TESSLING, *BROWN*, AND *A.M.*: TOWARDS A PRINCIPLED APPROACH TO SECTION 8

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This article analyzes the Supreme Court of Canada's search-and-seizure jurisprudence in anticipation of the Court's forthcoming decisions on the admissibility of evidence obtained by police dog searches in Brown *and* A.M. *After reviewing the historical development of s. 8, the author then goes on to discuss the strengths and weaknesses of the Court's analysis of sense-enhancing aids and the reasonable expectation of privacy in* Tessling. *The article ultimately argues that the Court ought to eschew a case-by-case model for establishing the existence of a reasonable expectation of privacy, and go beyond the facts of* Brown *and* A.M. *in order to adopt a more principled approach to s. 8. The author maintains that a more principled approach is necessary because state actors need clearer guidance if they are to successfully balance individual privacy with the use of sense-enhancing aids.*

Cet article analyse la jurisprudence de la Cour suprême du Canada sur les fouilles, les perquisitions et les saisies en prévision des prochaines décisions de la Cour sur l'admissibilité de la preuve obtenue par les chiens policiers dans Brown *et* A.M. *Après avoir revu le développement historique de l'article 8, l'auteur discute des forces et des faiblesses de l'analyse, par la Cour, des aides améliorant les sens et les attentes raisonnables en matière de protection de la vie privée dans* Tessling. *L'auteur finit par faire remarquer que la Cour devrait éviter un modèle au cas par cas, établir l'existence d'attentes raisonnables de protection de la vie privée et aller au-delà des faits de* Brown *et* A.M. *afin d'adopter une approche à l'égard de l'article 8 qui soit fondée sur des principes. L'auteur maintient qu'une telle approche est nécessaire parce que les acteurs de l'État ont besoin d'une orientation plus claire pour bien équilibrer la protection de la vie privée des individus et l'utilisation des aides améliorant les sens.*

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* B.A., LL.B., LL.M. This article is an edited version of my Master of Laws thesis which was authored in residence at the University of Alberta. I would like to thank my graduate supervisor, Dr. Sanjeev Anand, for his guidance during the preparation of this article. I would also like to thank the Alberta Law Foundation and the Culliton Scholarship Committee for funding my research.

I. INTRODUCTION

If interpreted properly by the Supreme Court of Canada, s. 8 of the *Canadian Charter of Rights and Freedoms*[1] can effectively reconcile the interests of law enforcement and individual privacy. Section 8 reads as follows: "Everyone has the right to be secure against unreasonable search or seizure."[2] These few pithy words leave many questions for the Supreme Court to address. At what point does a state actor commence a search? What is the extent of the privacy right to be protected? How must a search be conducted to avoid running afoul of the section's guarantees? Legal scholars have attempted to address the most fundamental question about the institution's interpretation of the section: has the Court effectively reconciled the privacy interests of the individual with the need of the state to acquire evidence of unlawful acts?

The Supreme Court's judgment in *R. v. Tessling*[3] gave legal scholars an important sense of the Court's approach to s. 8 as we move into the twenty-first century. In *Tessling*, the Court was faced with law enforcement authorities employing unique Forward Looking Infra-Red (FLIR) technology to acquire knowledge about heat emanations from a home. This knowledge, when used in conjunction with other sources of information, could satisfy the threshold for obtaining a search warrant to enter the property. Despite this fact, the Court ruled that the use of FLIR technology did not engage s. 8 because the homeowner did not enjoy a reasonable expectation of privacy in the heat that emanated from his home. In *Tessling*, the parameters of the reasonable expectation of privacy principle previously articulated by the Supreme Court were put to a unique test and consequently the judgment is of paramount significance.

This article is divided into five sections. The first discussion outlines the state of s. 8 jurisprudence prior to the *Tessling* judgment. The second section analyzes the fundamental problems with the appellate level decision of the Ontario Court of Appeal in the case. The third segment examines the Supreme Court's judgment in *Tessling* and makes suggestions about how the Court can better protect the privacy rights of citizens while providing clearer guidance about the reach of s. 8 protection. The fourth section examines the Alberta Court of Appeal's judgment in *R. v. Kang-Brown (G.)*[4] and the Ontario Court of Appeal's judgment in *R. v. M.(A.)*,[5] and argues that the use of police dogs should often be subject to *Charter* scrutiny. Finally, the article considers the merits of Parliamentary regulation of sense-enhancing aids.

Although I argue that the Supreme Court's ruling in *Tessling* — that the respondent did not enjoy a reasonable expectation of privacy in the heat emanations from his home — was correct, I also contend that the Court's reasoning is deficient in certain respects. The

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

2 *Ibid.*, s. 8.

3 2004 SCC 67, [2004] 3 S.C.R. 432 [*Tessling*].

4 2006 ABCA 199, 391 A.R. 218 [*Brown* (C.A.)], appeal as of right to the S.C.C., appeal heard on 22 May 2007, judgment reserved.

5 (2006), 79 O.R. (3d) 481 (C.A.) [*A.M.*], leave to appeal to S.C.C. granted, appeal heard on 22 May 2007, judgment reserved (publication ban in case, publication ban on party).

judgment is too limited to the facts that were peculiar to the case. Consequently, important questions about the nature of the right protected by s. 8 are left unanswered. For example, how cogent does information gleaned by sense-enhancing aids have to be before a reasonable expectation of privacy will likely be found? What if state actors are able to use two or more sense-enhancing aids to develop a clear picture about the private activities of citizens? Will there still be no reasonable expectation of privacy because each aid, when assessed in isolation, is not capable of revealing personal and confidential information about its subject? When does an individual abandon a reasonable expectation of privacy in objects or information?

In the future, the use of FLIR-like aids must be subject to more substantial constitutional (minimum) standards. I argue that the Court must make it clear that it will look to the cumulative effect of the use of two or more sense-enhancing aids to acquire personal information. This is particularly important during an age that will undoubtedly feature frequent technological advances that could imperil the privacy right protected by s. 8 of the *Charter*. Furthermore, I argue that the Court should restore the principle that s. 8 claims are to be framed neutrally.

Above all, *Tessling*'s case-by-case approach to assessing s. 8 claims will, among other things, fail to protect individual privacy in the twenty-first century. The Supreme Court must, where possible, provide clearer guidance to courts and law enforcement authorities about the reach of s. 8 protection. Thus, most importantly, I contend that the Supreme Court should eschew the case-by-case model and go beyond the facts of *Brown* and *A.M.* to provide the most coherent framework possible to reconcile the state's desire to use sense-enhancing aids with individual privacy.

II. THE JURISPRUDENTIAL FRAMEWORK

Prior to assessing the merits of *Tessling*, authorities that played vital roles in establishing the state of the law in this area must be canvassed. *Hunter v. Southam*,[6] a case decided shortly after the entrenchment of the *Charter*, is perhaps the most important authority touching on s. 8. In *Hunter*, many of the prerequisites to a constitutional search and seizure were outlined and explained by the Supreme Court of Canada. The issue in the case was whether provisions of the *Combines Investigation Act*[7] were inconsistent with s. 8 because they authorized unreasonable searches and seizures.[8] Justice Dickson, who delivered the majority judgment in the case, sought to ensure that the *Charter*'s enumerated rights would be interpreted purposefully. He wrote:

> The *Canadian Charter of Rights and Freedoms* is a purposive document. *Its purpose is to guarantee and to protect, within the limits of reason, the enjoyment of the rights and freedoms it enshrines.* It is intended to constrain governmental action inconsistent with those rights and freedoms.[9]

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6 [1984] 2 S.C.R. 145 [*Hunter*].
7 R.S.C. 1970, c. C-23.
8 *Supra* note 6 at 148.
9 *Ibid.* at 156 [emphasis added].

From Dickson J.'s perspective, this meant that "prior authorization" based on reasonable and probable grounds would be a fundamental prerequisite to a constitutional search and seizure.[10] Consequently, in the absence of prior authorization in the form of a warrant,[11] a search would be presumptively unreasonable — an approach designed to prevent "unjustified searches before they happen."[12]

In addition to outlining other requirements for a valid search or seizure, *Hunter* marked the emergence of the reasonable expectation of privacy principle that is now at the core of s. 8 jurisprudence. In the absence of a reasonable expectation of privacy in the subject matter of the alleged search, s. 8 will not be engaged. In other words, the Court will not find a search unless there has been an infringement of a reasonable expectation of privacy. In more recent times, the Supreme Court has struggled to articulate clearly the parameters of the reasonable expectation of privacy principle that emerged in *Hunter*.[13]

The Court's goal, articulated in *Hunter*, of preventing unjustified searches before they occur is particularly important when one considers the jurisprudence under s. 24(2) of the *Charter*.[14] In the event that authorities carry out an unconstitutional search contrary to s. 8,

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10 It should be noted that Dickson J.'s insistence on prior authorization based on reasonable and probable grounds is only applicable to the criminal context and has many exceptions to it. For example, it has been held that there is a dramatically reduced reasonable expectation of privacy at border crossings. Consequently, in many cases, the Supreme Court has upheld statutory schemes that authorize border searches on a much lower standard than reasonable and probable grounds. See e.g. *R. v. Jacques*, [1996] 3 S.C.R. 312; *R. v. Monney*, [1999] 1 S.C.R. 652; *R. v. Simmons*, [1988] 2 S.C.R. 495. Similarly, in *R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627, the Court found that the *Hunter* criteria did not apply to the administrative or regulatory context. A lower standard is often necessary.

11 Even in the criminal context there are important exceptions to the warrant requirement enunciated in *Hunter*. Most notably, in *R. v. Caslake*, [1998] 1 S.C.R. 51, the common law power of search incident to arrest was outlined and described by the Court; in *R. v. Mann*, [2004] 3 S.C.R. 59 [*Mann*], the common law power of search incident to investigative detention was introduced.

12 *Hunter*, *supra* note 6 at 160.

13 Justice Dickson's judgment has received the endorsement of many academics for a host of sound reasons: it emphasizes protecting people, not places; and, perhaps most importantly, it provides more guidance about how a constitutional search can be carried out than was needed to address the facts of the case. This commentary was, without a doubt, borne of a desire to prevent unjustified state intrusions prior to their occurrence. Perhaps this approach was also designed to assist claimants in getting a remedy pursuant to s. 24(2), and to prevent the Court from being deluged in s. 8 claims — an unavoidable corollary to a case-by-case assessment of s. 8 cases. See e.g. Don Stuart, "The Unfortunate Dilution of Section 8 Protection: Some Teeth Remain" (1999) 25 Queen's L.J. 65 at 66; Don Stuart, "Four Springboards from the Supreme Court of Canada: Hunter, Therens, Motor Vehicle Reference and Oakes — Asserting Basic Values of Our Criminal Justice System (1987) 12 Queen's L.J. 131 at 153; Alan D. Gold & Michelle Fuerst, "The Stuff That Dreams are Made Of! — Criminal Law and the Charter of Rights" (1992) 24 Ottawa L. Rev. 13 at 25; Neil Finkelstein, "Constitutional Law — Search and Seizure after Southam," Case Comment, (1985) 63 Can. Bar Rev. 178 at 202.

14 Although the policy goal, articulated by Dickson J. in *Hunter*, of preventing unjustified searches before they occur was made in relation to the warrant *per se* requirement, it has since been broadened by the Court. In *R. v. Golden*, 2001 SCC 83, [2001] 3 S.C.R. 679 at para 89, Iacobucci and Arbour JJ. addressed the issue of whether or not the police could justify a strip search of a suspect based on the common law power of search incident to arrest: "Given that the purpose of s. 8 of the *Charter* is to protect individuals from unjustified state intrusions upon their privacy, it is necessary to have a means of preventing unjustified searches before they occur, rather than simply determining after the fact whether the search should have occurred." This broad policy objective of striving to prevent unjustified state intrusions before they occur has been described by some authors as involving more than simply the warrant *per se* requirement; it has also been used to demand judicially created principles delineating

the evidence will not necessarily be excluded pursuant to s. 24(2). Section 24(2) stipulates that when evidence is obtained contrary to the *Charter*, the "evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute."[15] In *R. v. Collins*,[16] the Court interpreted this statement of principle in such a way that evidence obtained contrary to s. 8 will, in many cases, not be excluded. The Court made it clear that it will look for "unacceptable conduct by the investigatory and prosecutorial agencies"[17] as a major factor in the 24(2) analysis. Peter Connelly has described the Court's early approach to ss. 8 and 24(2) to mean that "only the most blatant violation [of s. 8] by law-enforcement authorities will afford relief."[18]

More recently, in *R. v. Buhay*,[19] the Supreme Court addressed s. 24(2) after a s. 8 violation was found. In *Buhay*, the police seized marijuana from a locker in the Winnipeg Bus Depot. After finding a s. 8 violation, the Court turned its attention to the s. 24(2) analysis. The Court outlined the criteria to be assessed as follows: "(1) the effect of admitting the evidence on the fairness of the subsequent trial, (2) the seriousness of the police's conduct, and (3) the effects of excluding the evidence on the administration of justice."[20] After discussing the first criterion, trial fairness, the Court turned its attention to the "seriousness of the breach."[21] The Court reasoned that the seriousness of the breach is assessed with reference to a number of criteria: "[W]hether it was comitted in good faith, or was inadvertent or of a merely technical nature, or whether it was deliberate, wilful or flagrant."[22] Moreover, the seriousness of the breach is assessed with reference to an objective standard; a state actor cannot defend a *Charter* violation merely by asserting that he thought he was acting within his powers.

What is most important for the purposes of this article is that the Court was clear that the "good faith of the police is an important factor to consider in order to assess the seriousness of a violation of s. 8 of the *Charter*."[23] However, the key issue is the standards by which such an assessment can be made. It is difficult to assess whether or not state actors acted in "good faith" when the Court has taken a case-by-case approach to s. 8 rather than establishing clear, logical, consistent standards against which police behaviour can be assessed. Thus, it will be extremely difficult to impugn the conduct of state actors when the parameters of the reasonable expectation of privacy principle are left unclear. Simply put, there can be no bad faith when it is not possible to know the rules; if state actors cannot access information about the extent of their powers, evidence obtained contrary to s. 8 will, in many cases, not be

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when legitimate state surveillance turns into an infringement on a reasonable expectation of privacy. See e.g. 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 238.

15 *Charter*, *supra* note 1.

16 [1987] 1 S.C.R. 265.

17 *Ibid.* at 281.

18 Peter Connelly, "The Fourth Amendment and Section 8 of the Canadian Charter of Rights and Freedoms: What has been Done? What is to be Done?" (1984-85) 27 Crim. L.Q. 182 at 210.

19 2003 SCC 30, [2003] 1 S.C.R. 631 [*Buhay*].

20 *Ibid.* at para. 41.

21 *Ibid.* at para. 52.

22 *Ibid.*, quoting *R. v. Therens*, [1985] 1 S.C.R. 613 at 652.

23 *Ibid.* at para. 57.

excluded pursuant to s. 24(2). This is unfortunate because, as academic Alan N. Young argues persuasively, "a right without a remedy is not truly a right."[24]

Consequently, the Court must make a concerted effort to provide state actors with guidance about the privacy implications of state surveillance.[25] Ideally, the Court will enunciate, where possible, "[b]righter lines" delineating the point where permissible state surveillance ends and an intrusion on a reasonable expectation of privacy occurs.[26] Not only will this approach advance Dickson J.'s goal of preventing unjustified state intrusions before they occur, it will also ensure that state actors are not able to infringe on a reasonable expectation of privacy and claim good faith because of ambiguities in the jurisprudence.

The fundamentally important idea that courts, when confronted with s. 8 claims, should establish clear, overarching principles and resist a case-by-case approach to s. 8 will not escape criticism. To cite one example, Cass R. Sunstein, a prominent American academic, has emerged as a vocal proponent of judicial "minimalism," which he defines as an approach to deciding cases whereby judges seek "to avoid broad rules and abstract theories, and attempt to focus their attention only on what is necessary to resolve particular disputes."[27] In his view, there are a number of factors that should lead judges to resolve only the facts that arise in each case. For instance, Sunstein argues that a minimalist approach will "reduce the burdens of judicial decision" because judges often cannot take the time to agree on matters going beyond each case.[28] Sunstein also cites judicial economy as an important reason for judicial minimalism because when judges focus exclusively on the facts of each case decisions take "relatively less time to produce."[29]

Had he operated in the Canadian context, Sunstein probably would not have argued in favour of a minimalist approach to s. 8 cases. First, with respect to judicial economy, if Canadian courts adhere to a case-by-case approach, the court system will be deluged with s. 8 claims. Albeit that doing more than what is necessary to dispose of each case will add work in the short term, there is a cogent argument that this added workload will be more than compensated for by a reduction in the number of s. 8 claims that courts must hear. In sum, as broad principles replace ambiguities, courts will spend less time deciding s. 8 claims.

Sunstein also recognized that "no defense of minimalism should be unqualified" because there are circumstances in which the approach is less desirable.[30] As an example, he notes that in constitutional areas where "there is a great need for predictability," minimalism is less appropriate.[31] As discussed, the protection of privacy and the remedial analysis in s. 24(2) necessitate greater predictability in s. 8 jurisprudence. Thus, it can be argued that even

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24 Alan N. Young, "Privacy as an Endangered Species: The False Promise of the *Charter of Rights*" (2001) Spec. Lect. L.S.U.C. 353 at 399.

25 *Ibid.* at 390.

26 Scott C. Hutchison, "Knowledge is Power: The Criminal Law, Openness and Privacy" (2005) 29 Sup. Ct. L. Rev. (2d) 419 at 422.

27 Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Cambridge, Mass.: Harvard University Press, 1999) at 5, 9 [footnotes omitted].

28 *Ibid.* at 4.

29 *Ibid.* at 15.

30 *Ibid.* at 262.

31 *Ibid.* at 263.

Sunstein would agree that a case-by-case approach to s. 8 is undesirable in many circumstances.

Moving beyond a case-by-case approach to s. 8 claims will not be an easy task; however, important cases in the area suggest some of the principles that would be part of an overarching approach. Vital concepts in assessing informational and territorial privacy include the idea of neutrality, the nature of the information protected by the *Charter*, and the locations where claimants can expect privacy. These fundamental issues have been addressed in three landmark cases rendered by the Supreme Court of Canada, all of which need to be considered in some detail.

The first decision is *R. v. Plant*.[32] In *Plant*, the issue before the Supreme Court was whether a police check of information in a public computer system was a search that triggered s. 8 of the *Charter*. The police, by using a computer terminal that was linked to Calgary's utility services, were able to check the amount of electrical consumption at the appellant's residence. When they discovered that the electrical consumption of the property was well above average, the police used this information along with a tip and their observations from a perimeter search to obtain a warrant to search the premises. After obtaining the warrant, the police entered the residence and discovered significant numbers of seeding plants, which were later identified as marijuana.[33]

After noting that s. 8 was designed to protect individuals, not property, the Court turned its attention to whether the appellant had a reasonable expectation of privacy in the computerized records. Justice Sopinka, who authored the majority judgment, wrote:

> In fostering the underlying values of dignity, integrity and autonomy, *it is fitting that section 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.[34]

Justice Sopinka acknowledged that the result could be different in cases where the "personal and confidential" threshold was met.[35] However, in relation to the electrical records from the appellant's home this standard was not satisfied; the accused did not enjoy a reasonable expectation of privacy in the records and, consequently, s. 8 was not engaged.[36]

In her dissenting reasons, McLachlin J. contended that the appellant did enjoy a reasonable expectation of privacy in the computerized electrical consumption records.[37] She

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32 [1993] 3 S.C.R. 281 [*Plant*].
33 *Ibid.* at 285-286.
34 *Ibid.* at 293 [emphasis added].
35 *Ibid.* at 293-94.
36 *Ibid.* at 294.
37 *Ibid.* at 302.

reasoned that the records "are capable of telling much about one's personal lifestyle, such as ... what sort of activities were probably taking place there." Consequently, in her view, the police required a search warrant to get the information.[38]

Justice McLachlin's conclusion that the electrical information revealed, with any probability, what was taking place inside the dwelling is questionable. The records simply disclose how much electricity is consumed in a home during a given time period; they reveal little about what is taking place inside the walls of the property. There is an infinite variety of actions that require significant amounts of electricity; use of a sauna and frequent indulgence in home repair are but two examples of such activities. It is only when electrical consumption records are accompanied by other information that any picture of what is occurring inside a home can possibly emerge. Justice McLachlin asserted that, "[t]he records tell a story about what is happening inside a private dwelling."[39] I contend that if the records do tell a story, it is a limited one that is not terribly revealing.

Although I respectfully disagree with her conclusion, McLachlin J.'s opinion in *Plant* spoke to one of the most important ambiguities in the *Charter*'s protection of informational privacy: how meaningful does the information have to be before s. 8 protection will likely be triggered? As argued, the electrical records in *Plant* fell well short of confirming the activities of the home's occupants, but Sopinka J.'s reasons do not give the reader a clear enough sense of the distinction between mundane details and personal and confidential information. The cogency of the information that will be the subject of a reasonable expectation of privacy is an issue that the Court could have addressed with greater care in *Plant*.

In *R. v. Wong*,[40] La Forest J., for the majority of the Supreme Court, made an important contribution to s. 8 jurisprudence. The case featured the Toronto police investigating gaming houses that they thought were frequented by illegal gamblers. The police deduced that the illicit conduct could only be monitored with video surveillance technology.[41] In keeping with this strategy, the officers installed "a video camera in the drapery valence of the room that was registered to Mr. Wong."[42] After monitoring the room on a number of occasions, the police entered and found strong evidence of illegal gambling.

The issue for the Court to address was whether Mr. Wong enjoyed a reasonable expectation of privacy in the hotel room. In ruling that Wong enjoyed such an expectation, La Forest J. provided future courts with crucial, clear guidance about the approach to be taken in any s. 8 analysis:

> [I]t would be an error to suppose that the question that must be asked in these circumstances is whether persons who engage in illegal activity behind the locked door of a hotel room have a reasonable expectation of privacy. Rather, *the question must be framed in broad and neutral terms so as to become whether in a*

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38 *Ibid.*
39 *Ibid.*
40 [1990] 3 S.C.R. 36 [*Wong*].
41 *Ibid.* at 41.
42 *Ibid.* at 42.

society such as ours persons who retire to a hotel room and close the door behind them have a reasonable expectation of privacy.[43]

In addition to ensuring the absence of a "system of subsequent validation for searches,"[44] La Forest J.'s judgment in *Wong* is important for a fundamental reason: it recognizes that all citizens were intended to enjoy the rights enshrined in a neutrally drafted *Charter*. *Wong* implicitly reminds us that while those whose actions place them at odds with the law can be pursued and punished, they must enjoy the rights and freedoms that are available to all citizens.

In *R. v. Edwards*,[45] the Supreme Court had the opportunity to turn its attention to a fundamental question about the privacy right protected by s. 8: where does a person enjoy a reasonable expectation of privacy? This question is important when one remembers that private information cannot be protected under all circumstances. For instance, it is clear that people do not enjoy a reasonable expectation of privacy in items they leave in a public park, or a home where they are an unwelcome visitor. But does an individual enjoy a reasonable expectation of privacy in a home where he is a guest with lawful access to the premises? This was the question faced by the Court in *Edwards*.

In *Edwards*, the police were informed that the appellant was a drug trafficker operating out of his car. Shortly afterward, the police began watching him closely. The police received further information that the appellant had drugs either at his residence, or the residence of his girlfriend, Ms. Evers, or on his person. The police suspected that there could be cocaine in the residence of Ms. Evers, but they did not have enough information to obtain a warrant to search the premises. Despite this problem, two police officers arrived at her apartment and were able to secure her co-operation. Once the police were admitted to the apartment, Ms. Evers led the officers to a couch in her living room where they found a plastic bag full of cocaine. She and the appellant were then charged with possession of cocaine for the purposes of trafficking.[46]

The Court began by making it clear that "the privacy right allegedly infringed must ... be that of the accused person who makes the challenge."[47] This meant that the issue on which the appeal would be decided was whether the appellant enjoyed a reasonable expectation of privacy in his girlfriend's apartment. After intimating that a "reasonable expectation of privacy is to be determined on the basis of the totality of the circumstances,"[48] Cory J. wrote:

> The factors to be considered in assessing the totality of the circumstances may include, but are not restricted to, the following:
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> (i) presence at the time of the search;
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> (ii) possession or control of the property or place searched;

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43 *Ibid.* at 50 [emphasis added].
44 *Ibid.*
45 [1996] 1 S.C.R. 128 [*Edwards*].
46 *Ibid.* at paras. 2-10.
47 *Ibid.* at para. 34.
48 *Ibid.* at para. 45.

(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.[49]

On the basis of the criteria outlined above, the Court ruled that the appellant did not enjoy a reasonable expectation of privacy in Ms. Evers' apartment. The appellant, the Court reasoned, did not satisfy any of the criteria employed to assess these claims and the evidence also indicated that he was no more than a guest who "stayed over occasionally."[50] Also, the appellant made virtually no contributions to the maintenance of the residence and had no authority to regulate access to the premises.[51] In sum, none of the factors cited applied to the appellant and the Court found that he did not enjoy a reasonable expectation of privacy in his girlfriend's apartment.

Its failure to adequately protect individual privacy rights makes *Edwards* an unfortunate addition to the jurisprudence touching on s. 8. *Edwards* dictates that the criteria to be employed in the future when assessing claims to a reasonable expectation of privacy will be heavily weighted in favour of property rights.[52] Whether one has control of the premises searched or the ability to exclude others from the property are not factors that should be considered to be critical in establishing a reasonable expectation of privacy.[53] Section 8 should protect the privacy rights of all individuals irrespective of their capacity to control property.

In tying the reasonable expectation of privacy to property, the Court diminished the privacy rights of the economically disadvantaged. Just because a poor person requires the permission of, say, the Salvation Army to have a room for the evening should not necessarily mean that he does not enjoy a reasonable expectation of privacy in that room once he is permitted unfettered access. By the same token, what about the troubled youngster who sleeps in a room at a friend's home to avoid having to weather another cold night on the street? These individuals deserve a more flexible approach than the one adopted by the Supreme Court in *Edwards*. Moreover, the Court's emphasis on property rights places the *Edwards* decision at odds with *Hunter*, a case in which the majority made it clear that s. 8 "protects people, not places."[54]

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49 *Ibid.* [emphasis added].
50 *Ibid.* at para. 47.
51 *Ibid.* at para. 49.
52 *Edwards* also bears striking resemblance to the work of Rehnquist J. of the Supreme Court of the United States. See *Rakas v. Illinois*, 439 U.S. 128 (1978) at 134, Rehnquist J. ruled that "[a] person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed." More will be said later about the merits of Canadian courts following the principles articulated by American jurists.
53 David J. Schwartz, "Edwards and Belnavis: Front and Rear Door Exceptions to the Right to be Secure from Unreasonable Search and Seizure" (1998) 10 C.R. (5th) 100 at 106.
54 *Supra* note 6 at 159.

Another troubling aspect of the Court's approach in *Edwards* is the majority's decision to restrict standing such that "s. 24(2) provides remedies only to applicants whose own *Charter* rights have been infringed."[55] This means, for example, that the police will be able to violate the privacy rights of one person to acquire evidence against another. In *Edwards*, La Forest J., in his own reasons, disagreed strongly with the Court's approach saying that s. 8 "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."[56] Lawn and Bernstein have provided a particularly stunning example of the consequences of the majority's approach:

> [O]ne can imagine a situation in which a co-accused who is persuaded to relinquish control of narcotics or stolen goods will be convicted based on evidence derived from a warrantless search of his partner's home, while the partner, who has standing under s. 24(2), can have the same evidence excluded. The application of the privacy threshold to s. 8 can therefore lead to opposite results for two co-accused, even where all other circumstances are equal.[57]

Sadly, *Edwards* remains the law in Canada despite claims from many academics that the Court's approach to territorial privacy requires reinvention.[58]

It was in this context that *Tessling* came before the Ontario Court of Appeal and later the Supreme Court of Canada. Past precedent had been successful in ensuring that the right protected by s. 8 would only be triggered in the event of a reasonable expectation of privacy in the information seized. Fortunately, in *Wong*, the Supreme Court made it clear that privacy claims would be framed in a neutral way to ensure that all citizens enjoy the *Charter*'s rights. Moreover, in *Hunter*, Dickson J. elected to "examine the purpose of s. 8 and then to set down certain principles applicable generally to determining both the reach of s. 8 and the validity of statutory search powers."[59] This decision to provide clear guidance on the constitutional requirements for a valid search was important for a number of reasons: to prevent unjustified state intrusions before they occur, to prevent *post hoc* analyses about the validity of searches, and to help ensure that courts are not deluged in s. 8 claims due to a lack of clarity about the state of the law.

With respect to informational privacy, the Court's decision in *Plant* to place great weight on the nature of the information acquired in an alleged search is consistent with the goal of protecting the privacy rights of people, not places. This approach is another sound legacy of Dickson J.'s judgment in *Hunter*.[60] While it is clear that, on occasion, the location of the alleged search will determine whether a claimant can establish a reasonable expectation of

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55 *Supra* note 45 at para. 55.

56 *Ibid.* at para. 59.

57 Julia Lawn & Andrew Bernstein, "Primacy to Privacy? The Supreme Court and the Privacy Threshold in *Edwards*" (1997) 55 U.T. Fac. L. Rev. 341 at 346.

58 See e.g. Tim Quigley, *Procedure in Canadian Criminal Law*, 2d ed. (Toronto: Carswell, 2005) at 8.2(b)(iii).

59 Marc Rosenberg, "Unreasonable Search and Seizure: Hunter v. Southam Inc.," Case Comment, (1985) 19 U.B.C. L. Rev. 271 at 274.

60 D. Fletcher Dawson, "Unreasonable Search and Seizure: A Comment on the Supreme Court of Canada Judgment in Hunter v. Southam Inc." (1984-85) 27 Crim. L.Q. 450 at 470.

privacy, this will be the exception, not the norm.[61] An examination of the nature of the information acquired in an alleged search should be the most important factor when the Court assesses a claim to informational privacy. It would appear that the *Plant* judgment tilts the law in this direction. However, in *Plant*, the Court could have provided more guidance about the distinction between meaningful private information and less significant knowledge.

On the subject of territorial privacy, the Court's judgment in *Edwards* constituted a major setback in protecting citizens' privacy rights. While the *Plant* judgment upheld Dickson J.'s goal of protecting people, not places, the Court in *Edwards* decided that a proprietary interest would almost certainly be required if one claims a reasonable expectation of privacy. As argued, it is unfortunate that *Edwards* mandates that the criteria to be employed (such as the ability to regulate access and ownership of the property) in assessing claims involving territorial privacy emphasize property rights.[62] What is particularly disappointing about the *Edwards* judgment is that the Supreme Court of Canada appears to have inappropriately adopted the approach to territorial privacy adhered to by the Supreme Court of the United States.[63]

Above all, *Tessling* would provide an opportunity for an appellate level court to outline a series of principles that could be applied to future cases. In light of Canada's constitutional structure and the need to prevent intrusions on personal privacy before they occur, a clear, more coherent, more predictable s. 8 framework was badly needed.[64] Although the Supreme Court came closer to the mark than the Ontario Court of Appeal, for reasons that will be discussed, both judgments failed to provide much needed guidance about the reasonable expectation of privacy protected by s. 8 of the *Charter* in an age of improving technology.

III. *TESSLING* AT THE ONTARIO COURT OF APPEAL

In February 1999, the police began investigating Mr. Tessling because they suspected that he and a colleague were involved in distributing marijuana to a known drug dealer. On 29 April 1999, the police equipped an airplane with FLIR technology and flew over the properties owned by Tessling and his colleague to detect heat patterns emanating from them. The police employed FLIR technology because it allowed them to take pictures of the energy emanating from the surface of the structures on the properties. Depending on the insulation

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61 R.T.H. Stone, "The Inadequacy of Privacy: *Hunter v. Southam* and the Meaning of 'unreasonable' in Section 8 of the *Charter*," Case Comment, (1989) 34 McGill L.J. 685 at 691.

62 The Supreme Court of Canada, in *Edwards*, *supra* note 45, essentially adopted criteria articulated by the U.S. Court of Appeals in *United States v. Gomez*, 16 F.3d 254 at 256 (8th Cir. 1994).

63 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 at 41. Professor Don Stuart has also argued persuasively that American Fourth Amendment jurisprudence should be carefully assessed before it is imported into Canada: "U.S. jurisprudence on search and seizure should be followed with caution in Canada." See Don Stuart, *Charter Justice in Canadian Criminal Law*, 4th ed. (Toronto: Carswell, 2005) at 247-48.

64 American academic Thomas Clancy stated the problem succinctly: "Given that police officers are usually the initial decision-makers and need clear guidance, that is, they should not be deciding what is a search based on some complicated formula ... [a clearer] rule permits the police to know in advance what is a search." See Thomas K. Clancy, "What is a 'Search' Within the Meaning of the Fourth Amendment?" (2006) 70 Alb. L. Rev. 1 at 38.

of the home and the location of the source of the emanations, this technology could detect heat but it could not "identify the exact nature of [the] source or see inside the building."[65]

Marijuana growing operations emit an unusual amount of heat. From the perspective of the police, FLIR technology is useful because an uneven pattern of heat emissions from a property could indicate that a marijuana grow operation is inside the walls of the structure. As mentioned, this is not an exact science because the heat emanating from the structure could be the product of lawful activities. It is only when the heat patterns are examined in conjunction with other information that any picture of what is occurring inside the property can be gleaned.[66]

When the police used this technology to examine the heat patterns emanating from Tessling's property, there was cause for further investigation. After examining the results of the flyover and consulting two informants, the police sought a search warrant to enter the property. They relied on the results of the FLIR examination and the information provided by the two informants to obtain a search warrant to enter Tessling's property. After obtaining a warrant, the police entered Tessling's home and discovered large amounts of marijuana and some weapons.[67]

At trial, counsel for the accused argued that the evidence obtained in the search should have been excluded. The crux of the defence case was that the police would not have been able to obtain a search warrant in the absence of the FLIR results. Because the information obtained in the flyover could not otherwise be obtained without entering the home, the examination was a search pursuant to s. 8. Thus, when the police flew over Tessling's property with the FLIR technology, this was a warrantless search that violated Tessling's privacy to such an extent that the evidence should be excluded pursuant to s. 24(2) of the *Charter*.[68]

The trial judge accepted the submissions of the Crown to the effect that the use of FLIR technology did not constitute a search pursuant to s. 8 and, even if it did, the evidence should not be excluded in a 24(2) analysis. On the basis of the evidence obtained in the search, Tessling was convicted at trial of possession of marijuana for the purposes of trafficking and was sentenced to six months imprisonment. He was also convicted of related drug charges and weapons offences.[69] He appealed to the Ontario Court of Appeal.

Tessling's argument that the FLIR examination of his home constituted a search pursuant to s. 8 meant that the issue before the Court of Appeal was whether he enjoyed a reasonable expectation of privacy in the heat emanations. If he did, then the police carried out a search and required a warrant; if he did not, then the police required no prior authorization before undertaking the examination. Despite the Crown's argument that heat emanations from a home reveal little about the personal habits of its occupants, Abella J.A., (as she then was)

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65 *R. v. Tessling* (2003), 63 O.R. (3d) 1 at para. 8 (C.A.).
66 *Ibid.* at paras. 9-10.
67 *Ibid.* at paras. 11-13.
68 *Ibid.* at paras. 14-18.
69 *Ibid.* at paras. 21-23.

writing for the Court, ruled that "the use of FLIR technology to detect heat emanations from a private home constitutes a search and requires, absent exigent circumstances, prior judicial authorization."[70] As there were no exigent circumstances in the case, Tessling was the victim of an unreasonable search contrary to s. 8.

Justice Abella began her judgment by citing the Supreme Court's ruling in *Plant*. In her view, the focus in *Plant* was on electrical bills that were already in the hands of a third party. There was no reasonable expectation of privacy because the information was in the hands of the utility company and, consequently, was subject to examination by members of the public.[71] In other words, the facts in *Plant* were different because a third party had the opportunity to examine the information before it was turned over to the police.

In *Plant*, Sopinka J. outlined a number of criteria to be assessed in determining the nature of the subject matter in which a complainant can assert a reasonable expectation of privacy. He wrote:

> Consideration of such factors as *the nature of the information itself*, the nature of the relationship between the party releasing the information and the party claiming its confidentiality, the place where the information was obtained, the manner in which it was obtained and the seriousness of the crime being investigated allow for a balancing of the societal interests in protecting individual dignity, integrity and autonomy with effective law enforcement.[72]

Justice Abella deduced correctly that the nature of the relationship between the parties in *Plant* was different because the information in that case was already subject to public scrutiny prior to police examination. That the information in Tessling's case was obtained from his home and not a utility company is another distinction between the facts in *Plant* and *Tessling*. Also, in *Tessling*, it is irrefutable that the police used advanced technology to obtain the information from the property. Flying over a home to acquire information is, arguably, more intrusive than obtaining records from a utility company's offices.

One of the problems with Abella J.A.'s analysis is that her conclusion that personal and confidential information was gleaned by the FLIR scan is unsupported by the facts of *Tessling*. The *Plant* decision clearly establishes the principle that if s. 8 is to be engaged, the "information seized must be of a 'personal and confidential' nature."[73] Yet Abella J.A. presented no coherent argument that the information seized in the flyover met this threshold. This is a reflection of the fact that the knowledge acquired in Tessling's case was not revealing when examined in isolation. In fact, as Abella J.A. herself acknowledges later in the judgment: "The surface emanations are, on their own, meaningless."[74] She then cited the dissenting analysis of McLachlin J. (as she then was) in *Plant*.[75] As argued earlier, McLachlin J. was mistaken when she concluded that electrical consumption records reveal,

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70 *Ibid.* at para. 34.
71 *Ibid.* at paras. 40-42.
72 *Supra* note 32 at 293 [emphasis added].
73 *Ibid.* at 293.
74 *Supra* note 65 at para. 66.
75 *Supra* note 32 at 301 ff.

with any degree of probability, what is taking place inside a home. The electrical records in *Plant* are similar to the ones in *Tessling* in that they reveal nothing personal about what is taking place in a building beyond the structure's electrical consumption profile.

In addition to this incoherent conception of the information acquired in the flyover, the way in which Abella J.A. distinguished *Plant* has troubling implications for personal privacy.[76] Justice Abella's excessive emphasis on the fact that in *Plant* the records were made available to a third party leaves the impression that this factor is determinative in the reasonable expectation of privacy analysis. This approach has dire consequences for privacy rights.[77] Just because an individual passes on private information to a third party such as, for instance, a doctor, should not mean that they have automatically relinquished their privacy interest in such information.[78] Thus, it can be argued that Abella J.A. should have placed greater weight on the nature of the information, not on whether it was already available to a third party.[79]

Justice Abella went on to make other observations which reveal a mistaken conception of the capacity of FLIR technology. She wrote:

> [T]he measurement of heat emanations from inside a home is the measurement of inherently private activities which should not be available for state scrutiny without prior judicial authorization.... *Some perfectly innocent activities in the home can create the external emanations detected and measured by the FLIR, and many of them, such as taking a bath or using lights at unusual hours, are inherently personal.*[80]

While most of this is perfectly true, it is incorrect to say that the examination of heat emanations necessarily constitutes the "measurement of inherently private activities." There is an infinite variety of activities that can give rise to the external emanations that were detected at Tessling's residence; the use of a bathtub or the illumination of lights are but two possibilities among thousands. Solely on the basis of the FLIR examination, it would be impossible to make a credible inference that a bathtub is being used at unusual hours of the day. If police learned that a home's occupants had recently purchased a large hot tub, this information could potentially be combined with a FLIR examination to make the inference that a hot tub was the source of the emanations. But additional information of this kind would be needed before a picture of what is taking place in the home could possibly emerge.

Perhaps the most troubling aspect of Abella J.A.'s judgment in *Tessling* is her reliance on the judgment of the U.S. Supreme Court in *Kyllo v. United States*.[81] She drew a dubious distinction between information that is acquired through the use of sophisticated technology and information that is obtained through more basic observation methods when she wrote: "In my view, there is an important distinction between observations that are made by the naked eye or even by the use of enhanced aids, such as binoculars, *which are in common use*,

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76 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 at 25-26.

77 *Ibid.*

78 See e.g. *R. v. Dyment*, [1988] 2 S.C.R. 417.

79 *Supra* note 76.

80 *Supra* note 65 at paras. 67, 69 [emphasis added].

81 533 U.S. 27 (2001) [*Kyllo*].

and observations which are the product of technology."[82] This line of reasoning comes from the *Kyllo* decision of the U.S. Supreme Court. For a number of reasons, the *Kyllo* judgment is fundamentally flawed and should not be relied on by Canadian courts.

Kyllo featured a set of circumstances that were strikingly similar to those in *Tessling*. The U.S. Department of the Interior suspected that marijuana was being grown in the residence of Mr. Kyllo. Authorities subsequently employed a thermal imager to scan the heat emanations from Kyllo's home. The results of the scan revealed that "the roof over the garage and a side wall of petitioner's home were relatively hot compared to the rest of the home and substantially warmer than neighbouring homes in the triplex."[83] This information was buttressed in a warrant application by tips from informants, and a federal judge issued a warrant authorizing a search of Kyllo's home.[84]

The Fourth Amendment guarantees that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."[85] The issue for the U.S. Supreme Court to address was whether the scan conducted by authorities infringed this constitutional guarantee. The Court ruled that it did. Justice Scalia, who authored the majority judgment, wrote:

> We think that obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical "intrusion into a constitutionally protected area," constitutes a search — at least where (as here) the *technology in question is not in general public use.*[86]

Moreover, Scalia J. felt that the heat emanations revealed "intimate details" about the nature of the activities taking place inside the home and consequently, he reasoned, that the authorities conducted a warrantless search contrary to the Fourth Amendment.[87]

With respect, Scalia J. was mistaken in ruling that the scan revealed intimate details about Kyllo's dwelling. It revealed the heat patterns emanating from the home — not intimate details about what was taking place inside the walls of the property. Justice Scalia, later in his judgment, seemingly recognized the limited nature of the scan when he wrote:

> *While it is certainly possible to conclude from the videotape of the thermal imaging that occurred in this case that no "significant" compromise of the homeowner's privacy has occurred,* we must take the long view, from the original meaning of the Fourth Amendment forward.[88]

The original meaning of the Constitution refers to the way that it would have been construed at the time it was adopted. This is of little assistance in the Canadian context. The goal of Canadian courts should not be to examine how the FLIR flyover would have been assessed

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82 *Supra* note 65 at para. 63 [emphasis added].
83 *Supra* note 81 at 30.
84 *Ibid.*
85 U.S. Const. amend. IV.
86 *Kyllo*, *supra* note 81 at 34 [references omitted, emphasis added].
87 *Ibid.*
88 *Ibid.* at 40 [emphasis added].

in 1982, 1990, or any other period since the entrenchment of the *Charter*. The state of technology in 1982 was such that FLIR may not have been contemplated as a surveillance method. Thus, the ever-changing landscape of technological surveillance casts doubt on the idea that the framers of the *Charter* put their minds to the privacy implications of FLIR technology. Moreover, as stated by Dickson J. in *Hunter*:

> A constitution ... is drafted with an eye to the future.... It must, therefore, be capable of *growth and development* over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind.[89]

In sum, the American approach of assessing how the framers would have viewed technology that did not exist at the time the Constitution was drafted is an exercise that is of little assistance to Canadian courts. American academic Susan W. Brenner has criticized her country's emphasis on framers' intent when assessing the capabilities of modern technology: "[w]e cannot rely solely on what has been, because what will be, has never been."[90]

The most troubling aspect of the *Kyllo* precedent is the emphasis the majority placed on the availability of the technology used by authorities. That the technology used in the scan was not broadly available to the public is a crucial reason for the majority's disposition of the case. If the technology used in the case was in public use, it could seemingly be employed without violating the Fourth Amendment. When this approach is taken to its logical conclusion, the dissemination of new technologies will mean the individual's reasonable expectation of privacy will be unavoidably diminished. It is for this reason that Stevens J., who wrote for the dissent in *Kyllo*, rejected this so-called public use doctrine as "perverse" because the "threat to privacy will grow, rather than recede, as the use of intrusive equipment becomes more readily available."[91]

If the public use doctrine is imported into Canada, it will have sweeping implications for privacy rights. It is conceivable that in the years to come, technology with the capacity to see through the walls of a home will become available to the public. State actors could then use this technology to monitor the private activities of residents while insisting that s. 8 could not be engaged because the technology they used was available to the public. In essence, this doctrine could mean that people would no longer enjoy a reasonable expectation of privacy in their homes. Thus, it can be argued that the public use doctrine is undesirable and will, in the long term, diminish individual privacy rights. Furthermore, the doctrine is fundamentally inconsistent with the vital Canadian principle that improving technology should not necessarily erode the privacy right enshrined in s. 8. Justice La Forest, in *Wong*, wrote that

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89 *Supra* note 6 at 155 [emphasis added]. Professor Sanjeev Anand has argued in favour of the perspective of Professors Morton and Knopff that it is acceptable under a "framers' intent" approach to apply existing rights to new facts and unacceptable to create new rights that are then applied to old facts. Professor Anand has expressed concern at the Supreme Court of Canada's inconsistent application of framers' intent. See Sanjeev Anand, "The Truth About Canadian Judicial Activism" (2006) 15 Const. Forum Const. 87 at 91.

90 Susan W. Brenner, "The Fourth Amendment in an Era of Ubiquitous Technology" (2005) 75 Miss. L.J. 1 at 42.

91 *Supra* note 81 at 47.

"s. 8 was designed to provide continuing protection against unreasonable search and seizure and to keep pace with emerging technological development."[92]

In addition to its logical flaws and its troubling implications for privacy rights, the majority judgment in *Kyllo* represents the approach adopted by the U.S. Supreme Court to this area of the law. Although Canada is, in many respects, similar to the United States, its constitutional structure distinguishes it from that country. For instance, the U.S. Constitution singles out property rights for special protection.[93] This could explain why Scalia J. insisted that any interference with a private dwelling will likely constitute a search. This higher standard could be a by-product of the heightened constitutional protection of property rights in the American context.[94]

The Ontario Court of Appeal's decision in *Tessling* is a disappointing addition to the jurisprudence about s. 8 for several reasons: it deviates from past precedent, it suffers from substantial inconsistencies, it advances an incoherent conception of the reasonable expectation of privacy threshold, and it inappropriately relies on American Fourth Amendment jurisprudence. In certain parts of her judgment, Abella J.A. regarded the FLIR examination as constituting a serious intrusion on the privacy rights of Tessling; yet, quite remarkably, she acknowledged that the FLIR scan revealed information that was, in the absence of other knowledge, meaningless.

Ultimately, whether Tessling's privacy rights were violated by the FLIR scan is an issue about which reasonable people may differ; however, it is difficult to see the benefits of the Ontario Court of Appeal's judgment. First, to the extent that the appellate level judgment provides guidance about s. 8, it has highly undesirable consequences: the American public use doctrine may be predictable, but it has dire ramifications for individual privacy. Further, the appellate level judgment is confused to the point that law enforcement authorities and future courts can take little guidance from it. In sum, Abella J.A.'s judgment is, in a sense, a prisoner of its own incoherence. Fortunately, the Supreme Court of Canada had the opportunity to assess the merits of the Court of Appeal's judgment.

IV. *TESSLING* AT THE SUPREME COURT OF CANADA

In 2004, the Supreme Court of Canada rendered its landmark judgment in *Tessling*. Though its analysis was complex, the Court was unanimous in its decision and Binnie J., writing on behalf of the Court, tackled some of the fundamental issues involved in the case. He labeled privacy "a protean concept" whose parameters were not subject to easy definition.[95] This ambiguity, reasoned Binnie J., meant that a "judicial 'catalogue' of what

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92 *Supra* note 40 at 54. Furthermore, James A.Q. Stringham is critical of Abella J.A.'s decision to rely on social conventions by examining whether the technology used was in general public use. He rightly points out that s. 8 should contain a normative core and not simply be subject to advancing technology. See James A.Q. Stringham, "Reasonable Expectations Reconsidered: A Return to the Search for a Normative Core for Section 8?" (2005) 23 C.R. (6th) 245 at 257-60.

93 U.S. Const. amend. V.

94 See e.g. *Kyllo*, *supra* note 81.

95 *Supra* note 3 at para. 25.

is or is not permitted by s. 8 is scarcely feasible."[96] Consequently, he adopted a "totality of the circumstances" test for determining whether Tessling enjoyed a reasonable expectation of privacy in the heat emanations from his home. What was meant by the "totality of the circumstances" concept was that it was not just one factor that needed to be examined. Rather it was all of the different circumstances that affected the use of the FLIR technology that had to be assessed.

Justice Binnie then established the criteria to be examined in determining "the totality of the circumstances" test. Several key questions had to be answered: "(1) What was the subject matter of the FLIR image? (2) Did the respondent have a direct interest in the subject matter of the FLIR image? (3) Did the respondent have a *subjective* expectation of privacy in the subject matter of the FLIR image?"[97]

Perhaps the most significant set of questions related to whether Tessling's expectation of privacy was *objectively* reasonable. The issues to be considered in this regard included:

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 FLIR heat profile exposed any intimate details of the respondent's lifestyle, or information of a biographical nature.[98]

Each of these fundamentally important issues was canvassed in detail by Binnie J. in his judgment.

A. WHAT WAS THE SUBJECT MATTER OF THE FLIR IMAGE?

Justice Binnie rejected the Court of Appeal's reasoning that FLIR technology had the capacity to provide private information. He wrote: "While sources such as baths and innocent light fixtures 'create' external emanations of heat, the evidence is clear that FLIR technology cannot at this state of its development differentiate between one heat source and another."[99] In arriving at this conclusion, Binnie J. exhibited a level of understanding of the capacity of FLIR technology that was clearly lacking in the Ontario Court of Appeal. As argued, the FLIR examination revealed little about what was taking place inside Tessling's home.

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[96] *Ibid.* at para. 19.
[97] *Ibid.* at para. 32.
[98] *Ibid.*
[99] *Ibid.* at para. 35.

B. DID THE RESPONDENT HAVE A DIRECT INTEREST IN THE SUBJECT MATTER OF THE IMAGE?

At this stage of his judgment, Binnie J. turned his attention to the *Edwards* criteria for assessing claims to territorial privacy. In a cryptic analysis, Binnie J. deduced that the *Edwards* precedent did not apply because Tessling was the owner of the home that was the subject of the FLIR flyover.[100]

Although it had no bearing on the outcome of Tessling's claim, Binnie J. clearly elected to leave the *Edwards* property-centric approach to assessing claims to territorial privacy in place. Although it would have been asking a lot for the Court to re-examine the merits of *Edwards*, that it is still the law of Canada is highly unfortunate.[101]

C. DID THE RESPONDENT HAVE A SUBJECTIVE EXPECTATION OF PRIVACY IN THE SUBJECT MATTER OF THE FLIR IMAGE?

Justice Binnie wisely rejected the Crown's argument that the escape of heat from a home represents the voluntary exposure of this information: "Few people think to conceal their home's heat loss profile, and would have difficulty doing so if they tried."[102] Though it did not weigh heavily on the outcome of the case, Tessling was seen as enjoying a subjective expectation of privacy in the emanations.[103]

Fortunately, in the Court's analysis, less emphasis was placed on the presence of a subjective expectation of privacy than in the American context. While Binnie J. recognized that the subjective expectation of the claimant should be a factor in the reasonable expectation of privacy analysis, he was rightly reluctant to allow it to become determinative. He wrote:

> 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. In an age of expanding means for snooping readily available on the retail market, ordinary people may come to fear (with or without justification) that their telephones are wiretapped or their private correspondence is being read.... *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 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.[104]

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100 *Ibid.* at para. 37.

101 Although a thorough discussion of the *Edwards* criteria is beyond the scope of this paper, it has been persuasively suggested that a relaxation of the rules of standing to allow third party claimants the opportunity to challenge a search pursuant to s. 24(2) would help overcome the property-centric analysis of *Edwards*. See Lawn & Bernstein, *supra* note 57 at 349; Dawe, *supra* note 63 at 42.

102 *Tessling*, *supra* note 3 at para. 41.

103 *Ibid.*

104 *Ibid.* at para. 42 [emphasis added].

In Fourth Amendment cases in the United States, a claim to a reasonable expectation of privacy is assessed with strong reference to whether the claimant manifested a subjective expectation of privacy.[105] This emphasis on the minds and efforts of claimants has a troubling corollary: the state, by its actions, can reduce an individual's subjective expectation of privacy. For instance, the state could announce that improving technology has allowed it to develop intrusive satellites with the capacity to see through the walls of homes. Because individuals adjust their subjective expectations to take account of this development, they are no longer able to establish a subjective expectation of privacy in the subject matter of the new technology. It is for this reason that Professor Ric Simmons has written that in the American context, "a defendant's subjective expectation of what is and is not private can too easily be manipulated by the government itself."[106]

D. WAS THE RESPONDENT'S EXPECTATION OF PRIVACY OBJECTIVELY REASONABLE?

1. THE PLACE WHERE THE ALLEGED SEARCH OCCURRED

In the Ontario Court of Appeal, Abella J.A. placed significant emphasis on the fact that the FLIR examination took place at Tessling's residence. From the Supreme Court's perspective, this factor was not as weighty. In Binnie J.'s view, that Tessling's home was the subject of the examination was but one limited factor militating in favour of his assertion of a reasonable expectation of privacy:

> The fact that it was the respondent's home that was imaged using FLIR technology is an important factor but it *is not controlling and must be looked at in context and in particular, in this case, in relation to the nature and quality of the information made accessible by FLIR technology to the police.*[107]

The Supreme Court's decision to place greater weight on the nature of the information gleaned in the flyover was a refreshing change from the approach taken by the Court of Appeal. Placing significant emphasis on the nature of the information acquired reflects what should have been the primary goal of s. 8 since *Hunter*: to protect the privacy rights of people, not places.

2. WAS THE SUBJECT MATTER IN PUBLIC VIEW?

Justice Binnie intimated that the information in question was in public view. While the FLIR detected heat patterns in close proximity to Tessling's home, the technology was unable to see through the walls of the edifice.[108] This meant that all that could be recorded

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105 See e.g. *Kyllo*, *supra* note 81.

106 Ric Simmons, "From *Katz* to *Kyllo*: A Blueprint for Adapting the Fourth Amendment to Twenty-First Century Technologies" (2002) 53 Hastings L.J. 1303 at 1313. See also Harvey Wingo, "A 2020 Vision of Visual Surveillance and the Fourth Amendment" (1992) 71 Or. L. Rev. 1 at 21-22; Melvin Gutterman, "A Formulation of the Value and Means Models of the Fourth Amendment in the Age of Technologically Enhanced Surveillance" (1988) 39 Syracuse L. Rev. 647 at 731.

107 *Supra* note 3 at para. 45 [emphasis added].

108 *Ibid.* at paras. 46-47.

during the FLIR flyover existed on the exterior of the home and was, consequently, in public view.

3. HAS THE SUBJECT MATTER BEEN ABANDONED?

At this stage of his analysis Binnie J. reiterated his earlier conclusion that it would be impossible to conceal heat emanations from one's home.[109] The corollary of this was clear: Tessling did not abandon the heat emanations; rather he was left with little choice but to expose them to whomever was interested in their detection.

Justice Binnie did not take the opportunity to provide any substantive guidance about when individuals can be deemed to have abandoned items or information. This emphasis on addressing only the facts of *Tessling* means that there is little clarity in the law with respect to abandonment. Tessling was incapable of stopping the outflow of heat from his home in the same way that individuals are forced to place their garbage outside for pickup because they are, in many municipalities, not permitted to burn it.[110] Yet it is common knowledge that police often sift through garbage in the hunt for valuable information. By the same token, people are incapable of preventing their bags from emanating odours that can be detected by police dogs. Does this mean that police dogs are detecting information that cannot be abandoned? These examples illustrate the ambiguity about abandonment that was left in *Tessling*'s wake. Until this and other uncertainties are addressed, the law of search and seizure with respect to sense-enhancing aids will resemble "a guessing game where privacy is defined and proclaimed on a case-by-case basis."[111]

4. WAS THE INFORMATION ALREADY IN THE POSSESSION OF THIRD PARTIES?

As discussed, this factor was almost determinative in the Court of Appeal's decision. In that Court's opinion, the information in *Plant* was already in the hands of a third party and this distinguished the case from *Tessling* to such an extent that Tessling could claim a reasonable expectation of privacy in the heat emanations.

As argued, the problem with the Court of Appeal's approach is clear: private information is often passed on to third parties for narrow purposes. Thus, whether information has been disclosed to others should simply be a limited factor militating in favour of a reduced privacy expectation; it should not be considered critical. Justice Binnie elected rightly to place significantly less weight on whether the information had been exposed to anyone other than the state actors who acquired it.[112]

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109 *Ibid.* at para. 48.
110 Pomerance, *supra* note 14 at 236.
111 *Ibid.* at 233.
112 *Supra* note 3 at para. 49.

5. WAS THE POLICE TECHNIQUE INTRUSIVE IN RELATION TO THE PRIVACY INTEREST?

This factor was the source of much greater discussion in the Supreme Court's judgment than it was in the Court of Appeal's analysis. In essence, it forced the Court to address the question that went to the core of the case: what is the nature of the information that can be elicited in a FLIR examination? As was made clear by Binnie J. and acknowledged in passing by Abella J.A., the information acquired in the examination of Tessling's residence was, in the absence of other information, of no use.

Contrary to the statements of Abella J.A., the FLIR technology had no capacity to come close to monitoring the private activities of the occupants of Tessling's residence. This simple reality serves to discredit the examples used by Abella J.A. As mentioned, she spoke of state actors standing on FLIR technology to acquire knowledge about when the lady of the home takes her bath. Binnie J. recognized that the technology, on its own merits, was incapable of delivering anything close to this kind of information: "FLIR imaging cannot identify the source of the heat or the nature of the activity that created it.... FLIR's usefulness depends on what other information the police have."[113]

While Binnie J. is correct in his assessment of the limitations of FLIR technology, there is a much larger question he fails to consider that merits careful examination. What is the effect of using a number of sense-enhancing instruments to see inside a private area? A FLIR examination may be meaningless on its own, but when combined with results from another type of sense-enhancing aid such as, perhaps, a satellite or a police dog, an inference can be made about what is inside a private place. The issue presented by this is similar to the problem in *Kyllo*: as technology improves, the threat to privacy could increase as more FLIR like sense-enhancing aids are made available to law enforcement. By not addressing the situation in which a number of sense-enhancing aids are being used together, Binnie J. would appear to give state actors a license to use such instruments to infringe upon a reasonable expectation of privacy. At the very least, the Supreme Court judgment in *Tessling* has left this fundamentally important matter for another day.

The significance of Binnie J.'s failure to consider the cumulative effect of the use of sense-enhancing aids is highlighted by the work of Professor Wayne Renke. Renke has written about the constitutional issues presented by data mining, a technological law enforcement weapon that presents issues similar to FLIR technology. Data mining refers to a search of one or more electronic databases for information. According to Renke, data mining is a two step process. First, "[q]uery based information retrieval" is designed to uncover "information that is already expressly or explicitly in a database or set of databases."[114] Then, "automated pattern discovery" connotes the process of identifying

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[113] *Ibid.* at para. 53.

[114] Wayne Renke, "Who Controls the Past Now Controls the Future: Counter-Terrorism, Data Mining and Privacy" (2006) 43 Alta. L. Rev. 779 at 786 [footnotes omitted].

patterns in data.[115] Since 11 September 2001, data mining has been touted as a potentially lethal weapon in the so-called war on terrorism.[116]

In a global economy, citizens understand that with each transaction and interaction, records about them are prepared and stored. Yet, the privacy loss is minimal because "no record custodian has more than a context-specific glimpse of us."[117] Each transaction yields information that is, in most cases, mundane. But data mining involves state actors gaining access to a number of these records with the goal of developing a clear picture of the private habits of individuals. It is this reality, Renke argues, that presents a clear threat to individual privacy:

> The records ... [that are data mined by the state] ... are held by separate parties. They are not assembled into informational mosaics of our transactional lives.... We have privacy as against the State, since it does not have custody of all of our transactional information, and it must make particular inquiries with custodians to obtain information, following the applicable due process rules.... *The networked assemblage of records presupposed by data mining negates practical obscurity by itself.* Our transactional records are all available for viewing. It is as if the State has an actual or virtual dossier assembled on us all.[118]

Thus, it is axiomatic, argues Renke, that data mining has the potential to infringe substantially on the privacy interests of citizens. Equally disturbing is that data mining can be conducted by the state in a clandestine fashion and that the results may alert state actors of the need to move on an individual without that person ever knowing that they were the subject of a data mining operation.[119] Consequently, he argues that the "quantity of intrusions" should be assessed "not merely to the reasonableness of the search, but to the issue of whether reasonable expectations of privacy were violated."[120]

Data mining furnishes a compelling example. Members of a consumer society engage in numerous financial and administrative transactions in the course of their daily lives. In many of these transactions, information is routinely transmitted to others. Imagine a citizen who purchases clothing items, acquires an automobile and secures a loan from a financial institution, all within a short period of time. On each of these transactions he or she has provided important and sometimes personal information to sellers, loan officers, or others. In each of these transactions the consumer is conscious of and consents to disclosures of personal information. What the individual is not aware of is that governments may gather and accumulate this information which, in its totality, results in a detailed, composite profile that discloses much more information than the person consented to release. In short, the accumulation, aggregation, and organization of data voluntarily disclosed in the course of our lives is materially different from the disclosure of information in isolated transactions. While there is express or explicit consent to the latter, there may not even be knowledge of, let alone consent for, the former.

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115 *Ibid.* at 786-87.
116 *Ibid.* at 780.
117 *Ibid.* at 796.
118 *Ibid.* at 796-97 [footnotes omitted, emphasis added].
119 *Ibid.* at 808.
120 *Ibid.* at 809.

Unfortunately, Renke is left to hypothesize about how the Supreme Court of Canada will address the aggregation of private records.[121] The highest Court has not taken the liberty to pass judgment on the constitutionality of the state aggregating personal information about citizens who are suspected of wrongdoing. I contend that this confusion about the constitutional ramifications of data mining stems from the chief shortcoming of the *Tessling* judgment: Binnie J. failed to assess whether the aggregation of information by sense-enhancing aids will infringe on a reasonable expectation of privacy.

There are significant parallels to be drawn between the FLIR scan in *Tessling* and data mining. Like FLIR technology, data mining yields tidbits of information that are, when assessed in isolation, meaningless. Krysten C. Kelly, an American academic, has written about the capacity for satellites to provide information about individuals by surveying "the exteriors of various locations, and not the interior."[122] Like in data mining, one of these satellites alluded to by Kelly could be used in conjunction with other technological instruments such as FLIR to provide state actors with access to cogent information that is kept in private places. It is this technological conundrum that, regrettably, the *Tessling* judgment leaves for another day.

In falling short of addressing the aggregation of information acquired by sense-enhancing aids, the Court has failed to confront completely the problem in *Kyllo*: advancing technology will mean a greater threat to personal privacy. The capabilities, however limited, of instruments like FLIR, cannot be assessed in isolation.[123] To prevent state actors from employing, unburdened by s. 8 scrutiny, two or more sense-enhancing aids for the same purpose, the Court should have made it clear that it will look to the cumulative effect of such efforts. Thus, in assessing the intrusiveness of technology used to access personal information, Binnie J. should have broadened the scope of his inquiry to articulate a new cumulative effect test. This would have provided clear guidance about the parameters of the surveillance power of law enforcement authorities. Perhaps more importantly, it would help to prevent the relentless advance of technology from undermining individual privacy rights. In conclusion, its failure to propose a solution to this emerging problem is surely the Supreme Court's greatest omission in its disposition of *Tessling*.

6. WAS THE USE OF SURVEILLANCE TECHNOLOGY ITSELF OBJECTIVELY UNREASONABLE?

At this point in his judgment, Binnie J. addressed Abella J.A.'s reliance on the U.S. Supreme Court's judgment in *Kyllo*. According to Binnie J., whether the technology used by police is in general public use is irrelevant. Rather, the focus of the inquiry must be on the "nature and quality of the information about activities in the home that the police are able to obtain."[124]

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121 *Ibid.*

122 Krysten C. Kelly, "Warrantless Satellite Surveillance: Will Our 4th Amendment Privacy Rights Be Lost In Space?" (1995) 13 John Marshall Journal of Computer and Information Law 729 at 755.

123 Ian Kerr & Jena McGill, "Emanations, Snoop Dogs and Reasonable Expectations of Privacy" (2007) 52 Crim. L.Q. 392 at 431.

124 *Supra* note 3 at para. 58.

The Supreme Court of Canada's rejection of the *Kyllo* judgment means that individual privacy should receive greater protection in Canada than the United States. Abella J.A. was prepared to rely on *Kyllo* because the result was consistent with her view of *Tessling*, but she failed to accept explicitly that judgment's troubling corollary: as technology improves and more intrusive search instruments become more accessible to the public at large, police will be able to use these developments without infringing on a reasonable expectation of privacy. It is for this reason that Binnie J. wisely chose to emphasize the nature of the information provided by FLIR, not whether the technology employed was in public use.[125]

7. DID THE FLIR HEAT PROFILE EXPOSE ANY INTIMATE DETAILS OF THE RESPONDENT'S LIFESTYLE OR CORE OF HIS BIOGRAPHICAL DATA?

At this juncture of the inquiry, the judgment of Sopinka J. in *Plant* was critical. As discussed, in *Plant* the Court emphasized the importance of assessing the nature of the information that is the subject of a s. 8 claim. Thus, pursuant to past precedent, the Court in *Tessling* turned its attention to the question on which the appeal clearly hinged: did the heat emanations at Tessling's residence touch on a "biographical core of personal information?"[126] From the Supreme Court's perspective, the information provided by FLIR was sufficiently mundane that this threshold was not satisfied.[127]

Although it is difficult to take issue with Binnie J.'s conclusion that the FLIR scan did not touch on a biographical core of personal information, his judgment fails to provide a sense of how meaningful information must be before a reasonable expectation of privacy will likely be found. What if a single sense-enhancing aid used in a future case yields, say, a 16 percent possibility that an item or substance revealing private information including biographical data is present in a private place?[128] Or alternatively, what if the possibility is 40 percent? Although courts never work in percentages,[129] these examples illustrate the uncertainty about the cogency of the information that will likely be the subject of a reasonable expectation of privacy.

I contend that it would be Orwellian to insist that a single sense-enhancing aid must establish, with absolute certainty, the presence of personal and confidential information before there is judicial oversight. But as discussed, McLachlin J.'s dissenting reasons in *Plant* speak to the difficulty associated with drawing the line that separates mundane information from private, intimate details.[130] It should be noted that in other contexts, the

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125 *Ibid.*

126 *Ibid.* at para. 25, quoting *Plant*, *supra* note 32 at 293.

127 *Ibid.* at paras. 59-62.

128 For a further discussion, see Trevor Shaw, "The Law on the Use of Police Dogs in Canada" (2004) 48 Crim. L.Q. 337.

129 See *infra* notes 132, 136, and accompanying text.

130 American academic Clifford Fishman has expressed disillusionment about the lack of clarity about what constitutes cogent information in the American context: "Each additional piece of information the police can derive from electronic devices — each narrowing of the investigative focus — puts them a step closer to what is factually required for a court order to permit private location monitoring. Yet, the agents will have no sure way of knowing at what point the use of the beeper crosses the line that separates non-search from search — a crossing that could prove fatal to the investigation. This state of affairs is unsettling in that it promotes neither police efficiency nor individual privacy." See Clifford S.

Supreme Court has attempted the difficult task of giving clear meaning to complex legal doctrines.[131] For example, in *R. v. Starr*,[132] the Court struggled to define the amorphous concept of proof beyond a reasonable doubt. Justice Iacobucci wrote: "The trial judge told the jury that they could convict on the basis of *something less than absolute certainty of guilt, but did not explain, in essence, how much less.*"[133] The Court went on to define proof beyond a reasonable doubt as much closer to absolute certainty than proof on a balance of probabilities.[134] With respect to biographical information and intimate details, the Court should attempt to define a cogency threshold that will make a reasonable expectation of privacy a likely proposition.[135] Because the reasonable expectation of privacy threshold is the point at which any judicial oversight commences, that threshold should be a low one.[136]

Aside from his contextual analysis, the fashion in which Binnie J. framed the issue in *Tessling* lends itself to misinterpretation. He wrote:

> Thus it was in 1763 that in a speech before the British Parliament, William Pitt (the Elder) famously extolled the right of everyone to exclude from his private domain the forces of the King.... *It is perhaps a long spiritual journey from Pitt's ringing pronouncements to the respondent's attempt to shelter a marijuana grow-op in the basement of his home.*[137]

A strict reading of this statement could lead law enforcement authorities and future courts to conclude that the Supreme Court has abandoned the principle that s. 8 claims must be framed neutrally.[138] Looking to what is ultimately recovered during an alleged search can have the effect of validating excessively intrusive state conduct after the fact. Section 8 of the *Charter* does not read: only law-abiding citizens have the right to be secure against unreasonable search or seizure. Thus, in the future, the Supreme Court must be careful to ensure that the language it uses provides clear guidelines for law enforcement authorities and future jurists assessing *Charter* claims. I contend that to avoid confusion about this fundamental principle, the Court should commence all s. 8 judgments by clearly framing the issue neutrally.

There are also persuasive reasons for a neutral examination of all s. 8 claims. In the United States, courts have been reluctant to frame search and seizure claims neutrally, the most

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Fishman, "Technologically Enhanced Visual Surveillance and the Fourth Amendment: Sophistication, Availability and the Expectation of Privacy" (1988) 26 Am. Crim. L. Rev. 315 at 332.

131 Another example would be the "air of reality" test that is used by trial judges when they are assessing whether to leave a defence with the jury. See *R. v. Fontaine*, 2004 SCC 27, [2004] 1 S.C.R. 702.

132 2000 SCC 40, [2000] 2 S.C.R. 144.

133 *Ibid.* at para. 239 [emphasis added].

134 *Ibid.* at para. 242.

135 American author Ric Simmons has discussed this problem in relation to searches in the American context: "precedents implicitly assume (whether correctly or not) 100% accuracy from the ... search in question, they provide little guidance about analyzing cases in which the accuracy of the device might be less than perfect.... What percentage of accuracy is necessary to survive constitutional scrutiny (95%? 99%?) is a difficult question." See Simmons, *supra* note 106 at 1355-56 [footnotes omitted].

136 Steve Coughlan, "Privacy Goes to the Dogs" (2006) 40 C.R. (6th) 31 at 35.

137 *Supra* note 3 at paras. 14-15 [emphasis added].

138 Don 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 256ff.

recent example being the case of *Illinois v. Caballes*,[139] which featured a dog sniff that yielded convincing evidence of the presence of contraband in the vehicle of Mr. Caballes. Justice Stevens wrote that "a dog sniff... that reveals no information other than the location of a substance that *no individual has any right to possess does not violate the Fourth Amendment*."[140] Justice Stevens's analysis fails to take account of the fact that the Fourth Amendment was, like s. 8 of the Canadian *Charter*, drafted neutrally.[141] If the American framers wanted only law-abiding citizens to enjoy the right enshrined in the Fourth Amendment, they should have made this clear in the way they drafted the Constitution. It is remarkable that in *Kyllo* the U.S. Supreme Court looked to framers' intent to assess the intrusiveness of a technological instrument that did not exist in the eighteenth century; yet, in *Caballes*, the majority did not acknowledge that the framers drafted the Fourth Amendment neutrally so as to protect all individuals from unreasonable search or seizure. Whatever the explanation for the confusion of American jurists about the Fourth Amendment, Canadian courts must be careful to ensure that the principle of neutrality enunciated by La Forest J. in *Wong* is upheld and that the *Charter*'s protection is available to all individuals.[142]

The *Caballes* authority ignores the fact that sniffer dogs will, at least in some cases, incorrectly alert to the presence of contraband.[143] For example, paper currency that has been in circulation can, unbeknownst to the current holder, come into contact with prohibited substances. If such currency is contained in a bag that is the subject of a dog sniff, the result can be a false signal and, as a result, an intrusive search of a private area. Thus, the *Caballes* authority leaves state actors with a troubling incentive: use intrusive sense-enhancing aids. If your suspicions are correct and contraband is discovered, the intrusion is justified.[144] And if contraband is not present, the privacy loss is suffered by others. When taken to its logical conclusion, *post hoc* analyses can defend almost all state intrusions with the result that the value of a reasonable expectation of privacy is diminished.[145] Thus, it can be argued persuasively that the *Wong* principle of neutrality is fundamental to s. 8 protection.

In the end, the Supreme Court of Canada overturned the Ontario Court of Appeal's judgment and ruled that Tessling did not enjoy a reasonable expectation of privacy in the heat emanations from his home. This conclusion is a reflection of the emphasis the Supreme Court placed on the limitations of FLIR technology. As discussed at length, the FLIR scan provided extremely limited information about Tessling's private activities.

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139 125 S. Ct. 834 (2005) [*Caballes*].

140 *Ibid.* at 838 [emphasis added].

141 James J. Tomkovicz, "Technology and the Threshold of the Fourth Amendment: A Tale of Two Futures" (2002) 72 Miss. L.J. 317 at 389.

142 *Supra* note 40 at 50.

143 Cecil J. Hunt, II, "Calling in the Dogs: Suspicionless Sniff Searches and Reasonable Expectations of Privacy" (2005) 56 Case W. Res. L. Rev. 285 at 315.

144 Joshua B. Adams, J.D., "Search and Sniff: What's Left of the Fourth Amendment after *Illinois v. Caballes*?" (2006) 32 New Eng. J. on Crim. & Civ. Confinement 185 at 196.

145 Amanda S. Froh, "Rethinking Canine Sniffs: The Impact of *Kyllo v. United States*," Case Comment, (2002) 26 Seattle U.L. Rev. 337 at 356.

The judgment of the Supreme Court in *Tessling* has its strengths. Justice Binnie's "totality of the circumstances" test cleverly allowed the Court to assess Tessling's claim without allowing less significant factors to be determinative of the case. There were a number of reasons for finding a reasonable expectation of privacy: the information had not been disclosed to any third parties; the FLIR scan was conducted at Tessling's residence and the heat emanations had not been abandoned. The Court's decision to assess these factors within the broader context of the limited information acquired by FLIR seems sensible. It was also prudent for the Supreme Court to distance itself from the American public use doctrine as well as American courts' excessive emphasis on the presence of a subjective expectation of privacy.

But the case-by-case approach adopted by the Supreme Court of Canada means that there exists tremendous uncertainty about the state of s. 8 jurisprudence. A careful reading of the judgment leaves the impression that the Court does not place significant emphasis on the goal of preventing unjustified state intrusions before they occur. The Court does not appear to understand that a *post hoc* analysis is fundamentally at odds with protecting privacy. Furthermore, the lack of clarity in the judgment means that s. 8 claims will have to be carefully analyzed by courts on a case-by-case basis, a reality that will continue to place heavy demands on the Canadian judiciary. In my opinion, after examining the Supreme Court's judgment in great detail, it becomes clear that its case-by-case approach to s. 8 constitutes the problem in *Tessling*. I contend that when the Court hears *Brown* and *A.M.*, it should re-assess the wisdom of this case-by-case model and elect to return to the *Hunter* approach by articulating broad principles to sensibly guide law enforcement and courts in the years to come.

V. *BROWN*, *A.M.* AND THE CHANCE TO SET THINGS RIGHT

On 25 January 2002, police officers were patrolling the Greyhound bus terminal in Calgary as part of the so-called "Jetway project." This project, spearheaded by the Royal Canadian Mounted Police (RCMP), was designed to monitor the "travelling public in airports and bus and train stations"[146] so as to apprehend individuals responsible for perpetrating criminal offences. The project was, at the time, a national program "carried on in a number of cities from coast to coast."[147]

At about 11:00 a.m., RCMP officers were observing passengers as they disembarked the overnight bus that came from Vancouver and arrived in Calgary. As passengers came down the stairs, Mr. Kang-Brown emerged from the bus. Shortly afterward an RCMP officer became interested in Kang-Brown because of his nervous demeanor. The officer later said that his training led him to identify suspicious behavioural indicia manifested by Kang-Brown as he entered the bus terminal.[148] In order to make contact with Kang-Brown, the officer engaged him in small talk about his travel plans and the nature of his luggage.[149] At one point in the conversation, the officer asked Kang-Brown whether it would be okay for

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146 *R. v. Kang-Brown (G.)* 2005 ABQB 608, 386 A.R. 48 at para. 2 [*Brown* (Q.B.)].

147 *Ibid.*

148 *Ibid.* at paras. 5-14.

149 *Ibid.* at paras. 16-21.

him to "show me what you're traveling with?"[150] It was at this time that Kang-Brown became nervous and the officer signaled for Chevy, a police dog, to be brought over to sniff his luggage. After the dog made a "passive indication" of the presence of contraband, Kang-Brown was arrested for possession of and/or trafficking a controlled substance; the contents of his bag were examined and police found a box at the bottom containing roughly 17 ounces of cocaine.[151] The evidence indicated that when the police dog signaled for contraband he was correct 90 percent to 92 percent of the time.[152]

At trial, Kang-Brown contended that the actions of the police dog constituted an unconstitutional search contrary to s. 8. In her detailed reasons, Romaine J., of the Alberta Court of Queen's Bench, ruled that Kang-Brown was not the victim of an unconstitutional search. The *Tessling* precedent formed a crucial component of her decision. Justice Romaine applied the "totality of the circumstances" test articulated by Binnie J. in *Tessling* and opined that the only significant difference between the facts in *Tessling* and those in *Brown* was "in the reliability of the information detected by the investigative tool."[153]

Despite the fact that the dog sniff in *Brown* revealed much more cogent information about the private area, Romaine J. insisted that Kang-Brown did not enjoy a reasonable expectation of privacy in the emanations from his luggage:

> [One must] ask whether *the Supreme Court would have come to a different conclusion [or perhaps the same conclusion] in* Tessling *if FLIR imaging allowed the police to draw a more reliable inference that the heat emanations were the result of a drug grow operation....* [D]etails such as an individual's political views, sexual orientation, religious beliefs or even, as the court suggests in *Tessling*, innocent activities such as taking a bath or using lights at unusual hours [constitute protected information pursuant to s. 8]. This is all personal information that individuals in this society are clearly entitled to protect from the control and scrutiny of the state.[154]

This statement ignores the fundamental principle that all s. 8 claims are to be framed neutrally. The casual language used by Binnie J. in *Tessling* was clearly construed as the Supreme Court's renunciation of the *Wong* precedent. This is a respect in which *Tessling* failed to give the appropriate guidance to law enforcement and future courts.

In the end, Romaine J. ruled that "the odour emanating from Mr. Kang-Brown's bag, which he voluntarily brought into a public transportation facility, was not information in which he had a reasonable expectation of privacy."[155] Disappointed with this outcome, Kang-Brown appealed to the Alberta Court of Appeal.

In a cryptic judgment, the Alberta Court of Appeal upheld the finding of the trial judge with respect to the alleged infringement of s. 8. The Court began by reasoning correctly that

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150 *Ibid.* at para. 19.
151 *Ibid.* at paras. 22-26.
152 *Brown* (C.A.), *supra* note 4 at para. 24.
153 *Brown* (Q.B.), *supra* note 146 at para. 72.
154 *Ibid.* at para. 73 [emphasis added].
155 *Ibid.* at para. 74.

there was "no binding authority compelling either a conclusion that there was a s. 8 search here, nor a conclusion that there was no s. 8 search here."[156] With this backdrop in mind, the Court began examining the police dog's ability to detect only contraband:

> 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.... *Had the appellant had none of the 9 illegal drugs*, the dog sniff would have had no effect. Innocent items such as medicine, food or perfume, even illegal money or burglary tools or smuggled cigarettes or guns, would have gone undetected. Non-drug odors are a red-herring here, in my view.[157]

In this passage, the Court ignored *Wong* and appears to have adopted Romaine J.'s perspective that the Supreme Court, in *Tessling*, renounced the *Wong* precedent. While it is unlikely that Binnie J. intended this outcome, it serves as an important reminder of the need to author judgments carefully so that clear guidance about s. 8 is provided. I contend that the imprecise language used by Binnie J. is a reflection of his case-by-case mindset. Because he felt he was only disposing of Tessling's appeal, he was not mindful of the way his words would be interpreted by future jurists. Whatever the explanation, the Court's failure to frame the s. 8 claim neutrally in the *Tessling* judgment is a major problem in the jurisprudence that must be corrected in *Brown* and *A.M.* To do this, the Supreme Court should make it clear that all s. 8 judgments are to begin with the neutral framing of the claim so that all will enjoy the *Charter*'s rights and freedoms.

As indicated previously, false positives may come from sniffer dogs and can lead to incursions upon personal privacy. In *Brown*, the evidence indicated that the dog was wrong eight to ten percent of the time, an error rate that is not trivial. Thus, the Alberta Court of Appeal erred in advancing a test that focused exclusively on the suspect's expectation of privacy in contraband.

Another interesting aspect of the Court of Appeal's judgment in *Brown* is the lack of emphasis on the quality of the information gleaned by the police dog. The evidence before the Court indicated that the animal was capable of detecting contraband "90% to 92%" of the time.[158] This statistic means that the dog sniff in *Brown* provided much more cogent information about the contents of a private area than did the FLIR scan in *Tessling*; yet, remarkably, this reality was of little consequence to the Court's disposition of the case. This speaks to the need for the Supreme Court to attempt to give clearer guidance about how significant private information must be before a reasonable expectation of privacy will likely be found. As discussed, trying to identify the point at which meaningless information gives way to meaningful intimate knowledge will not be easy. However, the Court must, with reference to other legal doctrines — such as the "air of reality" test and other principles of proof — attempt to provide greater clarity in this regard. As argued previously, because the

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156 *Brown* (C.A.), *supra* note 4 at para. 26.

157 *Ibid.* at paras. 47-48 [emphasis added].

158 *Ibid.* at para. 24.

reasonable expectation of privacy threshold marks the beginning of judicial oversight, hopefully the bar will be set low.

The other appeal that the Supreme Court will hear along with *Brown* is *A.M.*,[159] another case involving a police dog. In *A.M.*, three police officers attended at St. Patrick's High School in Ontario and, with the use of a police dog, undertook a random search of the school's premises. After entering the gymnasium of the school, the police dog reacted to the backpack of A.M., one of the students; the pack was then searched, and a significant quantity of marijuana and psilocybin was uncovered by the police.[160]

Unlike the Alberta Court of Appeal in *Brown*, the Ontario Court of Appeal in *A.M.* found that the police actions were contrary to s. 8 of the *Charter*.[161] In a sparingly written judgment, Armstrong J.A. drew a parallel to the case of *R. v. Evans*.[162] In *Evans*, the police knocked on the door of a suspect with a view to sniffing for drugs. Although *Evans* involved a human nose and *A.M.* featured a police dog's senses, both revealed personal information about the contents of a private area.

Believing it would lend support to its assertion that there was no reasonable expectation of privacy in the odour emanating from A.M.'s bag, the Crown cited *Tessling*. In concluding that *Tessling* was of little assistance to the Crown, Armstrong J.A. wrote:

> I am not persuaded that the judgment of the Supreme Court of Canada in *Tessling* is supportive of the Crown's position that a dog sniff is not a search. In *Tessling*, the house of the accused was specifically targeted as a result of information that the accused was involved in a marijuana grow operation. I see a significant difference between a plane flying over the exterior of a building (on the basis of information received) and the taking of pictures of heat patterns emanating from the building, and a trained police dog sniffing at the personal effects of an entire student body in a *random* police search.[163]

In essence, the Court of Appeal felt that the presence of other information from the two informants in *Tessling* distinguished the case from *A.M.* This view reflects, no doubt, the concern that sense-enhancing aids can be used randomly without any cause for suspicion against any member of the public. Although I have sympathy for this concern, I will argue in the next part of this article that the regulation of sense-enhancing aids is a role for which Parliament is better suited than the judiciary. In light of the facts of *A.M.*, it would have been better for the Court to distinguish *Tessling* on the basis of the cogency of the information gleaned by the police dog. In *Tessling*, the single sense-enhancing aid revealed little about Tessling's private affairs; in *A.M.*, the police dog was able to detect compelling information about the presence of contraband inside the bag of A.M.

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159 *Supra* note 5.
160 *Ibid.* at paras. 1-2.
161 *Ibid.* at paras. 57-60.
162 [1996] 1 S.C.R. 8 [*Evans*].
163 *Supra* note 5 at para. 47 [emphasis added]. More will be said about the random use of sense-enhancing aids in Part VI, below. It is commendable that Armstrong J.A. discussed the problem.

The facts of *A.M.* and *Brown* speak to the need for the Supreme Court to re-examine and assess the law with respect to abandonment. Just as *Tessling* was unable to prevent heat emanations from leaving his home, A.M. and Kang-Brown were no doubt burdened by their incapacity to stop the escape of odour from their bags. Instead of simply concluding that A.M. and Kang-Brown did not abandon the odour emanations, the Court must attempt to provide some guidance about when an individual abandons items or information.

Above all, the *Brown* and *A.M.* appeals should alert the Supreme Court to the need to address the aggregation of information acquired by sense-enhancing aids. One envisions the possibility of odour detecting sense-enhancing aids being used in conjunction with, say, infrared technology and satellites, to see inside private spaces. While each sense-enhancing aid gleans mundane information, the sum of all the parts is detailed, private knowledge that should be the subject of a reasonable expectation of privacy and, as a result, *Charter* scrutiny. Because *Brown* and *A.M.* are, like *Tessling*, cases that feature sense-enhancing aids, they provide the Supreme Court with the opportunity to provide clear, sensible guidance about this issue of aggregation. As argued previously, improving technology means that a cumulative effect test should be introduced and discussed by the highest Court.

With respect to the result of the *Brown* and *A.M.* appeals, I contend that the Supreme Court should indicate that the use of police dogs will, in most cases, be subject to *Charter* standards. Although the nature of s. 8 claims is such that concrete rules allowing or preventing certain sense-enhancing aids are undesirable, most police dogs have the ability to detect, with considerable precision, information about the presence of certain chemicals inside the bags or luggage of citizens.

The Court should, however, enter an important caveat: a reasonable expectation of privacy will be an unlikely proposition in certain public places where dogs are used to detect the presence of explosives and other chemicals designed to cause mass casualties. The terrorist attacks in the United States, Madrid, and London all provide a sobering reminder of the need for a reduced privacy expectation in high security areas such as airports and other mass transportation facilities.[164] Thus, the Court should go beyond the facts of *Brown* and *A.M.* to discuss the important differences between drug-detecting and bomb-detecting dogs.[165] This is another respect in which important guidance for future jurists and law enforcement would be helpful.

Having said this, the fact that dog sniffs occur in public places should, in most cases, not act as a barrier to the establishment of a reasonable expectation of privacy. One of the primary arguments used by the Alberta Court of Appeal to reject Kang-Brown's claim to a

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[164] See National Commission on Terrorist Attacks Upon the United States, online: 9-11 Commission <http://www.9-11commission.gov>; "Madrid Train Attacks" *BBC News* (14 February 2007), online: BBC News <http://news.bbc.co.uk/2/hi/in_depth/europe/2004/madrid_train_attacks>; "London Attacks" *BBC News* (15 August 2007), online: BBC News <http://www.news.bbc.co.uk/2/hi/in_depth/uk/2005/london_explosions>. For a recent example of the reduced expectation of privacy in high security areas, see "Brown plans new anti-terror laws" *BBC News* (3 June 2007), online: BBC News <http://www.news.bbc.co.uk/2/hi/uk_news/politics/6715885.stm>.

[165] Sherri Davis-Barron, "The Lawful Use of Drug Detector Dogs" (2007) 52 Crim. L.Q. 345 at 384.

reasonable expectation of privacy was the fact that the alleged search occurred in a "public place."[166] In fact, the Court placed such emphasis on this factor that it appears as though it could have been determinative of the case. Courts should exercise caution in allowing such a factor to be decisive in a reasonable expectation of privacy analysis.[167] Although individuals enjoy a particularly heightened privacy expectation in their homes, it is also quite clear that many of our most intimate and important interactions occur in public.[168] Furthermore, people must often transport items that are kept in deeply private places like homes.[169] This necessarily involves taking items in luggage through public venues.

Earlier in this article I contended that the *Edwards* criteria have an unfortunate impact on the reasonable expectation of privacy analysis. As argued, *Edwards*'s focus on property rights as a barometer of one's privacy expectation has an adverse impact on the economically disadvantaged. The Supreme Court would only perpetuate the *Edwards* problem by insisting that Kang-Brown could not claim a reasonable expectation of privacy because the dog sniff occurred in public. This would pave the way for an even greater reduction in the privacy rights of the poor. For example, homeless persons who have no choice but to walk the streets with their bags would be treated like second-class citizens because they cannot take refuge in a home that they own. Thus, the location of the alleged search must often be assessed within the broader context of the cogency of the information gleaned by the sense-enhancing aid or aids.[170] This seems most in line with *Hunter*'s fundamental goal of protecting the privacy rights of people, not places.

VI. A ROLE FOR PARLIAMENT?

Coughlin and Gorbet have argued that Parliament should introduce a warrant requirement for the use of FLIR-like technology based on "reasonable suspicion."[171] The authors charge

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166 *Brown* (C.A.), *supra* note 4 at para. 81.

167 David E. Steinberg, "Making Sense of Sense-Enhanced Searches" (1990) 74 Minn L. R. 563 at 578.

168 Raymond Shih Kay Ku, "The Founders' Privacy: The Fourth Amendment and the Power of Technological Surveillance" (2002) 86 Minn. L. Rev. 1325 at 1354.

169 Tomkovicz, *supra* note 141 at 434.

170 As discussed, although the location of an alleged search should generally not be determinative in a contextual analysis, there will be exceptions. For instance, nobody would dispute that the sniffer dogs that operate in airports and are trained to detect bombs do not infringe on a reasonable expectation of privacy. See Stuart, *supra* note 138 at 258.

171 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. The nature of the information that will satisfy the higher standard of reasonable and probable grounds was discussed in *R. v. Debot*, [1989] 2 S.C.R. 1140. That case addressed a warrantless search of the person yielding contraband, and the majority judgment of Wilson J. stated that the "totality of the circumstances" must be examined to assess whether there were reasonable and probable grounds to undertake the search (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 statutory standard of reasonable and probable grounds. With respect to the lower standard, reasonable suspicion, there have been a number of cases that have addressed the kind of information that will satisfy this threshold: in *Florida v. J.L.* 529 U.S. 266 (2006), the U.S. Supreme Court ruled that an anonymous tip from an unknown caller that an individual was carrying a concealed firearm did not satisfy the reasonable suspicion threshold required to undertake a search; in *Mann*, *supra* note 11, the majority judgment of Iacobucci J. for the Supreme Court of Canada found reasonable suspicion justifying further investigation where a person closely matching a radio

that it is odious that state actors may use FLIR-like sense-enhancing aids "freely and indiscriminately" to target whomever they wish whenever they wish.[172] A warrant requirement, they argue, would ensure some regulation of sense-enhancing aids such that they could only be used when there is reason to suspect illicit conduct, a reform designed to prevent instruments like FLIR from serving as the impetus for further investigation.[173]

I contend that Parliament should consider such a reform.[174] The FLIR scan in *Tessling* did not reveal intimate details, but if carried out prior to the information being received from the two informants, it could have fueled suspicions about what was going on inside Tessling's home. At present, state actors are able to use FLIR wherever they want and whenever they wish. This means that police can fly over poor neighbourhoods or, say, parts of an urban area that are occupied by racial minority groups that are statistically more likely to indulge in marijuana production. Professor Steinberg has described the problem vividly: "Police may use these techniques in high-crime areas to engage in a virtual fishing expedition, observing everyone who wanders into the wide net cast by the sense-enhanced search."[175]

The random quality of sense-enhanced police surveillance was also alluded to by Armstrong J.A. in *A.M.* and by Professor Renke in relation to data mining.[176] The suggestions contained in this article — the cumulative effect test and a greater definition of when a single sense-enhancing aid reveals private information, to name a few — will prevent state actors from aggregating information or using powerful sense-enhanced surveillance technology to acquire a warrant. However, it falls to Parliament to ensure that these instruments are not used in a clandestine fashion to alert state actors to the need for further investigation. It is open to Parliament to provide greater rights protection than that available under the minimum standards of the *Charter*. Thus, there is merit to the suggestion that legislation should be used to prevent improving technology from threatening privacy rights.

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dispatch description of the suspect was found in close proximity to the scene; 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. The information did, however, provide reasonable suspicion meriting further investigation.

172 Coughlan & Gorbet, *ibid.* at 243.

173 *Ibid.* at 241.

174 In *R. v. Wise*, [1992] 1 S.C.R. 527 [*Wise*], the Supreme Court discussed the possibility of Parliament implementing a lower threshold for technological surveillance used to monitor vehicles. The Court discussed possibilities such as a "solid ground" for suspicion as the basis for obtaining authorization from an independent authority to use a vehicular tracking device (at 549). Not only has the possibility of Parliamentary regulation been contemplated, it has in fact occurred. For example, s. 492.2(1) of the *Criminal Code*, R.S.C. 1985, c. C-46, allows for a warrant to be issued for the use of a number recorder when information provided on oath satisfies a justice that there are "reasonable grounds to suspect that an offence under this or any other Act of Parliament has been or will be committed, and that information that would assist in the investigation of the offence could be obtained through the use of a number recorder." It should be noted, however, that in *R. v. Nguyen*, 2004 BCSC 76, C.R. (6th) 151 at para. 30, the reasoning in *Wise* could not be extended to justify s. 492.2(1) because the higher *Hunter* standard applied. Furthermore, the Crown did not make the case that, pursuant to s. 1 of the *Charter*, s. 492.2 of the *Criminal Code* constituted a reasonable limit on Nguyen's s. 8 *Charter* rights (at para. 31). Consequently, the *Hunter* standard of reasonable and probable grounds was read into s. 492.2 of the *Criminal Code*.

175 Steinberg, *supra* note 167 at 619.

176 *A.M.*, *supra* note 5 at para. 47; Renke, *supra* note 114 at 795.

Another reason for Parliament to regulate sense-enhancing aids by legislation is that the legislative branch of government is in a better position to assess technological developments as they emerge.[177] For instance, the procedural aspect of judicial decision making means that legislators have an advantage in their capacity to provide principles that keep pace with current realities.[178] Professor Kerr writes:

> Legislative rules tend to be the product of a wide range of inputs, ranging from legislative hearings and poll results to interest group advocacy and backroom compromises.... *The task of generating balanced and nuanced rules requires a comprehensive understanding of technological facts. Legislatures are well-equipped to develop such understandings; courts generally are not.*[179]

In sum, to prevent the arbitrary use of sense-enhancing aids and to contribute a knowledgeable, educated perspective on sense-enhancing methods, Parliament should consider legislation governing the use of these instruments. Hopefully the *Brown* and *A.M.* appeals will alert Parliament to the need to at least examine the possibility of legislative regulation.

VII. CONCLUSION

Because the *Tessling* judgment addresses the state's use of sense-enhancing aids, it is the source of considerable debate. Detractors of the judgment fear it will automatically pave the way for unregulated state scrutiny of the private communications and activities of citizens. My concern is related, though distinct. I fear that an approach that emphasizes case-by-case analyses at the expense of a principle-focused discussion will not provide sufficient clarity in framing the right enshrined in s. 8. The fact that we live in an information age that features frequent technological advances has only intensified the criticism of the *Tessling* precedent. Ultimately, this much is clear: reconciling the state's desire to use sense-enhancing aids with individual privacy will be among the greatest challenges facing the Supreme Court of Canada in the twenty-first century. Justice La Forest eloquently shed light on the extent of this challenge:

> [I]f the state were free, at its sole discretion, to make permanent electronic recordings of our private communications, there would be no meaningful residuum to our right to live our lives free from surveillance...A society which exposed us, at the whim of the state, to the risk of having a permanent electronic recording made of our words every time we opened our mouths might be superbly equipped to fight crime, *but would be one in which privacy no longer had any meaning.*[180]

This article is not designed to be a critique of the Supreme Court's ultimate disposition of Tessling's appeal. On the facts that were before the Court, the result was the correct one. In assessing Tessling's claim to a reasonable expectation of privacy, the Court deduced correctly that the information obtained in the FLIR flyover was sufficiently mundane that s.

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177 Orin S. Kerr, "The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution" (2004) 102 Mich. L. Rev. 801 at 850.

178 *Ibid.* at 871.

179 *Ibid.* at 875 [emphasis added].

180 *R. v. Duarte*, [1990] 1 S.C.R. 30 at 44 [emphasis added].

8 protection should not be afforded. Furthermore, as argued, Binnie J. sensibly examined other factors militating in favour of Tessling's claim within the broader context of the limited knowledge acquired by the FLIR. For these reasons and a few others, the Court's "totality of the circumstances" analysis, tailored uniquely to the facts before it, produced the correct outcome in the appeal.

But providing for meaningful protection of the privacy right at the core of s. 8 is a more complicated task than the Court recognized in *Tessling*. A case-by-case approach to resolving s. 8 claims has a number of unfortunate consequences. For instance, as discussed, the Court's goal, as articulated in *Hunter*, of preventing unjustified state searches before they occur will, tragically, be undermined. The corollary of this is clear, and unfortunate: the next claimant who is successful in a s. 8 claim featuring a similar sense-enhancing aid or aids may have difficulty obtaining a remedy pursuant to s. 24(2). Even if a remedy is obtained, the matter will have to be litigated, a result that will drain the resources of the judiciary.

These consequences seem minor when one examines the most troubling aspect of the *Tessling* legacy: its ramifications for individual privacy. The Supreme Court's failure to provide guidance about the reach of s. 8 protection will mean that violations of s. 8 will unnecessarily occur because state actors are not given enough information about the parameters of their power. While claimants may be successful in challenging infringements, potentially embarrassing private information will already have been exposed to the state. Thus, a *post hoc* case-by-case analysis is fundamentally at odds with the protection of individual privacy.

Developing a special formula for assessing all s. 8 claims involving sense-enhancing aids would be impossible. That these cases are so heavily influenced by their facts is one of the reasons courts are so frequently called upon to serve as arbiters of s. 8 disputes. Thus, admittedly, Binnie J. was right to reason that cataloguing technological developments as either constitutional or unconstitutional is not a realistic approach to this area of the law. But the Court can give much clearer guidance to state actors about the use of sense-enhancing aids. The problematic nature of the Alberta Court of Appeal's judgment in *Brown* is undoubtedly partly attributable to the shortcomings of *Tessling*.

Although courts can articulate clearer constitutional minimum standards, they cannot regulate the use of technology. A cumulative effect test may place important checks on how the state acquires evidence that it seeks to adduce in Court, but it will not prevent it from randomly monitoring its citizens' private lives. Justice Armstrong, in *A.M.*, wisely identified the randomness with which sense-enhancing aids can be used as cause for concern. I have contended that Parliament is well equipped to conduct the research and consultation that will be required to regulate the use of sense-enhancing aids in the future. Thus, the courts can do their part, but they are not the only institution that can balance technology, law enforcement, and privacy in the twenty-first century.

I have contended that the Supreme Court of Canada should find that dog sniffs will often infringe on a reasonable expectation of privacy depending on the quality of the information they can deliver. I have also argued that some of the troubling reasons provided by the Alberta Court of Appeal in *Brown* require re-examination. But most importantly, when the

Supreme Court of Canada releases its judgment in *Brown* and *A.M.*, one can only hope that it will have abandoned the case-by-case approach to search and seizure cases. A purposive approach to s. 8 that maintains a sound balance between law enforcement and privacy will require nothing less.