Court No25860

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COUR OF APPEAL FOR ONTARIO)

B E T W E E N:

HER MAJESTY THE QUEEN

Appellant

and

WALTER TESSLING

Respondent

and

THE ATTORNEY GENERAL OF ONTARIO

Intervenor

FACTUM OF THE INTERVENOR
THE ATTORNEY GENERAL OF ONTARIO

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Part One: The Facts

1. The Intervenor, the Attorney General of Ontario, agrees with the facts set out by the Appellant. Further, the Attorney General of Ontario agrees with and endorses the positions and arguments advanced by the Appellant in its factum. In addition the Attorney General of Ontario relies upon the following submissions.

Part Two: Points in Issue

2. The intervenor the Attorney General of Ontario intends to make submissions on following issues of law which arise from the judgment under appeal:

Issue One **Does the use of a device to gather information about gross waste heat associated with the outside of a building amount to a search or seizure for constitutional purposes?**

3. It is the Attorney General of Ontario's position that the use of such a device is not a search or seizure for the purposes of section 8 analysis. There is no meaningful intrusion on the spatial, personal, or informational privacy interests of the subject. While this mundane bit of information may fit into a larger matrix of investigative data to permit more substantive conclusions, that is not the correct approach to s.8 analysis.

Issue Two **If it is a search or seizure, is that search or seizure unreasonable unless it is conducted pursuant to a search warrant issued in accordance with the "*Hunter* standards"?**

4. Even if the use of such a device can somehow be characterized as a 'search' that is not the end of the inquiry. In this case the Court of Appeal erred in assuming that the only standard that could constitutionally authorize state 'search' activity is a warrant issued pursuant to the '*Hunter* standards'. It is the Intervenor's position that, in light of the minimal (really *de minimis*) intrusion involved, and the important state objective of enforcing the criminal law, something the activity in this case (which was lawful) is constitutionally acceptable on some lesser standard.

Part Three: Argument

Issue One **Does the use of a device to gather information about gross waste heat associated with the outside of a building amount to a search or seizure for constitutional purposes?**

Issue Two **If it is a search or seizure, is that search or seizure unreasonable unless it is conducted pursuant to a search warrant issued in accordance with the "*Hunter* standards"?**

A. INTRODUCTION

5. The Respondent asserts that his constitutional right to be secure against unreasonable search or seizure was violated when the police, without entering onto his property, used a relatively unsophisticated device to find out whether some parts of the outside of his house were warmer than other parts. This mundane bit of information would normally be of no interest to anyone. By itself it involves *no entry* into the Respondent's domain inside his house, does nothing to *interfere* with his physical person, and *discloses* nothing that could be considered 'intensely personal' information about him. All that is learned by the police is that one part of the outside of the house is warmer than other parts. Is that a "search"? Is it "unreasonable"?

6. In order to assess the Respondent's claim of constitutional violation one must:

(a) Articulate when governmental conduct will constitute a "search" for constitutional purposes;

(b) Determine whether the governmental conduct in this case falls within that description and;

(c) Determine whether the conduct, if it is a search, was "unreasonable" in a constitutional sense.

B. WHAT IS A SEARCH?

7. For generations, the Anglo-Canadian law on search and seizure was organized

around concepts of property. Indeed, it has become traditional to begin a study of the subject by referring to the General Warrant cases of the 1760's and their pronouncements on the role of property as the basis of civilized society. A "search" was simply a very specific sort of governmental trespass or interference with an individual's right to property. The more important the property, the graver the interference.[1] Even today, for *statutory* purposes, a search is an otherwise unauthorized physical entry onto someone's property to look for physical evidence.[2]

8. Constitutional protection against unreasonable searches is, of course, found in section 8 of the Charter of Rights and Freedoms, which provides that everyone has the right to be "secure against unreasonable search or seizure." While the section has the advantage of brevity, it offers little guidance on what precisely it guarantees. The section is a "vague and open"[3] guarantee "totally lacking in specificity."[4] Unlike the American *Fourth Amendment*,[5] there is no specific "historical, political or philosophical context capable of providing an obvious gloss on the meaning of the guarantee".[6]

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1. The most famous of these cases is of course *Entick v Carrington* (1765), 19 State Tr. 1029. In that case Lord Cambden rested his judgment on the right to property, and wrote (at 1066): "The great end, for which men entered into society, was to preserve their property. That right is preserved sacred and incommunicable in all instances, where it has not been taken away or abridged by some public law for the good of the whole."

2. Consider the cases dealing with the scope of activity authorized under s.487 of the *Criminal Code*, such as *R. v. Banque Royale du Canada* (1985), 18 C.C.C.(3d) 98 (QueCA) leave to appeal to Supreme Court of Canada refused, *loc cit.* In *R. v. Kelly* (1999), 132 C.C.C. (3d) 122 (N.B. C.A.). at 129, "Generally, any examination by state agents for the purpose of discovering evidence of the commission of an offence is a search within the meaning of statutory search provisions." In *R. v. Wong*, [1990] 3 S.C.R. 36, for example, the Court concluded that video surveillance in a hotel room was a search for constitutional purposes, but that s.487 could not authorize such an intrusion on statutory interpretation principles.

In the United Kingdom this approach continues: *Malone v. Commissioner of Police* [1979] 2 All ER 620 (HC) holding that wiretapping is not a 'search or seizure' because no tort of trespass is involved.

3. *Hunter v. Southam Inc.,* [1984] 2 S.C.R. 145 at 154.

4. *Thompson Newspapers v. R.*, [1990] 1 S.C.R. 425 per Wilson J. at

5. The Fourth Amendment of the American Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

6. *Hunter v. Southam Inc.,* [1984] 2 S.C.R. 145 at 155.

9. Notwithstanding this lack of explicit internal or external aids to interpretation, in *Hunter v. Southam*,[7] this Court, quite properly, looked beyond property in an effort to identify the proper *organizing principle* for a modern *constitutional* understanding of what constitutes a reasonable search. In doing so, Justice Dickson, rejected narrow notions of property as the purpose behind s.8. He wrote:[8]

> Historically, the common law protections with regard to governmental searches and seizures were based on the right to enjoy property and were linked to the law of trespass. It was on this basis that in the great case of *Entick v. Carrington* (1765),…, the Court refused to countenance a search purportedly authorized by the executive, to discover evidence that might link the plaintiff to certain seditious libels.
>
> In my view the interests protected by s. 8 are of a wide ambit than those enunciated in *Entick v. Carrington.* Section 8 is an entrenched constitutional provision. It is not therefore vulnerable to encroachment by legislative enactments in the same way as common law protections. There is, further, nothing in the language of the section to restrict it to the protection of property or to associate it with the law of trespass. It guarantees a broad and general right to be secure from unreasonable search and seizure.

He looked to the landmark American search case of *Katz*[9] and accepted the notion that a "reasonable expectation of privacy" was the appropriate precept around which to develop a constitutional understanding of search. Such a standard balances the citizen's interest in being 'left alone' against the community's various legitimate interests which might detract from absolute privacy. Justice Dickson wrote:[10]

> In *Katz*, Stewart J. discussed the notion of a right to privacy, which he described ... as "his right to be let alone by other people". Although Stewart J. was careful not to identify the Fourth Amendment exclusively with the protection of this right, nor to see the Amendment as the only provision in the Bill of Rights relevant to its interpretation, it is clear that this notion played a prominent role in his construction of the nature and the limits of the American constitutional protection against unreasonable search and seizure. In the Alberta Court of Appeal, Prowse LA. took a similar approach to s. 8, which he described as dealing "with one aspect of what has been referred to as the right of privacy, which is the right to be secure against encroachment upon the citizens' reasonable expectation of privacy in a free and democratic society".

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7. *Hunter v. Southam Inc.,* [1984] 2 S.C.R. 145 at 155.
8. *Hunter v. Southam Inc.,* [1984] 2 S.C.R. 145 at 157-58.
9. *U.S. v. Katz,* (1967), 389 U.S. 347
10. At 159-60. See also the comments in *R. v. Dyment*, [1988] 2 S.C.R. 417 at 427 per La Forest J.

> Like the Supreme Court of the United States, I would be wary of foreclosing the possibility that the right to be secure against unreasonable search and seizure might protect interests beyond the right of privacy, but for purposes of the present appeal I am satisfied that its protections go at least that far. ***The guarantee of security from unreasonable search and seizure only protects a reasonable expectation. This limitation on the right guaranteed by s. 8, whether it is expressed negatively as freedom from "unreasonable" search and seizure, or positively as an entitlement to a "reasonable" expectation of privacy, indicates that an assessment must be made as to whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement.*** [emphasis added]

Indeed, we have gone so far as to remove a "right to property" *per se* from the set of interests that s.8 protects. While privacy remains *related* to property, and intrusions on property will often incidentally engage privacy interests, s.8 focuses on state action that has as its *objective* an *intrusion* on *privacy* in some sort of *investigative* sense.[11] As LaForest J. observed in *Dyment*[12]

> it may be confusing means with ends to view these inherited rights as essentially aimed at the protection of property. The lives of people in earlier times centred around the home and the significant obstacles built by the law against governmental intrusions on property were clearly seen by Coke to be for its occupant's "defence" and "repose"; see *Semayne's Case* (1604), …. Though rationalized in terms of property in the great case of *Entick v. Carrington* (1765), … the effect of the common law right against unreasonable searches and seizures was the protection of individual privacy. Viewed in this light, it should not be cause for surprise that a constitutionally enshrined right against unreasonable search and seizure should be construed in terms of that underlying purpose unrestrained now by the technical tools originally devised for securing that purpose. However that may be, this Court in *Hunter v. Southam Inc.* clearly held, in Dickson J.'s words, that the purpose of s. 8 "is ... to protect individuals from unjustified state intrusions upon their privacy"… and that it should be interpreted broadly to achieve that end, uninhibited by the historical accoutrements that gave it birth…

For constitutional purposes then ***a search takes place whenever police investigative activity intrudes upon an individual's reasonable expectation of privacy***.

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11. *Quebec (A.G.) v. Laroche*, [2002] 3 S.C.R. 708 per Lebel J. at ¶52 to 54
12. *R. v. Dyment*, [1988] 2 S.C.R. 417 at 427 per La Forest J. (citations omitted)

C. WHAT IS PRIVACY? WHAT IS AN EXPECTATION OF PRIVACY?

(1) INTRODUCTION

10. That isn't the end of the inquiry, of course, because privacy is itself "a broad and somewhat evanescent concept".[13] This Honourable Court, in the context of *Charter* jurisprudence, has developed a ***purposive*** and ***flexible*** approach to identifying the privacy interests protected at a constitutional level. As Justice Sopinka observed in *Evans,*[14] "… the Court must ***inquire into the purposes of s. 8*** in determining whether or not a particular form of police conduct constitutes a 'search' for constitutional purposes". [emphasis added] The inquiry is contextual and requires a consideration of all the relevant circumstances: "[A] reasonable expectation of privacy is to be determined on the basis of the totality of the circumstances"[15]

(2) PURPOSIVE THEMES AND DIFFERENT TYPES OF PRIVACY

11. This Court's purposive and flexible approach to constitutional privacy draws heavily upon the analytical framework and rationale put forward in the influential 1972 report on *Privacy and Computers.*[16] This approach to understanding the *constitutional* dimensions of privacy was first articulated in *Dyment*[17] by Justice La Forest, writing:

> The first challenge, then, is to find some means of identifying those situations where we should be most alert to privacy considerations. Those who

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13. *Dagg v. Canada*, [1997] 2 S.C.R. 403 at ¶67. In the United States for example, 'privacy' has (for reasons peculiar to that country's jurisprudence and history) has taken on an expansive meaning, well beyond the law governing state investigative activities and spawned a broad doctrine of 'substantive privacy' which incorporates a right to make certain personal decisions (such as the use of contraceptives, abortion or non-harmful sexual acts in private: *Griswold* v. *Connecticut,* 381 U. S. 479 (1965); *Eisenstadt v. Baird* (1972), 405 U.S. 438 (contraceptives); *Roe v. Wade* (1973), 410 U.S. 113 (abortion); *Lawrence and Garner v. Texas,* (2003) 539 U.S. 558 (sodomy).) At the same time a number of activities labelled "search" under the Canadian constitutional approach are considered unintrusive in the American context (for example, consent interceptes (*R. v. Wong*, [1990] 3 S.C.R. 36; cf.) and a variety of document searches (*R. v. Plant*, [1993] 3 S.C.R. 281; cf. *United States v. Miller*, 425 U.S. 435 (1976))

14. *R. v. Evans*, [1996] 1 S.C.R. 8 at ¶10

15. *R. v. Buhay*, [2003] 1 S.C.R. 631 at ¶18, citing *Edwards*, at para. 31, and *R. v. Wong*, [1990] 3 S.C.R. 36, at p. 62).

16. Canada, a Report of the Task Force established by the Department of Communications and the Department of Justice, *Privacy and Computers* (Ottawa; Information Canada; 1972). The report has been repeatedly cited by this Honourable Court, most notably in *R. v. Dyment*, [1988] 2 S.C.R. 417, but also in *R. v. Law* [2002] 1 S.C.R. 227 at ¶16ff; *Schreiber v. Canada* [1998] 1 S.C.R. 841 at ¶51 by Iacobucci J. in dissent; *Dagg v. Canada*, [1997] 2 S.C.R. 403 at ¶65 (per LaForest J. dissenting); *R. v. Osolin,* [1993] 4 S.C.R. 595 and in *R. v. Plant,* [1993] 3 S.C.R. 281 at ¶18ff.

17. *R. v. Dyment*, [1988] 2 S.C.R. 417

> have reflected on the matter have spoken of zones or realms of privacy; see, for example, *Privacy and Computers*, …. The report classifies these claims to privacy as those involving ***territorial or spatial*** aspects, those related to the ***person***, and those that arise in the ***information*** context.

The same approach to privacy has been accepted by the *Ontario Commission on Freedom of Information and Individual Privacy* an by the *Law Reform Commission of Canada*:[18]

> The Ontario Commission… has identified three sorts of privacy: territorial, personal and informational . Territorial privacy is privacy in a spatial sense and involves the right to be free from ***uninvited entries or unwarranted intrusions*** into one's home. Privacy of the person protects the ***dignity of the person*** and encompasses freedom from physical assault. Privacy in the information context concerns a person's claim to ***control over personal information***.

These 'realms of privacy' identify the different exemplifications of the individual's interest in being 'left alone' by the state (and others). They are inherently valuable in and of themselves as manifestations of what the citizen can expect in a free and democratic society. As the Court said in *Dagg* "…privacy is grounded on physical and moral autonomy – the freedom to engage in one's own thoughts, actions and decisions."[19] Each kind of privacy contributes to the underlying purposes of privacy, the fostering of individual dignity and autonomy.

12. The protection of privacy is intended to contribute to the well-being of individuals and to society as a whole: total or perfect privacy is only achieved by the recluse who excises himself from all human intercourse to lead a completely atomistic life. ***A purposive approach to the issue examines privacy in terms of securing or enhancing individual dignity and autonomy within a community that is free and democratic.*** Our constitutional understanding of privacy must protect values and interests that contribute to how people conceive of themselves and their role in, and

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18. LRCC, *Report 33, Recodifying Criminal Procedure, Vol. 1, Police Powers* (Law Reform Commission of Canada, Ottawa: 1991) at 118, adopting the comments of the Ontario Commission on Freedom of Information in *Public Government for Private People* vol.3 *Protection of Privacy* (Freedom of Information Commission (Ontario), Toronto: 1980) at 498ff.

19. *Dagg v. Canada*, [1997] 2 S.C.R. 403 at ¶65, per La Forest J. (dissenting in the result, for the

…Note continued on following page

relationship to, such a community. ***Intrusions which involve no meaningful diminution of these underlying values <u>are not searches.</u>***

(a) <u>Personal (Bodily) Privacy</u>

13. Personal or bodily privacy represents a core, irreducible zone of privacy attracting the highest protection from the constitution. It relates to the physical integrity of the subject's body and the space or "bubble" immediately surrounding the person. It is intimately related to the dignity and worth of the individual. Taking bodily samples for DNA testing[20] (or databanking[21]) and "strip searches"[22] are examples of intrusions on this manifestation of privacy. This form of privacy is not engaged in this case.

(b) <u>Spatial (Territorial) Privacy</u>

14. Spatial privacy is most readily associated with pre-*Charter* search law because in many ways it conceptually and practically overlaps with, and is linked to, property and property-like interests. Constitutional privacy interests in this sphere are grounded in the individual's dominion over a particular defined property or space and the right to exclude the world, including state actors, from entry onto, or interference with, that property. While related to, and overlapping with property interest, it is important to keep in mind that the constitutional imperative at work is privacy.

15. In the context of an assertion that an intrusion into this category of privacy is a search, this Honourable Court has observed that the criteria for identifying a 'reasonable expectation of spatial privacy' parallel those underlying the inquiry into whether an accused has standing to challenge a particular search. In *Edwards*[23] the Court considered the issue of "standing" and observed that, "A reasonable expectation of privacy is to be determined on the basis of the totality of the circumstances". *Edwards* suggests a number of factors to be considered as part of the "totality of the

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majority on this point)

20. *R v. S.A.B.*, [2003] 2 S.C.R. 678
21. *R. v. Briggs* (2001), 157 C.C.C. (3d) 38 (OntCA)
22. *R. v. Golden*, [2001] 3 S.C.R. 679
23. *R. v. Edwards*, [1996] 1 S.C.R. 128.

circumstances" used to assess a claim of a reasonable expectation of spatial privacy. ***The nature of the interests protected is reflected in the criteria for identifying when the interest arises***. This non-exhaustive list is:

1. presence at the time of the search;
2. possession or control of the property or place searched;
3. ownership of the property or place;
4. historical use of the property or item;
5. the ability to regulate access, including the right to admit or exclude others from the place;
6. the existence of a subjective expectation of privacy; and
7. the objective reasonableness of the expectation.

The assessment to be made is based on all of the facts, with no one element being required or dominating. Part of this assessment involves, of course, a consideration of how a free and democratic society *should* approach the privacy question in issue.

16. Obviously different locations attract more or less intense spatial privacy expectations based on the nature of the activities undertaken in such places, and their relationship to personal dignity and autonomy. The home, historically and practically the citizen's principal resort from the state, normally is the *situs* a high expectation of spatial privacy. An office is less private. Vehicles and other locations have significantly reduced expectations of spatial privacy. As well, individuals may have different spatial privacy interests depending on their legal relationship to the place or things in question. For example, it is well established that a passenger has a different expectation of spatial privacy in a vehicle than has the driver or owner of the vehicle.[24]

17. All of these distinctions are consistent with the values of dignity and autonomy as manifested in and protected by an expectation of spatial privacy.

18. The most obvious intrusions on spatial privacy arises from a physical entry: conventional 'searches' and the seizure of things as evidence. Other less direct

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24. *R. v. Belnavis*, [1997] 3 S.C.R. 341

intrusions will be constitutionally characterized as searches if they are destructive of the 'private' quality of the place such that it is no longer available for, "it's occupants 'defence' and 'repose'"[25]. Thus surreptitious video surveillance, even if it is conducted without a legal trespass, is nonetheless a "search".[26] That technology (unlike the technology here) *obliterates* whatever spatial privacy inhered in the place. Similarly, the indiscriminate use of 'consent intercepts' to secretly record conversations would change the nature of all human intercourse and alter the nature any place to which individuals might have resort.[27]

19. None of this is to say that in the course of an investigation the police cannot or should not try to find out what is happening in a home or other sphere of spatial privacy; just the opposite is true. Police quite properly try to discover just that. The community demands that crime be discovered and, where discovered, that it be punished. The *Charter* protects against state conduct which causes a home or other place to lose its private quality, not against police efforts to deduce from available evidence what is taking place behind drawn blinds.

(c) Informational Privacy

20. Expectations of informational privacy are generally the most challenging to identify and quantify. Participation in society necessarily means that information about ourselves flows constantly – our appearance, social interactions, movements, and any variety of transactions with state and private actors who may cooperate with the police mean that a range of data is available to those inclined to observe or record them.[28]

21. This Honourable Court has clearly recognized that not every acquisition of information can be characterized as a search. To do so would stifle legitimate police

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25. To paraphrase *R. v. Dyment*, [1988] 2 S.C.R. 417at 426
26. *R. v. Wong*, [1990] 3 S.C.R. 36
27. *R. v. Duarte*, [1990] 1 S.C.R. 30
28. *R. v. Elzein* (1993), 55 C.C.C.(3d) 50 (QueCA); *R. v. Bryntwick*, [2002] O.J. no.3618 (SC)

inquiries and create investigative gridlock. In *Evans*[29] and again in *Plant*[30] the Court has cautioned against taking too broad an approach to what investigative actions might be constitutionally labelled as 'searches':[31]

> The word "search" is defined by The Oxford English Dictionary (2nd ed. 1989), vol. XIV as: "1. a. The action or an act of searching; examination or scrutiny for the purpose of finding a person or thing....Also, investigation of a question; effort to ascertain something." In this sense, every investigatory method used by the police will in some measure constitute a "search". However, ***the scope of s. 8 is much narrower than that, and protects individuals only against police conduct which violates a reasonable expectation of privacy. To hold that every police inquiry or question constitutes a search under s. 8 would disregard entirely the public's interest in law enforcement in favour of an absolute but unrealistic right of privacy of all individuals against any state incursion however moderate.***[emphasis added]

Not every investigative technique is a search: "it is 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."[32]

22. Insofar as expectations of informational privacy are concerned, this Honourable Court (taking a purposive approach to a reasonable expectation of informational privacy) has stated that in order to attract constitutional protection information must be at the "***biographical core of personal information*** which individuals in a free and democratic society would wish to maintain and control from dissemination to the state" and which, if disclosed, would "***reveal intimate details***" about the "***personal lifestyle or private decisions*** of the" subject.[33]

23. In *Plant*, the leading s.8 case on expectations of informational privacy, the Court considered a form of information much like (indeed, if anything, more private than) the

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29. *R. v. Evans*, [1996] 1 S.C.R. 8
30. *R. v. Plant*, [1993] 3 S.C.R. 281
31. *R. v. Evans*, [1996] 1 S.C.R. 8 at ¶48 per Major J. in dissent, but not on this issue (see Sopinka J. at ¶10).
32. *R. v. Evans*, [1996] 1 S.C.R. 8 at ¶ 11
33. *R. v. Plant*, [1993] 3 S.C.R. 281 at ¶20.

information in issue here. The police obtained access to the electricity consumption records of a particular home. The records would not, by themselves, disclose *how* the energy was used, *who* used it, or *what* was being done in the house, but could, when considered with other evidence, provide some insights into the goings on within the home. The information was not normally available to the public[34] and the police only got access through a special arrangement with the utility. The accused complained that by discovering this information the state had trenched upon his expectation of informational privacy. The majority here disagreed, however, concluding that "***electricity consumption reveals very little about the personal lifestyle or private decisions*** of the occupant of the residence"[35] and such does not give rise to a reasonable expectation of informational privacy.

(3) PRIVACY AND EXPECTATIONS OF THE STATE

24. Our understanding of privacy in a *constitutional* context must, of course, be cast in terms of the relationship between the individual and the state, and the legal prohibitions on the state which flow from a conclusion that the activity in question is a 'search'. As well, the test should be cast with reference to what citizens in a free and democratic society *should* be able to expect from their government, rather than what circumstances *cause* them to expect. In *Wong* the LaForest J. said:[36]

> *R. v. Duarte* approached the problem of determining whether a person had a reasonable expectation of privacy in given circumstances by attempting to assess whether, by the standards of privacy that persons can expect to enjoy in a free and democratic society, the agents of the state 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 not have been open to the agents of the state to act as they did without prior judicial authorization.*** To borrow from Professor Amsterdam's reflections, ... the adoption of this standard invites the courts to assess whether giving their sanction to the particular form of unauthorized surveillance in question would see the amount of privacy and

34. *R. v. Plant*, [1993] 3 S.C.R. 281 at ¶44 (though Sopinka J. seemed to take a different view of the evidence)
35. *R. v. Plant*, [1993] 3 S.C.R. 281 at 20
36. *R. v. Wong*, [1990] 3 S.C.R. 36

> freedom remaining to citizens diminished to a compass inconsistent with the aims of a free and open society. [emphasis added]

Put another way: [37]

> whether an individual's privacy interests will attract s. 8 protection depends on ***whether a "reasonable person would expect that the investigative technique in question so trenched on personal privacy that it should only be available with some form of judicial pre-authorization"***

25. Considering privacy, or expectations of privacy, from a constitutional perspective then, one must consider the extent to which – if at all – the questioned government conduct would, if permitted without judicial pre-authorization, undermine the values of personal autonomy:

- ***Would that prospect 'see the amount of privacy and freedom remaining to citizens diminished to a compass inconsistent with the aims of a free and open society'?***
- ***Would it prevent individuals from leading autonomous, meaningful lives independent of government meddling?***
- ***Would it impair the creation or development of networks of individuals in intimate, personal relationships?***
- ***Would it change the way we perceive our ability to participate in personal, family, community or political life?***

26. Any lesser test would radically lower the threshold for the identification of state conduct said to intrude on privacy and effectively place a search label on any investigative actions. Unintrusive state action to acquire even the most mundane datum

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37. Per Iacobucci J. dissenting in *Schreiber v. v. Canada (AG)*, [1998] 1 S.C.R. 841 at ¶49, quoting S.C. Hutchison, et al, *Search and Seizure Law in Canada* (1993 (loose-leaf)) at p. 1-12

would become a search. It would amount to a trivialization of privacy as a constitutional concept and undermine the public's perception of the balance between individual protection and the law's ability to permit the police a reasonable ambit of activity to gather evidence of crime.

(4) CONCERN FOR FUTURE CASES AND FUTURE TECHNOLOGIES

27. No doubt the Court carries a great trust for the future to ensure that approbation of a particular search does not become a licence for future more intrusive activities. In the context of investigative techniques which involve the use of a technology care must be taken to ensure against a rule which unintentionally invites the use of more advanced and more intrusive versions of the same technology at some future point in time. Clearly this was a concern for the Court of Appeal in this case and for Justice Scallia in *Kyllo.*[38]

28. Concern for the careful development of the law is not, however, a mandate to lose sight of the case that is actually before the court. ***The Court's duty to the future is discharged not by ignoring the relatively mundane issue before it, but by articulating a rule or test that is substantive not mechanical.*** There is no need to fear this device or any other simply because it is a "technological" aid so long as the test used to assess any alleged search is substantive. One can never lose sight of need to examine whether a reasonable expectation of privacy based on the facts actually before the court: "[T]he consideration of whether an individual has a reasonable expectation of privacy can only be decided within ***the particular factual context of the surveillance***"[39] and not based on open-ended ideas about ideal privacy.

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38. *Kyllo v. U.S.* 533 U.S. 27 (2001)
39. *R. v. Wong*, [1990] 3 S.C.R. 36 per Lamer J. concurring, at 61-2 [emphasis added]

D. CONCLUSION: THE TEST OF ASSESSING PRIVACY CLAIMS

29. In considering whether state action interferes with a reasonable expectation of privacy the Court should first identify the nature of the privacy interest said to be affected and the true nature and extent of the intrusion. This includes identifying the relevant context of the intrusion and expectations about how free and democratic societies conduct themselves in that area of life.

The state action and alleged intrusion must then be assessed against the interests and values protected by section 8 to determine whether allowing the investigative activity would be inconsistent with those values and the *purposes* behind the protection of a reasonable expectation of privacy. This requires a consideration of the questions that have been noted earlier:

- Would allowing the impugned action 'see the amount of privacy and freedom remaining to citizens diminished to a compass inconsistent with the aims of a free and open society'?
- Would it prevent individuals from leading autonomous, meaningful lives independent of government meddling?
- Would it impair the creation or development of networks of individuals in intimate, personal relationships?
- Would it change the way we perceive our ability to participate in personal, family, community or political life?
- Would the reasonable person think that the investigative technique in question so trenched on personal privacy that it should only be available with some form of judicial pre-authorization?

The objective of this heuristic is to probe whether there is any meaningful intrusion on the dignity and a autonomy of the subject caused by the questioned state action. In the absence of such a meaningful intrusion there is no need for constitutional protection.

E. ASSESSING THE CLAIM IN THIS CASE

30. In this case the state action in issue is the use of a device which, without any sort of physical intrusion, is able to measure gross waste heat on the outside of a building and tell which parts of the exterior (if any) are warmer than other parts. As has been emphasized in many places[40] it does not 'see inside' the building or disclose what is going on. Heat differentials can be caused by so many things that the technique, without more, cannot discriminate between a sauna bath, prolonged cooking or commercial drug cultivation.

31. What spheres of privacy are engaged? Clearly no element of personal or bodily privacy is involved. Equally, there is no meaningful intrusion on spatial privacy. There is no entry or interference with personal property. Nor is there anything tantamount to an entry. While it is technology based, the technique in question is not the sort of privacy 'atom bomb' that could "annihilate privacy"[41] in the way that surreptitious video and audio surveillance might. The existence of the technique does not alter the nature of a home as a place of retreat and repose where individuals are at liberty to conduct their lives free from governmental meddling.

32. There is an informational element to the use of the device, in that the state does acquire a bit of knowledge about the subject. But the bit of information here is, with respect, in the *de minimis* range when measured against the purposes of a protection of privacy. It cannot be said that the acquisition of this information without judicial pre-authorization will, in any meaningful way, impair Mr. Tessling's constitutionally protected autonomous self-realization or the integrity of his right to control intensely private

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40. Colbridge, T. "Kyllo v. United States: Technology Versus Individual Privacy" (2001) FBI Law Enforcement Bulletin, v.70, no. 10, p.25, October 2001; Strandberg, K. "National Criminal Justice Reference Service Abstracts" (2001) Law Enforcement Technology, v. 28, no. 7, 80, July 2001; Baker, D. " More Heat Than Light: Judicial Discord Regarding Thermal Heat Imagery and the Fourth Amendment" (1998) Prosecutor, vol. 32, no. 1. 16 at 20 January/February 1998; Kobos, J. "Note: Kyllo v. United States: A Lukewarm Interpretation of the Fourth Amendment," (2003) 64 Mont. L. Rev. 519 at 536-539

41. *R. v. Wong*, [1990] 3 S.C.R. 36 at 43-4

information. How warm the outside of his house is at the basement line is not part of his biographical core of personal information. It does not, by itself, reveal intimate details about his personal lifestyle or private decisions.

33. How does this measure up against the purposes of a constitutional protection of privacy? The use of such a device does nothing to interfere with the dignity or autonomy of the individual. It is not inconsistent with freedom or democracy. It does not prevent or inhibit individuals in how they live their private lives. It is impossible to imagine anyone (except perhaps someone with a "grow op" in the basement) who would have any concern in relation to information about external heat differentials on their dwelling. There was no search here.

34. Even if one accepts that the police were here discovering information about the growing of marijuana in the Respondent's basement, there is no expectation of privacy in such information. While not said in quite the same context, this Honourable Court's recent observations in *Clay* bear repeating:[42]

> Reliance is placed by the appellant on the observations of La Forest J. that "privacy is at the heart of liberty in a modern state" … and that "the right to liberty enshrined in s. 7 of the Charter protects within its ambit the right to an irreducible sphere of personal autonomy wherein individuals may make inherently private choices free from state interference" . However this "privacy" aspect of s. 7 relates to "inherently private choices" of fundamental personal importance. It was invoked by Wilson J., speaking for herself only [in *Mortgentaler*], to include "the decision of a woman to terminate her pregnancy"…. La Forest J., for a plurality in *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, …spoke in this regard of "the right to nurture a child, to care for its development, and to make decisions for it in fundamental matters such as medical care". …He extended the "irreducible sphere of personal autonomy" … to include "the intensely personal considerations that often inform an individual's decision as to where to live"…, but six of the nine judges who decided the appeal did not join in that opinion. ***What stands out from these references, we think, is that the liberty right within s. 7 is thought to touch the core of what it means to be an autonomous human being blessed with dignity and independence in "matters that can properly be characterized as fundamentally or inherently personal"*** (Godbout, at para. 66).

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42. *R. v. Clay*, 2003 SCC 75 at 31-2 (citations to *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844, at para. 66, *R. v. Morgentaler*, [1988] 1 S.C.R. 30, at p. 171 and *B. (R.) v. Children's Aid Society of Metropolitan Toronto* [1995] 1 S.C.R. 315, at para. 83, omitted)

> With respect, there is nothing "inherently personal" or "inherently private" about smoking marihuana for recreation. The appellant says that users almost always smoke in the privacy of their homes, but that is a function of lifestyle preference and is not "inherent" in the activity of smoking itself. [emphasis added]

F. IF IT IS A SEARCH, IS IT UNREASONABLE?

35. This Court has repeatedly indicated that where a minimal privacy interest is engaged it is necessary to balance that against the state interest served by the impugned intrusion:

> This Court has emphasized on many occasions the need to strike the appropriate balance between the privacy interests of the accused on the one hand and the realities and difficulties of law enforcement on the other hand,[43]

> Claims to privacy must, of course, be balanced against other societal needs, and in particular law enforcement, and that is what s. 8 is intended to achieve.[44]

In *Plant*, for example, the Court looked to the seriousness of the offence under investigation in assessing whether the state interest in accessing the electricity records amounted to s.8 breach.

36. What is less than clear from the authorities is whether this consideration or balancing of a compelling state interest against a minimal intrusion on to an expectation of privacy goes to the 'search' label or to the 'reasonableness' of the conduct once so labelled.

37. In either case, the conduct of the state here is reasonable:

- It was legal,
- It is minimally intrusive,
- it was not part of any sort of misuse of the technology involved,
- the conduct was precisely the sort of investigation citizens in a free and democratic society would expect of their police

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43. *R. v. Golden*, [2001] 3 S.C.R. 679 at ¶46 per Arbour J.
44. *R. v. Dyment*, [1988] 2 S.C.R. 417 at 427

G. A PRACTICIAL ISSUE: A WARRANT REQUIREMENT FOR *FLIR* WOULD MAKE NO SENSE

38. One further point – the court cannot consider this issue without looking at the *practical effect* of a conclusion that this investigative technique requires judicial pre-authorization. The impact of such a conclusion militates *against* such a finding. The Court of Appeal and the Respondent say that this unintrusive technique should be labeled a 'search' and should be available to police only upon the *Hunter* standard of judicial pre-authorization. The difficulty with this suggestion, of course, is that it would make the technique all but redundant. If the police are to be required to show reasonable grounds to believe that an offence is being committed in the building in question *before* they can get authorization to conduct a FLIR flyover, there would be *no reason* to bother with the interim step of a "FLIR warrant". They have the necessary grounds and they would simply use their reasonable grounds as the basis of an Information to Obtain the appropriate *Controlled Drugs and Substances Act* or *Criminal Code* warrant to conduct a *conventional* search for the physical evidence. There would never be any reason to resort to FLIR warrant.[45]

H. THE FLAWS IN THE COURT OF APPEAL'S APPROACH

39. The Court of Appeal's judgment fundamentally misconceives the nature of the protection afforded by s.8. and how to approach the analysis of such issues. In addition to the submissions made above, the Attorney General of Ontario adds the following points:

(1) INFORMATIONAL V. SPATIAL PRIVACY

40. The Court of Appeal erred in confusing informational and spatial privacy interests. Clearly a physical entry into a home by the state would constitute a search. That does not mean, however, that a search occurs whenever the state is able to deduce what is going on inside a home using evidence or information available without any sort of entry.

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45. *R. v. Rugg*, [2003] B.C.J.No. 2965 (ProvCt)

(2) CONFUSING INVESTIGATIVE ***CONCLUSION*** WITH INVESTIGATIVE ***INSTRUSION***

41. In the same vein, the Court erred by equating the state's ability to deduce what was likely going on in the home with a physical intrusion of the home. This confuses the ability of the police to place a piece of information into a matrix of facts and evidence to reach an investigative conclusion, with the state directly intruding on that space.

(3) WOULD AMOUNT TO CONSTITUTIONAL PROHIBITION ON INVESTIGATIVE EFFORTS INTENDED TO PERMIT DEDUCTION OF PERSONAL INFORMATION

42. If the Court of Appeal is right in its approach our conception of policing will radically change. Any effort by the police to determine what is happening in a zone of spatial privacy will become a search tantamount to a physical entry of that place. Police routinely try to determine what is happening behind closed doors – the nature of criminal activity makes that the essence of investigation.

I. CONCLUSION

43. The Respondent's privacy was not intruded upon when the state was able to measure the gross waste heat on the outside of his house. It was not intruded upon when the state deduced from that and other evidence that he was likely involved in the commercial cultivation of marijuana in his basement. It was not violated when they obtained a warrant to search his house. There has been no section 8 breach.

Part Four: Order Requested

44. The Intervenor the Attorney General of Ontario respectfully requests that the Appeal be allowed.

All of which is respectfully submitted this 26th day of March, 2004

_____
Scott C. Hutchison
Crown Counsel
Of Counsel to the Intervenor

Part Five: Authorities

CASES

1. *B. (R.) v. Children's Aid Society of Metropolitan Toronto* [1995] 1 S.C.R. 315
2. *Dagg v. Canada*, [1997] 2 S.C.R. 403
3. *Eisenstadt v. Baird* (1972), 405 U.S. 438
4. *Entick v Carrington* (1765), 19 State Tr. 1029
5. *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844
6. *Griswold* v. *Connecticut,* 381 U. S. 479 (1965);
7. *Hunter v. Southam Inc.***,** [1984] 2 S.C.R. 145
8. *Kyllo v. U.S.* 533 U.S. 27 (2001)
9. *Lawrence and Garner v. Texas,* (2003) 539 U.S.
10. *Malone v. Commissioner of Police* [1979] 2 All ER 620 (HC)
11. *Quebec (A.G.) v. Laroche*, [2002] 3 S.C.R. 708
12. *R v. S.A.B.*, [2003] 2 S.C.R. 678
13. *R. v. Banque Royale du Canada* (1985), 18 C.C.C.(3d) 98 (QueCA) leave to appeal to Supreme Court of Canada refused, *loc cit.*
14. *R. v. Belnavis*, [1997] 3 S.C.R. 341
15. *R. v. Briggs* (2001), 157 C.C.C. (3d) 38 (OntCA)
16. *R. v. Bryntwick*, [2002] O.J. no.3618 (SC)
17. *R. v. Buhay*, [2003] 1 S.C.R. 631
18. *R. v. Clay*, 2003 SCC 75 at 31-2
19. *R. v. Duarte*, [1990] 1 S.C.R. 30
20. *R. v. Dyment*, [1988] 2 S.C.R. 417
21. *R. v. Edwards*, [1996] 1 S.C.R. 128.
22. *R. v. Elzein* (1993), 55 C.C.C.(3d) 50 (QueCA)
23. *R. v. Evans*, [1996] 1 S.C.R. 8
24. *R. v. Golden*, [2001] 3 S.C.R. 679
25. *R. v. Kelly* (1999), 132 C.C.C. (3d) 122 (N.B. C.A.)
26. *R. v. Law* [2002] 1 S.C.R. 227
27. *R. v. Morgentaler*, [1988] 1 S.C.R. 30
28. *R. v. Osolin,* [1993] 4 S.C.R. 595
29. *R. v. Plant*, [1993] 3 S.C.R. 281
30. *R. v. Rugg*, [2003] B.C.J.No. 2965 (ProvCt)
31. *R. v. Wong*, [1990] 3 S.C.R. 36
32. *Roe v. Wade* (1973), 410 U.S. 113
33. *Schreiber v. v. Canada (AG)*, [1998] 1 S.C.R. 841
34. *Thompson Newspapers v. R.*, [1990] 1 S.C.R. 425
35. *U.S. v. Katz,* (1967), 389 U.S. 347
36. *U.S. v. Miller*, 425 U.S. 435 (1976)

BOOKS AND ARTICLES

37. Canada, a Report of the Task Force established by the Department of Communications and the Department of Justice, *Privacy and Computers* (Ottawa; Information Canada; 1972)
38. Colbridge, T. "Kyllo v. United States: Technology Versus Individual Privacy" (2001) FBI Law Enforcement Bulletin, v.70, no. 10, p.25, October 2001;
39. Strandberg, K. "National Criminal Justice Reference Service Abstracts" (2001) Law Enforcement Technology, v. 28, no. 7, 80, July 2001;
40. Baker, D. " More Heat Than Light: Judicial Discord Regarding Thermal Heat Imagery and the Fourth Amendment" (1998) Prosecutor, vol. 32, no. 1. 16 at 20 January/February 1998;
41. Hutchison, et al, *Search and Seizure Law in Canada* (1993 (loose-leaf)) at p. 1-12
42. Kobos, J. "Note: Kyllo v. United States: A Lukewarm Interpretation of the Fourth Amendment," (2003) 64 Mont. L. Rev. 519 at 536-539
43. LRCC, *Report 33, Recodifying Criminal Procedure, Vol. 1, Police Powers* (Law Reform Commission of Canada, Ottawa: 1991)
44. Ontario Commission on Freedom of Information in *Public Government for Private People* vol.3 *Protection of Privacy* (Freedom of Information Commission (Ontario), Toronto: 1980)