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Privacy as Construed During the *Tessling* Era: Revisiting the "Totality of Circumstances Test", Standing and Third Party Rights*

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Abstract

In the wake of the Supreme Court of Canada's Landmark decision in Tessling, *a new approach has been progressively implemented by Canadian courts with respect to constitutionally protected privacy rights. This article aims at reconciling this new methodology with that developed in* Edwards *as well as with the principles enunciated in the seminal case* Hunter *v.* Southam. *The broad and malleable nature of section 8 of the* Canadian Charter *will also lead us to ponder dissenting views and to discuss the influence of American jurisprudence.*

We will also strive to establish a useful conceptual framework for understanding privacy's legal reach, and thus provide guidance in striking a balance between competing claims. In the process of breaking

Résumé

Dans la foulée de la décision de principe de la Cour suprême du Canada dans Tessling, *les tribunaux canadiens procèdent à l'implantation d'une nouvelle méthodologie à l'égard de la protection constitutionnelle octroyée au droit à la vie privée. Le présent article vise à réconcilier cette nouvelle approche avec celle développée précédemment par la Cour suprême dans* Edwards *et avec les principes énoncés dans la décision* Hunter *c.* Southam. *La portée large et malléable de l'article 8 de la* Charte canadienne *nous mènera également à méditer sur des points de vue dissidents et sur l'influence exercée par la jurisprudence américaine.*

Nous tenterons également de mettre au point un cadre conceptuel permettant de mieux comprendre la

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down insightful decisions, we will look at the effects of the abuse of process and the assumption of risk doctrines.

portée juridique de la vie privée et de mieux identifier où se situe l'équilibre entre revendications contradictoires. Alors que nous décortiquerons la jurisprudence pertinente, nous nous pencherons sur les effets engendrés par les doctrines d'abus des procédures et d'acceptation des risques.

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"*If we spoke a different language, we would perceive a somewhat different world.*" Ludwig Wittgenstein thus ably expressed how one's culture and one's upbringing can influence one's grasp on reality. A society defines relative values by which it will abide; these values will in turn influence every citizen and their activities.

In Canada, many different factors contributed to define the meaning of privacy as understood in a broad sense. On one hand, the anonymity afforded by the rapidly increasing concentration of population in large metropolitan centres, the appearance of the insulated and migratory nuclear family, the weakening of community bonds and moral norms, and the emphasis on individual aspirations and achievements, all have created our predisposition and need for a high standard of individual privacy[1]. The constitutionalization of individual rights by the *Canadian Charter of Rights and Freedoms*[2] further increased the tendency for individuals to claim greater personal space.

On the other hand, the high population density of some neighbourhoods, the growing importance of advertisement, mass media and credit, and dramatic technological breakthroughs have enhanced our desire of obtaining information on others and increased our ability to accomplish such a goal[3]. These threats to privacy steer more and more people towards taking precautions which will ensure the sanctity of their privacy.

Such mounting tensions between our need for privacy and our ability to overcome it are prompting conflicts like never before – including harsh legal battles. Many values are confronted in the process, although our society's well-being requires the presence of each one of them, most notably: crime fighting and privacy; free access to information and confidentiality; freedom of action and accountability, etc. This intensity highlights another dilemma we

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1 Arthur SCHAFER, "Privacy: A Philosophical Overview", in Dale GIBSON (ed.), *Aspects of Privacy Law*, Toronto, Butterworths, 1980, 1 at 2.

2 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (hereinafter "*Charter*").

3 A. SCHAFER, *loc. cit.* note 1 at 2 and 3.

now face with shocking clarity: how do we, Canadians, legally construe privacy? Privacy may be universally essential, but how are Canadian courts shaping the concept?

Privacy can be found at the core of our culture, both morally and legally. Even though it can be overridden by other values in certain situations, this can only occur when strong justifications are set forth. History and present days constantly assert privacy's crucial significance for both individuals and groups. Individuals need privacy as a protection from others with respect to their personal affairs, their intimate feelings and relations; not to enjoy such partial reclusion would prohibit the blossoming of many and would ruin the lives of countless people[4]. Groups need privacy in order to sustain their specific ideas and ways of life, their various political perspectives, which may not coincide with the majority's; this diversity could later on benefit society's progress and vitality[5]. Some thinkers and judges have even gone as far as to conceive privacy as an element of human dignity[6]. A judge even went as far as to declare the following:

> *It is only through the exercise of our privacy rights that we are able to distinguish ourselves from animals. It is only on that philosophical plane that we are truly distinct from other societies and cultures that are either dictatorships or socially constrained cultures. It is of the highest moment that we preserve the rights to our privacy.*[7]

In spite of its almost sacred nature, the right to privacy cannot prevail over everything else and will have to yield when public interest requires it to. "The problem, then, becomes one of balancing the individual's claim to privacy against the community's claim to regulate conduct for the general good"[8]. Nowhere is such a balancing act made more explicit than when an individual or a group of individuals are confronted to the State; nowhere is a legal protection of privacy as peremptory as when the State may be the one harming it. Therefore, the following study offers an overview of how privacy has been conceptualized within the context of s. 8 of the *Charter*.

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4 *Id.* at 14 and 15.

5 *Id.* at 15.

6 *Id.* at 17 and 18; see also: *R.* v. *Dyment*, [1988] 2 S.C.R. 417 at para. 21 [*Dyment*].

7 *R.* v. *Watts*, (2000) B.C.J. (Quicklaw) No. 2721 at para. 10 (Prov. Ct.).

8 A. SCHAFER, *loc. cit.* note 1 at 19.

The inevitable discretion linked with adjudication renders it essential to define rational criteria and principles as guidance for the courts. This body of principles will be carefully analyzed according to the following methodology. Firstly, we will define privacy from a conceptual perspective. Secondly, we will present the criteria which determine the existence of a reasonable expectation of privacy within the purview of s. 8 of the *Charter*. Within this second part, we will focus on the approach courts have developed regarding informational privacy. Finally, we will study what standing is required before arguing that a violation of s. 8 occurred.

I. The Concept of Reasonable Expectation of Privacy

Sadly, the notion of privacy is not as clear as it is essential. Vague and ambiguous, it does not allow its analysts to delineate its contours in an objective and absolute way[9]. The articulation of even a functional definition of this concept represents a true struggle. Fortunately, many brilliant people have reflected upon this complex issue and may help shed some light on it.

Two main definitions have circulated these past years. A first definition has been phrased as "the right to be let alone" or "the right to be let alone to live one's life with the minimum degree of interference"[10]. This definition refers to the notion of "negative liberty", characterized by an absence of State action or interference in individuals' lives. In the seminal decision *Hunter* v. *Southam*[11], Dickson J. (as he then was) refers to such a definition when he states the following:

> *In* Katz, *Stewart J. discussed the notion of a right to privacy, which he described at p. 350-51 as "his right to be let alone by other people". … In the Alberta Court of Appeal, Prowse J. A. 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".*[12]

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9 *Id.* at 13.

10 *Id.* at 6.

11 [1984] 2 S.C.R. 145 [*Hunter*].

12 *Id.* at 159.

A second definition may be identified, which can be formulated as "the control we have over information about ourselves" or as "the individual's ability to control the circulation of information relating to him"[13]. It allows us to extend the reach of privacy to our communications with others and has been cited with approval by La Forest J. in *R.* v. *Dyment*[14] and in *R.* v. *Duarte*[15]:

> *Finally, there is privacy in relation to information. … As the Task Force put it (p. 13): "This notion of privacy derives from the assumption that all information about a person is in a fundamental way his own, for him to communicate or retain for himself as he sees fit".*[16]
>
> …
>
> *If privacy may be defined as the right of the individual to determine for himself when, how, and to what extent he will release personal information about himself …*[17]

We must immediately add to this perspective an essential element provided by s. 8 of the *Charter* itself: "the s. 8 protection [is] confined to 'a reasonable expectation' because of the fact that the words 'search or seizure' [are] qualified by the word 'unreasonable'"[18]. Section 8 reads as follows:

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

The reasonableness standard implies that

> [A]*n 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.*[19]

This standard represents an interesting compromise between two competing claims: the necessity of protecting privacy rights from State interference and the need for flexibility when designing

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13 A. SCHAFER, *loc. cit.* note 1 at 8.

14 *Dyment*, *supra* note 6.

15 [1990] 1 S.C.R. 30 [*Duarte*].

16 *Dyment*, *supra* note 6 at 429 and 430.

17 *Duarte*, *supra* note 15 at 46.

18 *R.* v. *McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627 at para. 22 [*McKinlay Transport*].

19 *Hunter*, *supra* note 11 at 159 and 160.

and applying the law. The "reasonableness" standard forestalls any arbitrariness, while referring implicitly to the circumstances of each case hinders these rules from becoming too rigid[20].

This flexibility has been insisted upon by the Supreme Court of Canada in *McKinlay Transport* where Wilson J. stated:

> *Since individuals have different expectations of privacy in different contexts and with regard to different kinds of information and documents, it follows that the standard of review of what is "reasonable" in a given context must be flexible if it is to be realistic and meaningful.*[21]

Once the reasonable expectation of privacy is conceptualized, how may we conclude to its existence? In the following section, we will discuss how the courts have proceeded in this endeavour.

II. The Existence of a Reasonable Expectation of Privacy: The *Edwards/Tessling* Test

At this stage, it would be wise to lay out the Supreme Court's "principled approach" on the matter before bringing its meanders to light, which might otherwise engulf us. The Supreme Court developed a two-step test to determine if s. 8 of the *Charter* is to be of any application: "(1) the existence of a subjective expectation of privacy; and (2) the objective reasonableness of the expectation"[22].

At the outset, we must harness this abstract test by carefully considering how the Supreme Court's decisions in *R.* v. *Edwards*[23] and *Tessling* interact. Their interrelation raises methodological concerns and conceptual subtleties, the main relating respectively to

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20 Lee PAIKIN, "La norme du 'caractère raisonnable' dans le droit de la perquisition et de la saisie", in Vincent M. DEL BUONO (ed.), *Procédure pénale au Canada*, trans. by Ethel Groffier, Montréal, Wilson & Lafleur, 1983, at 108.

21 *Id.* at 542 and 543.

22 *R.* v. *Tessling*, [2004] 3 S.C.R. 432 at para. 19 [*Tessling*]; see also how other courts have applied this test: *R.* v. *McCarthy*, [2005] N.S.J. (Quicklaw) No. 482 at para. 30 (Prov. Ct.) [*McCarthy*]; *R.* v. *Andrews*, [2005] Q.J. (Quicklaw) No. 8595 at para. 65 and 66 (Prov. Ct.) [*Andrews*]; *R.* v. *Patrick*, [2005] A.J. (Quicklaw) No. 1527 at para. 24 (Prov. Ct.) [*Patrick*]; *R.* v. *Wong* (1987), 34 C.C.C. (3d) 51 at 63 (Ont. C.A.) [*Wong*].

23 [1996] 1 S.C.R. 128 [*Edwards*].

the following aspects: their apparently differing methods and their distinct purposes.

A. The Interrelation Between *Edwards* and *Tessling*

Further consolidated in *Tessling*, as the two versions displayed hereafter suggest, the two-step test first appeared, albeit in a tentative manner, in *Edwards*:

> [the test as formulated in Edwards]
>
> *The factors to be considered in assessing the totality of the circumstances may include, but are not restricted to, the following:*
>
> *(i) presence at the time of the search;*
>
> *(ii) possession or control of the property or 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; and*
>
> *(vii) the objective reasonableness of the expectation.*

> [the test as formulated in *Tessling*]
>
> *The "Totality of the Circumstances" Test*
>
> *I proceed on the basis of the "totality of the circumstances" test set out by Cory J. in Edwards and the questions listed therein, at para. 45, but the questions need to be tailored to the circumstances of the present case.*
>
> *Did the Respondent Have a Reasonable Expectation of Privacy?*
>
> *On the facts of this case, we need to address:*
>
> 1. *What was the subject matter of the* [obtained information]*?*
> 2. *Did the respondent have a direct interest in the subject matter of the* [obtained information]*?*
> 3. *Did the respondent have a subjective expectation of privacy in the subject matter of the* [obtained information]*?*
> 4. *If so, was the expectation objectively reasonable? In this respect, regard must be had to:*
>   a. *the place where the alleged "search" occurred;*
>   b. *whether the subject matter was in public view;*
>   c. *whether the subject matter had been abandoned;*
>   d. *whether the information was already in the hands of third parties; if so, was it subject to an obligation of confidentiality?*

e. whether the police technique was intrusive in relation to the privacy interest;

f. whether the use of surveillance technology was itself objectively unreasonable;

g. whether the [obtained information] *exposed any intimate details of the respondent's lifestyle, or information of a biographical nature.*

However different the tests used in *Edwards* and *Tessling* may appear to be, both originate from Dickson J.'s (as he then was) purposive approach of s. 8 of the *Charter* as displayed in *Hunter*.

Pragmatically rejecting the cataloguing of an almost endless amount of investigative techniques, the Supreme Court preferred developing a comprehensive method which could be tailored to the specifics of each case[24]. This method has been dubbed "the totality of the circumstances test"[25]. It first emerged in *Edwards* and evolved until it was applied again in *Tessling*; the same test, although under different auspices, played in both cases a crucial role in determining whether a specific activity constituted an unreasonable search under s. 8[26].

The reason explaining why *Edwards* and *Tessling* articulated the same test in startlingly different fashions resides in the distinctiveness of their proper purposes. To understand how different the facts and the questions raised in each case were, we will briefly outline their respective facts and then turn to some remarks Binnie J. made in *Tessling*.

In *Edwards*, Mr. Edwards had left drugs at his girlfriend's apartment. Once the police seized the drugs, he alleged he benefited from a reasonable expectation of privacy in his girlfriend's apartment. In contradiction with such an allegation, his girlfriend considered him as "just a visitor" and "no more than an especially

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24 *Tessling*, *supra* note 22 at para. 19, 31; *R.* v. *Kang-Brown*, [2005] A.J. (Quicklaw) No. 1110, at para. 71 (Q.B.) [*Kang-Brown*], affirmed: *R.* v. *Brown*, [2006] A.J. (Quicklaw) No. 755, at para. 26, 46, 50, and 52 (C.A.); notice of appeal filed as of right on September 6, 2006: [2006] S.C.C.A. (Quicklaw) No. 323; *Patrick*, *supra* note 22.

25 *Patrick*, *supra* note 22 at para. 25; *Tessling*, *supra* note 22 at para. 19.

26 *R.* v. *Cheung*, [2005] S.J. (Quicklaw) No. 474 at para. 36 (Q.B.) [*Cheung*]; *Kang-Brown* (Q.B.), *supra* note 24 at para. 67, 71.

privileged guest" in her apartment, and although he left a few personal belongings in her apartment, he didn't contribute to the rent or the household, aside from his alleged contribution in the purchase of a couch. Finally, despite owning a key to the apartment, he lacked the authority to regulate access to the premises. His girlfriend could admit anyone he wished to exclude, and she could exclude anyone he wished to admit.

In *Tessling*, the RCMP overflew properties of the accused using an airplane equipped with a new technological development: a FLIR (for "forward looking infrared radar") camera. This new technology, referred to as thermal imaging or high-flying infrared technology, detects heat radiating out from a source and is only sensitive to thermal surface radiant temperature. It allowed the police to determine patterns of heat distribution over different parts of the building they were observing. Noting an unusual amount of heat emanating from one part of the building, they inferred that this was probably due to a marihuana grow operation, which was generating an unusually high power usage. The RCMP did not obtain any judicial authorization prior to the overflight. Furthermore, the information provided by this overflight, combined with information yielded by two informants, led to a successful search warrant application. In this case, Mr. Tessling, opposing the RCMP's investigative technique, needed to assert a reasonable expectation of privacy in the information the FLIR collected, i.e. heat emanations exiting his household.

Given the profound factual dissimilarities between these two cases, the "totality of circumstances test" used in each decision varied profoundly. The test's format, according to Binnie J., will correspond to the type of privacy protected by s. 8 which is alleged in a specific case: personal privacy, territorial privacy or informational privacy[27]? Let's take a closer look at these three versions of privacy.

The strongest constitutional protection is granted to personal privacy since it protects bodily integrity, "and in particular the right

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27 *Cheung*, *supra* note 26 at para. 35; *Kang-Brown* (Q.B.), *supra* note 24 at para. 66; *R.* v. *Ly*, [2005] A.J. (Quicklaw) No. 304 at para. 38 (Prov. Ct.) [*Ly*]; *R.* v. *Rajaratnam*, [2005] A.J. (Quicklaw) No. 1346 at para. 46 (Q.B.) [*Rajaratnam*], affirmed: *R.* v. *Rajaratnam*, [2006] A.J. (Quicklaw) No. 1373 (C.A.); *Tessling*, *supra* note 22 at para. 20.

not to have our bodies touched or explored to disclose objects or matters we wish to conceal"[28].

Constitutional protection is also bestowed upon territorial privacy conceived on a spectrum of importance from the home at the upper level, ranging down through commercial space, private cars and schools to prisons, at the bottom[29].

Then comes informational privacy or, as Binnie J. puts it, "the thorny question of how much *information* about ourselves and activities we are entitled to shield from the curious eyes of the State"[30]. Worthy of constitutional protection only upon a subtle threshold (which we will study in depth later on), this type of privacy raises in an acute way the importance of cautiously deciding the reasonableness of any subjective expectation of privacy.

Therefore, the "totality of circumstances test" will be shaped differently depending on the type of privacy involved in a specific set of circumstances. For example, in *Edwards*, Mr. Edwards argued that he enjoyed a territorial privacy in his girlfriend's apartment. In *Tessling*, Mr. Tessling could invoke an informational privacy with respect to the activities that were disclosed by the heat emanations, but also a territorial privacy since the disclosed activities occurred inside his home, i.e. a delineated territory. Each type of privacy described above (whether personal, territorial or informational) commands a different version of the same test.

In *Tessling*, Binnie J. added two criteria prior to exploring the subjective or objective nature of the expectation of privacy, criteria which help frame the issue around the right activity and piece of information: "(1) [w]hat was the subject matter of the [obtained information]? (2) Did the respondent have a direct interest in the subject matter of the [obtained information]"[31]?

In determining the subject matter of the obtained information, Binnie J. stated that FLIR devices do not see into or through structures, neither can "FLIR technology … at this state of its development

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28 *Tessling*, *supra* note 22 at para. 21.

29 *Cheung*, *supra* note 26 at para. 35; *Tessling*, *supra* note 22 at para. 22.

30 *Tessling*, *supra* note 22 at para. 23.

31 *Id.* at para. 32.

differentiate between one heat source and another"[32]. FLIR technology closely resembles "a camera that takes photographs of heat instead of light"[33]. As Binnie J. went on to say, "the relative crudity of the present technology does not, in itself, permit any inferences about the precise activity giving rise to the heat"[34]. This information, yielded by FLIR devices, about what is going on inside the home cannot, by itself, prove sufficient to fulfill the reasonable grounds criterion necessary for the issuance of a warrant.

As for having a direct interest in the obtained information, Binnie J. noted that the information was obtained from the home of the accused and that he therefore had a direct interest in the information originating from it[35].

We will now move on to analyze the intricacies of the subjective and objective expectations of privacy regarding informational privacy.

B. The Subjective Expectation of Privacy

1. The Subjective Expectation of Privacy's Factual Dimension

Very little theory comes into play at this stage since the evidence almost entirely dictates its outcome. In *Andrews*[36], Bédard J. paid attention to the testimony of the accused and then studied the evidence, notwithstanding his testimony, in order to determine whether a subjective expectation of privacy existed or not[37]. Since the accused was transferring, when the search occurred, the searched garbage bags from his private property to his car on his own premises, and since the testimony of the accused concurred with this conclusion, Bédard J. found that a subjective expectation of privacy did exist with respect to the contents of the garbage bags[38].

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32 *Id.* at para. 35.

33 *Id.* at para. 34.

34 *Id.* at para. 36.

35 *Id.* at para. 37.

36 *Andrews*, *supra* note 22 at para. 79.

37 *Id.* at para. 79.

38 *Id.* at para. 78-89.

In *Patrick*[39], while considering this topic, Wilkins J. linked it with the question of whether the object or information (in this case, garbage bags) had been abandoned[40]. This discussion will occur later on, when discussing the *Tessling* test.

In *R.* v. *Nguyen*[41], the accused was arrested by a police officer because the passenger in his car had not fastened her seatbelt properly. Drugs were then found in the truck with the use of a police dog. Hanssen J. stated the following: "[h]owever, the subject-matter of the dog sniff was not the contents of the truck but rather the odour emanating from the truck. The fact that Mr. Nguyen had vacuum sealed the baggies containing the cannabis marihuana to prevent the escape of the odour indicates he had a subjective expectation of privacy in the contents of the baggies"[42].

In *R.* v. *Gosse*[43], Mr. Gosse was charged with possession of a large quantity of methamphetamines, marijuana and cocaine which was discovered in his suitcase by two RCMP constables at a bus terminal.

Having secured the cooperation and consent of various public transportation companies for such operations, the constables routinely patrolled the bus terminal with a police dog trained to detect odours of controlled substances. The public was not restricted from the areas where they patrolled, which included the luggage compartments of buses. The police dog detected strong odours in one such luggage compartment; they then linked it to the accused.

In his reasoning, Wilkins J. noted that Mr. Gosse provided no evidence which hinted that he had retained any subjective expectation of privacy in his luggage compartment or his suitcase.

Wilkins J. also alluded to the absence of evidence which could have suggested any commitment or representation from the bus line to Mr. Gosse that they would prevent law enforcement authorities from gaining access to the premises, the buses or the luggage compartments.

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39 *Patrick*, *supra* note 22.

40 *Id.* at para. 29.

41 *R.* v. *Nguyen*, [2006] M.J. (Quicklaw) No. 204 (Q.B.).

42 *Id.*, at para. 35.

43 *R.* v. *Gosse*, [2005] N.B.J. (Quicklaw) No. 330 (Q.B.) [*Gosse*].

Finally, the RCMP police dog roaming in public view throughout the bus terminal and the identifiability of the RCMP constables' clothing when accompanying the dog ruled out any basis for inferring a subjective expectation of privacy on the part of Mr. Gosse regarding the detection of an odour emanating from his suitcase while stored in the bus' luggage compartment[44].

In *R.* v. *Kang-Brown*, Mr. Kang-Brown was arrested for trafficking cocaine and possession of heroin. He then applied to exclude the evidence of cocaine seized from his luggage by RCMP officers in the bus terminal. Here is how the search took place.

After having been noticed by a constable dressed in casual clothes with his weaponry hidden under his coat, Mr. Kang-Brown was approached by the said constable who identified himself. While they were discussing the details of Mr. Kang-Brown's trip and the type of work the officer was carrying out (namely detecting drug traffickers), the officer started asking questions about Mr. Kang-Brown's luggage and asked if he could search it. The officer was about to seize the bag when Mr. Kang-Brown, panicking and very agitated, pulled it back. At this point, the officer signaled to a colleague that they should bring their police dog in the vicinity of the accused. The police dog quickly assented to the presence of drugs in the bag.

Noting the absence of testimony from the accused on this matter, Romaine J. added that the searched bag was carried through public transportation and that nothing could lead to the existence of a subjective expectation of privacy in the odour emanating from the bag.

In *McCarthy*, Mr. McCarthy was arrested at a train station for drug trafficking and possession of one kilogram of cocaine contained in his backpack; here are the events leading to his arrest.

Four police officers, accompanied by a police dog, routinely surveyed a train station, with the intention of finding people involved in criminal activities. Only the officer in charge of the police dog wore police clothes, the other three policemen wearing plain clothes.

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44 *Id.* at para. 29; the same conclusion was reached in *R.* v. *McLay*, [2006] N.B.J. (Quicklaw) No. 73 at para. 38 (Prov. Ct.) [*McLay*].

The officer in charge of the dog appeared in Mr. McCarthy's sight in order to provoke the accused. Arousing suspicion by his suddenly agitated demeanor, Mr. McCarthy was quickly approached by a plain-clothed officer who identified himself. While being questioned, Mr. McCarthy was approached from behind by the police dog which indicated a positive reaction to the scent of narcotics from the backpack.

Faced with whether Mr. McCarthy had a subjective expectation of privacy in the scent of narcotics coming from his backpack, MacDougall J. noted that Mr. McCarthy did not testify. He went on to mention that Mr. McCarthy kept his backpack with himself at all relevant times, that it could not easily be misplaced, confused or lost track of, and that it did not attract particular attention. The backpack's contents were securely concealed; Mr. McCarthy could thus expect that his bag would neither be searched nor seized.

Nevertheless, Mr. McCarthy's reaction to the police dog showed he knew the odour coming from his backpack could be detected despite his best efforts at concealing it. Quoting Binnie J. in *Tessling*, MacDougall J. stated that "[i]t is true that a person can have no reasonable expectation of privacy in what he or she knowingly exposes to the public, or to a section of the public, or abandons in a public place"[45].

MacDougall J. then proceeded to consider the location where the search occurred and concluded that if Mr. McCarthy chose to use public transportation, he accepted the inability of controlling the distance between himself and members of the public. Furthermore, his train ticket reserved the right for the company to inspect his luggage for safety reasons. Although this in no way authorized the police to search Mr. McCarthy's personal belongings, it did impact the accused's belief of maintaining absolute control over his luggage. Therefore, Mr. McCarthy did not have a subjective expectation of privacy regarding the odour coming out of his backpack.

In *Rajaratnam*[46], two RCMP plain-clothed officers spotted Mr. Rajaratnam coming out of a bus and attending his bag. Both officers then found Mr. Rajaratnam's locked bag on a cart and smelled it.

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45 *Id.* at para. 34, quoting *Tessling*, *supra* note 22 at para. 40.

46 *Rajaratnam*, *supra* note 27.

Identifying, through the zipper, a strong fabric softener odour often used to camouflage the odour of drugs, they arrested Mr. Rajaratnam for trafficking a controlled substance, later identified as cocaine.

Mr. Rajaratnam did not testify on the issue of having a subjective expectation of privacy in the odour emanating from his bag. When the RCMP officers smelled the bag, the cart on which it was found was located in an area which the general public could not access, but which was accessible to police officers; however, no evidence suggested that Mr. Rajaratnam knew that such restrictions existed. The bag was locked; nevertheless, signs posted throughout the bus terminal indicated that passengers may be asked to reveal the contents of their luggage, mostly for safety reasons.

Rowbotham J. insisted on an event described by the accused during his testimony. Mr. Rajaratnam mentioned he saw, while in a bus terminal en route to his final destination, someone go through his bus' luggage compartment. Learning it was a Greyhound employee, the accused thought that was fine. From this indifference to the fact that someone could go through the luggage compartment for any reason, Rowbotham J. concluded Mr. Rajaratnam did not have a subjective expectation of privacy in his bag, even less in the odour coming out of it.

In *Tessling*, Binnie J. mentioned that a person is presumed to have a privacy interest with respect to what is happening inside his home. However, a person retains no expectation of privacy regarding what happens outside his household: "the escape of heat from *outside* a home, like the escape of smoke from a fireplace chimney or cooking odours from a kitchen fan, represents the voluntary exposure of information"[47]. Nevertheless, Binnie J. recognized that people enjoy a subjective expectation of privacy regarding the heat escaping their homes when the police are interested to learn more not about the heat patterns *per se*, but about what is going on inside the home:

> *However, I do not think it can be said that "allowing" heat to escape rebuts an expectation of privacy … Living as he does in a land of melting snow and spotty home insulation, I do not believe that the respondent had a serious privacy interest in the heat patterns on the exposed external walls of his home. However, the police were clearly interested in the*

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47 *Id.* at para. 39.

> *"heat profile" not for its own sake but for what it might reveal about the activities inside the home. In that respect, to the extent that it is in issue, the respondent maintained a subjective expectation of privacy.*[48]

Binnie J. stressed we must discover what the police are intent on learning through their actions in order to better frame the existence of a subjective expectation of privacy. Had they wanted to learn about how efficient the house's insulation was, there probably would not have been any expectation of privacy. However, since they wished to profile what activities were going on inside the house, the accused had maintained a subjective expectation of privacy.

In *Cheung*, a device known as a Digital Recording Ampmeter ("DRA") was attached to a post nearby one of the accused's home for two weeks. A DRA directly measures the actual amount of electricity provided to the premises from the power line at any moment. The information thus obtained led to a search warrant which eventually revealed a marihuana grow operation, proceeds of crime and theft of electricity.

Compared to electricity consumption records, a DRA provides two main advantages. First, it reveals electricity consumption that occurred while the meter was being bypassed and thus unable to record the real amount of electricity used. Second, it discloses the consumption taking place at any given moment in time. Thanks to this second advantage, investigators can measure, in amperage, electrical consumption every five to seven minutes, allowing them to determine cycles of electricity consumption in a household. Most notably, in tracking down potential marihuana producers, investigators pay attention to eventual consumption cycles of high and low electricity usage which would imply that the user is attempting to simulate daylight hours. A high usage during twelve hours, followed by a low usage for twelve hours, would suggest that the user wishes to force a marihuana crop to bud.

In this case, the DRA revealed much higher electricity consumption than what the meter indicated, and it showed twelve hour high and low electricity consumption patterns, indicative of a marihuana grow operation.

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[48] *Id.* at para. 41.

In deciding the existence of a subjective expectation of privacy, Smith J. used Binnie J.'s reasoning in *Tessling*, concluding that both cases were sufficiently analogous. As in *Tessling*, one of the accused's home was subjected to the DRA. As the FLIR technology, a DRA does not directly intrude the house, but rather measures external data, namely the electricity flow going inside the house. This flow allows for inferences to be made about what is going on inside the house. Smith J. thereby concluded that the accuseds had a subjective expectation of privacy regarding both the electricity data and the activities going on inside the house.

Notwithstanding all these subtle factual nuances, the subjective expectation of privacy still retains a normative dimension worth exploring.

2. The Subjective Expectation of Privacy's Normative Dimension

Were we not to infuse a minimally normative nature to the subjective expectation of privacy, this concept could be contorted well below its initial purpose. The way American case law skidded far from the "ordinary person's conception of the term"[49] provides us with good examples of such potential distortions.

In *Rakas* v. *Illinois*[50], the United States Supreme Court had to determine whether two car passengers had a reasonable expectation of privacy regarding evidence which was found in the car. The passengers were accused, along with the driver, of armed robbery. The driver successfully claimed a violation of his Fourth Amendment right to privacy, while the two passengers were denied such a right on the basis that "the remote possibility that the owner *might* voluntarily reveal their joint secret (a chance that did *not* materialize) was sufficient to destroy the occupants' expectation of privacy entirely"[51]:

> *One of the most troubling of these propositions is the contention (expressed initially in* Rakas *and reiterated in* Rawlings*) that an expec-*

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49 See: Jonathan DAWE, "Standing to Challenge Searches and Seizures Under the *Charter*: The Lessons of the American Experience and Their Application to Canadian Law", (1993) 52 *U.T. Fac. L. Rev.* 39.

50 439 U.S. 128 (1978) (U.S. S.C.) [*Rakas*].

51 J. DAWE, *loc. cit.* note 49 at 54.

> *tation of privacy from intrusion by the whole world is a necessary antecedent to an expectation of privacy from intrusion by government agents.*[52]

Such an interpretation should be avoided, especially since "people reveal secrets or entrust items to others in implicit reliance that the items or information will not be turned over to the government"[53]. We should not confuse the standard of privacy we oppose to other private citizens and the one we oppose to the government – these standards obey to two completely different logics. A person may foresee the possibility that his friend will reveal the information to someone else, but foreseeing this does not imply he also envisions his friend talking to any government official about it.

Moreover, a purely malleable subjective expectation of privacy could lead to situations where, by its actions, a government could abolish various standards of privacy[54]. If, for example, a government clearly announced that routine and random searches of homes would systematically take place, it would thereby reduce the extent of the protection granted by s. 8 because no one could subjectively hope to be free from governmental intrusion in his home anymore.

Since such a perverse use of the subjective expectation of privacy could take place, we should view s. 8 as guaranteeing "certain minimum expectations of privacy … that may not be reduced"[55]. To this end, we can refer to *Hunter* where Dickson J. (as he then was) stated that the right guaranteed by s. 8 could be expressed "as an entitlement to a "reasonable" expectation of privacy"[56]. In *Tessling*, Binnie J. confirmed this view through a warning:

> *I should add a caveat. The subjective expectation of privacy is important but its absence should not be used too quickly to undermine the protection afforded by s. 8 to the values of a free and democratic society. … Suggestions that a diminished subjective expectation of privacy should automatically result in a lowering of constitutional protection should therefore be opposed. It is one thing to say that a person who puts out the*

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52 *Id.*

53 *Id.*

54 Kate MURRAY, "The Reasonable Expectation of Privacy Test and the Scope of Protection Against Unreasonable Search and Seizure Under Section 8 of the *Canadian Charter of Rights and Freedoms*", (1986) 18 *Ottawa L. Rev.* 25 at 30.

55 *Id.* at 30 and 31.

56 *Hunter, supra* note 11 at 159.

> *garbage has no reasonable expectation of privacy in it. It is quite another to say that someone who fears their telephone is bugged no longer has a subjective expectation of privacy and thereby forfeits the protection of s. 8. Expectation of privacy is a normative rather than a descriptive standard.*[57]

In *Andrews*[58], Bédard J. reiterated this approach by stressing the absence of a strict causality between constitutional protection and one's subjective expectation of privacy. A citizen has not waived his expectation of privacy in his garbage bags simply because he acknowledges that someone might eventually sift through their content. One's expectation can survive despite this acknowledgment if a generally recognized norm corroborates it. For example, in this case, it is generally accepted as a given that people do not inspect garbage bags. Therefore, leaving garbage bags outside does not comprise an acquiescence to their opening.

3. The Subjective Expectation of Privacy and the Assumption of Risk Doctrine

The reasoning exposed in the preceding section, which entails distinct standards of privacy *vis-à-vis* private citizens and the government, should be used to limit the application of the "assumption of risk" doctrine to the existence of an expectation of privacy. According to this theory, the onus should be on the defendant to "show why he did not take precautions sufficient to make police detection of his activities impossible"[59].

This theory was first discussed by the Ontario Court of Appeal in *Lebeau*[60]. In this case, the Court had to decide whether homosexual people meeting in a public washroom in order to practice homosexual acts had a reasonable expectation of privacy, to which proposition the Court responded: "that others would observe and recognize what was going on from the persistent use that these men made of the place was a risk that they undoubtedly understood"[61].

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57 *Tessling*, *supra* note 22 at para. 42.

58 See: *Andrews*, *supra* note 22 at para. 109-111.

59 K. MURRAY, *loc. cit.* note 54 at 30.

60 [1988] O.J. (Quicklaw) No. 51 (C.A.).

61 *Id.* at 186.

This doctrine was also discussed in *R.* v. *Griffith*[62] where McDermid D.C.J. quoted and approved an American decision which stated the following:

> *The concomitant disclosure to the telephone company, for internal business purposes, of the numbers dialled by the telephone subscriber does not alter the caller's expectation of privacy and transpose it into an assumed risk of disclosure to the government.*[63]

According to these two judgments, a clear criterion must be met before the assumption of risk doctrine may be applied: when performing a specific activity, a person must be aware of the risk of it being detected specifically by police officers or other governmental agents, not only by any citizen.

In *Duarte*, La Forest J. rejected the application of the assumption of risk doctrine to the surreptitious electronic recording of a person's spoken words:

> *The Court of Appeal was correct in stating that the expression of an idea and the assumption of the risk of disclosure are concomitant. However, it does not follow that, because in any conversation we run the risk that our interlocutor may in fact be bent on divulging our confidences, it is therefore constitutionally proper for the person to whom we speak to make a permanent electronic recording of that conversation.*[64]

This does not mean, however, that any risk for an activity of being detected by police officers is "constitutionally suspect": the risk for an activity of being detected may simply be inherent to the practice of certain activities:

> *In coming to this conclusion, however, the court did not find that all "risks" faced by individuals subject to police investigation were constitutionally suspect. Clearly, there must be some room left for valid and legitimate investigatory techniques. … In my view, the "risk" that growing marijuana will be smelled by police officers standing at the front door while lawfully entitled to do so is of the same order as the risk that someone is a "tattle-tale".*[65]

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62 (1988), 44 C.C.C. (3d) 63 (Ont. D.C.).

63 *Id.* at 76 (which quoted *The People of the State of Colorado* v. *Sporlader*, 663 P. 2d 135 (1983)); see also *R.* v. *Mikituk*, [1992] S.J. (Quicklaw) No. 235 at para. 30 (Q.B.).

64 *Duarte*, *supra* note 15 at 48.

65 *Evans* v. *The Queen*, [1996] 1 S.C.R. 8 at para. 55 and 56 (S.C.C.).

Let's now discuss how the courts have construed the existence of an objectively reasonable expectation of privacy with respect to informational privacy.

C. The Objectively Reasonable Expectation of Privacy and the *Tessling* Test: Informational Privacy

Faced with a set of circumstances involving mainly informational privacy, a situation which differed considerably from the one in *Edwards*, Binnie J. conceived a new version of the "totality of circumstances test":

> *Did the Respondent Have a Reasonable Expectation of Privacy?*
>
> *...*
>
> *If so, was the expectation objectively reasonable? In this respect, regard must be had to:*
>
> *a. the place where the alleged "search" occurred;*
>
> *b. whether the subject matter was in public view;*
>
> *c. whether the subject matter had been abandoned;*
>
> *d. whether the information was already in the hands of third parties; If so, was it subject to an obligation of confidentiality?*
>
> *e. whether the police technique was intrusive in relation to the privacy interest;*
>
> *f. whether the use of surveillance technology was itself objectively unreasonable;*
>
> *g. whether the* [obtained information] *exposed any intimate details of the respondent's lifestyle, or information of a biographical nature.*[66]

Despite its novelty, this test has been applied many times by different courts since its creation. Using these new judgments as a barometer, we will try to provide the reader with an indication as to how these different steps tend to be interpreted.

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66 *Tessling*, *supra* note 22 at para. 32.

1. The Place Where the Alleged "Search" Occurred

In *Tessling*, Binnie J. quoted Lamer C.J. who described the importance of this condition as follows:

> *The nature of the place in which the surveillance occurs will always be an important factor to consider in determining whether the target has a reasonable expectation of privacy in the circumstances. It is not, however, determinative.*[67]

The police actions were exercised on the exterior of the accused's house, which benefits from the highest degree of privacy; however, Binnie J. quickly noted that this factor must be weighed against the nature and quality of the information retrieved by the police thanks to the FLIR method[68].

In *R.* v. *Ritter*[69], a storage unit was searched pursuant to a search warrant and a computer was seized. Having no reasonable expectation of privacy with respect to the storage unit, the accused claimed privacy rights in the computer. In rejecting this claim, J. relied on the following facts: the computer was owned by the company that had employed the accused; a company policy prohibited their employees from using the company computers for a personal use; the company could take away or replace the computer or transfer it from the accused to another employee at any given moment. Therefore, the accused could not reasonably expect that the computer would be free from the intrusion or interference of others.

In *R.* v. *T.T.H.*[70], Franklin J. made the following remarks which speak for themselves:

> *An individual driving a vehicle that is not his, for which he cannot identify the owner, or produce valid documentation, including registration or insurance cannot expect to restrict access to the vehicle by the authorities. In this case, that is especially so because it was 3:00 a.m. and the public were put at risk by the manner in which the vehicle was driven.*

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67 *Wong*, *supra* note 22 at 62.

68 *Tessling*, *supra* note 22 at para. 45.

69 [2006] A.J. (Quicklaw) No. 791, at para. 35 (Prov. Ct.).

70 [2006] A.J. (Quicklaw) No. 1468, at para. 29 (Prov. Ct.).

In *R.* v. *Simpson*[71], police officers gained entrance to a locked apartment building by walking in behind residents. Himel J. decided that no reasonable expectation of privacy in the building's hallway existed since the accused did not own the hallway, he could not regulate access to it, and he did not leave valuable items there (an indication that he did not have a subjective expectation of privacy).

In *R.* v. *Osanyinlusi*[72], upon execution of a search warrant in connection with several robberies, police officers instead found pieces of crack cocaine in the house owned by another accused. Mr. Osanyinlusi lived in one of the upstairs bedrooms and claimed he had a reasonable expectation of privacy within the bedroom.

In deciding against such an assertion, Seppi J. underlined that the bedroom door was open, that the room was filled with garbage bags filled with various items, that the safe in which the items were found was in plain view and was unlocked, that the accused had made no efforts to exclude others from the room, and that he did not control access to its contents. As a final indicator, the accused did not provide any evidence on the *voir dire* that could corroborate that he had an expectation of privacy with respect to the bedroom.

In *R.* v. *Evanishen*[73], a marihuana grow operation was discovered in a closed rural school. The accused lived in one of the rooms of the school located in a wing access to which required opening a locked door. Given the following, Jackson J. concluded against the existence of any legitimate privacy interest: the accused was not the owner or the tenant of the school; no consent to his presence there had been given by the owner of the school; no evidence suggested anyone coming out of or going into the school, and no delivery of food or personal items were observed, thereby preventing any observer from concluding that someone lived there.

In *R.* v. *Sandhu*[74], police officers investigating a murder were authorized to enter a residence by the father without informing him

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71 [2005] O.J. (Quicklaw) No. 5056, at para. 30 (S.C.J.).

72 [2006] O.J. (Quicklaw) No. 2529, at para. 52 (S.C.J.).

73 [2006] S.J. (Quicklaw) No. 187, at para. 26-28 (Prov. Ct.).

74 [2005] O.J. (Quicklaw) No. 5914 (S.C.J.).

of their intent. They arrested the father's son who was found in his bedroom.

Trafford J., in deciding whether this consent given by the father constituted a waiver of the protection afforded by s. 8 to the accused, considered that although the father's consent allowed the officers inside the residence, the accused enjoyed a distinct reasonable expectation of privacy over his bedroom. Therefore, his father's consent could not be extended to granting the officers access to the accused's bedroom[75].

In *R.* v. *Binning*[76], two police officers intercepted a van for speeding. Having observed certain indications that lawfully led them to search the van, the driver and the passenger with respect to drug-related offences, the two officers came across a bag containing the accused's passport and a case containing a laptop computer and a business card under the accused's name.

Given that the accused was not in the van, the officers asked for help in locating the accused, in case he was travelling ahead of the van. The accused was identified travelling in a van as well and was arrested. He was later on charged for possession of controlled substances for purposes of trafficking, said substances having been found in his van.

Although the accused could not claim standing in order to challenge the interception and the search of the first van, Blair J. recognized his claim to privacy over the bags containing his passport, his laptop computer and his business card[77]. Despite having been granted standing, the accused could not establish a reasonable expectation of privacy since: his bags were not locked; nothing identified the lawful owner of the bags on the exterior of the bags; the driver and passenger of the van made no remarks to the police officers with respect to the bags, and the bags were visible and accessible within the van[78].

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75 *Id.* at para. 81.

76 [2006] B.C.J. (Quicklaw) No. 320 (S.C.).

77 *Id.* at para. 45.

78 *Id.* at para. 47.

In *Cheung*, a DRA was installed on property adjacent to the accused's home. Smith J. noted that although such a device may measure external data, in this case the flow of electricity going into the home, it however cannot give its users direct access to the inside of the home: "[t]his information supports inferences as to activities conducted in the premises but does not provide direct knowledge of those activities"[79].

In *McCarthy*, the police detected drugs in the accused's luggage using a police dog in a bus terminal. When commenting on the location where the search took place, MacDougall J. stated the following:

> *The search was not in or about a dwelling, in which there is the highest expectation of privacy … It was not in an area where there would be an element of control or limited access to the public, such as an office, a friend's house, a hotel room, motor vehicle or locker. The accused chose to use public transit and therefore would be prepared to pass in close proximity to members of the public from every walk of life. He cannot control the space between himself and other members of the public and would expect to be literally rubbing elbows.*[80]

In *Gosse*[81], police officers located drugs in the accused's suitcase after having inspected a bus's luggage compartment with their police dog. In describing the search, McNally J. considered the following: the accused was not present nor in the immediate vicinity of the bus at the time of the search; the accused was not personally searched in any way; the suitcase was not located near him; the suitcase was not opened; the accused exercised no control over the bus's luggage compartment and could not restrain anyone from gaining access to it; access to the luggage compartment was not tightly supervised and was open to bus line employees and passengers alike.

Furthermore, the bus line company, which owned the bus and the bus terminal where the search occurred, had entered into an agreement with the RCMP authorizing its members to traverse its

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79 *Cheung*, *supra* note 26 at para. 43.

80 *R.* v. *McCarthy*, *supra* note 22 at para. 34.

81 *Gosse*, *supra* note 43 at para. 24-28.

premises with a police dog, including the luggage compartments of their buses[82].

In *Andrews*[83], police officers searched garbage bags on the accused's unoccupied property. Despite the property's vacancy, which lasted many months, Bédard J. deemed that the property had maintained its privateness, thus reinforcing the reasonableness of the expectation of privacy invoked under s. 8 of the *Charter*.

2. Whether the Subject Matter was in Public View

In *Tessling*, Binnie J. commented that anyone paying attention to buildings could observe indications that heat exited through various parts of a building; for example, someone can notice that patches of snow may melt more rapidly on certain parts of a roof than on others. Even though the naked eye may not precisely identify all the subtleties in heat escaping homes, "[e]verything shown in the FLIR photograph exists on the external surfaces of the building and in that sense it records only information exposed to the public (albeit the public, unaided by technology, cannot in fact observe the heat pattern in the detail FLIR imaging affords)"[84].

In *McCarthy*[85], the debate centered on the detectability of the odour emanating from the accused's backpack. Since no evidence hinted towards someone being able to discern the odour of marihuana through the accused's backpack, MacDougall J. concluded that such information was not being revealed to the general public. However, by his awareness of a police dog's ability to detect such an

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82 On the matter of a cooperation agreement between a transport agency and the police, the following comments taken from *R.* v. *Naglingniq*, [2006] Nu. J. (Quicklaw) No. 3 at para. 36 (Ct. J.), add an interesting nuance:

> *The poster in the airport and in the cargo area indicating that the premises are used for training for police dogs is of little assistance in assessing when a search may have taken place. The presence of the posters does not reduce an individual's expectation of privacy when they leave parcels at airport or cargo premises. Charter rights are constitutionally derived and are not affected by an agreement of co-operation made between an airline and the police, or by a poster.*

83 *Andrews*, *supra* note 22 at para. 91-94.

84 *Tessling*, *supra* note 22 at para. 47.

85 *McCarthy*, *supra* note 22 at para. 34; see also *Kang-Brown* (Q.B.), *supra* note 24 at para. 73 c) and d).

odour, the accused knowingly exposed this information to a section of the public, and thus could not entertain any reasonable expectation of privacy in it[86].

In *R.* v. *Hutchings*[87], a person's telephone number was retrieved from the telephone company through a private arrangement and not through official police proceedings. McEachern J. highlighted that there was "no evidence the telephone number was not a listed number that could have been obtained by searching an appropriate telephone book"[88].

In *R.* v. *Plant*[89], the police obtained the computerized electricity records of the accused thanks to the Calgary Utilities Commission's consent. Sopinka J. commented that "it is generally possible for an individual to inquire with respect to the energy consumption at a particular address, so that this information is subject to inspection by members of the public at large"[90].

In *R.* v. *H. (C.R.)*[91], police obtained the criminal record and probation order of the accused through a police database. The probation order and the criminal record were deemed public records[92].

In *R.* v. *Hufsky*[93], a person's driver's license and proof of insurance were asked by a police officer during a random stop of the accused's vehicle. Le Dain J. said that documentary evidence of compliance with a legal requirement which constitutes a lawful condition of the exercise of a right or privilege (which includes a driver's license and proof of insurance) may be looked at by police officers at any time[94].

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86 *Tessling*, *supra* note 22 at para. 40.

87 (1996) 111 C.C.C. (3d) 215 (B.C.C.A.) [*Hutchings*].

88 *Id.*, at para. 22.

89 [1993] 3 S.C.R. 281 [*Plant*].

90 *Id.* at para. 22.

91 [2003] M.J. (Quicklaw) No. 90 (C.A.) [*C.R.H.*].

92 *Id.* at para. 66.

93 [1988] 1 S.C.R. 621 [*Hufsky*] (this judgment was reaffirmed by the Supreme Court in *R.* v. *Ladouceur*, [1990] 1 S.C.R. 1257 (S.C.C.)).

94 *Hufsky*, *supra* note 93 at para. 23.

3. Whether the Subject Matter had Been Abandoned

The dominant approach with respect to this topic has been well expressed in *R.* v. *Krist*[95]. In *Krist*, The British Columbia Court of Appeal focused on the issue of whether the expectation of privacy protecting a home could extend to garbage deriving from such home. In deciding that it did not, the Court stated the following:

> *From the deliberate discarding or abandonment of trash, it is logical to conclude that a person who has discarded or abandoned the items or things making up trash no longer has a subjective expectation of privacy concerning them. ... What we are concerned with is ... information that may be gleaned from trash which has been abandoned by a householder to the vagaries of municipal garbage disposal. Putting material in the garbage signifies that the material is no longer something of value or importance to the person disposing of it, and that there is no reason or need to retain it.*[96]

In *R.* v. *Allard*[97], acting upon a tip from an informant, a police officer found two garbage bags near a garbage container located on the accused's property. The officer then seized the garbage bags without a warrant while remaining on the public road. These bags contained suspicious objects leading the officer to think that ecstasy was being produced.

Toupin J. insisted on the following facts: the bags were left near a container for collection the same day; the police officer remained on the public road during the seizure and acted the same way that a trash collector would have.

Following *Krist*, Toupin J. concluded that the accused had relinquished his exclusive right to control the bags since their location made them accessible to any passerby.

In *R.* v. *Butterworth*[98], a Revenue Canada investigator examined the contents of a wastebasket located in a hotel room from which the accused had checked out a few hours before. He then found copies of postal slips indicating that the accused had mailed

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95 [1995] B.C.J. (Quicklaw) No. 1606 (C.A.).

96 *Id.* at para. 26-28.

97 [2006] J.Q. (Quicklaw) No. 3377 (Prov. Ct.).

98 [1997] M.J. (Quicklaw) No. 129 (Prov. Ct.).

three packages to his home. These packages consisted of contraband cigarettes.

Swail J., quoting *Krist*, decided that by deliberately discarding the postal slips into a wastebasket of a hotel room and by letting it there after having checked out, the accused had abandoned any expectation of privacy in the postal slips.

In *R.* v. *Delaa*[99], police officers wished to retrieve cast-off from a sexual assault suspect. With this in mind, an officer in disguise simulated a gum survey and approached the suspect, asking him if he would participate. The suspect obliged and discarded four pieces of gum that he spat out into small recipients. The disguised officer then asked for his name and coordinates, which the suspect wilfully provided.

In deciding against the existence of a reasonable expectation of privacy in the discarded pieces of gum, Park J. considered that the accused had not been placed in custody nor coerced by governmental agents in participating, that the survey took place in a public parking, and that the accused disposed of the gum in a manner indicative of having retained no privacy interest into it[100].

In a rare feat, a judge dared depart from the reasoning expressed in *Krist* and brought interesting albeit uncommon nuances to the concept of abandonment. In *Andrews*[101], Bédard J. reframed the understanding of discarding garbage. For Bédard J., when a citizen leaves his garbage on the street for collection, he does not abandon it as much as he accomplishes a necessary step for it to be taken away[102].

Bédard J. defined abandonment as getting rid of something to the extent where one is completely indifferent as to what may await the discarded object[103]. He then highlighted the difference between a garbage bag and an object, for example a chair. In the case of a chair, the object is in public view; however, a garbage bag's content remains hidden from the public. Moreover, someone discarding a

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99 [2006] A.J. (Quicklaw) No. 948 (Q.B.).

100 *Id.* at para. 135.

101 *Andrews*, *supra* note 22 at para. 96-119.

102 *Id.* at para. 101.

103 *Id.* at para. 102.

chair can envision a passer by picking it up; the same cannot be said with respect to a garbage bag. The garbage bag is left for a specific purpose, i.e. to be collected by the garbage collectors, not simply because it is abandoned. Until the garbage bag has been entirely released from its owner by its collection, its owner still exercises control over it and still assumes responsibility for it. Finally, garbage collection represents the only way for most people of getting rid of personal belongings and information; not everyone disposes of a garberator, a fireplace or a wood-burning stove. And regarding such discarded elements, not everyone is completely indifferent as to what may await them.

On the importance of the garbage's location and the distinction between private and public property, Wilkins J. commented, in *Patrick*, that it represented a factor among others and could not determine the outcome by itself[104]; the critical issue remains whether the object was abandoned or not. In this case, contrarily to the conclusion reached in *Andrews*, Wilkins J. concluded the garbage bags had been abandoned when the accused had left them in a place built exclusively for garbage disposal, even though it was located on the accused's property[105].

4. Whether the Information was Already in the Hands of Third Parties; if so, Whether an Obligation of Confidentiality Existed

In *R.* v. *Cave*[106], a police officer called the B.C. Hydro office, which divulged that the level of electricity consumption at the accused's residence was higher than normal for his type of house. The police did not even get access to the records themselves. De Villiers J. stated that nothing in the relation between an electricity company and one of its consumers entertained any confidentiality agreement[107].

In *Patrick*, Wilkins J. considered that although the garbage bags were clearly not in the possession of third parties at the time of the

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104 *Patrick*, *supra* note 22 at para. 36-38.

105 *Id.* at para. 39.

106 [1991] B.C.J. (Quicklaw) No. 3899 (Prov. Ct.) [*Cave*].

107 *Id.* Unedited decision (no pages nor paragraphs are available); see also *Plant*, *supra* note 89 at para. 22.

search, the accused must have been aware that they would have been collected soon[108].

In *Rajaratnam*, the accused's bag passed through the hands of baggage handlers and was mixed with fellow passengers' bags, all of whom could have smelled marihuana through the bag. Therefore, in spite of having been undetected, the possibility of the odour being discerned was enough for it to be considered in the hands of third parties[109].

5. Whether the Police Technique was Intrusive in Relation to the Privacy Interest

In *Tessling*, the debate did not center on the heat profile the police could establish, but rather on the nature and quality of the information it helped infer as to what was going on in the house. Because the use of a FLIR led to scrawny information, Binnie J. concluded that such a technique did not allow an intrusion into the home. Since it gave only external information about the home, he also concluded that the process was non-intrusive and that the information thus gathered had little impact on the furtherance of an investigation.

In *Cheung*, Smith J. insisted on "the more detailed nature of the data produced by the DRA and the nature and extent of the inferences that can be drawn from that data"[110]. DRA observations allow the police to determine the actual electricity consumption every five to seven minutes and to develop power usage cycles. Neither the electricity consumption bill nor the FLIR observations can provide such precision, which in turn enables police officers to draw more elaborate inferences regarding the activities taking place inside one's home.

However, Smith J. did not exaggerate the quality of the information obtained by a DRA. He carefully noted that, taken alone, the cyclical electricity consumption did not invariably lead to a marihuana grow operation, and that in every case where such an operation was discovered, the search warrant application referred to

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108 *Patrick*, *supra* note 22 at para. 40.

109 *Rajaratnam*, *supra* note 27 at para. 62.

110 *Cheung*, *supra* note 26 at para. 44.

either a confidential informant or some other evidence reinforcing such a suspicion. Although he considered, in the instant case, that the warrant would not have been issued had the DRA information not been available, such information could not suffice *per se* for there still remained the possibility of a legal plant grow operation[111].

On this specific point, however, Fradsham J. disagreed in *R.* v. *Le*[112], where he stated that once a DRA discloses a cyclical pattern of increased electricity consumption, the DRA is one hundred percent reliable in identifying a plant grow operation: "[t]he DRA does what the FLIR cannot: give invariably reliable information that a plant grow operation is occurring in the home"[113]. So did Lamoureux J. in *Ly*, who furthermore stated that unlike FLIR imaging, a DRA reveals personal information which is not generic and which warrants protection under s. 8[114].

Smith J. further analyzed the nature and strength of the evidence provided by the DRA. He noted that, in the instant case, the DRA revealed specific activities taking place inside the home simply because the consumption patterns radically differed from any normal usage and that the consumption level, at certain times, far exceeded a normal consumption level. Therefore, it could be more easily inferred from such a pattern that a marihuana grow operation was taking place. However, had the electricity consumption stood closer to a normal consumption rate, the inferences thus made would have been much less precise and revealing: "[a]ccordingly, the potential for this technology to disclose ordinary activities of an intimate nature within the home seems to be limited"[115].

In determining whether the DRA technique was intrusive in relation to the privacy interest (i.e. the accused's home), Smith J. somewhat hesitated before concluding it had been intrusive. Running counter to this conclusion was the fact that the DRA had been installed outside the home and was observing something occurring outside the home as well, i.e. power originating from the power line.

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111 *Id.* at para. 59.

112 [2005] A.J. (Quicklaw) No. 338 (Prov. Ct.) [*Le*].

113 *Id.* at para. 37.

114 *Ly*, *supra* note 27 at para. 47.

115 *Cheung*, *supra* note 26 at para. 60.

Concurring with his conclusion was the detailed nature of the information it provided and the strong support it conferred to the inference of a marihuana grow operation[116].

In *R.* v. *Davis*[117], Auxier J. considered that although a police dog yields much more precise and reliable information than does a FLIR device, it does not represent an intrusive investigative technique, when conducted in a public surrounding, for the following reasons, quoted from an American judgment: it does not require opening the luggage; it does not expose non-contraband items which would otherwise remain hidden from public view; it does not subject the suspect to an embarrassing and inconvenient treatment. Moreover, Auxier J. quoted an Australian judgment which defined a search as implying a "physical intrusion", which is missing from a mere dog sniffing.[118]

In *Rajaratnam*, a police officer who smelled the zipper of a bag and identified the odour of a fabric softener normally used to dissimulate drugs did not employ an intrusive method.[119]

In *Kang-Brown*, Romaine J. presented the dog sniff as enjoying a ninety-two percent degree of reliability in supporting an inference of the presence of drugs.[120] In deciding whether this greater reliability would convert a dog sniff into a search under s. 8, Romaine J. tried to guess if Binnie J. would have qualified differently the FLIR operation in *Tessling* had the FLIR enjoyed a similar degree of reliability. In answering this hypothetical question, Romaine J. stated the following:

> *The technology would still be non-intrusive, as no intrusion in any meaningful physical sense would result from its use. The information obtained would not relate to any insight into the occupant's private life, other than his drug-growing operations, nor would it reveal anything of an occupant's biographical core of personal information. It would certainly not affect the "dignity, integrity and autonomy" of the occupant. Is the information the technology would disclose, that the home contains a marijuana grow-operation, information with respect to which an individual*

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116 *Id.* at para. 62(4)(e).

117 [2005] B.C.J. (Quicklaw) No. 90 (Prov. Ct.) [*Davis*].

118 *Id.* at para. 15-18; see also *Gosse*, *supra* note 43 at para. 36.

119 *Rajaratnam*, *supra* note 27 at para. 63.

120 *Kang-Brown* (Q.B.), *supra* note 24 at para. 73 (g).

has a reasonable expectation of privacy? In my opinion, it is not, and the increased reliability of FLIR technology to the point where it was as reliable as a dog sniff in inferring the presence of prohibited drugs would not affect the outcome in Tessling.[121]

Therefore, Romaine J. circumscribed s. 8 using a more restrictive scope than the position taken by the judges deciding the same issue regarding a DRA. The same opinion was expressed in *Davis*, where Auxier J. stated that the comparatively higher reliability of a dog sniff did not make it more intrusive than FLIR imaging[122].

For Romaine J. and Auxier J., the intrusiveness of a search revolves around the type of information the investigative technique can produce. Therefore, a search would be deemed intrusive if it revealed "intimate details of the lifestyle and personal choices of the individual"[123]. We will explain this expression later on in this analysis.

In *Patrick*, Wilkins J. could barely conceive less intrusive a process than the one which occurred in this case: the police officers crossed "an invisible property line totally accessible to anyone" to remove garbage bags with their hands; they did not need to reach over nor through a fence, nor did they have to open a gate or lift a lid or anything of that nature[124].

6. Whether the Use of Surveillance Technology was Itself Objectively Unreasonable

In *Tessling*, Binnie J. focused, as stated before, on "the nature and quality of the information about activities in the home that the police are able to obtain"[125] through the use of the FLIR technique. Since the heat information is by itself meaningless and revealed very little about what activities were taking place inside the home, we must not overstate the danger of using such investigative techniques and should avoid slipping into Orwellian scenarios too

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121 *Id.*; the same conclusion was reached in *McLay*, *supra* note 44 at para. 38.

122 *Davis*, *supra* note 117 at para. 18-20.

123 *Plant*, *supra* note 89 at para. 20; *Kang-Brown* (Q.B.), *supra* note 24 at para. 73(g); *Davis*, *supra* note 117 at para. 21; see also: *Rajaratnam*, *supra* note 27 at para. 49; *McCarthy*, *supra* note 22 at para. 33.

124 *Patrick*, *supra* note 22 at para. 41.

125 *Tessling*, *supra* note 22 at para. 58.

quickly. Binnie J. declared that we should evaluate the technologies according to their present state of capability and deal with their evolution using a case by case method.

In *Kang-Brown*, Romaine J. once again focused the debate on the nature and quality of the information provided by the investigative technique. Romaine J. stated that the reliability of an investigative technique does not increase or decrease its intrusiveness. In fact, a dog sniff is, despite its greater reliability, less intrusive than other investigative techniques. Romaine J. also insisted on weighing the investigative technique's reasonableness against the seriousness of the crime it is intended to detect. Using this approach, a dog sniff was deemed objectively reasonable[126].

On the nature of the investigative technique, in this case a dog sniff, MacDougall J. expressed the following views in *McCarthy*. Firstly, a dog's nose does not alarm the public by its complexity or mysteriousness. Secondly, the exceptional abilities of a dog's nose have been acknowledged and used by mankind from time immemorial and have since been used for hunting and search and rescue operations. Thirdly, no technology is involved when a dog sniffs. Finally, people understand how a dog's nose works and they know that its remarkable sensitivity distinguishes it from their own. Therefore, such an investigative technique, when used in public, does not verge on the unreasonable side[127].

In *Gosse*, quoting an American judgment, McNally J. characterized the dog sniff as an exceptionally non-intrusive and discreet *sui generis* investigative technique[128].

7. Whether the Obtained Information Exposed any Intimate Details of the Respondent's Lifestyle, or Information of a Biographical Nature

While trying to define what type of information would be protected by s. 8, Binnie J. quoted the following excerpt written by Sopinka J.:

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126 *Kang-Brown* (Q.B.), *supra* note 24 at para. 73 (h); the same conclusion was reached in *Rajaratnam*, *supra* note 27 and in *McLay*, *supra* note 44 at para. 38.

127 *McCarthy*, *supra* note 22 at para. 35.

128 *Gosse*, *supra* note 43 at para. 36.

> [I]*n order for constitutional protection to be extended, the information seized must be of a 'personal and confidential' 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 society 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.* [Emphasis added.][129]

For Binnie J., "a FLIR image that discloses that heat sources of some unknown description are present inside the structure, or that the heat distribution is uneven" does not trigger the application of s. 8. Such information does not reveal any "biographical core of personal information" or any "intimate details of one's lifestyle".

For example, such information includes: political views and affiliations, religious beliefs, financial and professional status, sexual orientation and practices, personal relationships and romantic interests, health and personal hygiene, private thoughts, or even innocent activities such as taking a bath or using lights at unusual hours[130].

In *R.* v. *M.E.*[131], the name and date of birth of the accused, a youth, were surprisingly deemed "core biographical information" on the basis of what the police purported to use this information for (namely, determining whether the youth was facing criminal charges) and of the higher protection that is granted to young people. This conclusion was reached despite the fact that the criminal record of the youth could be found on police databases.

In *R.* v. *Cole*[132], it was decided that the mobile telephone company for which an accused was a subscriber constituted "an innocuous piece of commercial information which would not attract s. 8 *Charter* protection".

In *R.* v. *Fattah*[133], mobile telephone records disclosing telephone numbers of calls made from and to a mobile telephone did not

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129 *Plant*, *supra* note 89 at 293.

130 *Andrews*, *supra* note 22 at para. 60; *Kang-Brown* (Q.B.), *supra* note 24 at para. 7 (g).

131 [2006] O.J. (Quicklaw) No. 1657 at para. 32, 33 and 41 (C.J.).

132 [2006] O.J. (Quicklaw) No. 1402 at para. 41 (S.C.J.).

133 [2006] A.J. (Quicklaw) No. 232 at para. 25 (Q.B.).

reveal any "intimate details of the lifestyle or personal choices" of the user.

In *Cheung*[134], Smith J. pondered his opinion on the matter before concluding that a DRA did reveal information protected by s. 8. Considering that this information only contributed to reveal an illegal activity, Smith J. thought it a strained interpretation of s. 8 to grant constitutional protection to such information. Moreover, the DRA helped identify an illegal activity only because of the unusual electricity consumption patterns, without what the DRA could not lead to reveal intimate details of an occupant's lifestyle or normal activities. On the other hand, Smith J. decided that these considerations should rather serve to assert the reasonableness of police actions under s. 24(2).

Since the information yielded by a DRA is considerably more detailed and probative than that afforded by a FLIR, and since it can sufficiently support the inference of a marihuana grow operation, it "crossed the line" drawn in *Tessling*[135].

In *Gosse*, McNally J. decided that a dog sniff did not reveal any "biographical core of personal information", nor did it affect the accused's "dignity, integrity and autonomy" since all it could reveal was the existence of a controlled substance[136]: "the dog could detect 9 types of illegal drugs, and nothing else. Had the appellant had none of the 9 illegal drugs, the dog sniff would have had no effect"[137]; "unlike opening the package (which would allow police to see whatever is in it[138]), a dog sniffing for drugs can tell us only one thing: are there drugs in the package"[139].

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134 *Cheung*, *supra* note 26.

135 *Id.* at para. 62 (4) and 63; the same conclusion was reached in *Le*, *supra* note 112 at para. 37 and in *Ly*, *supra* note 27 at para. 47.

136 *Gosse*, *supra* note 43 at para. 38; the same conclusion was reached in *Kang-Brown* (Q.B.), *supra* note 24 at para. 74, in *Rajaratnam*, *supra* note 27 at para. 64, and in *Davis*, *supra* note 117 at para. 21-24.

137 *R.* v. *Brown* (C.A.), *supra* note 24 at para. 48.

138 For an interesting discussion on the difference between a police dog and an x-ray machine, see: *R.* v. *Taylor*, [2006] N.J. (Quicklaw) No. 218 at para. 16-19 (C.A.).

139 *Taylor*, *supra* note 138 at para. 22; see also: *R.* v. *Gallant*, [2006] N.B.J. (Quicklaw) No. 138 at para. 36 (Q.B.): "If the Supreme Court of Canada concluded that a device that measures heat escaping from a private home does not affect personal dignity, integrity and autonomy, it is hard to find that a dog sniff of escaping odors in a public place, does".

Secreting a controlled substance cannot enjoy a *Charter* protection: "citizens do not have a legitimate privacy interest in the possession of contraband drugs"[140].

In *Andrews*, Bédard J. considered that, since most people can only get rid of their personal belongings and information through the garbage collection, a garbage bag must be presumed to contain personal information worthy of protection under s. 8.[141] Contradicting this view, Wilkins J. in *Patrick* decided that once some belonging or some information found its way in a garbage bag, it had been abandoned, lost its value and importance for its owner and thus did not deserve any constitutional protection[142].

D. Conclusion for Part II

Tessling was rendered at a moment when it was much sought. The test used in the *Edwards* case quickly proved inapplicable to claims related to informational privacy, having been devised for premises and objects. *Tessling* filled that void in a clear and efficient way. It also provided a method which can be generalized to many different types of cases, a very important element if we wish to develop privacy rights through a principled approach.

Tessling can be singled out for another reason (notwithstanding that it enjoyed the support of a unanimous Court): Binnie J. discussed an apparently frightening new technology capable of filling our minds with terrifying scenarios without giving in to any narrow-minded approach or attitude. Binnie J. looked at the FLIR technology at its face-value and not for what it might be or could eventually become, without reducing the sharpness of s. 8 or tying up the judges' discretion too harshly.

It promoted an individualized method for determining the intrusiveness of new technologies – an essential discretion for tribunals if we want to create an efficient balancing act between the fight against crime and the need for privacy. A strict and severe approach

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140 *R.* v. *Peardon*, [2005] B.C.J. (Quicklaw) No. 807 (Prov. Ct.).

141 *Andrews*, *supra* note 22 at para. 118 and 119.

142 *Patrick*, *supra* note 22 at para. 43 and 44.

regarding new technologies would have paralyzed police methods and would have led to an accumulation of frustrations on their part; a relaxed and unworried attitude with respect to their intrusiveness would have sent an alarm signal to citizens across the country. These dangerous obstacles were avoided by promoting a case by case approach.

Nevertheless, disquieting criticisms with respect to some aspects of *Tessling* cannot be shunned.

The inevitable reverse side of a principled approach as adopted in *Tessling* lies in the absence of predictability:

> *There will never be bright lines drawn around the sphere of constitutional protection, but the present regime resembles more of a guessing game where privacy is defined and proclaimed on a case-by-case basis.*[143]

Another potentially problematic consequence of *Tessling* may lie in the resurgence of "speculative sweeps"[144]. When, for instance, police officers can wander through public places using a dog without having any prior suspicion, ordinary citizens cannot but wonder what they are looking for:

> *The Court in Tessling Says there was no search because there was no reasonable expectation of privacy. It is one thing to decide there was no reasonable expectation of privacy and therefore no section 8 protection engaged. To go further and deny that there was a search would be hard to justify to a house owner watching a police helicopter flying overhead with F.L.I.R. technology.*[145]

The same remarks can be held with respect to police dogs. Despite knowing the capacities of a dog's nose, common sense leads ordinary citizens to infer of their presence that police are looking for something and thereby committing a search.

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143 R. M. POMERANCE, "Shedding Light on the Nature of Heat: Defining Privacy in the Wake of *R.* v. *Tessling*", (2005) 23 *C.R.* (6th) 229 at 233.

144 See the interesting comments expressed by Rowe J. in *Taylor*, *supra* note 138 at para. 30-37.

145 D. STUART, "Police Use of Sniffer Dogs Ought to be Subject to *Charter* Standards: Dangers of Tessling Come to Roost", (2005) 31 *C.R.* (6th) 255 at 260.

This application of *Tessling* strains the idea that the question of whether a reasonable expectation of privacy exists must be asked by referring to ordinary citizens and not criminals:

> *Finding drugs does not retroactively make any "search" disappear. The relevant question is not whether counterfeiters or fences or drug smugglers have a reasonable expectation of privacy for the tools, merchandise or fruits of their trade. The first question is whether the ordinary citizen who has committed no offence has a reasonable expectation of privacy which would be significantly invaded by the police action in question here. The danger of the police rifling through homes or suitcases is not so much their finding illegal items like guns, but their seeing legal intimate or personal items. So here one must first ask whether there would have been a "search" under s. 8 if the appellant had had* ***no*** *illegal narcotics in his luggage.*[146]

The impact of such a position on ordinary citizens' lives is not negligible: from now on, they can be scrutinized by police dogs without having any claim to oppose. As a consequence, a minimization of their privacy standards occurred.

Now that we have brushed a portrait of how the expectation of privacy is construed, we will now center our analysis on who may bring an action based on an allegation of a s. 8 violation.

III. The Right to Bring an Action Regarding One's Reasonable Expectation of Privacy and Third Party Rights

When does one have the right to bring an action (*locus standi*) in order to seek a legal remedy regarding an unreasonable search or seizure? Despite this being a case by case matter, we can still establish a methodology to help us in the process.

The search of a person will never cause any difficulty: one can always claim a privacy right in his own body since he unquestionably has an interest in it. However, seizures and searches of premises, receptacles and information raise complex issues of their own, for which "[t]he law requires an ascertainable interest in the applicant

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146 *R.* v. *Brown* (C.A.), *supra* note 24 at para. 47.

or a definable grievance".[147] Therefore, according to the latter part of this judicious comment – which is more self-evident than the former –, a person subjected to a search or seizure for evidentiary purposes may himself invoke s. 8 without hesitation:

> *In order to qualify as a 'person aggrieved by an unlawful search and seizure' one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else.*[148]

What happens when an accused wishes to attack the reasonableness of a search or seizure practiced against a third party? This accused will have to prove that he enjoys a reasonable expectation of privacy (the abovementioned "ascertainable interest") in the searched premises, the seized goods or the information. How may he prove the existence of such an expectation? To learn more about what his burden of proof will entail, we must turn to the guiding lights of *Edwards.* We will thus discuss the various steps of a test the Supreme Court ably established in this judgment with respect to the application of s. 8.

Before addressing these topics in depth, we should outline the interpretive approach chosen by the Supreme Court with which we must proceed in determining the rights conferred by s. 8. This approach was very well summarized by La Forest J. in *Dyment*:

> *From the earliest stage of Charter interpretation, this Court has made it clear that the rights it guarantees must be interpreted generously, and not in a narrow or legalistic fashion* […]. *The function of the Charter, in the words of the present Chief Justice, then Dickson J., in* Hunter *v.* Southam […] *"is to provide ... for the unremitting protection of individual rights and liberties". It is a purposive document and must be so construed. That case dealt specifically with s. 8. It underlined that a major, though not necessarily the only, purpose of the constitutional protection against unreasonable search and seizure under s. 8 is the protection of the privacy of the individual*[…]. *And that right, like other Charter rights, must be interpreted in a broad and liberal manner so as to secure the citizen's right to a reasonable expectation of privacy against governmental encroachments. Its spirit must not be constrained by narrow legalistic*

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147 *R.* v. *Model Power (a division of Master Miniatures Ltd.)*, [1979] O.J. (Quicklaw) No. 1069 at para. 6 (H.C.J.).

148 *Jones* v. *United States*, 362 U.S. 257 (1960), at 261; see also: *United States* v. *Cella*, 568 F.2d 1266 (1977).

classifications based on notions of property and the like which served to protect this fundamental human value in earlier times.[149] [Emphasis added.]

A. Section 8 Guarantees a Personal Right

"Like all *Charter* rights, s. 8 is a personal right. It protects people and not places".[150] The latter part of this statement stems from what Dickson J. expressed in *Hunter*[151] by quoting the American decision *Katz* v. *United States*.[152] This assertion freed the reasonable expectation of privacy from being strictly confined to the determination of proprietary or possessory interests in goods or premises. It gave greater breadth to the concept and allowed judges to consider many other factors in their analyses. The former part of this statement declares that privacy rights are intimately linked to and centered on one's person; it affords protection to one's own person, not to things independently from his person.

B. *Locus Standi* Under Section 8 Exists Regarding one's own Privacy Rights

1. Third Party Rights and Section 8

a. The Majority View in *Edwards*

"The right to challenge the legality of a search depends upon the accused establishing that his personal rights to privacy have been violated".[153] Therefore, invoking s. 8 will be limited to the persons whose own expectation of privacy has been intruded upon by a search or seizure; this expectation of privacy will have to be proven on a balance of probabilities.[154] The majority in *Edwards* asserted that

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149 *Dyment*, *supra* note 6 at 426.

150 *Edwards*, *supra* note 23 at para. 45.

151 *Hunter*, *supra* note 11 at 158 and 159.

152 389 U.S. 347 (1967).

153 *Edwards*, *supra* note 23 at para. 45.

154 *R.* v. *Sandhu*, (1993) 82 C.C.C. (3d) 236 at para. 26 (B.C.C.A.).

> *In any determination of a s. 8 challenge, it is of fundamental importance to remember that the privacy right allegedly infringed must, as a general rule, be that of the accused person who makes the challenge.*[155]

They started establishing their position by referring to the decision of the United States Supreme Court in *Alderman* v. *United States*[156] where the majority stated that

> [The] *suppression of the product of a Fourth Amendment violation* [the American equivalent of the Charter's s. 8] *can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence.*[157]

They continued with the perspective of Finlayson J.A. in *R.* v. *Pugliese*[158], where they "emphasized that the essence of the test under s. 8 was the existence of a personal privacy right"[159]. The majority in *Edwards* referred to Finlayson's following comments in order to insist on the personal and individual dimension of the right to an expectation of privacy:

> *It is the appellant's personal exposure to the consequences of the search and seizure that gives him the right to challenge … Accordingly, s. 8 is available to confer standing on an accused person who had a reasonable expectation of privacy in the premises where the seizure took place.*[160]

An illustration of this rule can be found in vehicle searches, with respect to which the owner of the vehicle can claim privacy rights whereas the passenger could not[161].

According to the majority, "[t]he intrusion on the privacy rights of a third party may however be relevant in the second stage of the

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155 *Edwards*, *supra* note 23 at para. 34.

156 394 U.S. 165 (1969) [*Alderman*].

157 *Id.* at 171 and 172.

158 (1992) 71 C.C.C. (3d) 295 (Ont. C.A.).

159 *Edwards*, *supra* note 23 at para. 42.

160 *R.* v. *Pugliese* (1992), 71 C.C.C. (3d) 295 at 301 (Ont. C.A.).

161 See *R.* v. *Baldwin*, [2007] N.J. (Quicklaw) No. 6 at para. 10 (Prov. Ct.); *R.* v. *Boudreau*, [2006] B.C.J. (Quicklaw) No. 1354 at para. 52, 54 and 56 (S.C.); *R.* v. *Lee*, [2005] O.J. No. 4389 at para. 18-21 (S.C.J.).

s. 8 analysis, namely whether the search was conducted in a reasonable manner"[162].

However, La Forest J. strongly disagreed on this aspect in *Edwards* and forcefully argued his point of view. We will take the time to develop this position since it involves many ramifications.

b. Justice La Forest's Dissenting View in *Edwards*

La Forest J. argues that s. 8 includes a public reach that extends further than the protection it affords to individuals alone:

> *As I see it, the protection accorded by s. 8 is not in its terms limited to searches of premises over which an accused has a personal right to privacy in the sense of some direct control or property. Rather the provision is intended to afford protection to all of us to be secure against intrusion by the state or its agents by unreasonable searches or seizures. … Moreover, s. 8 does not merely prohibit unreasonable searches or seizures, but also guarantees to everyone the right to be secure against such unjustified state action … It is a public right, enjoyed by all of us. It is important for everyone, not only an accused, that police … do not break into private premises without warrant.*[163] [Emphasis added.]

By dissociating the protection afforded by s. 8 from the accused and making it a public right, La Forest J. hoped to eradicate the limitation according to which invoking s. 8 rests on establishing that one's own expectation of privacy has been breached. He wished to make it possible for an accused to raise violations of a third party's expectation of privacy. We can fathom the reasons behind this desire by quoting Sopinka J. as La Forest J. himself did:

> *In my view, the extent of invasion into the privacy of these third parties is constitutionally relevant to the issue of whether there has been an "unreasonable" search or seizure. To hold otherwise would be to ignore the purpose of s. 8 of the* Charter *which is to restrain invasion of privacy within reasonable limits. A potentially massive invasion of the privacy of persons not involved in the activity being investigated cannot be ignored simply because it is not brought to the attention of the court by one of those persons. Since those persons are unlikely to know of the invasion of their privacy, such invasions would escape scrutiny, and s. 8 would not fulfill its purpose.*[164] [Emphasis added.]

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[162] *Edwards*, *supra* note 23 at para. 36.

[163] *Id.* at para. 59.

[164] *R.* v. *Thompson*, [1990] 2 S.C.R. 1111 at 1143.

Here Sopinka J. was discussing the impacts of the interception of private communications on public pay phones. Privacy rights have a social value and, as we have established in the introduction, they are at the core of modern western societies. We favour individual autonomy because we believe its enforcement will prove more useful for society in the long term than the gains made in the short term by its violation[165].

This commitment stresses the need for strict limits by which State powers should abide when intervening in our lives. Therefore, this objective should be favoured by all possible means, including allowing an accused to invoke breaches of a third party's expectation of privacy. Such a mission should not be left to individuals who, unless they're accused, will not institute legal actions on the unique basis of a violation of their expectation of privacy. For La Forest J., "[n]ot to accept this point of view is to accord greater protection to the right of privacy to the accused or other wrongdoer than to a person against whom there may be no reasonable suspicion of wrongdoing"[166].

La Forest J.'s position clearly resembles the "target standing" doctrine of Fortas J. of the United States Supreme Court, which he expressed in dissent in *Alderman.* Fortas J. stated that the American equivalent of the *Charter*'s s. 8 "grants the individual a personal right, not to privacy, but to insist that the state utilize only lawful means of proceeding against him"[167]. This would mean an enlargement of s. 8 to encompass more than the right to privacy, something Dickson J. intentionally did not foreclose in *Hunter*[168].

As soon as someone was the target of a search (i.e. the person targeted by the investigation underlying the search), according to Fortas J., he was the victim of an invasion of privacy. He went on to say that "the Government violates his rights when it seeks to deprive him of his liberty by unlawfully seizing evidence in the course of an investigation and using it against him at trial"[169]. However, this

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165 J. DAWE, *loc. cit.* note 49 at 62.

166 *Edwards*, *supra* note 23 at para. 64.

167 *Id.* at 206.

168 *Supra* note 11 at 159; an idea which the Supreme Court reiterated in *Tessling*, *supra* note 22 at para. 15.

169 *Alderman*, *supra* note 156 at 209.

position was explicitly rejected in 1979 by the United States Supreme Court in *Rakas*.

Ultimately, the present state of law requires from an accused that he proves his reasonable expectation of privacy was violated by a search or seizure in order to attack the said search or seizure. Taking into account police behaviour towards third parties will occur only when deciding whether the search or seizure was unreasonable.

2. Third Party Rights and Section 7 of the *Charter*

Were we to conclude that third party rights cannot be invoked by the accused under s. 8, another possibility arises: the possibility of using the abuse of process doctrine under s. 7, as had tried Mr. Edwards before the Ontario Court of Appeal. By using this theory,

> *the accused* [is] *seeking a declaration that the introduction of the evidence, obtained in a manner that violated the* Charter, *would breach his s. 7 rights at trial by bringing the administration of justice into further disrepute. It is the accused's right not to be deprived of his liberty except in a manner consistent with fundamental justice that is at issue in the hearing.*[170]

According to the same authors, quoting the Supreme Court decision in *Harrer*[171], "[t]he accused's right becomes a personal one when the Crown seeks to introduce that evidence against him at trial"[172]. We will now expose the inner workings of the abuse of process doctrine and we will then show how it may be used by an accused in the context of a breach of a third party's reasonable expectation of privacy.

Finlayson J.A., in the Ontario Court of Appeal decision in *R.* v. *Edwards*[173], observed that the violation of a third party's reasonable expectation of privacy may, at least theoretically, give rise to the

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170 Ursula HENDEL and Peter SANKOFF, "*R.* v. *Edwards*: When two Wrongs Might Just Make a Right", (1996) 45 *C.R.* 330 at 332.

171 (1995) 101 C.C.C. (3d) 193 (S.C.C.).

172 U. HENDEL and P. SANKOFF, *loc. cit.* note 170 at 332 and 333.

173 (1994) 19 O.R. (3d) 239 (C.A.), of which we have discussed the Supreme Court decision more than once in the present text. This issue was not specifically decided by the Supreme Court in *Edwards*.

abuse of process doctrine and therefore to the violation of one's personal right under s. 7 of the *Charter*. He referred to comments made by Lamer J. (as he then was) in *Collins*[174], where, according to Finlayson, Lamer J. (as he then was) "asked, but did not answer, the question as to whether a third party can raise a *Charter* issue"[175]. Lamer J. then asked aloud if "the rights or freedoms infringed or denied … be those of the applicant"[176] and if the accused could "move under s. 24(2) for the exclusion of the evidence"[177] when an unreasonable search or seizure was committed on a third party's home.

Later on, Finlayson J.A. quoted comments Lamer J. (as he then was) used "which did not refer specifically to s. 7 of the *Charter* but which could have application in a proper s. 7 case"[178]. Discussing the notion of "further disrepute" under s. 24(2) of the *Charter*, Lamer J. (as he then was) said that further disrepute "will result from the admission of evidence that would deprive the accused of a fair hearing, or from judicial condonation of unacceptable conduct by the investigatory and prosecutorial agencies".[179] Therefore, according to this reasoning, the violation of a third party's reasonable expectation of privacy may give rise to the violation of one's personal right under s. 7 of the *Charter*. We will now analyze the abuse of process doctrine.

The abuse of process doctrine existed concurrently, for some time, under the common law and under s. 7 of the *Charter*. We will therefore study these two separately. The common law version was summed up in *R.* v. *Power*[180] and was then applied by the Ontario Court of Appeal in the *Edwards* case.

In *Power*, L'Heureux-Dubé J. quoted her comments in *R.* v. *Conway*[181] where she explained the substance of this doctrine. She said that "[u]nder the doctrine of abuse of process, the unfair or oppres-

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174 [1987] 1 S.C.R. 265 [*Collins*].

175 *Edwards*, *supra* note 23 at 253.

176 *Collins*, *supra* note 174 at para. 20.

177 *Id.*

178 *Edwards*, *supra* note 23 at 253.

179 *Collins*, *supra* note 174 at para. 31.

180 [1994] 1 S.C.R. 601 [*Power*].

181 [1989] 1 S.C.R. 1659.

sive treatment of an appellant disentitles the Crown to carry on with the prosecution of the charge"[182]. It implied that "where the affront to fair play and decency is disproportionate to the societal interest in the effective prosecution of criminal cases, then the administration of justice is best served by staying the proceedings"[183]. She ensued with *R.* v. *Keyowski*[184], where the Court unanimously affirmed that 'the remedy will only be granted in the "clearest of cases"'[185]. L'Heureux-Dubé J. summarized the Court's position as follows:

> [C]*ourts have a residual discretion to remedy an abuse of the court's process but only in the "clearest of cases", which, in my view, amounts to conduct which shocks the conscience of the community and is so detrimental to the proper administration of justice that it warrants judicial intervention. … To conclude that the situation "is tainted to such a degree" and that it amounts to one of the "clearest of cases" … requires overwhelming evidence … Cases of this nature will be extremely rare.*[186]

This theory led to only one form of remedy: the stay of proceedings. Therefore, confronted with such a severe solution, the courts had developed a very high threshold before allowing anyone to successfully bring it into play. Applying this theory to the *Edwards* case, Finlayson J.A. specified the applicable criteria:

> *Certainly the findings that the trial judge did make fall far short of the language of intimidation, coercion and abuse of authority necessary to elevate this argument to the level of a constitutional challenge.*[187]

However, subsequently to the Ontario Court of appeal's decision in *Edwards*, the Supreme Court rendered a decision which substantially changed the abuse of process doctrine by clarifying the impact of s. 7 of the *Charter* on this theory.

In *R.* v. *O'Connor*[188], the Supreme Court decided to abolish the distinction between the common law and *Charter* versions of abuse of process, merging the two so as to "not invite schizophrenia into

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182 *Id.* at 1667.

183 *Id.*

184 [1988] 1 S.C.R. 657.

185 *Power*, *supra* note 180 at para. 9.

186 *Id.* at para. 11 and 12.

187 *R.* v. *Edwards*, *supra* note 23 at 253 and 254.

188 [1995] 4 S.C.R. 411 [*O'Connor*].

the law".[189] The main difference between the two versions lied in the burden of proof and the availability of remedies: the common law version allowed the doctrine to prevail "only in the clearest cases" for the reason that it only afforded a stay of proceedings, a very severe remedy.

In order to merge the two, L'Heureux-Dubé J. proceeded by showing that both versions promoted the same fundamental values and that even if the burden of proof under s. 7 differed (i.e. the balance of probabilities), the remedy of stay of proceedings, now being considered under s. 24(1), would still be allowed "only in the clearest cases"[190]. L'Heureux-Dubé J. swiftly proceeded to say that remedies afforded under the *Charter* obeyed to a much more flexible regime under s. 24(1) than under the rigid common law version of abuse of process. Thanks to s. 24(1), judges had many alternatives besides staying the proceedings, for example reducing a sentence or granting damages. Therefore, alleged cases of abuse of process must now be proven by a balance of probabilities, just as it is the case for any other alleged violation of a *Charter* right[191].

Even though L'Heureux-Dubé J. maintained the existence of the common law version for cases which, for a reason or another, would escape the grasp of s. 7 but would still shock the community's fundamental values with respect to the administration of justice, she specifically rejected the continuation of two different analytical schemes[192].

If we use L'Heureux-Dubé J.'s analysis of the various rights guaranteed by s. 7 of the *Charter*, the introduction, at trial, of proof obtained in violation of a third party's reasonable expectation of privacy could, at least theoretically, be inserted in the category described as

> *a residual category of conduct caught by s. 7 of the* Charter. *This residual category does not relate to conduct affecting the fairness of the trial or impairing other procedural rights enumerated in the* Charter, *but instead addresses the panoply of diverse and sometimes unforeseeable*

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189 *Id.* at para. 71.

190 *Id.* at para. 68.

191 *Id.*

192 *Id.* at para. 70.

> *circumstances in which a prosecution is conducted in such a manner as to connote unfairness or vexatiousness of such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the judicial process.*[193]

The burden weighing on an accused, were he to invoke such a violation, can be summarized as follows:

> *Where the accused seeks to establish that … the Crown violates s. 7 of the* Charter, *he or she must establish that the impugned* [violation] *has, on the balance of probabilities, prejudiced or had an adverse effect on his or her ability to make full answer and defence.*[194]

However, the possibility, under s. 7, of invoking the violation of a third party's rights has yet to be decided by the Supreme Court. Nevertheless, the following excerpt hints towards the fact that it may well be within the realm of the possible:

> *Given that many, if not most, of the individual rights protected in the Charter also have a broader, societal dimension, it is therefore consistent with both the purpose and the spirit of the Charter to look, in certain cases, beyond the possibility of prejudice to the particular accused, to clear cases of prejudice to the integrity of the judicial system.*[195]

Taking this perspective into account, "shocking police conduct will be no less shocking because it involves the rights of others and not the accused"[196]. The same authors asserted, regarding s. 7, that "each of [the Supreme Court's definitions of the principles of fundamental justice] would be fulfilled by a principle which affirms respect for the *Charter* itself"[197].

Therefore, obtaining evidence by violating a third party's right under s. 8 would encroach the principles of fundamental justice were it to be admitted at the accused's trial, granted this evidence, once admitted, would lead to a violation to the accused's right to life, liberty or security.

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193 *Id.* at para. 73.

194 *Id.* at para. 74.

195 *Id.* at para. 64.

196 U. HENDEL and P. SANKOFF, *loc. cit.* note 170 at 336.

197 *Id.* at 337.

Despite such an alternative, La Forest J.'s criticism on the possibility of invoking the theory of abuse of process, instead of s. 8, still resonates:

> *My colleagues suggest that if a flagrant case arose, it could be dealt with on the basis of abuse of process. To adopt this type of "Chancellor's foot" approach, while curtailing the possibility of developing in a principled way in the light of experience the constitutional provision specifically aimed at the evil, seems to me to be at best incongruous.*[198]

3. Third Party Rights and Section 24 of the *Charter*

a. The Relation between Section 7 and Section 24(2)

When the third party against whom a violation of s. 8 occurred is facing a trial, the judge hearing his case will inevitably consider what outcome the violation should lead to under s. 24. Two situations may be foreseen: one where the evidence is admitted under s. 24(2) at the third party's trial, and one where it is excluded. How will the analysis conducted under s. 7 at the accused's trial interact with the conclusions reached at the third party's trial under s. 24? The first situation was very aptly presented by Hendel and Sankoff:

> *At A's trial, the evidence is admitted after a s. 24(2) inquiry. It would be incongruous for B to then argue that his or her s. 7 right would be violated by the admission of that evidence at his or her trial. It has been previously determined that the administration of justice would not be brought into disrepute by admitting that evidence in the former proceeding. … The s. 24(2) ruling by definition addresses our concerns about unacceptable conduct.*[199]

However, we face a different situation if the evidence at the third party's trial is excluded under s. 24(2). What happens to the admissibility of the same evidence at the accused's trial? At the third party's trial, the evidence could have been excluded according to one of the two following rationales: "(1) where fairness of the trial would be compromised, and (2) where the violation was so serious that the judiciary could not condone it".[200]

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198 *Edwards*, *supra* note 23 at para. 65.

199 U. HENDEL and P. SANKOFF, *loc. cit.* note 170 at 338.

200 *Id.* at 339 (passage taken from *R.* v. *Collins*, [1987] 1 S.C.R. 265 (S.C.C.)).

If the evidence is excluded from the third party's trial on either basis, the admission of this evidence at the accused's trial could prove contrary to the principles of fundamental justice:

> *Finally, … Defence Counsel alluded to a s. 7 and s. 11(d) argument based on trial fairness which might arise in a situation where co-accused A is successful in excluding from evidence a call in which he had standing and the Crown intends to introduce into evidence such call for use against C who was without standing to challenge its admissibility. If this were to occur, I leave open the right of an accused to apply for exclusion on the basis of trial fairness.*[201]

> *It is clear that I have discretion to exclude evidence under s. 7 and s. 11(d) of the* Charter, *even where a right of the individual applicant has not been directly infringed.*[202]

If a subsequent proceeding were to obliterate such a precedent by admitting the evidence in question, it would legitimize the police conduct which was previously considered as bringing the administration of justice into disrepute. The logical conclusion that should stem from such a situation has been expressed by Hendel and Sankoff:

> *Where evidence is obtained that would bring the administration of justice into disrepute because it was obtained by unacceptable police conduct, to introduce it at any hearing would be contrary to the principles of fundamental justice and cannot be in line with the protection mandated by the* Charter[203].

b. The Relation between Third Party Rights and Section 24(2)

"A claim for relief under s. 24(2) can only be made by the person whose Charter rights have been infringed"[204]. This principle enunciated by the majority in *Edwards* will guide our following comments. Before a court can consider this question, an accused needs to have demonstrated the violation of a *Charter* right. Once analyzing such violation under s. 24(2), a judge must decide if he will or will not consider how the police behaved towards third parties.

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201 *R.* v. *Trang*, [2001] A.J. (Quicklaw) No. 1498 at para. 31 (Q.B.).

202 *R.* v. *Adam*, [2006] B.C.J. (Quicklaw) No. 531 at para. 22 (S.C.).

203 *Id.* at 340.

204 *Edwards*, *supra* note 23 at para. 45.

This decision entails serious consequences. Since the Supreme Court has on occasion taken into account the fact that more than one *Charter* rights was breached or that there was a "large pattern of disregard" for the *Charter* to establish the seriousness of a violation, third party rights could be a decisive factor with respect to the admissibility of evidence[205]. This issue has yet to be clearly settled by the Supreme Court.

In *R.* v. *Silveira*[206], the Ontario Court of Appeal stated that police conduct towards third parties was not a relevant factor while proceeding with the s. 24(2) analysis: "it is only the *Charter* rights of the appellant and the alleged violations of these *Charter* rights with which we are concerned".[207] This issue was not dealt with by the Supreme Court majority decision in *R.* v. *Silveira*[208], which upheld the appellate court's judgment, but La Forest J., dissenting, strongly criticized the position taken by the Ontario Court of Appeal's majority decision. La Forest J. stated:

> *Nor do I agree with the majority's view that the violation of the* Charter *rights of the appellant's family is irrelevant. … More generally, the broader impact of the* Charter *breach cannot be ignored. It is relevant to the serious consequences of the breach and points to the fact that the danger from breaches of* Charter *rights extends beyond the particular individual. The* Charter *guarantees exist for the protection of all of us. … In sum, I am struck by the cumulative evidence of a poorly managed operation, a glaring pattern of disregard for Charter protected interests of the appellant and his family …*[209]

By reading s. 24(2), it seems rather clear "that the *Charter* itself mandates a consideration of "all the circumstances … To ignore the conduct of police with regard to third parties in the s. 24(2) inquiry is to look at only a fraction of the story"[210].

As a final remark on this matter, it would be interesting to return briefly to La Forest J.'s dissenting position in *Edwards* where he

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205 *R.* v. *Genest*, (1989) 45 C.C.C. (3d) 385 at 407 (S.C.C.); *R.* v. *Greffe*, (1990) 55 C.C.C. (3d) 161 at 185 (S.C.C.); U. HENDEL and P. SANKOFF, *loc. cit.* note 170 at 341.

206 (1994) 88 C.C.C. (3d) 61 (Ont. C.A.).

207 *Id.* at 76.

208 [1995] 2 S.C.R. 297.

209 *Id.* at para. 47 and 73.

210 U. HENDEL and P. SANKOFF, *loc. cit.* note 170 at 343.

thought that s. 8 guaranteed a public right, bestowed upon all of us as a community. According to this logic, La Forest J. argued that

> *I see no reason why, if we all share in the public right under s. 8, we cannot have resort to s. 24(2) if evidence so obtained is adduced against us. Nor do I read* [Hunter *v.* Southam as] *being confined to an individual's personal right to privacy, and indeed this issue was expressly left open.*[211]

c. The Interpretive Impact of Section 24(2) on Section 8: The Absence of an Automatic Exclusionary Rule

The United States greatly influence the development of Canadian law – the Supreme Court of Canada has never shied away from looking at what its "big sister" decided on an issue, when this could be of any help. In certain regards, it has proven to be a wise role-model; however, in others, caution should guide the Court before it follows the path embarked upon by its American counterpart.

Protection against unreasonable searches and seizures constitutes one of such themes that should warrant caution. Many elements distinguish the Canadian from the American situation. Most notably, the addition of s. 24(2) in the *Charter* has given Canadian courts an autonomous mechanism by which they can decide whether or not they should exclude evidence. This exclusionary mechanism differs very much from what exists in the United States, where once a person has proven he had standing under the Fourth Amendment (the right to be secure from unreasonable searches and seizures) and that his right was violated, the exclusionary rule would apply and the evidence thus obtained would be excluded; "[c]ourts applying the rule did not engage in any further balancing, or consider alternative remedies"[212].

Therefore, in American law, the determination of a violation necessarily implied an exclusion of the said evidence, such exclusionary process thereby dubbed "automatic". Such a context brings forth the clear relation between the interpretation of the Fourth Amendment and the admissibility of evidence. When defining the extent of the protection afforded by the Fourth Amendment, an American judge must always have in mind the potential conse-

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211 *Edwards*, *supra* note 23 at para. 66.

212 J. DAWE, *loc. cit.* note 49 at 56.

quences of his interpretation on the trial at hand, since it can directly result in the exclusion of evidence.

Instead of separating the interpretive phase of the guarantee and the admissibility of the evidence, as it is done in Canadian law, the American judge must adjust his interpretation in a way that does not overreach the purpose of the exclusionary rule. This purpose being solely the "deterring of police misconduct"[213], any evidence which was obtained through illegal police actions had to be excluded without any further consideration.

In Canadian law, once a judge has concluded to a s. 8 breach, he must turn to the application of s. 24(2) which guides him in considering the admissibility of the evidence obtained by violation of s. 8. Two conditions are hereby imposed to the judge: he must look at "all the circumstances" and "the evidence shall be excluded if … the admission of it in the proceedings would bring the administration of justice into disrepute". The factors which should be taken into account in this dual process have been aptly summarized by Cory J. in *Wise*[214]:

> *What then are the principles that should be considered? They are set out in* R. *v.* Collins*, [1987] 1 S.C.R. 265. There, Lamer J., as he then was, divided the factors that should be taken into account when considering the admissibility of evidence under s. 24(2) into three groups:*
>
> *(1) the effect of admission on the fairness of the trial process;*
>
> *(2) the seriousness of the violation; and*
>
> *(3) the effect of exclusion on the reputation of the administration of justice.*
>
> *It was emphasized that the object of s. 24(2) was not to remedy police misconduct, but rather to prevent the administration of justice being brought into further disrepute through the admission of improperly obtained evidence.*[215]

Because of this global oversight which a judge may use in considering the admissibility of evidence – a process taking place in a distinct and almost hermetic phase –, a Canadian judge disposes of

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213 *Id.* at 57.

214 *R.* v. *Wise*, [1992] 1 S.C.R. 527.

215 *Id.* at 539 and 540 (these criteria were recently affirmed in *R.* v. *Buhay*, [2003] 1 S.C.R. 631 at para. 41 [*Buhay*]).

more latitude when interpreting s. 8 because the recognition of a violation in no way precludes the possibility of admitting the evidence at trial[216]. Therefore, Canadian law under s. 8 should dissociate itself from the American position under the Fourth Amendment since the United States Supreme Court has always biased its interpretation in order to avoid an overbroad exclusionary rule instead of founding its interpretation on a "well thought out theory of privacy"[217].

This important interpretive margin granted to the Canadian judges should be used to its fullest, in conformity with the broad and liberal interpretive approach summarized by La Forest J. in *Dyment*[218] which would allow Canadian jurisprudence to evolve in a more coherent, logical and constant way than the path chosen by American jurisprudence on the matter. This concern was very well addressed by the Manitoba Court of Appeal in *R.* v. *Pohoretsky*[219]:

> *A finding that s. 8 Charter rights* [sic] *have been infringed or denied does not, of itself, render evidence inadmissible. The interpretation of s. 8 does not, for that reason, require the creation of exceptions to its application. ... Those are concerns that would be better considered in an application to exclude under s. 24(2).*[220]

As a final remark, we should note that the term employed in s. 8 is "to be secure". Limiting the protection of s. 8, as the judges have repeatedly done, to the notion of reasonable expectation of privacy, in spite of the possibility that it has a greater reach (as Dickson J. (as he then was) stated in *Hunter*[221]), prevents said section from fulfilling its objective completely.

Many jurisprudential problems appeared due to the application of a strict privacy approach to s. 8, most notably with respect to third party rights. In such cases, applying a "right to be secure against unreasonable search or seizure" instead of a personal reasonable expectation of privacy might have included a right "to insist that the

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216 In *R.* v. *A.A.*, [2005] O.J. (Quicklaw) No. 5686 at para. 31 (C.J.), Blacklock J. stated the following: "[i]n light of the presence of Section 24(2) of the Charter, it would seem to me to be a strange result indeed if the American standing rule cast a broader net than our own".

217 J. DAWE, *loc. cit.* note 49 at 53.

218 *Dyment*, *supra* note 6 and accompanying text.

219 (1985), 45 C.R. (3d) 209 (Man. C.A.).

220 *Id.* at 227.

221 *Hunter*, *supra* note 11.

state utilize only lawful means of proceeding against him"[222], even if these means do not directly affect the privacy of an accused.

We should look at the French version of s. 8, where the drafters used the term "*abusif*" (the French equivalent of "abusive") rather than "*déraisonnable*" (the French equivalent of "unreasonable"). This choice of term leads us even more clearly to the conclusion that s. 8 intended not to protect a right to privacy, but to prevent "abuses of state power".[223] When framed in these terms, s. 8 could encompass unconstitutional searches and seizures conducted upon third parties in order to incriminate a suspect.

Admitting evidence to an accused's trial that was obtained through third-party searches which violated s. 8 generate many problems – though it may suffice to describe only two. First, it shocks and affects the third-party who underwent the search; second, it gravely undermines our social values and makes a mockery of individual rights[224].

Even though we may be willing to tolerate violations of third party rights in certain circumstances, we should still recognize s. 8 violations at an accused's trial. Tolerating such violations should be expressed, as in every other situation where the Charter has been violated, under s. 24(2). This in turn would permit the judicial system "to control such abuses of individual rights by bringing them into the open, and to ensure that we recognize that even if in the end society considers the infringements justified, a line has been crossed, and our principles have been disturbed"[225].

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Many topics force the confrontation between different moral approaches, thus blurring the intended clarity of legal thought. Privacy rights bring forth such dilemmas in a startling way, where the fight against crime relentlessly pressures our privacy. Many moral conceptions confront themselves, some cherishing public order more than individual rights and vice versa. Caught between narrow legal-

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222 *Alderman*, *supra* note 156.

223 J. DAWE, *loc. cit.* note 49 at 61.

224 *Id.* at 63.

225 *Id.*

istic classifications and fundamental social needs, judges are more often than not in the line of fire. Between the need for jurisprudential coherence and responding to individual and societal claims, they must establish solutions adapted to contemporary demands. Technology and police methods evolve, therefore judges must reassert and strengthen our social values by extending their legal reach, without paralyzing police in their endeavours. A continually evolving balance must be struck between the fight for crime and the right to privacy, without one of them solely occupying center stage. To do so requires a consequential and responsible development of case law which asserts a primacy to principles and Charter values.