. Edwards,[1996] 1 S.C.R.128 at pp. 145 to 146
Regina v. Lauda (1999), 136 C.C.C. (3d) 358 at p. 376

[99] This aspect of the Katz doctrine has been roundly criticized as circular and, when applied in reverse to determine if the state conduct is a search, causes a downward spiral in constitutional protection. See, for example: Anthony Amsterdam, " Perspectives on the Fourth Amendment" (1974) 58 Minnesota Law Review 349 at p. 384 ; Richard Seamon ,footnote 31 supra, at pp.1023 to 1024

[100] Regina v. Edwards, supra, at pp. 145 to 146

[101] See, for example: Anthony Amsterdam' "Perspectives on the Fourth Amendment" (1974), 58 Minnesota Law Review 349 at p.384

80. The requirement that there be exhibited a subjective expectation of privacy in order to assert a claim to a s.8 privacy right is unworkable in the context of infrared surveillance[102]The recognition that if it so desired, the state could intrude by technology means into every area of our lives would result in the complete negation of any privacy in our society.

The Appellant's view of the application to the jurisprudence of this court to the case at bar

81. At the core of the Appellant's argument, and where it differs from the Ontario Court of Appeal and the (United States Supreme Court[103] and others[104]), lies the notion that the issue before this Court can be properly conceptualized by examining what privacy interest can be said to exist in the heat signatures on the exterior of a dwelling. This conceptualization is central to the Appellant's arguments that the heat signatures reveal no intimate details and because of that, are not information in which our society ought to recognize a reasonable expectation of privacy.

82. The state in the instant case has consistently taken the position that it used the FLIR to identify activities within the home. The privacy of those activities is indisputably a value that s.8 is intended to secure from unauthorized government examination. The Appellant focuses its argument on the means that it uses to obtain information about those activities The Appellant ignores the impact on the privacy interest that would be caused by allowing the state without prior judicial or legislative approval to gather information about activities in the home from the exterior of the home in circumstances where the individual has obviously shown a desire to keep these activities secret by confining them to the interior of the home.

83. This Court has rejected the approach espoused by the Appellant and insisted that, under s.8, the state conduct must be examined to determine

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[102] T. Wade McKnight "Passive, Sensory-Enhanced Searches: Shifting the Fourth Amendment 'Reasonableness' Burden", (1999) 59 Louisiana Law Review 1243 at pp. 1252 to 1254; Michael L. Huskins " Marijuana Hot Spots: Infrared Imaging and the Fourth Amendment", (1996) 63 The University of Chicago Law Review 655 at pp.665 to 667 and pp. 688 to 689

[103] Kyllo v. The United States 533 U.S. 27 (2001) at pp 35 to 39

[104] For example, United States v. Cusumano, 67 F. 3d 1497 (10th Cir. 1995) at pp. 1501 to 1502

whether it is offensive to the values s.8 is intended to secure recognizing that a focus on the means of intrusion in an electronic age would ultimately annihilate privacy by putting state conduct beyond the ability of the courts to protect privacy[105].

84. The Appellant argues that the FLIR does not capture the actual details of the activities and only in combination with other information can inferences be drawn about intimate activities. This is true just and irrelevant. This Court in *Plant*[106] held that information to attract s.8 protection need only 'tend' to give information about intimate activities. This rule in our law eliminates any argument that the infrared search is not a search because it only provides information from which inferences can be drawn.

85. The argument that somehow information is not entitled to the protection of s.8 because it by itself does not provide sufficient evidence for the issuance of a warrant ignores the simple proposition that the states encroachments on personal privacy in the context of a criminal investigation cannot be dependent upon the use or the weight of the evidence so obtained. Such a *post factum* assessment of the question would eviscerate the requirement of prior authorization[107].

86. The Appellant relies on the *obiter dictum* of Sopinka J. in Evans to the effect overhead infrared surveillance is a lawful investigative technique.[108]It is clear that the lawfulness of warrantless infrared surveillance was not before the Court in *Evans*. Only 3 of the 7 members of the panel concurred in the reasons of Sopinka J. Moreover, the Court did not have the benefit of *Kyllo*. It would appear unlikely that there was any serious debate on infrared surveillance in *Evans.* Finally, the comment does not state that warrantless infrared surveillance is lawful. This Court should not be persuaded by the comment.

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[105]Regina v. Wong, [1990] 3 S.C.R.36 at pp. 45 to 47; Regina v. Duarte, [1990] 1S.C.R. 30 at p. 47; Regina v. Wise, [1992] 1 S.C.R. 527 at pp. 563 to 564 per Laforest J., dissenting in the result. The majority did not differ from this view but accepted the Crown's concession that there had been a Section 8 violation and dealt with the case on the Section 24(2) issue where it differed with Laforest J. primarily on the question of the seriousness of the violation. The argument is developed in considerable detail by Professor Gutterman in his article, supra

[106] Regina v. Plant, [1993] 3 S.C.R. 281 at p. 293

[107] Kyllo v. The United States 533 U.S. 445 (2001) at pp. 38 to 39

[108] Regina v. Evans and Evans, [1996] 1S.C.R 8 at para. 29

A reasonable expectation may have to yield to a state interest

87. Once there is a reasonable expectation of privacy, a state intrusion engages s.8 and, a warrant is required to justify the intrusion except where it is not feasible to obtain prior judicial authorisation. The state intrusion upon a reasonable expectation of privacy must in any event be authorized by law in order to be reasonable. [109] This last argument made by the Appellant is completely contrary to authority[110] and the values underlying the Charter.

88. The last argument that the Appellant makes is that even where there is a reasonable expectation of privacy, and hence s.8 is engaged, the public interest in being left alone may have to way to the state's interest in effective law enforcement. The Appellant argues for the creation by this court of a rule of law that would exempt the use of FLIR surveillance from the warrant requirement and provide the authorization by law mandated by the reasonableness test found by this Court in *Hunter v. Southam*. This Court has rejected this type of judicial legislation and clearly mandated that the common law search powers ought not to be expanded and that any type of widening of encroachments on individual rights must be done by Parliament[111]

89. In that regard, Parliament enacted the 'general warrant' provisions of the Criminal Code[112] creating the jurisdiction to judicially authorize the "…use of any device or investigative technique or procedure …that would, if not authorized, constitute an unreasonable search or seizure….".[113] These provisions authorize the issuance of warrants to use, among other things, infrared surveillance devices[114]

90. The provisions were enacted to provide for constitutionally valid search powers in response to those decisions of this Court recognizing constitutionally protected privacy.[115]The police did not avail themselves of this

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[109] Hunter v. Southam, supra, at pp.159 to 168

[110] Indeed, the central finding in Entick v. Carrington (1765) 2 Wils. K B. 275 95. E.R. 807, at pp. 817 to 818 (E.R.) was that in order for there to be justification for a state intrusion, there must be some law that justifies the intrusion. A mere plea that the interests of the state require the entry is of no avail absent a law justifying the entry

[111] Regina v. Wong' [1990] 3 S.C.R. 36 at pp. 56 to 57

[112] Criminal Code, section 487.01

[113] Criminal Code, section 487.01(1)

[114] Regina. v. Martin, [1995] O.J.No. 4603 (Q.L.) Ont. Ct. of Jus, (Prov. Div.) at para. 15 and para. 19; Regina v. Kuitenen, [2001] B.C.J.No. 1292 (Q.L.) (B.C.S.C.) at paras 7, 11, and 28

[115] Regina v. Noseworthy (1997), 116 C.C.C.(3d) 378 (Ont. C.A.) at para. 11 to para. 13

legislation. It is therefore not necessary for this Court to create a constitutionally valid warrantless FLIR common law search power (which it cannot do based on its own jurisprudence). Such a power exists by statute.

91. The police in this case simply chose to disregard the protections of the Respondent's privacy rights found in the legislation and arrogated to themselves a power limited to a judge. Had the police applied for a warrant on the basis of the evidence they possessed prior to the FLIR search, they would never have been able to obtain such a warrant[116]

92. The argument is further inconsistent with this Court's jurisprudence. In *Hunter v. Southam*, this Court mandated a regime of prior judicial authorization absent a showing of a lack of feasibility where the state intrudes on a reasonable expectation of privacy. The role of the judicial officer in such a regime is to assess whether the interest of the state in law enforcement outweigh the interests of the individual in privacy[117]. To advance its proposed regime, the Appellant asks this Court to empower the police to intrude upon a reasonable expectation of privacy by means of surreptitious electronic surveillance any time they in their uncontrolled discretion choose and to answer to no court having done so. It is impossible to reconcile this proposal with any of this Court's prior jurisprudence let alone with the principles animating the Charter

Issue Three

Did the Ontario Court of Appeal err in excluding the evidence under s.24(2) of the Canadian Charter of Rights and Freedoms? The Respondent disagrees

93. It is not the proper function of this Court, absent some apparent error as to the applicable principles or rules of law, or absent a finding that it is unreasonable, to review findings of courts below in respect of s.24(2) of the Charter and to substitute its opinion for the decision arrived at by the Provincial Courts of Appeal[118]. The standard of deference requires that the Appellant make a showing that the Court of Appeal erred, absent which, the

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[116] Criminal Code, section 487.01(1)(a).
[117] Hunter v. Southam, [1984] 2 S.C.R. 145 at pp. 160 to 168
[118] Greffe v. The Queen, [1990] 755 at p. 783

finding of the Court of Appeal must stand in the event that this Court agrees that there was a s.8 violation.

94. The Appellant fails to distinguish between the good faith found by the trial judge and the lack of bad faith found by the Court of Appeal. The two concepts are different for the purposes of the s.24(2) analysis.[119] The Appellant is not correct when it argues that the Court of Appeal found that there was a showing of good faith. The Court of Appeal made no such finding[120]

95. The Appellant assigns error to the Ontario Court of Appeal in several areas.

(a) Deference to the trial judge's decision

96. The Respondent agrees that the reviewing court generally owes deference to the trial court on the issue of whether the administration of justice would be brought into disrepute by the admission of evidence in the course of a s.24(2) determination. There is deference likewise owed to the trial court on the issue of the findings on the Criteria set out by this Court in the *Duguay*[121] decision. The standard of review is one of palpable and overriding error absent an error in principle or law. [122] The findings must not be unreasonable[123].

97. The Ontario Court of Appeal did not owe deference to the learned trial judge in that the trial judge's essential factual findings were unreasonable and were based on errors in law and in principle.

(i) reasonableness of the finding of good faith

98. In the instant case, the critical finding of good faith[124] made by the trial judge was unreasonable and indeed, the proper finding on the record was made by the Court of Appeal that was only able to conclude that there was no

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[119] R. v. Wise, [1992] 2 S.C.R. 527; Regina v. Klimchuk (1991), 67 C.C.C.(3d) 385 (B.C.C.A) at PP 419 to 420

[120] Reasons for Judgment of the Ontario Court of Appeal, Appellant's Record, Tab 4, para. 77

[121] R. v. Dugay, [1989] 1 S.C.R. 93

[122] Buhay v. The Queen (2002), 174 C.C.C.(3d) 97 at para. 42 to para. 47

[123] Buhay v. The Queen supra, at para. 48

[124] Ruling on voir dire in Superior Court of Justice, at page 17, Appellant's Record, Tab 2

bad faith[125]. There was no evidence that the police in conducting the FLIR search reasonably relied upon any judicial or statutory authority or that the police had consulted with Crown counsel and had reasonably relied upon his advice. [126]

99. In order to rely on the good faith of the police to mitigate the seriousness of a breach, the evidence must demonstrate a reasonable and subjective belief on the part of the police that they were acting legally and relying upon some apparently constitutionally valid statute, common law power, a judge's order[127] or (possibly) investigative procedure. Absent such showing, the finding of good faith cannot be made[128]. In this case, there was no evidence as to the state of mind of any on the part of the police.

100. Good faith also requires that the police had reasonable and probable grounds prior to the search notwithstanding that they may have violated s.8[129]. In this case, the finding by the learned trial judge that the grounds to obtain the warrant did not exist until the FLIR search was conducted [130] precludes a finding of good faith.

(ii) Error In principle

101. The learned trial judge adopted the reasoning of this Court in the *Evans and Evans*[131] decision apparently on the s.24(2) issue[132]. The learned trial judge did not appreciate that in *Evans and Evans*, there had been

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[125] Reasons for Judgment of the Ontario Court of Appeal, Appellant's Record, Tab 4, para. 77

[126] Regina v. Fry (1998), 142 C.C.C.(3d) 166 (Nfld. C.A.) at para. 63 to para. 65; Regina v. Silveira ,[1995] 2 S.C.R. 297 at para. 149 to 150 clearly identifies good faith as a fact in mitigation of the seriousness of the breach. In the case under appeal, the Crown at trial did not elicit evidence of good faith in relation to the FLIR search: Submissions of Mr. Porter, Transcript of December 4, 2000, page 120, line 30 to page 122, line 13

[127] Regina v. Goncalves (1993), 81 C.C.C.(3d) 240 (Alta. C.A.) at. 245; appeal allowed at [1993] 2 S.C.R.3 (adopting the dissent of Fraser C.J.A.)

[128] Buhay v. The Queen, at para. 57 to 60; Regina v. Lauda (1999), 136 C.C.C.(3d) 358 (Ont. C.A.) at para. 80 to para. 89; Regina v. Klimchuk (1991), 67 C.C.C. (3d) 385 (B.C.C.A.) at pp. 419 to 420; Regina v. Kokesch (1990), 61 C.C.C. (3d) 207 (S.C.C.) at pp. 228 to 231. While these cases may disagree on precisely what the police must believe to be said to be acting in good faith, they all require an evidentiary showing as to the state of mind of the police at the operative time.

[129] Regina v. Grant, [1993] 3 S.C.R. 223 at pp. 259 to 260

[130] Ruling on Voir Dire in Superior Court, page 14, line 12 to line 28, Appellant's Record, Tab 2

[131] Evans and Evans v. The Queen, [1996] 1 S.C.R. 8 at para. 30

[132] Ruling on voir dire in Superior Court of Justice, at page 17 to page 19, Appellant's Record, Tab 2

evidence at trial and a clear and unchallenged finding that the police officers had adverted their minds to the law and had subjectively believed that they were acting in accordance with the law[133] The learned trial judge did not grasp that in *Evans and Evans*, there was evidence of the state of mind of the police officers that what they were doing was in accordance with the law as they reasonably believed it stood[134]. This alone distinguishes *Evans and Evans.*

102. Where the trial judge has made an erroneous finding that there was no breach of a Charter right, no deference is owed to the trial court to an alternative finding that the test for exclusion under s.24(2) has not been met in any event where the alternative finding is tainted by the erroneous finding that there was no Charter breach [135]. If this Court agrees with the Ontario Court of Appeal that there was a violation of s.8 of the Charter, then it follows that the finding of good faith by the trial judge is tainted by the error and the s.24(2) finding fatally undermined using the same reasoning employed by this Court in *Feeney*[136]

(iii) error in law

103. The learned trial judge in his reasons assessed good faith because when the police seized the evidence, they did so with a warrant that they believed to be facially valid[137]. The Crown conceded that without the results of the FLIR, a warrant could not have been issued to search in the instant case.[138] The Crown argues that this Court's holding in *Goncalves* governs and the subsequent determination of invalidity of the warrant has no effect on the good faith analysis[139]

104. Where the warrant would not have issued absent evidence that was obtained by a violation of the s.8 (or other Charter) right, the warrant is not constitutionally valid and the assessment of good faith for the purposes of

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[133] Evan and Evans v. The Queen, supra, at para. 30
[134] Evan and Evans v. The Queen, supra, at para. 30
[135] Regina v. Feeney, [1997] 2 S.C.R. 13 at para. 84 ; Regina v. Fawthorp (2002), 166 C.C.C.(3d) 97 (Ont.C.A.) at para. 37

[136] Regina v. Feeney, loc. cit.
[137] Ruling on Voir Dire in Superior Court of Justice, page 18 , Appellant's Record, tab 2

[138] Appellant's Factum, paragraph 9

s.24(2) is made with regard to the initial violation.[140] In such cases, the lack of initial good faith taints the warrant. This type of situation is entirely distinguishable from those where the claim of good faith is sustained because the violation flows from a search or seizure made with a facially valid warrant based upon substantively insufficient evidence obtained without the benefit of any evidence in violation of the Charter[141]. It is likewise distinguishable from a situation where a search is conducted with a facially valid warrant found invalid once evidence obtained through a good faith violation of s.8 (or other Charter) right is excised, because the Court finds the balance of the evidence insufficient to sustain the warrant[142]. Again the situation at bar is distinguishable from that in which the Information to Obtain the Warrant is sufficient even following the excision of evidence obtained in violation of the Charter from the Information to Obtain the Warrant[143]. For the purposes of the good faith analysis, it is incorrect to mitigate the seriousness of a s.8 violation by allowing the police to claim good faith because they obtained a facially valid warrant only as a result of obtaining evidence in violation of a Charter right for which they cannot claim good faith. The effect would allow the police to hide their wrong doing behind a judicial authorisation tainted by the conduct of the very state agent who seeks to rely on the warrant. It follows that the good faith finding of the learned trial judge is entirely dependent upon the issue of whether there was good faith in respect of the FLIR search. In the circumstances, the use of the warrant by the police in the search provides no evidence of good faith.

105. The reliance by the Appellant on *Wong* and *Duarte* is wrong[144]. Both of these cases depend on a finding of evidence of good faith throughout the process in the unconstitutional obtaining of the evidence

(iv) inadequacy of the trial judge's reasons on the alternative s.24(2) ruling

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[139] Appellant's Factum, paragraph 78
[140] Regina v. Kokesch, [1990] 3 at pp.32 to 34
[141] As in Regina v. Goncalves, [1993] 2 S.C.R. 3
[142] As in Evans and Evans v. The Queen, [1996] 1 S.C.R. 8 at pp. 23 to 24
[143] As in Regina v. Plant, [1993] 3 S.C.R. 281 at pp. 298 to 299

106. Where the reasons of a trial judge on the ruling under s.24(2) do not provide for meaningful appellate review, the appellate courts do not owe deference to the decision.[145] Where there is an allegation of unreasonableness, the absence of reasons may contribute to appellate intervention even on issues such as credibility (and, it is argued by analogy, findings of facts leading to rulings under s.24(2) of the Charter) where appellate deference is owed to trial judges.[146]

107. In the instant case, the finding of good faith followed as an alternative determination once there was made a finding that there was no s.8 violation. Where an appellate cannot be certain that the finding of good faith under s.24(2) is not tainted by an erroneous finding on the issue of whether the evidence was obtained by a Charter violation, the s.24(2) finding under appeal must be reconsidered in its (*de novo)*[147]just as the Court of Appeal did.

(b) Good faith in the Court of Appeal

108. The Appellant argues that the Court of Appeal gave inadequate weight to the good faith of the police. The Court of Appeal did not conclude that the police acted in good faith but rather that they did not act in bad faith[148]. The difference between 'good faith' and 'bad faith' is outlined in para. 94, *supra* and need not be repeated here. For the reasons outlined in para. 98-100, *supra,* there is not proper basis to conclude that a finding of good faith can be made.

109. The Appellant in argument propounds an objective good faith doctrine that would essentially require the accused to establish a lack of good faith.[149] A showing of good faith mitigates the seriousness of a breach. As a

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[144] Appellant's Factum, paragraph 80

[145] Buhay v. The Queen, supra, at para. 54: Regina v. Sheppard, [2002] 1 S.C.R. 869 at paras. 28, and 55;

[146] Regina v. Sheppard, [2002] 1 S.C.R. 869 at para. 38; Regina v. Brown (2002), 170 C.C.C. (3d) 37 (Ont. C.A.) at para 29 to para. 30

[147] Regina v. Grant , [1993] 3 S.C.R. 223 AT PP.256 to 261

[148] Reasons for Judgment of the Ontario Court of Appeal, Appellant's Record, Tab 4, para. 77

[149] Appellant's Factum, paragraph 78 and 79.

mitigating fact, the burden should be on the party relying on the good faith to establish it[150].

(c) the intrusive nature of the device

110. The Appellant argues that the Ontario Court of Appeal erred in its assessment of the intrusiveness of the FLIR device. The Court of Appeal was well aware of the issue and considered it.[151] The reasons on the Court of Appeal both on this issue and that of whether the FLIR engages s.8 of the Charter are premised on the reasonable conclusion that the FLIR is intrusive[152]. In short, an appreciation of the intrusiveness of the FLIR far from being ignored by the Court of Appeal is at the very foundation of the decision. This Court is bound by its own precedent to defer to the finding of the Court of Appeal on its characterisation of the nature and intrusiveness of the technology.

111. The reliance on the *Wise* the Appellant is misplaced. In *Wise*, the passage quoted by the Appellant is part of an analysis of whether the evidence was 'real or 'conscriptive' [153] and not part of a consideration of whether the 'tracking device' was of such an unobtrusive nature so as to support the admission of the evidence obtained through its use in violation of s.8 of the Charter.

112. The privacy of the home in our society is a goal so highly valued that any intrusion is regarded as significant.[154] The Court of Appeal was well aware of this. The simple conclusion is that any unlawful intrusion into the privacy of the home is constitutionally serious for the purposes of s.24(2). The Appellant can point to no judicial authority for the proposition that somehow a technologically primitive device that violates the expectation of

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[150] Regina v. Fry (1998), 142 C.C.C. (3d) 166 (Nfld. C.A.) at para. 63 to para. 65; Regina v. Silveira ,[1995] 2 S.C.R. 297 at para. 149 to 150 clearly identifies good faith as a fact in mitigation of the seriousness of the breach. In the case under appeal, the Crown at trial did not elicit evidence of good faith in relation to the FLIR search: Submissions of Mr. Porter, Transcript of December 4, 2000, page 120, line 30 to page 122, line 13

[151] Reasons for judgment of the Ontario Court of Appeal, para. 78, Appellant's Record. Tab 4

[152] Reasons for judgment of the Ontario Court of Appeal, para. 65 to para. 70, Appellant's Record. Tab 4

[153] Regina v. Wise, [1992], 1 S.C.R. 527 at pp. 541 to 544; a distinction which is no longer of any currency in any event since the Stillman decision.

privacy in a home is innocuous for the purposes of s.24(2). The reason for this gap is, of course, because there is no such authority.

(d) the impact on the repute of justice by the exclusion as opposed to the admission of the evidence

113. The Appellant raises two issues in which it argues that the Court of Appeal erred. The Respondent takes the position that there were no such errors. In fact, the Court of Appeal, was quite correct and in keeping with this Court's precedents in making the findings that it did. The matters raised are factual in nature and involve a challenge by the Appellant to the weight to be given factors in the s.24(2) decision; matters which this Court should decline to consider in any event.

(i) the seriousness of the firearms offences.

114. The Appellant argues that the Ontario Court of Appeal failed to take into account the ostensibly serious firearms offences. The Court of Appeal clearly did advert to the firearms offences[155] and the weight given to them in the analysis is clearly a matter on which the Court must defer.

115. Crown counsel at trial did not advance the position that the drug offences should be treated any differently than the firearms offences in the s.24(2) determination.[156] The learned trial judge did not deal with the two types of offences any differently in his s.24(2) determination[157]. In the Ontario Court of Appeal, the Crown did not make any submissions that the firearms should be treated any differently than the drugs from the point of view of s.24(2) and that Court saw no reason in light of that to treat them any differently or to conclude that the impact of the exclusion would be any different[158]. The Appellant now makes this argument for the first time having taken a consistently contrary position at trial and in the Ontario Court of Appeal.

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[154] Regina v. Kokesch, at p. 29
[155] Reasons for judgment of the Ontario Court of Appeal, para. 83, Appellant's Record. Tab 4

[156] Submissions of Mr, Porter, Transcript of December 4, 2000, Respondent's Record, Tab
[157] Ruling on Voir Dire in Superior Court of Justice, page 16 to page 17 Transcript of December 5, 2000, Appellant's Record, tab 2
[158] Reasons for judgment of the Ontario Court of Appeal, para. 83, Appellant's Record. Tab 4

116. A Crown Appeal cannot be the means whereby the Crown puts forward a different case than the one it chose to advance at trial. It offends double jeopardy principles to subject an accused who has been acquitted at trial to a second trial based on arguments raised by the Crown for the first time on appeal[159]. This rule applies to positions taken at trial with respect to the admissibility of evidence[160]. The raising of a fresh evidentiary issue by the Crown in an Appeal from a conviction deprives the accused of the right to make full answer and defence and should not be countenanced[161].

117. As is argued in paragraphs 96 to 97, *supra*, this Court has consistently taken the position that issues such as the assessment of the weight of the evidence and the factors in the s.24(2) determination is not something which can be raised in this Court.

(ii) marijuana production is a serious offence

118. The Appellant argues that the Court of Appeal erred in viewing marijuana production as no longer a serious offence in the context of its analysis of whether the repute of the administration of justice would be brought into greater disrepute by the exclusion as opposed to the admission of the evidence. In the first place, the Court of Appeal only stated that it is generally accepted "…that marijuana is at the lower end of the hierarchy of harmful drugs."[162] The Court of Appeal did not suggest that marijuana and its production is not a serious problem but merely repeated the view, consistent with the pronouncements of this Court (and Courts in Canada generally), the legislation, and the knowledge that experienced judges must be taken to have in administering the law, that marijuana is *relatively* less serious than some illegal substances. The matter of the weighing of this factor in the s.24(2) determination is, once again, something that this court has consistently deferred to the Courts of Appeal[163]. Finally, the Appellant did not raise this

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[159] Regina v. Varga (1994), 90 C.C.C.(3d) 484 (Ont.C.A.) at pp 493 to 494; Regina v. Vaillancourt (1995), 105 C.C.C.(3d) 552 (Que. C. A.) at pp. 562 to 564

[160] Regina v. Varga, ibid at p. 496

[161] Penno v. The Queen, [1990] 2 S.C.R. 865 at pp. 895 to 896

[162] Reasons for judgment of the Ontario Court of Appeal, para. 81, Appellant's Record. Tab 4

[163] See paragraphs 73 to 76, supra.

issue at trial by tendering evidence or making argument[164] or by argument in the Court of Appeal[165]. The issue of the relative seriousness of marijuana cultivation is a factual issue and ought not to be re-litigated in this Court.

119. The jurisprudence of this Court has consistently recognized, without the necessity of the tendering of evidence, that marijuana offences are serious, they are generally regarded as less serious than those involving hard drugs such as cocaine and heroin and that this is proper to consider in deciding whether the exclusion of the evidence would bring the administration of justice into disrepute than its admission [166]. The *Plant* decision, in relation to this issue, in entirely in accord with the authorities that hold that marijuana offences are not the most serious drug offences[167]. The penal legislation recognizes that marijuana offences are less serious than those involving 'hard drugs'[168]

120. This Court owes deference to the lower Courts on the issue of the relative impact on the repute of justice of exclusion as opposed to admission. In this regard, the need for appellate deference is more acute than in some other areas involved in the s.24(2) determination[169]

121. The Appellant chose not to advance this argument in the lower courts and must, in the circumstances be taken to have been aware of the issue and the evidence in support of it both at trial and in the Court of Appeal. The Appellant attempts, in its Factum[170], to provide evidence relative to the point. The Appellant, as has been argued above ought not to be permitted to raise the issue in this Court in this manner[171]

PART IV: SUBMISSIONS ON COSTS

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[164] Submissions of Mr., Porter, Transcript of December 4, 2000, Respondent's Record, Tab

[165] Respondent's Factum in the Ontario Court of Appeal, para. 26 to para. 28, Respondent's Record, Tab

[166] from Regina v. Kokesch, [1990] 3 S.C.R. 3at pp. 34 to 35 to Buhay v. The Queen (2003), 174 C.C.C.(3d) 97 (S.C.C.) at para. 68

[167] Regina v. Plant , [1993] 3 S.C.R. 281 at p. 301

[168] Controlled Drugs and Substances Act, S.C. 1996, chap. 19,as amended sections 4, 5, and 7. and Schedules I and II Save and except for the importation offence, marijuana is dealt with more leniently than the hard drugs listed in Schedule I of the CDSA

[169] Buhay .v The Queen, supra, at para. 70

[170] Appellant's Factum, paragraph 88 to 89: Appellant's Book of Authorities, Tabs 27, 31, and 33

[171] See paragraph 82 to 83, supra

122. The Respondent seeks his costs. The Respondent was acquitted in the Court of Appeal. The Appellant ostensibly sought and obtained leave to appeal in part on the grounds that it had employed the FLIR on a larger number of investigations and that it was in the public interest that the issue of the warrantless use of the FLIR be settled by this Court. In the circumstances, this appeal is a 'test case' for the surveillance technology employed by the Appellant. The interest of the Appellant goes far past its interest in the prosecution of the Respondent. To put the Respondent to the cost of this appeal brought by the Respondent largely to settle the constitutionality of its widespread use of an investigative technology should mandate the payment of the Respondent's costs of this appeal.

PART V: ORDER SOUGHT

123. The Respondent seeks an order that the Appeal be dismissed

ALL OF WHICH IS RESPECTFULLY SUBMITTED
Dated at Windsor, this 9th day of February 2004

FRANK MILLER
Counsel for the Respondent, Walter Tessling