SCC No.31496

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT

AND:

A.M.

RESPONDENT

AND:

ATTORNEY GENERAL OF BRITISH COLUMBIA

INTERVENER

SCC No. 31598

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

BETWEEN:

GURMAKH KANG BROWN

APPELLANT

AND:

HER MAJESTY THE QUEEN

RESPONDENT

AND:

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PART I: STATEMENT OF FACTS:

A. Overview:

1. The Attorney General of British Columbia ("AGBC" hereinafter) intervenes in these appeals following an order made under Rule 59 of the *Rules of the Supreme Court of Canada*.

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2. The cases on appeal raise an issue of fundamental importance under section 8 of the **Canadian Charter of Rights and Freedoms**; namely, the balance to be struck between the individual's right to informational privacy and the countervailing societal interest in safety, security of the public and the prevention of crime.

3. In defining the scope of privacy rights protected by section 8, this Court has recognized three principal forms of privacy: personal, territorial, and informational. Personal privacy protects bodily integrity. As all human activity occurs in "places", some level of territorial privacy is necessarily incidental to achieve the goal of individual integrity, dignity, and autonomy: ***R. v. Tessling***, [2004] 3 S.C.R. 432 at para. [21], [22]. Informational privacy, the section 8 interest at the forefront in these cases, is a term used to describe the right of the individual to determine for him or herself when, how and to what extent "a biographical core of personal information", including "information which tends to reveal intimate details of the lifestyle and personal choices of the individual", may be disclosed. Personal information is information which "individuals in a free and democratic society would wish to maintain and control from dissemination to the state": ***R. v. Plant***, [1993] 3 S.C.R. 281 at p. 293.

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4. To assert an infringement under section 8 on grounds that one's right to informational privacy has been breached by the state, the claimant must demonstrate a reasonable expectation of privacy in respect of the information. It has been said that privacy is "a protean concept, and the difficult issue is where the 'reasonableness' line should be drawn": ***Tessling*** at [25].

5. It is the position of the AGBC that when it comes to informational privacy, a clear line *can* be drawn. British Columbia says that no reasonable expectation of privacy attaches to personal information that is accessible in the public domain through minimally intrusive measures, and over which the individual cannot effectively exercise control or prevent from being discovered. By voluntarily attending in a public place with information that, by its nature, is not subject to individual control, a

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person impliedly accepts the risk that the information will become accessible. At this point, it can no longer be reasonably expected that the information will remain confidential or not be susceptible to observation or detection by others, including the state.

6. For the purpose of section 8 as it relates to informational privacy, defining the threshold for a reasonable expectation of privacy at the point where the individual no longer has the ability to maintain control over the information is a workable standard. It respects the balance between the individual's reasonable expectation that as long as it is kept confidential, his (or her) biographical core of personal information will not be interfered with unless authorized by law. At the same time, it recognizes and takes into account the strong public interest in effective law enforcement through the detection of criminal activity in the public domain. This standard accords with the principles recognized in ***Plant*** that informational privacy relates to information the individual "would wish to *maintain and control* from dissemination", and that the information must be "of a 'personal *and confidential*' nature": ***Plant*** at p. 293.

7. Drawing the line at the point where the individual no longer has the capacity to maintain control over the personal information establishes a practical limit. Incidental to effective crime prevention and investigation, there is a practical need for police agencies to be able to access information, make observations, and to interact with the public without 'averting their senses or equipment from detecting information in the public domain which could identify hazards to the community': ***Tessling***, citing ***Kyllo v. United States***, *infra*. Extending the application of section 8 to information that is not confidential or which the individual cannot reasonably keep from discovery would require the police to 'avert their senses', or ignore their observations, something the **Charter** was never intended to do.

8. Defining the section 8 right in such broad terms would have far-reaching implications. The detection and investigation of impaired driving provides a good example. If indicia of impairment such as slurred speech, poor coordination, flushed complexion, or the smell of liquor were considered information over which an individual may claim privacy simply because they emanate from the person, the ability of the police to effectively investigate impaired driving in furtherance of their duty to preserve

public safety would be significantly diminished. Section 8 of the **Charter** should not be defined in a way that gives rise to this result.

B. Facts:

9. The AGBC relies upon the facts as summarized in the judgments on appeal and the materials that have been filed by the Appellants and the Respondents.

PART II: POSITION ON POINTS IN ISSUE:

10. Her Majesty the Queen (Canada) frames the critical issue on these appeals in the following general terms:

> The use of a drug-sniffing police dog to detect the odour of a controlled substance emanating from a backpack in a public place does not constitute a breach of section 8 of the **Charter of Rights and Freedoms**.

11. The AGBC agrees with this statement. In the context of informational privacy, as it relates to emanations from or observations of the characteristics of the individual, once the odour of the controlled substance escaped from the bags brought by Kang-Brown to a bus station, or A.M. to his school, it was information about their persons which neither of them was able to exercise control over or reasonably prevent from being discovered. In those circumstances, neither Mr. Kang-Brown nor A.M. had a reasonable expectation of privacy to the information, and the technique used by the police to gather and assess that information did not violate their right to be secure against unreasonable search or seizure. Section 8 was not triggered by the dog sniff. The odour was readily accessible through minimally intrusive means and in the public domain.

PART III: ARGUMENT:

A. The Element of Control:

12. The right to privacy as protected by section 8 of the **Charter** is not absolute. It balances the societal interest in individual dignity, integrity and autonomy on the one hand, and effective law enforcement to protect the societal interests in safety, security, and prevention of crime on the other: ***Tessling*** at [18]. Where this balance lies in particular circumstances requires a two stage analysis: 1. is

there a reasonable expectation of privacy; and 2. if there is a reasonable expectation of privacy, is the state's intrusion upon it reasonable: ***R. v. Edwards***, [1996] 1 S.C.R. 128 at [33].

13. It is the AGBC's position that the focus in these appeals properly lies on the first stage of the analysis. If no reasonable expectation of privacy attached to the odour that emanated from the bags belonging to Kang-Brown and A.M., then the dog's detection of it and its subsequent use to justify an arrest and search of the bags did not infringe section 8.

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14. Not every investigatory technique used by police will trigger the application of section 8 of the **Charter**. It is only where a person's reasonable expectation of privacy is interfered with by an investigatory technique that section 8 of the **Charter** comes into play: ***R. v. Evans***, [1996] 1 S.C.R. 8 at [10]-[12].

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15. The question of whether there is a reasonable expectation of privacy is determined on the basis of the totality of the circumstances: ***Edwards*** at [31]. The importance of control as a significant element in the analysis was emphasized in ***Edwards*** at [45]:

> [45] A review of the recent decisions of this Court and those of the U.S. Supreme Court, which I find convincing and properly applicable to the situation presented in the case at bar, indicates that certain principles pertaining to the nature of the s. 8 right to be secure against unreasonable search or seizure can be derived. In my view, they may be summarized in the following manner:
>
> ...
>
> 2. Like all **Charter** rights, s. 8 is a personal right. It protects people and not places. See ***Hunter***, *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. ...
> 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 existence of a subjective expectation of privacy; and

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(vii) the objective reasonableness of the expectation.
See ***United States v. Gomez***, 16 F.3d 254 (8th Cir. 1994), at p. 256. (underlining added by AGBC)

The application of the ***Edwards*** factors will depend upon the circumstances of the particular case, as the totality of the circumstances test requires a tailoring of the factors in any particular case: ***Tessling*** at [31].

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16. With respect to informational privacy, this Court has recognized that fostering the underlying values of dignity, integrity and autonomy requires recognition that section 8 of the **Charter** "should seek to protect a biographical core of personal information which individuals in a free and democratic state 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": ***Plant*** at p. 293. Integral to this definition of informational privacy is recognition that it is information the individual "would wish to maintain and control from dissemination". In order for constitutional protection to be extended, "the information seized must be of a 'personal and confidential' nature": ***Plant*** at p. 293. The corollary proposition is that where the information is not in the control of the individual, or is not confidential in nature, there is no reasonable expectation of privacy to it.

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17. In ***Tessling***, this Court emphasized that a reasonable expectation of privacy seeks to protect the "biographical core of personal information", including "intimate details of ... lifestyle and personal choices": ***Tessling*** at [60]. At issue was whether there was a reasonable expectation of privacy to heat emanations detectable by infrared scan ("FLIR") of the exterior surface of a home. This Court concluded that the accused did not have a reasonable expectation of privacy to the heat emanations: ***Tessling*** at [65]. The critical issue for determination was what the investigative technique told the police about the privacy interest at stake, the interior of the home: ***Tessling*** at [41], [53]-[55], [58]. The Court concluded that FLIR only gave general information about the home, which only became significant when combined with other information, and as such did not trench on a reasonable expectation of privacy: ***Tessling*** at [58], [62], [63]. A significant factor in arriving at this conclusion was that the information gathered was on the external surface of the home, and therefore exposed to the public: ***Tessling*** at [46]-[47], [63]. The Court stated, at [41]:

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"[Few] people think to conceal their home's heat loss profile, and would have difficulty doing so if

> they tried. Living as he does in a land of melting snow and spotty home insulation, I do not believe that the respondent had a serious privacy interest in the heat patterns on the exposed external wall of his home. ..."

18. In ***R. v. Buhay***, [2003] 1 S.C.R. 631, the Court applied the ***Edwards*** factors in concluding the accused had a reasonable expectation of privacy to the contents of a bus station locker, from which the smell of marijuana emanated. Security guards opened it and confirmed the presence of marijuana before contacting the police, who then opened it without a warrant. The focus of this Court's decision was on the *physical contents* of the locker, and the fact that the accused could regulate access to it with a key. ***Buhay*** thus turned on a notion of territorial privacy, and the accused's ability to control it: ***Buhay*** at [18], [21], [24], [33]. This Court did not address the issue of informational privacy associated with the smell. However, in the **Charter** section 24(2) analysis, the Court concluded that the fact "the locker was emitting a smell of marijuana" could be used by the police as one of the grounds for obtaining a warrant: ***Buhay*** at [65]. Logically, the smell outside the locker was beyond the accused's control, was information both the public and police had access to, and thus no reasonable expectation of privacy existed in it.

19. Lower courts have also considered the threshold of control as significant in whether or not there is a reasonable expectation of privacy. In ***R. v. Pervez***, [2005] A.J. No. 708 (Alta. C.A.), the court stated, at [13], "[o]ne measure of an individual's privacy interest is whether that the person can assert any control over the records. Pervez was not able to do so." In ***R. v. Parchment***, [2002] B.C.J. No. 903 (B.C.C.A.), the accused handed a package of drugs over to a companion, who in turn surrendered it to the police upon their arrest. The accused argued he had a reasonable expectation of privacy to the drugs found in his companion's possession, a contention the court rejected since he had neither possession nor control of them: ***Parchment*** at [7], [10].

20. In ***R. v. Laurin***, [1997] O.J. No. 905 (Ont. C.A.), the issue was whether the accused had a reasonable expectation of privacy to the odour of marijuana emanating from his apartment into the common hall, where the police were able to smell it. The Court held that the police were entitled to be in the hall (in other words the accused could not control access to it), and as the accused must have

known of the smell of the marijuana in the hall (i.e., he did not have control over the dissemination of the information), there was no reasonable expectation of privacy: ***Laurin*** at [38]-[40].

21. In ***R. v. Lebeau*** (1988), 41 C.C.C. (3d) 163 (Ont. C.A.), the accused and others participated in sexual acts in a public washroom. In an effort to preserve their privacy while engaged in sexual acts, the accused posted guards at the door to warn them of the approach of anyone unknown to them. The police monitored the sexual acts in the washroom via video. The accused argued the police action violated a reasonable expectation of privacy. The Court stated, in part, at pp. 185-186:

> [That] others would observe and recognize what was going on from the persistent use that these men made of the place was a risk that they undoubtedly understood. In the circumstances, by reason of their look-outs and precautions, perhaps they had an expectation that they would escape detection by the police or interference by the public. But that is not an expectation of privacy. ...

This same point was made generally by Mr. Justice Fontana, in "*The Law of Search and Seizure in Canada*", 6th Ed. (2005), LexisNexis Butterworths, at p. 10:

> An expectation by an individual that he will escape detection by the police or be free from interference by the public, by reason of precautions he has taken, does not of itself constitute a "reasonable expectation of privacy".

22. Based on the foregoing cases, it is apparent that the ability of an individual to reasonably maintain control over, and therefore prevent access to, information about him (or her) plays an important role in the determination of whether that same person has a reasonable expectation of privacy, such that a claim properly lies under section 8 of the **Charter**. Furthermore, the mere intention or desire to maintain confidentiality or control dissemination of information will be insufficient to establish a reasonable expectation of privacy where the individual reasonably ought to know, in the circumstances, that the information may be observed by the public. As stated in ***Tessling***, at [26], "not all information an individual may wish to keep confidential necessarily enjoys section 8 protection". An expectation of privacy must be objectively reasonable. It will not meet this test if there is no effective ability to maintain control over the subject matter.

B. The Element of Control in the Totality of the Circumstances:

23. As noted in ***Tessling*** at [31], the question of whether there exists a reasonable expectation of privacy is one that is determined from the totality of the circumstances. The element of control, although not determinative of the issue, plays a significant role in the analysis. It must be considered in relation to each of the contextual factors that arise in a given case.

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a. Control of the Place:

24. As the place where the search occurs becomes more accessible to the public, and thus less amenable to the control of the individual, the courts have traditionally lowered the reasonable expectation of privacy that the individual may have: ***Tessling*** at [22].

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25. Attendance in a public place, be it a school, bus station, or like place where people congregate, brings with it an understanding that the individual may observe and be observed. Individuals present in such locations have no ownership, possession, or control of the property; they have no ability to regulate access, to admit or exclude others from that place. Persons who enter a place frequented by the public and where their conduct will necessarily be open to public view ought to know that others may see, hear, smell, and/or incidentally touch him or his belongings in the course of his attendance or travel. Unlike the situation in ***Evans***, where the police took advantage of the implied licence to approach, and in doing so intruded upon the territorial privacy associated with the accused's dwelling, an individual in a public place expects to be approached, be it by people asking for directions, seeking donations or sales or political views, to converse, or simply to pass by. In those situations, the person approaching will learn something of the individual, and the police are on no different footing. In short, the individual has no control over what others, including police, will be able to observe or sense about him when in the public domain.

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b. Control of the Subject Matter:

26. There is no question that individual characteristics, such as appearance, the sound of a voice, or the odour associated with one's body or belongings, are personal in nature. However, where these characteristics are brought into the public domain and the police are in a lawful position to observe or

sense them, the issue is not whether these attributes are personal, but whether they can reasonably be said to remain private or confidential. A reasonable person ought to know that these personal attributes, observable or detectable through presence in public places, are no longer confidential.

27. This question was addressed in the dissenting judgment in ***R. v. Kang-Brown***. Paperny, JA. suggested that "[o]dour often reveals intensely personal details of ... biographical data that individuals typically prefer to keep to themselves", and noted the scent products industry as evidence of this privacy interest: ***R. v. Kang-Brown*** at [121]. Equally however, the existence of personal scent products evidences recognition of the fact that individuals do not control the scents given off by their persons or property. If the intent to suppress odours emanating from one's person were sufficient to create a reasonable expectation of privacy, taking a breath mint would be sufficient to create a reasonable expectation of privacy in the odour of liquor in an impaired driving investigation. As much as an individual may wish to suppress a personal attribute that may be sensed or observed by the public, that is not the same as having a reasonable expectation of privacy to it, a point recognized in both ***Tessling***, at [26], and ***Lebeau***, *supra*.

28. There is support for the proposition that observable phenomena about the appearance of a person or his (or her) personal belongings, or emanations from his person amenable to being sensed has not typically been found to violate any reasonable expectation of privacy.

29. With respect to scent, in ***R. v. Rajartnam*** 2006 ABCA 333, the accused sought to disguise the odour of the drugs he was carrying with a scented fabric softener, which the police were able to smell. The court rejected the argument that the sniff was a de facto search of his bag, on the basis that a reasonable person knows that odours commonly escape from bags and other people will be in sufficiently close proximity to detect the odours: ***Rajartnam*** at [42]-[44], [50], [51]. The Court stated:

> [44] This argument ignores the fact that the odour of the Bounce sheets escaped into the public air space, something a reasonable person would realize. In fact, the very reason the Bounce sheets were placed in the bag was to allow the pungent odour to escape and mask the smell of drugs. While the officers confirmed the presence of Bounce sheets by sniffing quite close to the bag, a reasonable person in these circumstances would foresee that others, including baggage handlers and fellow passengers, would come close enough to the bag to detect the odour.

30. The AGBC also relies upon the authorities cited by Her Majesty the Queen (Canada) in the facta filed on these appeals, wherein Canadian courts have held that there is no reasonable expectation to privacy to the odour of controlled substances emanating into the public domain.

31. The smell of liquor or alcohol about the person has long been one of the grounds relied upon by the police to make a demand for breath in impaired driving cases. Many of the impaired driving cases focus on the detention incidental to a vehicle stop, and whether it is justifiable under section 1 of the **Charter**. However, incidental to the detention are observations made by the police to form the grounds for a demand. In ***R. v. Orbanski; R. v. Elias***, [2005] 2 S.C.R. 3, the issue was whether, prior to administering roadside sobriety tests, the police were required to advise the motorist of his right to counsel. The majority of the Court held that they were not. In coming to that decision, the majority noted that following the roadside stop, prior to the administering of the tests, "[h]aving observed Orbanski's erratic driving and <u>having detected the smell of liquor emanating from the vehicle</u>, the officer requested that the accused step out of the vehicle to perform some sobriety tests": at [50] (emphasis added). If there was a reasonable expectation to privacy to the odour of liquor, of course the police would not be able to rely upon it in formulating reasonable grounds for a breath demand. In ***R. v. MacDonald***, [2003] N.S.J. No. 507 (N.S.S.C.), the accused's roadside stop was found to be an arbitrary detention. However, the officer's observations of impairment were admitted:

> [20] The strong smell of alcohol, the flushed and red face, glossy and red eyes, slurred speech and sometimes stumbling answers were all indications of possible impairment that were detected by the police officer. This evidence was not "conscripted" from the appellant. It was evidence that would have been readily apparent particularly to a police officer trained to look for such tell-tale signs of impairment. Based on these observations the police officer had reasonable and probable grounds to make the breathalyzer demand.

See also ***R. v. Lotozky***, [2006] O.J. No. 2516 (Ont. C.A.) and ***R. v. Amey***, [2005] O.J. No. 3890 (P.C.).

32. Similarly, in some circumstances, police recording of a person's physical characteristics has been held not to violate any **Charter** right. In ***R. v. Shortreed*** (1990), 54 C.C.C. (3d) 292 (Ont. C.A.), the Court stated, at p. 304:

> [The] fact that photographs of a suspect can be taken without his consent following his arrest, does not mean that such consent is necessary before his arrest. The facial or other bodily features of the person are facts which can be recorded by a criminal investigator by means of a photograph. This

does not involve testimonial compulsion and hence does not breach the rule against self-incrimination.

The police are not obliged to obtain the consent of a suspect before taking his photograph in a public place, provided no physical compulsion is involved. For the same reasons that the assertion of one's right to silence does not impose an obligation on the police to cease asking non-coercive questions as part of the continuing investigation [***R. v. Hicks*** (1988), 42 C.C.C. (3d) 394], the refusal of a suspect to allow himself to be photographed should not preclude appropriate efforts by the investigating officers to obtain one. If this is done in a non-intrusive way and without trespass or other improper means, I do not regard the efforts as a breach of privilege, an invasion of privacy or a violation of **Charter** rights.

In ***R. v. Pelland***, [1997] O.J. No. 1539 (Ont. C.A.), the accused argued that the recording of his voice violated his section 8 rights. The court found there was no violation of his rights:

[11] Turning next to the alleged violation of the appellant's privacy rights under s. 8 of the **Charter**, we are not persuaded that the appellant had any reasonable expectation of privacy in the sound of his voice. The sound of one's voice is a physical characteristic much the same as a person's physical appearance. Accordingly, we are of the view that the surreptitious recording of the appellant's voice did not amount to a violation of his s. 8 **Charter** rights. Of importance, we note that the content of the voice sample itself was innocuous and it did not in any way implicate the appellant in criminality. ...

[12] Similarly, we reject the appellant's submission that his right to security of person under s. 7 of the **Charter** was violated. The taking of the voice sample was insubstantial, of very short duration and left no lasting impression. There was no penetration of the appellant's body and no substance removed from it. In ***R. v. Parsons*** (1993), 84 C.C.C. (3d) 226 (Ont. C.A.) this Court held that the surreptitious video-taping of an accused in police custody for purposes of preparing a photo identification line-up did not constitute a s. 7 **Charter** violation. We see no meaningful distinction between that case and the one at hand.

33. From the foregoing, it is clear that where an individual's characteristics may be observed by police with no significant intrusion, or in circumstances where a person ought reasonably to know the public may observe or perceive them, there is no reasonable expectation of privacy.

c. Police Investigative Techniques:

34. In deciding whether a reasonable expectation of privacy exists, regard must also be had to the police techniques utilized to detect the information. As noted in ***Tessling***, "not every form of

examination conducted by the government will constitute a 'search' for constitutional purposes": ***Tessling*** at [18]. It is the position of the AGBC that the less intrusive the "examination" is, the more compelling the argument that the information obtained through the "examination" was not of a confidential or private nature. It was not difficult to detect and was readily accessible. Furthermore, if the "examination" does not result in gathering information that reveals core biographical data, they have not interfered with the kind of information that section 8 of the **Charter** was designed to protect.

35. In ***Tessling***, this inquiry took the form of four related questions: (i) Was the subject matter on public view; (ii) Was the police technique intrusive in relation to the privacy interest; (iii) Was the use of surveillance technology itself objectively unreasonable; and (iv) Did the information obtained expose any intimate details of the individual's lifestyle or part of his core biographical data.

(i) Was the Subject Matter on Public View:

36. In many cases, the subject matter will be detectable without any assistance, and in that sense is on "public view". For example, there may be an odour of contraband or of liquor about the person that the police can smell unaided. Equally, the police may be able to make firsthand observations about the person's physical appearance, such as demeanour; or physical state, such as flushed complexion, watery eyes, or slurred speech. While sensory aides may augment police detection capabilities in regard to these sorts of personal characteristics, they do not change the nature of what is observed. For example, the police dogs in the appeals herein sensed what was in the air surrounding the individual bags, not the contents. Similarly, a flashlight illuminates to enhance vision, binoculars foreshorten distance, a camera records images. In each situation, the observations or perceptions of police are in relation to information that is exposed to the public as an externally manifested characteristic of the individual, and over which the individual exercises no meaningful control.

(ii) Was the police technique intrusive in relation to the privacy interest:

37. The defining element of informational privacy is confidentiality. Information is confidential when the individual has not exposed it to the public and is able to control it from being discovered. The ability of the police to discover information through simple, non-intrusive observation, conducted in the public

domain, indicating a lack of control over the information, militates against a finding of a reasonable expectation of privacy. Thus, where the police are able to discover the information through simple sensory perception, or the use of a device sensitive to external emanations only, the investigative technique is not intrusive in relation to the privacy interest.

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38. In ***Tessling***, at [51], this Court agreed with Stevens, J. in ***Kyllo v. United States***, 533 U.S. 27 (2001) (United States Supreme Court), that:

> public officials should not have to avert their senses or their equipment from detecting emissions in the public domain such as excessive heat, traces of smoke, suspicious odors, odorless gases, airborne particulates, or radioactive emissions, any of which could identify hazards to the community.

39. In the cases on appeal, the odour of controlled substances was discovered without any physical intrusion of the person or their belongings. The odour was in the public domain, beyond the control of either Mr. Kang-Brown or A.M. The police simply applied "their senses or equipment" to "detecting emissions in the public domain", and in no way interfered with information that could be classified as confidential to either Mr. Kang-Brown or A.M.

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40. Notwithstanding the absence of physical intrusion, in ***Kang-Brown***, Paperny, JA. concluded that the dog sniff was physically intrusive, noting the subjective fears many people have of dogs, the historical connotations attached to the use of dogs in law enforcement, and the enhanced olfactory sense possessed by the dog: ***Kang-Brown*** at [135]. While these concerns are not unfounded, they must not be overemphasized, and must be tailored to the circumstances of the case. The "historical connotations" attached to the use of dogs in law enforcement include salutary functions such as search and rescue, bomb detection, and tracking of suspects. Judicial notice has been given to the fact that humans give off odour that may be detected by dogs: ***R. v. Sherman***, [1997] B.C.J. No 2472 (B.C.S.C.) at [40]. Simply put, a well trained odour detecting dog is an investigative tool, and should not be presumed to be intrusive. Rather, there must be a contextual analysis. If the circumstances warrant it, such as a physical intrusion or intimidating behaviour from the dog, different considerations arise, as then the Court may be dealing with actions more properly characterized as a physical search, or perhaps a detention as defined by section 9 of the **Charter**.

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(iii) Was the use of surveillance technology itself objectively unreasonable:

41. In ***R. v. Wong***, [1990] 3 S.C.R. 36, Mr. Justice LaForest stated that the question of whether there is a reasonable expectation of privacy must be framed in broad and neutral terms: at p. 50. The analysis is to be applied contextually, depending on the circumstances of each case. All relevant factors should be considered, including the nature of the technology or the means employed by police. As discussed earlier, the degree of intrusiveness associated with the impugned police conduct is a relevant consideration. As a matter of common sense, the more intrusive the police measure, the stronger the argument that but for the specific steps taken by police, the information relating to the individual could not otherwise have been detected or accessed. It was not truly in the public domain.

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42. A second consideration is the nature of the information that was actually revealed by the impugned measures. Where the investigative technique does not reveal intimate and confidential details about the individual, or core biographical data, it is difficult to understand how it can be said that it interferes with a reasonable expectation of privacy. The more removed the information is from what is properly characterized as core biographical data, the less likely that an expectation of privacy in relation to that same information is reasonably held. Section 8 of the **Charter** was not intended to protect all information, only that which is "of a 'personal *and confidential*' nature": ***Plant*** at p. 293.

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43. In ***Tessling***, although the question posed under this aspect of the s.8 inquiry was whether the use of the police technology was objectively unreasonable, the Court's actual focus in determining the answer to the question was "the nature and quality of the information about activities in the home that the police [were] able to obtain" through use of the technology: ***Tessling*** at [58] (emphasis in original). The AGBC submits that the "reasonableness" of the police conduct is a question better asked under the second stage of the ***Edwards*** analysis. What is important in deciding whether the individual had a reasonable expectation of privacy in relation to the information is whether the technology or means used on behalf of the state revealed the kind of information that was meant to be protected by s.8. Does the means or technique used indiscriminately reveal the intimate and confidential details of the individual? In ***Tessling,*** the FLIR imaging only captured information external to the house, exposed to public view,

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