

**IN THE SUPREME COURT OF CANADA**  
(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

BETWEEN:

**RUSSELL STEPHEN PATRICK**

Appellant  
(Appellant)

- and -

**HER MAJESTY THE QUEEN**

Respondent  
(Respondent)

- and -

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## **PART I – STATEMENT OF FACTS**

### **Introduction**

1. This is an appeal from conviction for drug offences arising from the discovery of an “ecstasy” lab in a house. The trial turned on a s. 8 *Charter* challenge as to the admissibility of evidence found by the police in garbage bags that the Appellant had put out for collection. That evidence formed the grounds for a warrant to search the house. The Intervener supports the Respondent’s position that the evidence was admissible. The garbage constituted abandoned goods, there was no evidence of a subjective expectation of privacy, such an expectation would have been unreasonable, and seizure of the bags did not constitute a s. 8 *Charter* breach.

2. The Intervener further submits that there was no basis, on this record, for finding a s. 8 *Charter* breach and excluding the evidence of the garbage searches. First, because the Appellant elected not to testify on this issue, there was no direct evidence of a subjective expectation of privacy by the Appellant and no evidence from which such an expectation could be inferred. Second, it was not appropriate to presume an expectation of privacy in these circumstances. Third, the trial judge made an express finding of fact that the garbage, put out for collection, had been abandoned by the Appellant. That finding was reasonable, it was supported by the evidence, it was not open to appellate review, and it precluded a s. 8 *Charter* breach.

### **Overview of the Circumstances**

3. The Intervener adopts the Respondent’s statement of facts but wishes to emphasize certain aspects of the judicial history. The trial was contested solely on the *voir dire* issues concerning the admissibility of the evidence obtained in the execution of the search warrant. The Appellant alleged *Charter* breaches of ss. 8 and 10(b) by the police in: (a) taking the garbage bags he had left by the alley for collection; (b) the unreasonable execution of the search warrant of his house; and, (c) denying him his right to counsel on arrest. The Appellant testified in the *voir dire*, but limited his testimony to the execution of the search warrant and the access to counsel. The Appellant chose not to give any direct evidence regarding his conduct and expectations concerning the garbage bags. The Appellant provided no evidence of a subjective expectation of privacy, and no evidence of objective circumstances indicating that he was

maintaining a privacy interest in the bags of garbage after putting them out for collection. The trial judge found as a fact that the Appellant had clearly abandoned the bags of garbage. He held that if the Appellant had a presumed subjective expectation of privacy, he had “*clearly waived that expectation by placing the garbage where he did and abandoning it.*”<sup>1</sup> The trial judge further held that, even if he were wrong about the Appellant giving up that subjective expectation, that expectation of privacy was unreasonable based on the “totality of the circumstances test” outlined in *R. v. Tessling*.<sup>2</sup> The trial judge concluded the Appellant had not proven that there was a search and seizure protected by s. 8 of the *Charter*.<sup>3</sup> The other *Charter* challenges were also rejected and the evidence was admitted.

4. In the Alberta Court of Appeal the majority agreed with the trial judge’s ruling that the Appellant had abandoned any privacy interest he had in the contents of the garbage bags when he put them out for collection. They declined to address s. 24(2). The dissenting judgment of Conrad J.A. found that the Appellant had a reasonable expectation of “territorial privacy”, meaning his house, yard, and all within it. In the alternative, she found a reasonable expectation of “informational privacy” because he put his garbage in opaque bags and expected that the collectors would render it anonymous when mixed with other garbage. On either theory she concluded that the Appellant had not abandoned his garbage. On the s. 24(2) issue, Conrad J.A. held that the evidence should be excluded. She found both breaches serious, the territorial privacy breach because the police knew they were not permitted to trespass, and the informational privacy breach because garbage can contain intimate personal information, even though there was no evidence of any intimate personal information of the Appellant’s in the garbage bags in question.<sup>4</sup>

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<sup>1</sup> Record of the Appellant (hereafter R.A.), p. 14/para. 39

<sup>2</sup> R.A., p. 16/para. 47

<sup>3</sup> R.A., p. 17/para. 49

<sup>4</sup> R.A., p. 47/para. 44, p. 49/para. 52, p. 52/paras. 58-62

## **PART II – QUESTIONS IN ISSUE**

**5. The Appellant states the Questions in Issue as:**

- A. *Whether the Police breached the Appellant's s. 8 Charter protected right to be free from unreasonable search and seizure. Specifically:*
  - a. *Whether the Appellant had a reasonable expectation of territorial privacy with respect to his dwelling-house, its perimeter, and the garbage bags stored thereon; and*
  - b. *Whether the Appellant had a reasonable expectation of informational privacy with respect to the garbage bags and the information stored therein.*
- B. *If the police breached the Appellant's s. 8 Charter right, whether the evidence seized by the police from the search of the Appellant's dwelling-house should be excluded pursuant to s. 24(2) of the Charter.*

**6. The Intervener's Position is that:**

- (a) Garbage bags put out for collection are abandoned, and therefore could not invoke the search and seizure considerations of s. 8 of the *Charter* ;
- (b) The Appellant failed to prove he had a reasonable expectation of privacy in the garbage; and
- (c) The dissenting appellate court judge was not entitled to substitute her findings of fact for those of the trial judge.

## **PART III – ARGUMENT**

### **Abandonment – No s. 8 Charter Considerations**

#### **Introduction**

7. This appeal should be decided on the general proposition that garbage put out for collection has been abandoned and can not be subject to the protection of s. 8 of the *Charter*. The finding of abandonment was a finding of fact by the trial judge, based on the evidence. An appellate court is not entitled to substitute its view of the evidence for that of the trial judge unless the trial judge has made a material error in his analysis. The Intervener's position is that there were no errors committed by the trial judge and the conclusion he reached was not only reasonable, but also inevitable given the Appellant's failure to prove a reasonable expectation of privacy in his discarded garbage.

8. In ***R. v. Edwards***<sup>5</sup> this court endorsed the following principles:

1. *A claim for relief under s. 24(2) can only be made by the person whose Charter rights have been infringed. See **R. v. Rahey**, [1987] 1 S.C.R. 588, at p. 619.*
2. *Like all Charter rights, s. 8 is a personal right. It protects people and not places. See **Hunter v. Southan Inc.**, supra.*
3. *The right to challenge the legality of a search depends upon the accused establishing that his personal rights to privacy have been violated. See **Pugliese**, supra.*
4. *As a general rule, two distinct inquiries must be made in relation to s. 8. First, has the accused a reasonable expectation of privacy. Second, if he has such an expectation, was the search by the police conducted reasonable. See **Rawlings**, supra.*
5. *A reasonable expectation of privacy is to be determined on the basis of the totality of the circumstances. See **Colarusso**, supra, at p. 54, and **Wong**, supra, at p. 62.*
6. *The factors to be considered in assessing the totality of the circumstances may include, but are not restricted to, the following:*
  - (i) *presence at the time of the search;*
  - (ii) *possession or control of the property or place searched;*
  - (iii) *ownership of the property or place;*
  - (iv) *historical use of the property or item;*
  - (v) *the ability to regulate access, including the right to admit or exclude others from the place;*
  - (vi) *the*

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<sup>5</sup> ***R. v. Edwards*** [1996] 1 S.C.R. 128 at para. 45 (TAB 28 Respondent Authorities)



*existence of a subjective expectation of privacy; and (vii) the objective reasonableness of the expectation.*

See *United State v. Gomez*, 16 F.3d 254 (8th Cir. 1994) at p. 256.

7. *If an accused person establishes a reasonable expectation of privacy, the inquiry must proceed to the second stage to determine whether the search was conducted in a reasonable manner.*

9. In *R. v. Tessling*<sup>6</sup> this court applied the *Edwards* principles to a heat imaging surveillance (Forward Looking Infrared, FLIR) of a house taken from an airplane. In deciding whether the accused had a reasonable expectation of privacy in the heat that was radiating out of his house, the court indicated that the following questions should be addressed:

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?*
4. *If so, was the expectation objectively reasonable? In this respect, regard must be had to:*
  - a. *the place where the alleged “search” occurred;*
  - b. *whether the subject matter was in public view;*
  - c. *whether the subject matter had been **abandoned**;*
  - d. *whether the information was already in the hands of third parties; if so, was it subject to an obligation of confidentiality?*
  - e. *whether the **police technique was intrusive** in relation to the privacy interest;*
  - f. *whether the use of surveillance technology was itself objectively unreasonable;*
  - g. *whether the FLIR heat profile exposed **any intimate details** of the respondent’s lifestyle, or information of a biographical nature.*  
[emphasis added]

### The Finding of Abandonment

10. In this case the trial judge applied the “totality of the circumstances test” from *Edwards supra* and the factors listed therein, as well as the criteria specified in *Tessling supra*,<sup>7</sup> as listed above. The Appellant testified, but presented no direct evidence of a subjective expectation of

<sup>6</sup> *R. v. Tessling* [2004] 3 S.C.R. 432 at para. 32 (TAB 93 Respondent Authorities)

<sup>7</sup> R.A. pp. 9-17

privacy. The trial judge presumed such an expectation, for the sake of the analysis, but found that the evidence of abandonment meant the Appellant had waived that expectation. The trial judge also found that such an expectation was unreasonable in the circumstances.<sup>8</sup> In arriving at his conclusions, the trial judge considered not only the fact of abandonment but all of the circumstances.

11. The trial judge's decision was in keeping with the bulk of the case law (which he also considered) that holds garbage put out for collection, whether it is on or off private property, is not subject to s. 8 *Charter* considerations. Where the garbage was left on the public sidewalk for collection, it is abandoned.<sup>9</sup> Where it is unclear whether the garbage was still on private property, as in the case of a garbage bin outside an apartment complex, the garbage was still considered abandoned.<sup>10</sup> Even where the police had removed the garbage from the perimeter of private property, there was no breach of s. 8 because that garbage was also abandoned and the trespass was slight and technical (police step a couple of feet across property line),<sup>11</sup> or no trespass at all (inside property line, but adjacent to the rear lane).<sup>12</sup> This is also in keeping with the majority judgment of the United States Supreme Court in *California v. Greenwood*, holding that there is no constitutional protection for garbage left for collection.<sup>13</sup> Even this court has commented, in the judgment of Sopinka, J. in *R. v. Evans*, that while the "knock and sniff" approach to finding a marijuana grow operation in a house was an illegal perimeter search, the police had other legal means at their disposal, including a search of the accused's garbage.<sup>14</sup>

12. As the trial judge noted, "*location is not the litmus test for determining the expectation of privacy*".<sup>15</sup> Such an approach would lead to absurd results depending on where the container sits in terms of the property line. The police would be faced with the daunting task of having to get ever owner's consent before they can search garbage containers set out for collection in publicly accessible locations, but still on private property. Determining property lines may also prove extremely problematic. As the trial judge suggested, a survey may be the only conclusive method. If the container (bag, can, or bin) belonging to a building complex is on private

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<sup>8</sup> R.A. p. 12/paras. 28-29, p. 14/paras. 38-39, p. 16/para. 47

<sup>9</sup> *R. v. Krist*, (1995) 100 C.C.C. 3d 58 (B.C.C.A.) at paras. 10, 27, 28 (TAB 21 Appellant Authorities)

<sup>10</sup> *R. v. Kennedy* (1996) 95 O.A.C. 321 (C.A.) at paras. 4-5 (TAB 19 Appellant Authorities)

<sup>11</sup> *R. v. Tam* [1993] B.C.J. No. 781 (S.C.) at paras. 3-5 (TAB 23 Appellant Authorities)

<sup>12</sup> *R. v. Taylor* [1984] B.C.J. No. 176 (S.C.) at paras. 36-49 (TAB 24 Appellant Authorities)

<sup>13</sup> *California v. Greenwood* (1988) 486 U.S. 35 (TAB 38 Respondent Authorities)

<sup>14</sup> *R. v. Evans* [1996] 1 S.C.R. 8 at para. 29 (TAB 13 Appellant's Authorities)

property, permission from the landlord or business owner might not be enough. The police might have to get permission from every tenant of the complex or commercial building who uses that container.

13. A test based on location alone could also hinder or frustrate police investigations of other serious crimes like homicides, where incriminating evidence is frequently disposed of in garbage containers on or adjacent to public property. For example, in *R. v. Kinkead* a trial decision of the Ontario Superior Court, the police located a sweatshirt in a search of garbage near the area of three crime scenes, a murder and two sexual assaults. It provided a DNA match of a male that was the same in all three crimes.<sup>16</sup> Another example is *R. v. White*, an Alberta Queen's Bench decision on a domestic homicide in which the accused tried to dispose of his bloodied clothing by putting them in a garbage bag for pick-up in front of his house.<sup>17</sup> In other cases the garbage container becomes a repository not just for evidence, but for the actual remains of the victim. In *R. v. Commanda*, a manslaughter sentencing decision of the Provincial Court of Alberta, the victim's body had been dismembered and his arms were found in a dumpster.<sup>18</sup>

### **Presumptions and the Appellant's Failure to Testify**

14. The *voir dire* ruling in this case could well have been resolved on the simple basis that there was no evidence of a subjective expectation of privacy. The fact that the Appellant chose not to testify on the issue of the garbage should have been enough to defeat his *Charter* challenge, because there was no evidence from which a subjective expectation of privacy could be inferred, let alone shown to be reasonable. The Appellant, as applicant, had the legal burden to prove he held a subjective expectation of privacy that was reasonable in the circumstances.<sup>19</sup> Where an accused not only has the legal burden of proving a particular fact, but is the only one who can give direct evidence relating to that fact, the failure to call evidence should lead to an inference against that party. The inference is that his testimony would not assist his cause. In such circumstances, even if a trial judge does not draw an adverse inference, they are under no obligation to bridge the gap in the applicant's evidence by drawing presumptions in his favour.

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<sup>15</sup> R.A. p. 14/paras. 36-37

<sup>16</sup> *R. v. Kinkead* 1999 Carswell Ont 1320 (S.C.) at para. 32 (TAB 3)

<sup>17</sup> *R. v. White* (2006) 408 A.R. 64 (Q.B.) at para. 9 (TAB 4)

<sup>18</sup> *R. v. Commanda* (2007) 413 A.R. 363 (P.C.) at para. 17-9 (TAB 2)

<sup>19</sup> *R. v. Edwards*, *supra* note 5, at para. 45 (TAB 28 Respondent Authorities)

15. While a presumption may be appropriate in some circumstances, to presume a subjective expectation of privacy in circumstances such as these was unwarranted. The authority relied on for using such a presumption comes from an obiter comment of Binnie J. in *Tessling supra* writing for the court, where he said that “...it may be presumed unless the contrary is shown in a particular case that information about what happens inside the home is regarded by the occupants as private.”<sup>20</sup> This comment, even if it is authoritative obiter, does not entitle an applicant to a similar presumption about everything that emanates from a home. For example, the heat that radiated out of the house in *Tessling* was not entitled to the same presumption of expectant privacy as that which “happens inside the home”. By the same token, things taken out of the house and put out for disposal should not be entitled to that presumption. If an applicant wishes to assert a continuing expectation of privacy in such circumstances, then he or she is obliged to lead evidence, direct or circumstantial, by which a reasonable expectation of privacy might be proven. This not only allows the trier of fact to determine the *Charter* issues in a more relevant factual context (i.e. “totality of the circumstances”), but it also allows the Crown, as respondent, to test the applicant’s evidence through cross-examination and reply.

16. The trial judge in this case did not go so far as to use the presumption to find a subjective expectation of privacy. Rather, he ruled that it would not matter if there had been a subjective expectation of privacy at some stage, because the Appellant had waived it when he abandoned the garbage for pick-up. The trial judge further held that if the Appellant had retained the subjective expectation of privacy after disposing of his garbage, such an expectation would have been unreasonable.<sup>21</sup>

### **Substituted Findings of Fact Unwarranted**

17. Conrad, J.A. took a significantly different view of the evidence from that of the trial judge. In spite of the evidence of earlier surveillance, she characterized the actions by the police in seizing the garbage as based only on suspicion.<sup>22</sup> She disagreed with the finding that the garbage had been abandoned, holding that contrary inferences could be drawn from the evidence. She presumed a subjective expectation of privacy by the Appellant based both on territorial and

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<sup>20</sup> *R. v. Tessling*, *supra* note 6, at para. 38 (TAB 93 Respondent Authorities)

<sup>21</sup> R.A. p. 14/para. 39, p. 16/para. 47

<sup>22</sup> R.A. p. 51/para. 55

informational privacy.<sup>23</sup> She also implicitly disagreed with the finding of good faith, holding that both breaches were serious because the police knew they could not trespass and because garbage can contain intimate personal information, although this did not.<sup>24</sup>

18. The findings that the garbage was abandoned and that the Appellant retained no reasonable expectation of privacy were within the trial judge's discretion to make as the trier of fact. The Appellant had disposed of the garbage by putting it out for collection. There was no evidence that the Appellant controlled access to that garbage or had any intention to retrieve it at some time before it was collected. There was no evidence that it contained any personal information about the Appellant from which an informational expectation of privacy might be inferred. There was no evidence that the Appellant expected his garbage, on collection, to become so mixed with other garbage as to become anonymous or hard to find. Nor was there any evidence that the garbage collection system in Calgary works like a blender that turns sealed garbage bags into a purée of untraceable material. Finally, there was no evidence that the Appellant, in surrendering his garbage to the City collectors, had a subjective expectation of confidentiality or any objective basis for a belief in a resident/garbage-man relationship of confidentiality. On this trial record, such considerations would be speculative and unreasonable. If citizens could reasonably rely on the anonymity of garbage disposal, there would be no need to shred personal records, cut up old credit cards, or obliterate bank account numbers from bills before throwing such materials into the household garbage.

19. Conrad J.A. erred in substituting her view of the evidence for that of the trial judge. A trial judge's findings of fact and credibility are entitled to considerable deference. Provided the evidence is reasonably capable of supporting the trial judge's conclusions, an appellate court judge can not substitute their view of the evidence for that of the trial judge.<sup>25</sup> This trial judge committed no such errors. His findings were not only reasonable and supported by the evidence, but they were also the only logical conclusions to draw from the evidence.

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<sup>23</sup> R.A. p. 58/para. 84, p. 60/para. 87, p. 61/para. 93

<sup>24</sup> R.A. p. 60/para. 88, p. 68/para. 113

<sup>25</sup> **R. v. B. (R.H.) (Burns)** [1994] 1 S.C.R. 656 at para. 15 (TAB 1)

## **PART IV – SUBMISSIONS ON COSTS**

20. The Intervener makes no submissions regarding costs.

## **PART V – ORDER SOUGHT**

21. The Intervener requests permission to present oral argument at the hearing of the appeal.

22. The Intervener requests the following rulings:

- (a) That garbage put out for collection in these circumstances is abandoned and raises no s. 8 *Charter* concerns;
- (b) That in the absence of evidence, a reasonable expectation of privacy can not be inferred or presumed in these circumstances; and
- (c) That the finding of “abandonment” was a reasonable finding of fact not open to review by an appellate court;

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

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GT/aw

## **PART VI - TABLE OF AUTHORITIES**

<b>TAB</b>		<b>Cited at Paragraph No.</b>
1	<i>R. v. B. (R.H.) (Burns)</i> [1994] 1 S.C.R. 656; 1994 CarswellBC 576 at para. 15; 29 C.R. (4th) 113; 165 N.R. 374; 42 B.C.A.C. 161; 67 W.A.C. 161; 89 C.C.C. (3d) 193	19
2	<i>R. v. Commanda</i> , 2007 ABPC 51; 2007 CarswellAlta 196 at para. 17; (2007) 413 A.R. 363	13
*RA38	<i>California v. Greenwood</i> (1988) 486 U.S. 35	11
*RA28	<i>R. v. Edwards</i> [1996] 1 S.C.R. 128 at para. 45	8, 14
*AA13	<i>R. v. Evans</i> [1996] 1 S.C.R. 8 at para. 29	11
*AA19	<i>R. v. Kennedy</i> (1996) 95 O.A.C. 321 (C.A.) at paras. 4-5	11
3	<i>R. v. Kinkead</i> 1999 Carswell Ont 1320 (S.C.) at paras. 16-19, 32	13
*AA21	<i>R. v. Krist</i> , (1995) 100 C.C.C. 3d 58 (B.C.C.A.) at paras. 10, 27, 28	11
*AA23	<i>R. v. Tam</i> [1993] B.C.J. No. 781 (S.C.) at paras. 3-5	11
*AA24	<i>R. v. Taylor</i> [1984] B.C.J. No. 176 (S.C.) at paras. 36-49	11
*RA93	<i>R. v. Tessling</i> , supra note 6, at para. 32 & 38	9, 15
4	<i>R. v. White</i> , 2006 ABQB 909; 2006 CarswellAlta 1735 at para. 9; (2006) 408 A.R. 64	13

\* RA-Respondent Authorities

\* AA-Appellant Authorities

## **PART VII – STATUTE, REGULATION, RULE, ORDINANCE OR BY-LAW**

### **Sections 8, 10(b) and 24(2) of the *Charter***

Search or seizure	<b>8.</b> Everyone has the right to be secure against unreasonable search or seizure.
Arrest or detention	<b>10(b).</b> Everyone has the right on arrest or detention to retain and instruct counsel without delay and to be informed of that right
Exclusion of evidence bringing administration of justice into disrepute	<b>24(2)</b> Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this 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.
Fouilles, perquisitions ou saisies	<b>8.</b> Chacun a droit à la protection contre les fouilles, les perquisitions ou les saisies abusives.
Arrestation ou détention	<b>10(b)</b> Chacun a le droit, en cas d'arrestation ou de détention d'avoir recours sans délai à l'assistance d'un avocat et d'être informé de ce droit;
Irrecevabilité d'éléments de preuve qui risqueraient de déconsidérer l'administration de la justice	<b>24(2)</b> Lorsque, dans une instance visée au paragraphe (1), le tribunal a conclu que des éléments de preuve ont été obtenus dans des conditions qui portent atteinte aux droits ou libertés garantis par la présente charte, ces éléments de preuve sont écartés s'il est établi, eu égard aux circonstances, que leur utilisation est susceptible de déconsidérer l'administration de la justice.