DO WE THROW OUR PRIVACY RIGHTS OUT WITH THE TRASH? THE ALBERTA COURT OF APPEAL'S DECISION IN *R. V. PATRICK*

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Grocery lists, birth control information, bank records, and intimate letters to friends past: all are personal items that find their way into the garbage bins of Canadians on a daily basis.[1] Canadians have come to expect that once a garbage bag is thrown in a bin behind a home, it makes a direct uninterrupted trip to a landfill, a place where its contents will remain private through the decomposition process. Few realize that, quite frequently, the police, as state agents charged with the responsibility of solving criminal cases, sift through the discarded items of Canadians in the hunt for valuable information. This police behaviour raises two important constitutional questions. Do individuals enjoy a reasonable expectation of privacy in the contents of their garbage? If yes, what standard should be applied to balance this expectation with the need of the state to investigate crime?

These questions were recently addressed by the Alberta Court of Appeal in *R. v. Patrick*.[2] In *Patrick*, police officers sifted through the garbage of Mr. Patrick, an individual who was suspected of operating an ecstasy lab.[3] The knowledge acquired from the garbage was used in conjunction with other sources of information to acquire a warrant to enter the property.[4] The Court of Appeal found that Patrick did not enjoy a reasonable expectation of privacy because, among other things, he had abandoned the garbage retrieved by the police. *Patrick* is a disappointing decision. It fails to canvass properly the relevant Supreme Court authorities and incorrectly concludes that garbage is necessarily abandoned along with any reasonable expectation of privacy in its contents.

This comment is divided into three sections. The first discussion canvasses the jurisprudential backdrop relevant to garbage disposal and argues that Supreme Court authorities provide support for the finding of a reasonable expectation of privacy in garbage. The second part examines the Alberta Court of Appeal's judgment in *Patrick* and critiques the substance of the majority decision and the dissenting reasons within the context of previous authorities. The third portion argues that while under many circumstances people enjoy a reasonable expectation of privacy in the contents of their garbage, this privacy expectation is reduced because of the nature of garbage disposal and the balance between individual autonomy and state power.

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* B.A., LL.B., LL.M. The author would like to thank the American legal academy for providing him with the framework necessary to author this piece. Many of the ideas advanced in this comment trace their geneses to Fourth Amendment literature. This comment, much to the surprise of the author, is one of the first to discuss this issue from a Canadian perspective.

1 For a more comprehensive list, see Gary S. Levenson, "Constitutional Law — The Fourth Amendment Does Not Prohibit Warrantless Searches and Seizures of Garbage Containers Left at the Curb of a House — *California v. Greenwood*, 486 U.S. 35 (1988)," Case Note, (1990) 39 Drake L. Rev. 775 at 780.

2 2007 ABCA 308, [2008] 417 A.R. 276 [*Patrick*], appeal as of right to the Supreme Court of Canada, 32354 (14 August 2008).

3 *Ibid.* at para. 2.

4 *Ibid.*

I. THE CANADIAN JURISPRUDENTIAL FRAMEWORK

Section 8 of the *Canadian Charter of Rights and Freedoms*[5] protects the individual against unreasonable search or seizure. It reads: "Everyone has the right to be secure against unreasonable search or seizure." *Canada (Combines Investigations Acts, Director of Investigation and Research) v. Southam*,[6] the first Supreme Court authority to interpret the section, provides that the right protected by s. 8 is only to be triggered if the claimant enjoys a reasonable expectation of privacy in the information seized. In other words, there is no constitutional protection if the police do not infringe on a reasonable expectation of privacy.

Moreover, once a reasonable expectation of privacy has been found, *Hunter* mandates that prior authorization based on reasonable and probable grounds is a requirement for a valid search and/or seizure.[7] This means that prior authorization in the form of a warrant will often be required, a per se requirement designed to prevent unjustified searches from occurring.[8]

This "reasonable expectation of privacy" threshold entrenched in *Hunter* left open a vital question that has since been the subject of considerable litigation: in what items or information does a claimant enjoy a reasonable expectation of privacy? In *R. v. Plant*,[9] the Supreme Court shed light on this question. *Plant* featured a police check of a home's electrical consumption records that were stored in a public computer system.[10] Justice Sopinka, who delivered the majority's judgment in the case, wrote:

> 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*. The computer records investigated in the case at bar while revealing the pattern of electricity consumption in the residence cannot reasonably be said to reveal intimate details of the appellant's life since electricity consumption reveals very little about the personal lifestyle or private decisions of the occupant of the residence.[11]

While *Plant* provides a sense of the information that will be protected by s. 8 of the *Charter*, it leaves an important question unanswered: what about information that is passed on to third parties? In *R. v. Dyment*,[12] a police officer, after becoming suspicious that a

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5 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

6 [1984] 2 S.C.R. 145 [*Hunter*].

7 This reasonable and probable grounds threshold is only applicable to the criminal context; it has many exceptions to it. To cite one example, a lower standard is applied to border crossings and administrative statutes in the regulatory context. See *R. v. Simmons*, [1988] 2 S.C.R. 495; *R. v. Jacques*, [1996] 3 S.C.R. 312; *R. v. Monney*, [1999] 1 S.C.R. 652; *R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627.

8 In the criminal context, there are important exceptions to the warrant requirement. To cite the most prominent example, the common law power of search incident to arrest provides that the power to search is derived from the arrest itself — no independent grounds are needed for a search to occur. See *R. v. Caslake*, [1998] 1 S.C.R. 51. See also *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59 [*Mann*] for a discussion of the power of search incident to investigative detention.

9 [1993] 3 S.C.R. 281 [*Plant*].

10 *Ibid.* at 285-86.

11 *Ibid.* at 293 [emphasis added].

12 [1988] 2 S.C.R. 417 [*Dyment*].

patient may have consumed alcohol prior to driving, accepted a blood vial from a physician who had been treating a bleeding, unconscious Mr. Dyment. At the time the vial was taken, there was no evidence indicating that Dyment had been drinking prior to sustaining his injuries in an auto accident.[13] After defining a seizure as "the taking of a thing from a person by a public authority without that person's consent,"[14] the Court turned its attention to the question on which the appeal hinged: did the taking of the vial constitute a seizure pursuant to s. 8? Justice La Forest, who authored the judgment of the Court, wrote:

> There was no consent to the taking of the blood sample in this case; Mr. Dyment was unconscious at the time. But even if he had given his consent, I do not think that would have mattered if the consent was restricted to the use of the sample for medical purposes.[15]

Thus, in a free and democratic society, people often pass on information to third parties for narrow purposes; however, they do not necessarily relinquish their reasonable expectation of privacy in such information.[16]

Lastly, *R. v. Tessling*[17] and *R. v. Law*[18] are two Supreme Court cases that address abandonment, a highly fact-sensitive issue that arises in many s. 8 claims. In *Tessling*, the question was whether Mr. Tessling abandoned heat emanations from his home. Justice Binnie, who wrote for a unanimous court, ruled that concealing heat emanations from a home would be difficult.[19] Thus, Tessling was, in a sense, forced to abandon them.

Law featured a police examination of the contents of a safe that had been stolen from a business and later found in an open field.[20] The Court ruled that, because the safe had not been abandoned and there were no independent grounds for inspecting it, the police search was contrary to s. 8. However, Bastarache J. entered an important caveat:

> Any expectation of privacy must be reasonable. Thus, *an unattended suitcase may have to be inspected for explosives, a stray wallet for identification, or a deserted vehicle for evidence of theft.…* However, where the police cannot reasonably conclude the property has been abandoned by its owner, they are limited in their investigation by the privacy interest of the owner as protected by s. 8 of the *Charter*.[21]

The authorities discussed above — *Plant*, *Dyment*, *Tessling*, and *Law* — provide strong support for the assertion that citizens enjoy a reasonable expectation of privacy in the contents of their garbage. With respect to informational privacy, *Plant*'s emphasis on personal and confidential information can surely be extended to include the contents of

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13 *Ibid.* at 421.
14 *Ibid.* at 431.
15 *Ibid.* [footnotes omitted].
16 See also Lisa M. Austin, "One Step Forward or Two Steps Back? *R. v. Tessling* and the Privacy Consequences for Information Held by Third Parties," Case Comment, (2004) 49 Crim. L.Q. 22.
17 2004 SCC 67, [2004] 3 S.C.R. 432 [*Tessling*].
18 2002 SCC 10, [2002] 1 S.C.R. 227 [*Law*].
19 *Supra* note 17 at para. 41.
20 *Supra* note 18 at para. 18.
21 *Ibid.* at para. 19 [emphasis added].

garbage.[22] Furthermore, the Court's analysis in *Dyment* provides support for an important proposition: people do not relinquish their privacy rights simply because they pass items on to third parties such as, for example, cancer surgeons, counsellors, or garbage collectors.[23]

With respect to the most fact-sensitive aspect of s. 8 analyses, abandonment, *Tessling* and *Law* support the inference that when individuals dispose of garbage in a bin, they retain a reasonable expectation of privacy in the contents. Attempting to avoid disposing of garbage would be extremely difficult; quite arguably as difficult as seeking to prevent heat emissions from leaving a home or a distinct odour from escaping a bag.[24]

Moreover, the argument, advanced by some, that burning garbage is a credible way of keeping it from the curious eyes of the state is questionable.[25] First, many municipalities ban the burning of garbage.[26] Furthermore, this argument fails to register a fundamental fact: economics prevents some people from burning garbage on their property. While some citizens have the capacity to burn all of their documents and other items, the vast majority of Canadians do not enjoy a similar luxury.[27] Imagine a citizen who lives in a small apartment without a fireplace. This individual is in no position to burn his or her garbage. Also, the homeless would be left with an incentive to start fires in public places; however, in addition to being dangerous to the public, this behaviour could lead to a charge of arson. In conclusion, at the very least, a voir dire should be held to assess whether in fact an accused has the capacity to destroy his or her garbage. Such a voir dire must canvass the relevant municipal laws, the nature of the garbage that an accused seeks to claim as private, and the actual capacity of an accused to destroy his or her garbage.

In summary, although landmark Supreme Court of Canada cases support the finding of a reasonable expectation of privacy in garbage, in *Patrick*, the Alberta Court of Appeal sidestepped the thrust of these authorities in favour of its troubling conclusion.

II. *R. v. PATRICK*

After investigating Patrick for some time, the police searched the garbage receptacles at the back of his property and found compelling evidence of ecstasy production. After the knowledge acquired from Patrick's garbage was buttressed by other sources of information, a warrant for the search of his home was issued. During the resulting search of Patrick's residence, compelling evidence of drug production was seized; Patrick was subsequently

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22 As is often the case, because the United States is an older country with a larger population, American authors have written considerably more on this subject than their colleagues in Canada. For a compelling discussion of the privacy implications of law enforcement authorities rummaging through the garbage of citizens, see William Jennison, "Privacy in the Can: *State v. Boland* and The Right to Privacy in Garbage" (1992) 28 Gonz. L. Rev. 159 at 167-69.

23 Richard A. Di Lisi, "*California v. Greenwood*: Police Access to Valuable Garbage" (1989) 39 Case W. Res. L. Rev. 955 at 962.

24 For a greater discussion of police dogs, see *R. v. A.M.*, 2008 SCC 19, 373 N.R. 198.

25 Randall L. Cox, "Constitutional Law: *United States v. Hedrick*: The Warrantless Search of Garbage Within the Curtilage of a Home," Note, (1992) 45 Okla. L. Rev. 299 at 318.

26 Renee 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 236.

27 Alexandre Genest, "Privacy as Construed During the *Tessling* Era: Revisiting the 'Totality of Circumstances Test', Standing and Third Party Rights" (2007) 41 R.J.T. 337 at 369.

arrested for, and convicted of, trafficking ecstasy contrary to the *Controlled Drugs and Substances Act*.[28] Patrick appealed his conviction, claiming that the police, in searching the garbage on his property, violated his right to be free from unreasonable search and seizure.

Justice Ritter, who authored the judgment of the Alberta Court of Appeal, ruled that an examination of the totality of the circumstances yielded the conclusion that Patrick "abandoned any privacy interest he may have had" in the contents of his garbage.[29] Crucial to the Court's decision was its belief that garbage "may be subject to disturbance by bottle collectors and others looking for discarded treasures, as well birds, dogs, and vermin."[30] This statement, while perfectly true, supports a reduced privacy expectation; however, it ignores a fundamental reality: citizens risk that others will intrude on their personal privacy all of the time.[31]

For example, individuals, while travelling through public venues, risk that the pets of others will smell contraband in their bags; however, this does not mean that people do not enjoy a reasonable expectation of privacy when police dogs, acting in the name of the state, make a similar effort.[32] By the same token, citizens assume the risk that when they utter incriminating admissions to friends, these individuals may betray them by taping the conversations and relaying their substance to others. It does not follow that the state is allowed, in the absence of prior authorization, to tape individuals without their consent. Thus, the risk analysis that the Alberta Court of Appeal appears to have imported from the United States is largely unhelpful in framing the right enshrined in s. 8.[33]

Another troubling aspect of the *Patrick* decision is the Court's emphasis on the impersonal nature of garbage disposal. Justice Ritter stated: "[a]s discussed above, persons who put things in garbage have to be aware that the garbage handling system is far from secure."[34] While it is difficult to take issue with this statement, it devotes insufficient attention to the reasonable expectation of citizens that the system remains secure.[35]

Imagine a carpenter who uses a rope to help clear logs in a backyard. After a day's work, the rope is well worn and ultimately discarded in a garbage bin behind the property. Later in the evening, a serial killer, conscious of the need to ensure others are blamed for his deeds, rummages through the garbage of the carpenter, discovers the rope, and uses it to strangle his next victim. The rope is later recovered near the crime scene and submitted for DNA

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28 S.C. 1996, c. 19.

29 *Supra* note 2 at para. 14.

30 *Ibid.* at para. 16.

31 This line of reasoning would appear to come from the U.S. Supreme Court's judgment in *California v. Greenwood*, 486 U.S. 35 (1988). The argument advanced by the U.S. Supreme Court is often labelled "risk analysis." The idea is that because a certain sphere of our private lives is subject to being monitored by private citizens, we risk that the state will fill the vacuum. See e.g. *Kyllo v. United States*, 533 U.S. 27 (9th Cir. 2001). See also James Stribopoulos, "Reasonable Expectations of Privacy & 'Open Fields' — Taking the American 'Risk Analysis' Head On" [1999] 25 C.R. (5th) 351.

32 See e.g. *R. v. Kang-Brown*, 2008 SCC 18, 373 N.R. 67.

33 See *R. v. Duarte*, [1990] 1 S.C.R. 30. There are many examples; this is by no means an exhaustive list. See the dissenting reasons of Conrad J.A. in *Patrick*, *supra* note 2 at para. 55.

34 *Patrick*, *ibid.* at para. 37.

35 Jon E. Lemole, "From *Katz* to *Greenwood*: Abandonment Gets Recycled from the Trash Pile — Can Our Garbage Be Saved from the Court's Rummaging Hands?" (1991) 41 Case W. Res. L. Rev. 581 at 595.

analysis. Unbeknownst to the carpenter, because he handled the rope prior to discarding it, his DNA has been recovered from the scene of a homicide.[36] This bone-chilling example, I contend, would lead the vast majority of Canadians to insist that their garbage remain unmolested prior to pickup and disposal. Hence, the argument that the Alberta Court of Appeal devoted insufficient attention to the reasonableness of Patrick's expectation that the garbage collection system remains private.

Moreover, as argued, *Dyment*, a Supreme Court authority which was not discussed in the majority judgment, contemplates the passing of private information to third parties for narrow purposes. While citizens assume the risk that such information will be mishandled, or the subject of unwanted scrutiny, they do not relinquish all privacy interests. Justice La Forest, in *Dyment*, wrote:

> We may, for one reason or another, wish or be compelled to reveal such information, but situations abound where the reasonable expectations of the individual that the information shall remain confidential to the persons to whom, and restricted to the purposes for which it is divulged, must be protected.[37]

Thus, provided the information seized is of a personal and confidential nature, the *Dyment* authority provides support for the inference that even if garbage collectors betray the trust of citizens and pass on private knowledge to law enforcement, the *Charter* is engaged. Municipal authorities must tailor their practices to conform to *Charter* standards, not the other way around.

In her dissenting reasons, Conrad J.A. found that Patrick enjoyed a reasonable expectation of privacy in his garbage.[38] In her view, it was clear that garbage reveals a great deal about lifestyle choices.[39] Although she did not mention the *Dyment* authority, she also addressed the extent to which the citizenry passes on garbage to municipal authorities for one narrow purpose: so it can be taken to the landfill.[40] Moreover, after applying the *Tessling* authority, she dismissed the risk analysis undertaken by her colleagues: "[t]he risk that a house may be burglarized does not mean the homeowner has no reasonable expectation of privacy with respect to the home."[41] In her final analysis, she found a breach of s. 8 meriting exclusion of the evidence pursuant to s. 24(2).[42]

Justice Conrad's position is preferable to the one advanced by the majority. First and most important, her rejection of the assumption of risk analysis will serve to prevent an almost unparalleled narrowing of the privacy right enshrined in s. 8. As discussed, people hand items over to others for narrow reasons; this should not mean that they relinquish all reasonable claims to privacy in the process. Furthermore, her privacy analysis advances a

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36 The ease with which DNA can be left on objects is striking. For a particularly compelling analysis, see Elizabeth E. Joh, "Reclaiming 'Abandoned' DNA: The Fourth Amendment and Genetic Privacy" (2006) 100 Nw. U.L. Rev. 857 at 882.

37 *Supra* note 12 at 429-30.

38 *Supra* note 2 at para. 120.

39 *Ibid.* at paras. 94-95.

40 *Ibid.* at para. 105.

41 *Ibid.* at para. 108.

42 *Ibid.* at paras. 118-19.

more reasonable assessment of the expectations of people as they dispose of their belongings. Finally, a concern about the randomness with which state actors can single out citizens' garbage for inspection is implicit in her reasons.

III. DISCUSSION: THIS RIGHT MUST HAVE LIMITS

Although Conrad J.A.'s privacy analysis is more apposite than the one advanced by the majority, her approach is imperfect. While s. 8, by its wording, seeks to limit state power, the Supreme Court, in a number of landmark authorities, has reinforced the need to strike a balance between privacy and law enforcement. For example, in *Tessling*, Binnie J. wrote: "[t]he community wants privacy but it also insists on protection. Safety, security and the suppression of crime are legitimate countervailing concerns."[43] In applying the *Hunter* standard of reasonable and probable grounds and failing to introduce important caveats to a right to privacy in garbage, Conrad J.A. devoted insufficient attention to this balance.

Thus, while I respectfully disagree with the majority judgment, it is not without merit. For instance, the judgment speaks to the unique nature of garbage as the subject of a s. 8 claim. Justice Ritter wrote: "[o]n any measure, the expectation of privacy respecting garbage is substantially less than what one would expect for items left … in a yard and more so relative to items found in a home."[44] This intimation that people enjoy a limited expectation of privacy in their garbage is surely correct: the fact that garbage represents, by its very nature, items that are discarded should not be irrelevant in the privacy analysis.[45] This reduced privacy expectation leads inexorably to the conclusion that, as a prerequisite to a constitutional search of a suspect's garbage, the *Hunter* standard of reasonable and probable grounds should not apply.

Moreover, the peril of applying the *Hunter* standard in *Charter* claims involving garbage is best shown by a compelling example. The police are called to a residence in a Canadian urban centre. The officers are told that a shooting is in progress and that the suspect is a white male, roughly six feet tall, who is dressed in black pants and a blue sweater. When the officers come within four blocks of the residence, they spot a suspect matching the description. The officers pursue the suspect down an alleyway. The suspect turns a corner and, before the officers have a chance to see him, he puts the gun in a bag and throws it into a garbage disposal bin. The officers ultimately catch up to the suspect and conduct a search incident to investigative detention pursuant to *Mann*. If the *Hunter* standard applied to garbage disposal, the officers would require reasonable and probable grounds before searching the many disposal bins in the alleyway. Thus, a higher threshold would apply to a search of the garbage than a pat down search of the suspect — a result which is surely inappropriate in the circumstances.

The above example is even more compelling when it is remembered that if the *Hunter* standard applied to garbage searches, not only would the officers have to establish reasonable

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43 *Supra* note 17 at para. 17.

44 *Supra* note 2 at para. 38.

45 Kevin E. Maldonado, "*California v. Greenwood*: A Proposed Compromise to the Exploitation of the Objective Expectation of Privacy," Comment, (1990) 38 Buff. L. Rev. 647 at 667.

and probable grounds, they would have to do this rather quickly because the next garbage pickup is never far away. If they could not establish the requisite grounds, the garbage could be removed and taken to the landfill — a place where the missing gun could be lost forever. Although it is arguable that the officers would have reasonable and probable grounds to search the garbage bins in the alleyway, the example illustrates the extent to which the application of the *Hunter* threshold to garbage searches is inconsistent with any fair assessment of the appropriate balance between individual autonomy and state power.

Moreover, officers who suspect, for example, that a gun may be contained in one of a number of garbage disposal bins in an alleyway cannot realistically instruct municipal authorities to cease garbage collection until the requisite grounds are obtained for a search. Such an investigatory approach would not merely cause an appalling stench to permeate Canadian urban centres; it could prove dangerous to the health and well-being of the citizenry.[46]

Furthermore, the reasons of Bastarache J. in *Law* provide another important caveat: any claim to a reasonable expectation of privacy in garbage must be reasonable. This means, for example, that an individual cannot leave an item in plain view in a public park and later claim that it was garbage and meritorious of *Charter* protection. Similarly, an individual cannot leave a bag in a public place and complain that it is garbage after an inspection of its contents. In conclusion, while garbage should, in most cases, be protected by *Charter* standards, all claims must be reasonable. The *Law* authority is most helpful in drawing this crucial reasonableness line.

In light of the unique status of garbage and the limited expectation of privacy that can be attached to its contents, I contend that the lower standard of reasonable suspicion should apply to state searches of garbage.[47] In other words, state actors ought not to carry out a search of refuse if they do not have an objectively reasonable suspicion of wrongdoing.[48]

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[46] In Naples, Italy, garbage collection ceased for a number of days during spring 2008. It did not take long for major health concerns to take root. See "Garbage in, garbage out: The embarrassing rubbish mountain in Naples subsides—for now" *The Economist* (27 March 2008), online: Economist.com <http://www.economist.com/world/europe/displaystory.cfm?story_id=10925833>.

[47] I found broad support in the American literature for this approach. See e.g. Nancy Burke Rue, "Warrantless Search and Seizure of Curbside Garbage: *California v. Greenwood*, 108 S. Ct. 1625 (1988)," Case Note, (1989) 58 U. Cin. L. Rev. 361 at 371.

[48] Reasonable suspicion was best described by the U.S. Supreme Court in *Alabama v. White*, 496 U.S. 325 (1990) at 330:

> Reasonable suspicion is a less demanding standard than probable cause [the American equivalent to reasonable and probable grounds] not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause.

This lower standard is not to be confused with the higher *Hunter* standard of reasonable and probable grounds (or probable cause in the U.S.). In Canada, the leading authority on reasonable and probable grounds is *R. v. Debot*, [1989] 2 S.C.R. 1140 [*Debot*]. In *Debot*, Wilson J. intimated that the "totality of the circumstances" must be examined to assess whether there were reasonable and probable grounds to justify a warrantless search of an individual (at 1168). The reliability of the information predicting the commission of a criminal offence, the credibility of the information received from an informant, and the extent of the police investigation undertaken prior to the execution of the search all contributed to satisfying the threshold of reasonable and probable grounds. On occasion, the higher threshold of

This threshold would recognize a privacy interest in garbage while ensuring that the police are not deprived of a vital weapon used to investigate crime.[49]

IV. CONCLUSION

The state has, at its disposal, impressive resources. The ways in which these resources can be brought to bear on the citizenry must be the subject of clinical analyses by appellate level courts and, ideally, Parliament.[50] A balance between individual autonomy and state power must almost always be recognized. Although the majority judgment in *Patrick* contains helpful observations about the nature of garbage and the reduced privacy expectation that can reasonably be ascribed to its contents, it falls short of stipulating an appropriate threshold for garbage searches.

The dissenting opinion, on the other hand, appropriately extends *Charter* standards to police searches of discarded items; however, it does not place important limitations on a reasonable expectation of privacy in them. Consequently, the correct approach is somewhere between the majority decision and the dissenting one.

However, in the final analysis, the thought of allowing the state to rummage through the garbage of the citizenry at random seems perfectly acceptable, but only to those whose refuse makes a direct and unmolested journey to the incinerator or landfill.[51]

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reasonable and probable grounds will not be satisfied; however, the lower standard of reasonable suspicion will be met. For example, in *R. v. Lewis* (1998), 38 O.R. (3d) 540 (C.A.), the tip of an unknown informant did not meet the reasonable and probable grounds standard because the police were able to confirm only the ordinary conduct of the suspect and not the alleged criminal activity. However, the information did meet the lower standard of reasonable suspicion.

49 Rue, *supra* note 47 at 371.

50 Although geared more to sense-enhanced surveillance, in my previous article, I argued in favour of Parliamentary regulation of police powers. See William MacKinnon, "*Tessling*, *Brown*, and *A.M.*: Towards a Principled Approach to Section 8" (2007) 45 Alta. L. Rev. 79 at 114.

51 For a discussion of randomness in the context of s. 8, see Steve Coughlan & Marc S. Gorbet, "Nothing Plus Nothing Equals … Something? A Proposal for FLIR Warrants on Reasonable Suspicion" [2005] 23 C.R. (6th) 239 at 241.