

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

BETWEEN

RUSSELL STEPHEN PATRICK

**APPELLANT
(APPELLANT)**

- AND -

HER MAJESTY THE QUEEN

**RESPONDENT
(RESPONDENT)**

**FACTUM OF THE APPELLANT
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*,)**

RUTTAN BATES
711, 237 - 8th Avenue S.E.
Calgary, Alberta T3G 5C3

Jennifer Ruttan

Tel.: (403) 266-4640
Fax: (403) 266-4606
E-mail: jr@ruttanbates.com

**Counsel for the Appellant, Russell Stephen
Patrick**

**PUBLIC PROSECUTION SERVICE OF
CANADA**
Alberta Region, Calgary Office
510, 606 - 4th Street S.W.
Calgary, Alberta T2P 1T1

LANG MICHENER LLP
300 - 50 O'Connor Street
Ottawa, Ontario K1P 6L2

Marie-France Major

Tel.: (613) 232-7171
Fax: (613) 231-3191
E-mail: mmajor@langmichener.ca

**Agent for the Appellant, Russell Stephen
Patrick**

**DIRECTOR OF PUBLIC
PROSECUTIONS**
284 Wellington Street
2nd Floor
Ottawa, Ontario K1A 0H8

Jolaine Antonio

Tel.: (403) 299-3990

Fax: (403) 299-3966

E-mail: jolaine.antonio@ppsc.sppc.gc.ca

**Counsel for the Respondent Her Majesty
the Queen**

François Lacasse

Tel.: (613) 957-4770

Fax: (613) 941-7865

E-mail: flacasse@ppsc-sppc.gc.ca

**Agent for the Respondent Her Majesty the
Queen**

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PART I - STATEMENT OF FACTS

A. Overview

1. Armed only with suspicion, members of the Calgary Drug Section of the RCMP conducted six warrantless searches of two garbage containers situated on the appellant's property behind his dwelling house. On four of these occasions, they reached across the appellant's property line and seized bags of garbage. With the evidence obtained in this fashion, the investigating officers were able to secure a warrant to search the appellant's house and seize further evidence. The appellant was subsequently charged with unlawfully producing, possessing for the purposes of trafficking, and trafficking in 3, 4-methylenedioxyamphetamine (MDA), contrary to sections 7, 5(2), and 5(1) respectively of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19.

Ref: Alberta Court of Appeal Reasons for Judgment, dated October 18, 2007, Conrad J.A. in dissent ("Dissent Judgment"), App. Rec. Vol. I. at para 55 [Tab 2C]

B. The Investigation: 6 Warrantless Searches

2. The Royal Canadian Mounted Police (the "Police") commenced an investigation of Dallas Charles Gowing ("Gowing") for possible drug related offences in May, 2003. During their investigation of Gowing the Police became suspicious of the Appellant.

3. On December 4, 2003 the Police attended the residential property of the Appellant located at 443 - 88th Avenue Southeast Calgary (the "Premises") for the sole purpose of searching and seizing household waste from garbage bags that were stored on the Premises and set out for collection by the municipal garbage collectors (the "Warrantless Searches"). The Police attended the Premises on 6 separate occasions for the sole purpose of executing the Warrantless Searches, the last occasion being on December 17, 2003. Each of the Warrantless Searches were conducted in the darkness of the early morning hours. On December 22, 2003, 5 days after the last Warrantless Search, Cst. Smart used the information seized from the Warrantless Searches in the Information to Obtain ("ITO") a Search Warrant for the Appellant's dwelling-house ("Search Warrant").

Ref: Trial Judge's Written Reasons for Judgment, dated September 22, 2005 ("Trial Judgment"), App. Rec. Vol. I. at paras 7 and 11 [Tab 2A]

Agreed Statement of Facts, undated, marked as Exhibit 2 on June 6, 2005, App. Rec. Vol. II. [Tab 5A]

Evidence of Peter Hearty, App. Rec. Vol. I. at p.136 [Tab 4C]

Evidence of Ryan Joshua Smart, App. Rec. Vol. I. at pp. 166, 169, 173 and 174 [Tab 4D]

Evidence of Valerie Lynn Bouey, App. Rec. Vol. I. at p. 129 [Tab 4B]

C. Insufficiency of Information to Obtain a Warrant

4. Prior to the Warrantless Searches the Police did not have sufficient information to obtain a search warrant for the Premises.

Ref: Evidence of Peter Hearty, App. Rec. Vol. I. at p.137 [Tab 4C]

Evidence of Ryan Joshua Smart, App. Rec. Vol. I. at p. 177 [Tab 4D]

Evidence of Audrey Elaine Robinson, App. Rec. Vol. I. at pp. 96, 119 and 120 [Tab 4A]

5. In fact, the Police merely suspected the Appellant to be involved in illegal activity because of his loose associations with Gowing, which was limited to the following information:

- (1) On July 2, 2003, a vehicle registered to the Appellant was seen arriving in the area of 342 Wascana Crescent, Southeast Calgary. Gowing was seen attending at 342 Wascana Crescent and a 2002 PIMS entry indicated Gowing's association with that address. However, Gowing was not the registered owner of the lands and had a different address on his motor vehicle licence.
- (2) On July 3, 2003, Gowing was seen parking his vehicle in front of a garage at 411 - 25th Avenue, Northeast Calgary and carrying a cardboard box with unknown contents. A PIMS entry from 2001 showed the Appellant residing at 411 - 25th Avenue and a vehicle registered to the Appellant was parked one house west of 411. Neither Gowing nor the Appellant were the registered owners of 411 - 25th Avenue.
- (3) Neither the Appellant nor his vehicle was seen at the 411 – 25th Avenue residence other than on July 3 and 7th, 2003.
- (4) Gowing was seen on only one occasion at 443 - 88th Avenue, Southeast Calgary, the Premises, where the Warrantless Searches were conducted.

Ref: Agreed Statement of Facts, *supra*, App. Rec. Vol. II. at paras 14, 15, 17, 23 and 24 [Tab 5A]
 Information to Obtain Search Warrant, dated December 22, 2003, marked as Exhibit 9 on June 7, 2005, App. Rec. Vol. II. at paras 17, 20, 24, 25, 28, 30 and 42 [Tab 5F]
 Evidence of Peter Hearty, App. Rec. Vol. I. at p.137 [Tab 4C]
 Evidence of Ryan Joshua Smart, App. Rec. Vol. I. at p. 166 [Tab 4D]
 Evidence of Audrey Elaine Robinson, App. Rec. Vol. I. at pp.119-120 [Tab 4A]

D. The Place Searched

6. In conducting the Warrantless Searches the Police searched the garbage Receptacle located on the Appellant's territorial property. The receptacle was described as "an opening or indentation" in the wooden fence bordering the back of the Premises in which the garbage containers were stored (the "Receptacle"). The fence was in line with the neighbouring fences and represented the legal property line.

Ref: Trial Judgment, *supra*, App. Rec. Vol. I, at paras 7 and 14 [Tab 2A]
 Evidence of Ryan Joshua Smart, App. Rec. Vol. I. at pp. 159, 163 -165 [Tab 4D]
 Evidence of Audrey Elaine Robinson, App. Rec. Vol. I. at pp. 94 and 104 - 110 [Tab 4A]
 Evidence of Peter Hearty, App. Rec. Vol. I. at pp. 144, 145 and 148 [Tab 4C]

7. The Receptacle was enclosed at the top and bottom by fence boards that continued for the length of the fence. The base of the Receptacle consisted of a raised wooden platform which indented into the Appellant's back yard.

Ref: Trial Judgment, *supra*, App. Rec. Vol. I, at para 47 [Tab 2A]
 Evidence of Valerie Lynn Bouey, App. Rec. Vol. I. at p. 129 [Tab 4B]
 Tab 1, sub 'D' of Exhibit 3, package of photographs consisting of number 35 to 43 inclusive, undated, marked as Exhibit 6 on June 6, 2005, App. Rec. Vol. II. [Tab 5C]
 Page 163 of Corporal Robinson's Notes Depicting a Diagram, undated, marked as Exhibit 5 on June 6, 2005, App. Rec. Vol. II. [Tab 5B]

E. The Items Searched

8. The Police conducted the Warrantless Searches of the Appellant's household waste for the purpose of locating items that would reveal information about the activities of the Appellant within his dwelling-house; in particular information that would support their suspicion that the Premises was being used as part of the drug trade.

F. Invasiveness of the Search

9. The contents of the garbage bags were concealed from the public as illustrated by the following facts:

- (1) The household waste was placed in dark, opaque garbage bags and the contents could not be seen without opening the bags;
- (2) The garbage bags were stored in either metal or plastic garbage containers; and
- (3) The garbage containers were stored in the Receptacle designed for the containment of garbage pending collection by the municipal garbage collectors.

Ref: Trial Judgment, *supra*, App. Rec. Vol. I, at paras 16 and 47 [Tab 2A]
 Evidence of Valerie Lynn Bouey, App. Rec. Vol. I. at p. 129 [Tab 4B]
 Evidence of Audrey Elaine Robinson, App. Rec. Vol. I. at p. 94 [Tab 4A]

10. In order to obtain the information, the Police took the garbage bags off of the Appellant's private property, opened the bags, searched their contents, and sent selected items to the laboratory for chemical analysis.

Ref: Trial Judgment, *supra*, App. Rec. Vol. I. at para 12 [Tab 2A]
 Agreed Statement of Facts, *supra*, App. Rec. Vol. II at para 27 [Tab 5A]

11. Despite the Police being trained and knowing that it was improper to interfere with private property by trespass without a warrant, in each of the warrantless seizures, the Police crossed the property line and took the garbage bags stored on the Appellant's private property.

Ref: Trial Judgment, *supra*, App. Rec. Vol. I, at para 16 [Tab 2A]

G. Interference with Other Citizens' Property

12. On December 12, 2003, in executing one of the Warrantless Searches, Cst. Hearty took a garbage bag from another residence and put it in the Appellant's garbage container so no one would be suspicious of the fact the Police took the Appellant's garbage bags.

Ref: Evidence of Peter Hearty, App. Rec. Vol. I. at pp. 135 and 144 [Tab 4C]

H. The Investigation Team

13. The key officers in the investigation were Cst. Smart, Cpl. Robinson, Sgt. Bouey, and Cst. Hearty. Cst. Smart, the lead investigator, was a member of the Police for 7 ½ years and of the drug unit for approximately 4 years.

Ref: Evidence of Ryan Joshua Smart, App. Rec. Vol. I. at pp. 157 and 166[**Tab 4D**]

14. Cst. Smart confirmed he was aware that case law from the Supreme Court prohibited the police from trespassing upon private property to seize items. However, he believed that the garbage bags were on public property. His belief that the garbage bags were on public property was essential to his understanding of his authority to seize the garbage bags without warrant. According to Cst. Smart: “if the trash is on the other – up by his back door or inside his – inside his fence, then we wouldn’t be jumping the fence to grab that” because the garbage would be on private property and police are not authorized to go on private property without a search warrant.

Ref: Evidence of Ryan Joshua Smart, App. Rec. Vol. I. at pp. 161, 163 - 164, 169 - 170, 173, 175 - 176, and 182-185 [**Tab 4D**]

Printed page from R.C.M.P. Police Law Digest, undated, marked as Exhibit 12 on June 7, 2005, App. Rec. Vol. II. [**Tab 5F**]

Diagram, (Exhibit 4) with Constable Smart’s markings, undated, marked as Exhibit 7 on June 6, 2005, App. Rec. Vol. II. [**Tab 5D**]

15. Cst. Smart further testified that, through discussions with colleagues, he formed the belief that a search warrant was not necessary because the garbage bags were abandoned. None of the Police officers had notes of any discussions regarding the searches of the garbage bags.

Ref: Evidence of Ryan Joshua Smart, App. Rec. Vol. I. at pp. 175 - 176 [**Tab 4D**]

16. Cpl. Robinson, a 16 year member of the Police with 5 ½ years experience in the drug section, confirmed she was trained not to trespass upon private property and agreed that reaching through the fence to obtain the garbage bags stored on the Appellant’s private property would constitute a trespass.

Ref: Evidence of Audrey Elaine Robinson, App. Rec. Vol. I. at pp.92, 112 and 113 [**Tab 4A**]

17. Cst. Hearty, a member of the Police for 4 ½ years and of the drug section for 2 years, testified that it was **common practice** for the Police to search and seize citizens’ garbage bags without warrant. Cst. Hearty believed from his review of *Krist* in the Police Law Digest that the Police had the authority to search and seize garbage that was left out to be picked up by municipal garbage collectors. Cst. Hearty knew that *Krist* involved garbage that was left on public property.

Ref: Evidence of Peter Hearty, App. Rec. Vol. I. at pp.134, 139-142, 152 and 153 [**Tab 4C**]

18. Cst. Hearty testified that a warrant would have been required if the Police had to open doors to the Receptacle, or physically go onto the Appellant's property to seize the items, and specifically stated:

If there was doors there, it would have made a solid fence and for me to reach over the fence or move the fence **in such a way to get access to what's obviously private property**...that would have been a different situation for me and something we would have further discussed. This was clearly open to the public. There was no doubt in my mind at that point that this – I wasn't trespassing on his property, I reached through the fence – yes, I agree – and grabbed the garbage from that point without ever physically going over the fence line. (emphasis added)

Ref: Evidence of Peter Hearty, App. Rec. Vol. I. at pp.154-156 [**Tab 4C**]

19. Although the officers testified that they “would have” talked about whether a warrant was required and about other issues surrounding the tactics to be employed in this investigation, none of the officers had notes of the conversations or could provide details as to the dates, times, participants or particulars of such conversations. Cst. Hearty later testified that they did not discuss whether or not to get a warrant; “it never even crossed our mind”.

Ref: Evidence of Ryan Joshua Smart, App. Rec. Vol. I. at pp. 169-170 and 175-176 [**Tab 4D**]

Evidence of Audrey Elaine Robinson, App. Rec. Vol. I. at pp. 98, 112-113, 119 - 121[**Tab 4A**]

Evidence of Peter Hearty, App. Rec. Vol. I. at p.149 and 151 [**Tab 4C**]

Evidence of Valerie Lynn Bouey, App. Rec. Vol. I. at p.127[**Tab 4B**]

I. Validity of the Search Warrant

20. Material seized from the Warrantless Searches was used in the Information to Obtain a Search Warrant (“ITO”), sworn by Cst. Smart, to obtain a warrant to search the Appellant's dwelling house and outbuildings.

Ref: Trial Judgment, *supra*, App. Rec. Vol. I, at paras 7 and 12 [**Tab 2A**]

21. With the evidence from the Warrantless Searches excised from the ITO, there was insufficient evidence to issue the Search Warrant.

Ref: Evidence of Audrey Elaine Robinson, App. Rec. Vol. I. at pp. 119-120[**Tab 4A**]

Evidence of Peter Hearty, App. Rec. Vol. I. at p.137 [Tab 4C]
Majority Judgment, *supra*, App. Rec. Vol. I. at para 5 [Tab 2C]

J. Evidence of the Manner of the Search

22. The following evidence regarding the manner of the search is relevant to the analysis under s. 24(2) of the *Charter of Rights and Freedoms* (the “Charter”):

(1) None of the Police officers who entered the Appellant’s dwelling house had a copy of the Search Warrant. Cst. Smart, the only person with a copy of the Search Warrant, did not enter the dwelling-house until approximately 45 minutes after initial entry.

(2) Cst. Smart had the only copy of the Search Warrant in his briefcase when he entered the Appellant’s dwelling house, however, he failed to present a copy to the Appellant or identify himself as a lead investigator.

Ref: Evidence of Ryan Joshua Smart, App. Rec. Vol. I. at pp. 186 – 189 [Tab 4D]
Criminal Code, R.S.C. 1985, c.C-46, s. 29

(3) While in the police cruiser in front of the Premises, the Appellant asked Cst. Ross to see the Search Warrant, however Cst. Ross advised it was too late to get the Search Warrant.

Ref: Trial Judgment, *supra*, App. Rec. Vol. I, at paras 68 and 69 [Tab 2A]
Evidence of Stephen Russell Patrick, App. Rec. Vol. I. at pp. 190-191 [Tab 4E]
Evidence of Peter Kenneth Ross, App. Rec. Vol. I. at pp. 192, 193 and 195 [Tab 4F]

(4) The Police sought and obtained authorization in the Search Warrant to search the outbuildings, despite having information that there were no items of interest in the garage.

Ref: Evidence of Ryan Joshua Smart, App. Rec. Vol. I. at pp. 180 - 181[Tab 4D]

K. Case History

23. The trial judge found the Appellant had no reasonable expectation of privacy in the garbage bags stored on his private property, or their contents, and thereby concluded s. 8 was not engaged.

Ref: Trial Judgment, *supra*, at para 23 [Tab 2A]

24. Ritter J.A. on behalf of the majority of the Court of Appeal of Alberta (the “Majority”) concluded:

Having reviewed the trial judge’s reasons, and after considering the case law, and assessing the typical “markers” used to assess whether the **subjective expectation** of privacy was reasonably held, I am of the view that Patrick effectively abandoned any privacy interest he may have had, such that there is no violation of his s.8 *Charter* rights in these circumstances. (emphasis added)

Ref: Alberta Court of Appeal Reasons for Judgment, dated October 18, 2007, Ritter J.A. on behalf of the Majority (“Majority Judgment”), App. Rec. Vol. I at para 5 [Tab 2C]

25. Conrad J.A., in dissent, found that the Appellant had a reasonable expectation of privacy based both in the territory and information searched and seized (the “Dissent”). Further, Conrad J.A. would have excluded the evidence from the subsequent search of the Appellant’s dwelling-house pursuant to s.24(2) of the *Charter*.

Ref: Dissent Judgment, *supra*, App. Rec. Vol. I. at paras 55 – 63 [Tab 2C]

26. The Appellant submits that this appeal should be granted for the reasons of the Dissent and on the basis of the argument below and the convictions should be vacated and acquittals entered.

PART II – QUESTIONS IN ISSUE

27. The issues in this appeal are:

- 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*.

PART III – STATEMENT OF ARGUMENT

A. Freedom From Unreasonable Search and Seizure - Section 8 of the *Charter*

I. Interpretation of the Scope of Section 8

28. Section 8 of the *Charter* is engaged when government activity intrudes upon some reasonable expectation of privacy. The expectation of privacy need not be of the highest form to trigger protection of the *Charter*.

Ref: *R. v. Tessling*, [2004] 3 S.C.R. 432, at para 18, Book of Authorities (“B.A.”) [Tab 25]
R. v. Evans, [1996] 1 S.C.R. 8, at para 11, B.A. [Tab 13]
R. v. Buhay, [2003] 1 S.C.R. 631, at paras 18 and 22, B.A. [Tab 5]
Hunter v. Southam, [1984] 2 S.C.R. 145, at para 25, B.A. [Tab 1]
R. v. Kokesch, [1990] 3 S.C.R. 3, per Dickson C.J., at para 15. B.A. [Tab 20]

(a) Broad and purposive approach

29. A broad and purposive approach must be employed to determine whether a reasonable expectation of privacy exists. As stated by La Forest J. in *R. v. Duarte*: “the spirit of s. 8 must not be constrained by narrow legalistic classifications.”

Ref: *R. v. Duarte*, [1990] 1 S.C.R. 30, at paras 19 and 22, B.A. [Tab 10]
Buhay, supra, at paras 22 and 24, B.A. [Tab 5]
Hunter v. Southam, supra, at paras 14 - 27, B.A. [Tab 1]
Kokesch, supra, at para 15, B.A. [Tab 20]

30. The purpose of s. 8 of the *Charter* is to protect “individuals from unjustified state intrusion upon their privacy”. In order for privacy rights to have any meaning, investigatory techniques without a warrant must be reasonably constrained. Our system of prior judicial authorization is essential to balancing the interests of law enforcement to investigate offences with the rights of citizens to be free from state intrusion.

Ref: *Duarte, supra*, at paras 19, 22 and 44, B.A. [Tab 10]
Evans, supra, at para 11, B.A. [Tab 13]
R. v. Fry, [1999] N.J. No. 352 (Nfld. C.A.) at para 30, B.A. [Tab 15]
Hunter v. Southam, supra, at paras 27 - 32, B.A. [Tab 1]

(b) Seemingly minor intrusion leads to more intrusive search

31. Constraint to state investigatory techniques without warrant is required because a “seemingly minor” intrusion can lead to a more intrusive search.

Ref: *Evans, supra*, per La Forest J., at para 3, B.A. [Tab 13]

(c) Privacy interests are fundamental to democratic society

32. The protection of privacy interests is fundamental to a democratic society as it goes to the physical and moral autonomy of individuals and has “profound significance for the public order.” As Binnie J. stated in *Tessling*:

Few things are as important to our way of life as the amount of power allowed the police to invade the homes, privacy and even the bodily integrity of members of Canadian society without judicial authorization. As La Forest J. stated in *R. v. Dyment*, [1988] 2 S.C.R. 417, at pp. 427 – 28, “[t]he restraints imposed on government to pry into the lives of the citizen go to the essence of a democratic state.”

Ref: *Tessling, supra*, at para 13, B.A. [Tab 25]

R. v. Dyment, [1988] 2 S.C.R. 417, at para 17, B.A. [Tab 11]

33. The importance of protecting privacy interests have become an increasing concern since the inception of the *Charter*, which is exemplified by this Court’s acknowledgment of privacy interests beyond territorial ownership and by legislation enacted by Parliament and provincial legislatures.

Ref: *R. v. Plant*, [1993] 3 S.C.R. 281, at paras 15 – 19, B.A. [Tab 22]

R. v. Edwards, [1996] 1 S.C.R. 128, at paras 42 – 44, B.A. [Tab 12]

Privacy Act, RSC 1985, c.P-20

Freedom of Information and Protection of Privacy Act, RSA 2000, c.F-25

II. Privacy Interests

(a) General Principles

34. The scope of s.8 of the *Charter* protects the following distinct, but sometimes overlapping, privacy interests: (a) Personal privacy, (b) Territorial privacy, and (c) Informational privacy.

Ref: *Tessling, supra*, at paras 20, 22 and 24, B.A. [Tab 25]

Dissent Judgment, *supra*, App. Rec. Vol. I., at para 75 [Tab 2C]

35. The law has long recognized individuals' territorial privacy interests as they relate to one's dwelling-house and residential property. Territorial privacy interests include the perimeter of residential property.

Ref: *Tessling, supra*, at para 22, B.A. [Tab 25]

36. This Honourable Court has acknowledged that an individual may have a reasonable expectation of privacy beyond situations of enjoyment of one's property, including privacy interests in another person's home or in information possessed by third parties. As a result, this Court in *Edwards* and *Tessling* set out a number of factors as a guide to assessing whether an individual had a reasonable expectation of privacy.

Ref: *Tessling, supra*, at paras 22 – 24, B.A. [Tab 25]
Edwards, supra, at paras 42 – 44, B.A. [Tab 12]

37. The factors as stated in *Edwards* and *Tessling* were intended to broaden the scope of protection afforded by s. 8 of the *Charter*, not to reduce the reasonable expectation of privacy in activities on private property. As aptly stated by Conrad J.A., in dissent:

Moreover, the *Edwards* test, in my view, was not designed to diminish an owner-occupier's territorial claim to privacy, but to create the possibility of extending a territorial claim to property owned by another party. In this way, it was intended to enhance, rather than detract from, the impact of those cases in which the Supreme Court has established a citizen's right to privacy in the home.

Ref: Dissent Judgment, *supra*, App. Rec. Vol. I., at para 85 see also paras 80 and 86 [Tab 2C]

Hunter v. Southam, supra, at paras 19 - 27, B.A. [Tab 1]

Kokesch, supra, at para 19, B.A. [Tab 20]

Fry, supra, at para 35 and 36, B.A. [Tab 15]

(b) Erroneous Reasoning of the Majority

38. The reasoning of the Majority, it is submitted, is fundamentally flawed and should not be accepted by this Honourable Court for the following reasons:

- (1) Use of the *Edwards* factors to defeat a territorial privacy interest: The Majority used the factors in **Edwards** to defeat the Appellant's privacy interest in the activities on his private residential property. The interpretation of the scope of a *Charter* right should in no way confer investigatory powers to the state that they would otherwise not have. Since the Police, acting without warrant, had no greater powers than ordinary citizens, the

Majority's interpretation of s.8 of the *Charter* resulted in authorizing the Police to trespass on private property.

Ref: Majority Judgment, *supra*, App. Rec. Vol. I., at paras 13 – 18 and 28 - 33 [**Tab 2C**]

- (2) Failure to analyse the Appellant's claim of territorial privacy: The Majority did not analyse the Appellant's reasonable expectation of territorial privacy, as distinct from the issue of informational privacy. The Majority focused on the "items searched", the garbage bags, and neglected to properly consider that the "place searched" was private residential territorial property. This mischaracterization resulted in a failure to appreciate the Appellant's possession, control, ownership, historical use, and his ability to regulate access with respect to his private property.

Ref: Majority Judgment, *supra*, App. Rec. Vol. I., at paras 13, 16, and 18 [**Tab 2C**]
 Dissent Judgment, *supra*, App. Rec. Vol. I., at paras 69 and 74-78 [**Tab 2C**]
Tessling, supra, at para 20, B.A. [**Tab 25**]
R. v. Kelly, [1999] N.B.J. No. 98(N.B.C.A.), B.A. [**Tab 18**]

The Majority also failed to address the argument that the Warrantless Searches constituted perimeter searches and failed to distinguish, and in fact did not mention, the binding decisions of this Court in *Kokesch*, *Grant*, *Wiley* and *Evans*.

Ref: *R. v. Grant*, [1993] 3 S.C.R. 223, B.A. [**Tab 17**]
R. v. Wiley, [1993] 3 S.C.R. 263, B.A. [**Tab 28**]

Further, the Majority's reference to *Plant* was used to restrict the scope of s. 8 to protect only information going to an individual's biographical core. However, the facts in *Plant* involved two searches and seizures: (a) the perimeter search where police made observations of the outside of the residence while on private property and (b) seizure of electronic utility records. This Court found the perimeter search violated s. 8 on the basis of the law of trespass and reasoning in *Kokesch*. This Court then analysed whether the accused had a privacy interest in the energy records by assessing whether the records fell within the scope of the biographical core of information that an individual wished to keep from the state. There was no questioning whether the evidence obtained by the perimeter search constituted information going to an individual's "biographical core" because the territorial privacy interest was sufficient, on its own, to establish a privacy right. Once a

territorial privacy interest is established, no further analysis is required, especially any analysis that would diminish the reasonable expectation of privacy in one's private residential property.

Ref: *Plant, supra*, at paras 14-17 [**Tab 22**]
Majority Judgment, *supra*, App. Rec. Vol. I., at para 11[**Tab 2C**]

- (3) Mischaracterization of the items seized: The Police seized items from household waste that provided information about the activities conducted within the Appellant's dwelling-house. The Majority mischaracterized the items seized as garbage bags and thereby failed to appreciate the true nature of the informational privacy interest.

Ref: Majority Judgment, *supra*, App. Rec. Vol. I., at paras 16, 18, 28, 30 and 41 [**Tab 2C**]

- (4) Failure to properly analyse "abandonment": The Majority opined that the garbage bags were "abandoned" by relying on conclusions by other courts and without analysing: (a) that the Appellant's privacy interest in his territorial property was never abandoned, (b) the significant factual differences from the cases cited, and (c) the advancement in the law and the broadening of the scope of the protection of s. 8 since the cases cited in support of the conclusion of abandonment.

Further, the Majority engaged in circular reasoning by relying on the conclusion that the garbage bags were abandoned as the basis for rejecting that the other factors in *Edwards* demonstrated a privacy interest.

Ref: Majority Judgment, *supra*, App. Rec. Vol. I., at paras 18-27 [**Tab 2C**]

- (5) Misuse of implied licence and risk analysis: The Majority used the implied licence to municipal garbage collectors and "risk analysis" to defeat the Appellant's privacy interest and justify the actions of the Police.

Ref: Majority Judgment, *supra*, App. Rec. Vol. I., at paras 16, 26, 30, and 41 [**Tab 2C**]

(c) Proper Analysis of Reasonable Expectation of Privacy

39. The reasoning of Conrad J.A., in dissent, reflects the proper analysis to determine whether there is a reasonable expectation of privacy with respect to the Appellant's dwelling-house, its perimeter, the garbage bags stored thereon and the information in the household waste.

a. Territorial Privacy

40. In order to properly apply the factors set out in *Edwards* and *Tessling*, the subject matter being assessed must be properly characterized. The place searched, in this case, was the Appellant's private territorial property, specifically the garbage Receptacle located within the perimeter of his dwelling-house.

41. The factors as set out in *Edwards* and *Tessling* should not be used to take away an individual's territorial privacy interest in activities on his or her residential property. Where the claim to privacy involves one's dwelling-house and its perimeter, the location of the search and seizure is central to the analysis and, in the Appellant's submission, determinative of the issue.

Ref: Dissent Judgment, *supra*, App. Rec. Vol. I., at paras 81 and 82 [Tab 2C]
Fry, supra, at para 36, B.A. [Tab 15]

42. The proper application of the *Edwards* factors would acknowledge that the Appellant not only owned the property, but possessed it as his residence. As such, the Appellant had historical use of the dwelling-house and its perimeter, including the garbage Receptacle. Since the garbage Receptacle remained on his property, the Appellant retained the ability to regulate access to the garbage bags and could rely on his rights to be free from trespass as recognized by the common law, statute, and municipal bylaws.

Ref: *Kelly, supra*, at para 52, B.A. [Tab 18]

43. Although the Appellant's subjective expectation of privacy in his dwelling-house and its perimeter can be assumed, in absence of evidence to the contrary, the following facts support his subjective expectation of privacy:

- the garbage bags were stored on private property,
- the garbage bags were dark and opaque and the contents could not be viewed by the public,

- the garbage bags were stored in metal and green plastic containers, and
- the garbage containers were stored in an elevated Receptacle

Ref: *Tessling, supra*, at para 38, B.A. [Tab 25]

R. c. Andrews, [2005] J.Q. no 8595 at paras 39 – 41, 82, 92, 95, and 100, B.A. [Tab 3]

44. The objective reasonableness of the expectation of privacy to one's territorial property is supported by the long-standing recognition of the sanctity of one's dwelling-house and its perimeter and the laws prohibiting trespass.

Ref: *Kokesch, supra*, B.A. [Tab 20]

Dissent Judgment, *supra*, App. Rec. Vol. I., at paras 85 and 86 [Tab 2C]

i. The laws prohibiting trespass

45. The law prohibiting trespass upon private property is founded both in statute and common law. For example, s.2.1 of the *Petty Trespass Act*, RSA 2000, c, P-11 prohibits trespass upon land (a) that is a lawn, garden or land that is under cultivation or (b) that is surrounded by a fence, a natural boundary or a combination of a fence and a natural boundary.

Ref: *Petty Trespass Act*, RSA 2000, c, P-11, s. 2.1

Hunter v. Southam, supra, at para 28, B.A. [Tab 1]

46. The 1990 decision of this Court in *Kokesch* clearly states that individuals have a privacy interest in the perimeter to their home and Dickson C.J. endorsed the following comments of Ritchie J. in *R. v. Colet*, [1981] 1 S.C.R. 2:

All sections of the *Criminal Code* are presumably enacted "in the public interest" and it would in my view be dangerous indeed to hold that the private rights of the individual to the exclusive enjoyment of his own property are to be subject to invasion by police officers whenever they can be said to be acting in the furtherance of the enforcement of any section of the *Criminal Code* although they are not armed with express authority to justify their action.

...

As I have indicated, I am of the opinion that any statutory provision authorizing police officers to invade the property of others without invitation or permission would be an encroachment on the common law rights of the property owner and in case of any ambiguity would be subject to a strict construction in favour of the common law rights of the owner.

Ref: *Kokesch, supra*, at paras 20 – 22, B.A. [Tab 20]

47. This Court confirmed the privacy interest in the perimeter of one's dwelling-house in the 1993 trilogy of cases of *Plant, Grant* and *Wiley*, and the 1996 decision of *Evans*.

48. In this case the Police trespassed upon the Appellant's property when they conducted the Warrantless Searches. The evidence that supports the conclusion of trespass included:

- (a) the area where the garbage bags were stored was surrounded by a fence on both the top and bottom of the Receptacle,
- (b) the fence clearly marked the division between the Appellant's private property and public lands,
- (c) the Police interfered with items stored on private property by taking the garbage bags out of the containers stored in the Receptacle,
- (d) the Police could not have accessed or viewed the contents of the garbage bags without entering upon the Appellant's property, and
- (e) the Police acknowledged that their actions constituted a trespass.

Ref: Evidence of Audrey Elaine Robinson, App. Rec. Vol. I. at p. 92 and 112 - 113
[Tab 4A]

49. The Majority's reasoning that any trespass was *de minimis* because the Police did not have to step onto the property, erroneously focuses on how far onto the property the Police went rather than the extent of the interference with property stored thereon. The interference by the Police in the Appellant's territorial privacy interest was greater than in the traditional perimeter search cases for the following reasons:

- (a) the Police took items off of private property as compared to traditional perimeter searches where authorities make sensory observations of the outside condition of the house,
- (b) the Police sent selected items to the laboratory for chemical analysis as compared to making observations without the aid of sophisticated technology, and
- (c) the Police placed garbage bags belonging to other individuals on the Appellant's private property in order to conceal the fact that they had interfered with the his property.

Ref: Majority Judgment, *supra*, App. Rec. Vol. I., at para 41 **[Tab 2C]**
Dissent Judgment, *supra*, App. Rec. Vol. I., at para 90 **[Tab 2C]**

50. Further, the suggestion by the Majority that in order for the Appellant to have a privacy interest in the garbage bags, he had to construct a Receptacle secured by lock and key is an unreasonable standard and is contrary to the City of Calgary Bylaw 20M2001 (“Bylaw”) which mandates that the owner of a receptacle that is surrounded by a fence must ensure that there is an opening in the fence at least 0.2 meters wider than all the waste containers and plastic bags and at least 0.4 metres higher than the highest waste container or plastic bag.

Ref: City of Calgary Bylaw, 20M2001, at clause 8, B.A. [Tab 31]
Majority Judgment, *supra*, App. Rec. Vol. I. at para 33[Tab 2C]

ii. Exceptions to the laws prohibiting trespass

(a) Statutory authority

51. Parliament has not amended the *Criminal Code* to empower the police to trespass upon private property, without warrant, for the purpose of criminal investigation. Dickson C.J. in *Kokesch* reiterated:

This Court consistently has held that the common law rights of the property holder to be free of police intrusion can be restricted only by powers granted in clear statutory language.

Ref: *Kokesch*, *supra*, at para 20, B.A. [Tab 20]

52. If requiring the police to obtain search warrants to search garbage bags stored on private property creates a serious problem for the police to bring people to justice, it is Parliament’s role to amend the legislation. As La Forest J. warns in *Evans*:

... a judicially created restriction to a rule has a tendency to expand into other areas where the restriction is not compelling, and thus lead to a gradual erosion of the rule, which in this case has long been considered necessary for the protection of our freedom.

Ref: *Evans*, *supra*, at para 4, B.A. [Tab 13]
See also s. 492.1 of the *Criminal Code* as Parliament’s response to *R. v. Wise*, [1992] 1 S.C.R. 527, B.A. [Tab 29]

(b) Licence

53. An implied licence allowing a third party to enter upon private property is restricted to the terms of the waiver of the privacy interest. For example, the licence to knock at a residence is

restricted to “those activities that are reasonably associated with the purpose of communicating with the occupant”.

Ref: *Evans, supra*, at paras 14 and 15, B.A. [Tab 13]

54. If the purpose of the police is not consistent with an implied licence or waiver of privacy, the entry cannot be lawful. For example, in *R. v. Boughner*, [2002] O.J. No. 2181 the court found a knock on the door for the purpose to secure evidence against the occupants was unlawful.

Ref: *R. v. Boughner*, [2002] O.J. No. 2181(Ont. C.A.) at para 24, B.A. [Tab 4]

55. The Majority erroneously used the implied licence to municipal garbage collectors to collect the garbage as authority for the Police to trespass upon the Appellant’s private property. The licence to municipal employees cannot confer police power to trespass upon the Appellant’s property because:

- the Police are not municipal garbage collectors,
- the purpose of the trespass is for criminal investigation rather than to collect waste, and
- the extent of the trespass is greater because the Police not only took the garbage bags but opened the bags and sent material for laboratory analysis.

Ref: Dissent Judgment, *supra*, App. Rec. Vol. I. at paras 59, 61, 78 and 89[Tab 2C]
Majority Judgment, *supra*, App. Rec. Vol. I. at paras 16, 30 and 31 [Tab 2C]

56. The Majority further relies on the licence “to greatly reduce the viability of Patrick’s assertion that he expected his garbage was so sacrosanct that no one would ever lay their eyes on its content”. However, the licence to municipal garbage collectors to collect the Appellant’s garbage bags does not diminish the reasonable expectation that others will not trespass upon his private property for some unauthorized purpose; particularly in this case where the Bylaw prohibits scavenging waste both at the residence and at the city disposal sites.

Ref: Majority Judgment, *supra*, App. Rec. Vol. I., at para 41 [Tab 2C]
Bylaw, *supra*, at clauses 4; 39(c) and 43, B.A. [Tab 31]
Dissent Judgment, *supra*, App. Rec. Vol. I., at paras 59, 61,78 and 89 [Tab 2C]
Evans, supra, at paras 14 – 21, B.A. [Tab 13]

(c) Abandonment and Improper Use of Risk Analysis

57. The Majority relied on its conclusion that the garbage bags were abandoned to support its decision that there was no reasonable expectation of territorial privacy and concluded: “[w]hat is

important is the intention to part with what is in the bag, not where it is put”. This is another example of the problem created by the failure to analyse the issues of territorial and informational privacy separately. The relevant question in determining the existence of a reasonable expectation of territorial privacy is whether the Appellant abandoned “his right of privacy with respect to his home and yard and any articles contained therein”. There was no evidence of abandonment of such interests in this case.

Ref: Dissent Judgment, *supra*, App. Rec. Vol. I., at para 84 [Tab 2C]
Majority Judgment, *supra*, App. Rec. Vol. I., at para 18 [Tab 2C]

Conclusion on Territorial Privacy

58. The Appellant had a reasonable expectation of territorial privacy, which included the expectation that the Police would not trespass upon his private property, without warrant, and seize items stored thereon. Therefore, the Warrantless Searches executed by the Police breached his right to be free of unreasonable search and seizure as protected by s. 8 of the *Charter*.

b. Informational Privacy

59. The Appellant also submits that the Warrantless Searches breached his reasonable expectation of privacy in the information contained in the garbage bags. As recognized by this Court in *Tessling*, the scope of s. 8 of the *Charter* includes protection of 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”.

Ref: *Plant, supra*, at para 20, B.A. [Tab 22]
Tessling, supra, at para 25, B.A. [Tab 25]

60. The protection of informational privacy includes “the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others.”

Ref: *Tessling, supra*, at paras 20, 22 and 23, B.A. [Tab 25]

61. In assessing whether an individual has an informational privacy interest, the courts must consider the “totality of the circumstances”. The factors set out in *Tessling* provide a guideline for the analysis, but these factors must be modified to suit the particular circumstances of each

case. A proper analysis of the *Tessling* factors would recognize a reasonable expectation of privacy in the information in household waste.

Ref: *Tessling, supra*, at para 31, B.A. [Tab 25]
Dissent Judgment, *supra*, App. Rec. Vol. I. at para 96 [Tab 2C]

i The subject matter of the garbage bags

62. The subject matter of the garbage bags is information contained in household waste: household waste may disclose a variety of personal information including one’s lifestyle choices, DNA, finances, health and identification. Regardless of the content of a specific garbage bag, the significance of household waste is the information it reveals about the activities of a resident in his or her dwelling-house. The courts cannot consider actual content of garbage bags, as the Majority did in this case, to determine whether the information went to the biographical core of the Appellant. Whether police have the authority to utilize an investigatory technique cannot depend on the *ex post facto* results of the search.

Ref: *Hunter v. Southam, supra*, at paras 27 – 32, B.A. [Tab 1]

63. Unlike *Tessling*, where the information from the FLIR images was on its own “meaningless”, the household waste provided specific information about the Appellant’s activities and effectively allowed the police to look inside his dwelling-house without a warrant. This information also formed the grounds for the Search Warrant to search the Appellant’s dwelling-house.

Ref: *Tessling, supra*, at paras 34 – 36, B.A. [Tab 25]

ii The Appellant had a direct interest in the subject matter seized

64. There was no dispute, and the Crown relied on the fact, that the Appellant had a direct interest in the information contained in the household waste.

Ref: Dissent Judgment, *supra*, App. Rec. Vol. I. at para 98 [Tab 2C]

iii The Appellant had a subjective expectation of privacy

65. The subjective expectation of privacy can be presumed, because the Police seized information about the activities within the Appellant’s dwelling-house and used the information from the Warrantless Searches to obtain the Search Warrant for the dwelling-house.

Ref: *Tessling, supra*, at paras 38, 41 and 42, B.A. [Tab 25]

66. In addition to the presumption that the Appellant has a subjective expectation regarding the activities in his dwelling-house, the subjective expectation of privacy is supported by the following facts:

- the information in the household waste was concealed in dark, opaque garbage bags,
- the garbage bags were further concealed in metal and plastic garbage containers,
- the garbage containers were stored on private property,
- the Receptacle elevated the garbage containers and provided some protection from vermin,
- the contents of the garbage bags could not be viewed by the public, and
- the garbage bags were set out for collection by the municipal garbage collectors which would result in the mixing of the Appellant's household waste with others such that it would not be readily identifiable as the Appellant's, be virtually impossible to locate and ought not be scavenged as prohibited by the Bylaw.

Ref: See Appellant's Factum at paras 6-7 and 9
 Dissent Judgment, *supra*, App. Rec. Vol. I. at para 99 [Tab 2C]
Dyment, supra, at para 22, B.A. [Tab 11]
Andrews, supra, at paras 39 – 41, 82, 92, 95, 100, B.A. [Tab 3]
 Bylaw, *supra*, at clauses 4 and 39(c), B.A. [Tab 31]

iv The expectation of privacy was objectively reasonable

(a) Place where alleged search/seizure occurred

67. The place where the search and seizure occurred is particularly relevant in this case as it involved the seizure of items stored on private property. The fact that the Receptacle was accessible from the alley does not reduce the expectation of privacy, rather it is consistent with the licence to municipal garbage collectors to take the garbage bags, mix the contents with other collected items and dispose of them in a city disposal site. This process would render the items virtually anonymous and impossible to locate.

Ref: *Andrews, supra*, at paras 52 – 55 and 95, B.A. [Tab 3]
 Dissent Judgment, *supra*, App. Rec. Vol. I., at para 100 [Tab 2C]

(b) The subject matter was not in public view

68. Although the garbage containers were observable by someone in the alley, the contents of the garbage bags and information stored therein were not.

Ref: Trial Judgment, *supra*, App. Rec. Vol. I, at paras 16 and 47 [Tab 2A]
 Evidence of Valerie Lynn Bouey, App. Rec. Vol. I. at p. 129 [Tab 4B]
 Evidence of Audrey Elaine Robinson, App. Rec. Vol. I. at p. 94 [Tab 4A]
Andrews, supra, at paras 95 and 104 B.A. [Tab 3]

(c) The subject matter was not voluntarily abandoned

69. The fact that the garbage bags were stored in the Receptacle in a manner consistent with collection by the municipal garbage collectors does not equate to legal abandonment of one's privacy interest. Voluntary abandonment requires an unconditional relinquishment of one's interest and indifference as to the fate of the items or, as in this case, the information. This involves not only a physical divestment but also an intention to abandon.

Ref: *Andrews, supra*, at paras 86, and 103 - 108 B.A. [Tab 3]
 Dissent Judgment, *supra*, App. Rec. Vol. I. at paras 102 -103, 107 [Tab 2C]
 Ziff, Bruce: Principles of Property Law 4th ed, 2006 Thomson Canada Ltd., B.A. [Tab 30]

70. The Majority relied on the conclusion that garbage was abandoned property in the cases of *Krist, Kennedy, Delaa, Taylor, Tam, and Allard*, to the exclusion of applying proper legal analysis to the specific facts in this case. In so doing, the Majority failed to consider the following distinguishing factors which impact the relevance of the judicial reasoning applied in those cases:

- (1) Factually distinguishable cases: The cases of *Krist* and *Kennedy*, involved garbage bags on public property rather than being stored on private property. This is a significant distinguishing fact because it removes any issue of territorial privacy. It also alters the assessment of abandonment because, while on private property, there is no physical divestment of the garbage bags and their contents: therefore the owner retains control and the ability to regulate access to the garbage bags, including the ability to remove items from the garbage bags before they are collected.

Ref: *R. v. Krist*, [1995] B.C.J. No. 1606; 62 B.C.A.C. 133 (BCCA), B.A. [Tab 21]

Further, the garbage bag in *Kennedy* was in the lawful possession of a third party, the garbage collector, when the Police seized the items. Also relevant is the fact that Kennedy resided in an apartment building and prior to collection by municipal garbage collectors, his garbage bags were mixed with others from the apartment building. Therefore, Kennedy did not have a superior interest in the garbage than any other resident in the apartment.

Ref: *R. v. Kennedy* (sub nom. *R. v. Joyce and Kennedy*), [1996] O.J. No. 4401; 95 O.A.C. 321 Ont. C.A.), at para 4, B.A. [Tab 19]

The case of *Delaa* is factually distinguishable because Delaa directly handed the chewing gum over to a third party, an undercover police officer, while engaging in a taste test in a public place. *Delaa* did not involve the issue of informational privacy in household waste or the unlawfulness of police trespassing upon private property to seize household waste.

Ref: *R. v. Delaa*, [2006] A.J. No. 948(Q.B.) B.A. [Tab 9]

- (2) Development in the law of privacy interests since the decisions: the Majority failed to consider the impact of significant developments in the law since the decisions relied upon. For example, the decision of *Taylor* was decided in 1984 prior to *Hunter v. Southam*, the seminal case on the interpretation of s. 8 of the *Charter*. The analysis in *Taylor* is contrary to the principles later adopted by this Court in such cases as *Kokesch*, *Grant*, *Wiley*, *Plant* and *Evans* and the acknowledgement of privacy interests in information.

Ref: *R. v. Taylor*, [1984] B.C.J. No. 176(B.C. Supreme Court), at para 45, B.A. [Tab 24]

Similarly, the Majority heavily relied on the decision in *Krist*, without considering that *Krist* was rendered prior *Evans*, a case which clarified that implied licences to third parties did not constitute authority for police to trespass upon private property. *Krist* also predated *Edwards* and *Tessling*, both of which broadened the interpretation of the protection afforded by s. 8 of the *Charter*. The court in *Krist* considered the issue of abandonment as determinative of the issue of the existence of a privacy interest whereas this Court in *Edwards* and *Tessling* list it as one of the many factors to consider in determining the existence of a privacy interest.

Further, the reasoning in *Krist* is inconsistent with *Tessling* which recognized that an investigative technique which provides information regarding the nature of the activities in the home sufficient to support a warrant for the search of the home in and of itself violates the protection against the sanctity of one's home.

Ref: *Tessling, supra*, at paras 27 – 29 B.A. [Tab 25]
Krist, supra, at para 27 B.A. [Tab 21]

As for the *Tam* decision, it predated this Court's decisions in *Edwards, Plant, Grant*, and *Wiley*. The legal analysis in *Tam* is inconsistent with the current view of the scope of s. 8 protection. In particular, the finding in *Tam* that the trespass onto private property was trivial and insignificant conflicts with this Courts subsequent comments regarding the importance of privacy in one's home and its perimeter. The reasoning that since the garbage collectors could take the garbage bags, so could the police, also conflicts with the law and reasoning subsequently stated by this Court in *Evans*.

Ref: *R. v. Tam*, [1993] B.C.J. No.781(S.C.) at paras 2 - 5 B.A. [Tab 23]

- (3) Development in the law of subjective expectation of privacy: this Honourable Court in *Tessling* warned that the absence of a subjective expectation of privacy should not be used too readily to undermine the protection afforded by s. 8. However, in *Krist*, the court concluded that the garbage bags were abandoned and therefore there was no subjective expectation of privacy which was found to defeat *Krist's* claim to s. 8 *Charter* protection.

Ref: *Tessling, supra*, at paras 38 and 42, B.A. [Tab 25]
Krist, supra, at para 26, B.A. [Tab 21]

- (4) Lack of legal analysis on the issues and arguments raised in this case: the cases of *Kennedy* and *Allard* rely on the conclusion in *Krist* without any independent legal analysis. These cases do not deal with the issues of trespass, implied licences, and informational privacy and the impact of the decisions of *Edwards* and *Evans* to the applicability of the reasoning in *Krist*.

Ref: *Kennedy, supra*, at para 5, B.A. [Tab 19]
R. c. Allard, [2006] J.Q. No 3377; 2006 QCCQ 3080, B.A. [Tab 2]

Proper Assessment of Abandonment

71. When assessing the issue of abandonment and reasonable expectation of privacy in the context of the current status of the law, this Honourable Court must conclude that the garbage bags and information contained therein were not abandoned.

(i) No Physical Divestment

72. The Appellant did not divest physical control of the information because the garbage bags remained on his residential property and were stored in a manner that clearly indicated to the public that they were on private lands. At the time of the Warrantless Searches the Appellant had (a) control over the garbage bags, (b) the ability to regulate access to the garbage bags and assert his proprietary interest as against third party interference, and (c) the ability to retrieve the garbage bags and the information stored therein at the time of the seizure by Police.

(ii) No Intention to Abandon

73. The facts did not support an inference that the Appellant intended to abandon his privacy interest in the information contained in household waste. The contents of the household waste were concealed from public view and stored on private property. The only reasonable inference to be drawn from the fact the Appellant stored his garbage bags in a manner consistent with collection by the municipal garbage collectors was that the garbage collectors would collect the garbage bags and mix their contents with the garbage of other residents, such that the privacy of the information would be maintained through anonymity or difficulty in obtaining the garbage.

Ref: Dissent Judgment, *supra*, App. Rec. Vol. I. at para 107 [Tab 2A]

(iii) Garbage Collector's Licence does not Equate to Abandonment

74. The licence to municipal garbage collectors to collect the garbage bags cannot support an inference that the Appellant abandoned his privacy interest in the information in household waste, because:

- citizens are restricted in the methods of disposing of their household waste,
- citizens pay taxes for the municipal collection service and the licence to collect garbage is restricted to the proper exercise of authority by the municipal garbage collector,
- individuals are prohibited from scavenging or otherwise interfering with the garbage, and

- the laws against trespass and scavenging reflect society’s expectation that the information contained in household waste will not be improperly interfered with by others.

Ref: *Andrews, supra*, at paras 48 – 57, 86,100 - 111, B.A. [Tab 3]

Evans, supra, at paras 14 - 21, B.A. [Tab 13]

Bylaw, *supra*, at clauses 4, and 39(c), B.A. [Tab 31]

Dissent Judgment, *supra*, App. Rec. Vol. I. at paras 104 – 106 [Tab 2A]

75. Further, it is unreasonable to conclude that the licence to municipal garbage collectors would cause an individual to expect that third parties, and specifically the police, would take garbage bags stored on private property, search their contents and conduct analysis to determine information that is not otherwise visible with the naked eye.

76. This reasoning by the Majority has been rejected by this Court. For example, the licence or permission for doctors to seize blood for the purpose of offering medical assistance does not constitute abandonment for all purposes. The police are required to obtain a warrant in order to seize the blood. Similarly, the British Columbia Court of Appeal in *Washington* concluded that, despite the reasonableness of random searches of packages shipped by air y airline authorities for security purposes, individuals have a reasonable expectation that their packages will not be opened for some purpose unrelated to security.

Ref: *Dyment, supra*, B.A. [Tab 11]

R. v. Colarusso, [1994] 1 S.C.R. 20, B.A. [Tab 7]

R. v. Washington, 2007 BCCA 540 (B.C.C.A.) at para 46, B.A. [Tab 27]

See also: R. v. Truong, 2002 BCCA 315 (B.C.C.A.) at paras 9 and 19, B.A. [Tab 26]

(iv) Risk Analysis

77. The Majority also erroneously applied “risk” analysis when concluding that the possibility of interference with garbage by “bottle collectors and others looking for discarded treasures, as well as birds, dogs and vermin,” resulted in abandonment of the privacy interest. The mere risk, or possibility, that one’s garbage may be interfered with by third parties does not lead to the conclusion that an individual accepts the risk that the police could take garbage bags off of private property, open them, examine their contents and send selected items for laboratory analysis. This type of risk analysis has been rejected by this Court in *Duarte* and recently in

Buhay where this Court concluded that the mere possibility of a bus depot employee using a master key to open lockers did not diminish the reasonable expectation of privacy.

Ref: *Duarte, supra* at paras 21 and 30, B.A. [Tab 10]
Buhay, supra, at paras 22 and 23, B.A.[Tab 5]
 Dissent Judgment, *supra*, App. Rec. Vol. I. at paras 107 – 108 [Tab 2C]
 Majority Judgment, *supra*, App. Rec. Vol. I. at paras 16, 26, 27, 30, and 41 [Tab 2C]

78. The application of risk analysis is particularly dangerous in this case where the facts show the Appellant took steps to prohibit the exposure of the content of his household waste by storing the opaque bags in metal and plastic containers which were further contained in an elevated wooden Receptacle clearly located on private property. The risk that someone would unlawfully trespass upon private lands and scavenge does not divest the Appellant of his privacy interest, just as “[t]he risk that a house may be burglarized does not mean the homeowner has no reasonable expectation of privacy with respect to the home”.

Ref: Dissent Judgment, *supra*, App. Rec. Vol. I. at paras 107 – 108 [Tab 2C]

(v) **Impact of Conclusion of Abandonment of Privacy Interest in Household Waste**

79. Concluding that an individual abandons his or her privacy interest in the information contained in household waste by putting it out in a manner consistent with garbage collection would change the current status of the law.

80. If there is no reasonable expectation of privacy in information contained in household waste stored on one’s private property, individuals could not enforce their interests as against third party scavenging and converting the information to their own use. The maintenance of a reasonable expectation of privacy in information contained in household waste is key to the Crown’s successful prosecution of offences such as identity theft and stalking.

81. The failure to recognize a reasonable expectation of privacy of information in household waste would also impact civil law issues. For example, a business owner would be powerless to prevent a competitor from using information obtained from garbage bags intended to be collected by municipal authorities.

82. Similarly, an individual would be powerless to object to the media taking garbage bags off his or her property and searching their contents to reveal information people generally wish to remain confidential, such as medications, sexual activities, and personal correspondence. The media could even utilize technologies to glean information that is not otherwise observable with the naked eye and the individual would have no recourse against the media if such information found its way into the news or tabloids.

83. For the average person, it may be less likely that the media would be interested in their household waste, but it is foreseeable that other agencies such as investigators for insurance companies, consumer analysts, and political organizations would be interested in the information contained in household waste. It would concern the public if they were powerless to protect themselves from such scavenging.

(d) The information was not already in the hands of third parties.

84. At the point of seizure by the Police, the garbage bags were not in the possession of the municipal garbage collectors and the possibility that the information could be in the hands of third parties sometime in the future is irrelevant. The transfer of the contents of the garbage bags was not inevitable as the Appellant had the ability to retrieve the bags or any of its contents before the municipal garbage collectors took the bags.

(e) The police technique was intrusive in relation to the privacy interest

85. The factors relevant to the intrusiveness of the technique include:

- the Police trespassed and seized items stored on private property without lawful authority and without reasonable grounds,
- neither the purpose of the seizure nor the nature of the handling of the garbage bags was consistent with the scope of the implied licence to the municipal garbage collectors,
- the Police not only searched the contents of the concealed garbage bags, but sent selected items for laboratory analysis in order to determine information about the precise nature of the activities in the Appellant's dwelling-house not available through the use of sensory perceptions, and

- the sole purpose of the Police seizing the garbage bags was to see into the Appellant's dwelling-house and his activities conducted therein when they had no other lawful means of obtaining that information.

Ref: Dissent Judgment, *supra*, App. Rec. Vol. I. at para 111 [Tab 2C]
Appellant's Factum at paras 9 - 11

86. In this case the invasiveness of the technique was even greater than in *Kokesch, Plant, Grant, Wiley* and *Evans* where the police relied solely on their sensory perceptions.

(f) The use of the police technique itself was objectively unreasonable

87. The use of the technique was objectively unreasonable because it required the Police to trespass upon private property and take items physically off of private property in contravention of established law.

(g) The investigatory technique exposed intimate details of the accused's lifestyle or core biographical data

88. Armed with mere suspicion, the Police executed the Warrantless Searches with the sole purpose of obtaining information regarding the activities inside the Appellant's dwelling-house. Household waste may reveal qualitative information regarding an individual's personal activities conducted within the home. As aptly stated by Conrad J.A. in dissent:

Ordinarily, household garbage contains items from which a great deal can be learned about the homeowner's lifestyle and personal choices. Someone looking at the contents of a bag of household garbage might be able to tell, among other things, what the occupant of the house was eating, the kind of deodorant he used, his sexual practices, the size of his bank account, the state of his health (through the nature of discarded pill bottles, etc.) and the nature of his relationships with family and friends through discarded correspondence. The fact that not all of this information would interest the police does not diminish the reasonableness of a homeowner's expectation that all of this information should remain private.

Ref: Dissent Judgment, *supra*, App. Rec. Vol. I. at para 112 see also paras 94, 95 and 113 [Tab 2C]
Tessling, supra, at para 63, B.A. [Tab 25]
Andrews, supra, at paras 105 – 106, B.A. [Tab 3]

Conclusion on Informational Privacy

89. The Appellant had a reasonable expectation of privacy in the information contained in his household waste, including the expectation that the Police would not seize information revealing

the nature of his personal activities conducted within the privacy of his dwelling-house. Therefore, the Warrantless Searches executed by the Police breached the Appellant's right to be free from unreasonable search and seizure as protected by s. 8 of the *Charter*.

III. Review of the Search Warrant

90. Where a search warrant is issued based on an ITO that contains evidence seized in violation of the accused's s. 8 *Charter* right, the reviewing court must "consider whether the warrant could have been issued had the improperly obtained facts been excised from the information sworn to obtain the warrant". Excising the illegally obtained facts from the ITO is the only way to prevent the state from benefiting from the illegal acts of police officers.

Ref: *Grant, supra*, at paras 49 and 50, B.A. [Tab 17]
Evans, supra, at para 26, B.A. [Tab 13]
R. v. Garofoli, [1990] 2 S.C.R. 1421 at para 56, B.A. [Tab 16]

91. Without the evidence obtained from the Warrantless Searches there would be insufficient evidence in the ITO for the authorizing judge to have granted the Search Warrant.

Ref: Majority Judgment, *supra*, App. Rec. Vol. I. at para 5, B.A. [Tab 2C]
 Evidence of Audrey Elaine Robinson, App. Rec. Vol. I. at pp. 65 – 66 [Tab 4A]
 Evidence of Peter Hearty, App. Rec. Vol. I. at pp. 82 [Tab 4C]
 Evidence of Ryan Joshua Smart, App. Rec. Vol. I. at pp.119 [Tab 4D]

92. Since the Search Warrant could not have been granted, the search of the Appellant's dwelling-house constituted a warrantless search and violated the Appellant's s. 8 *Charter* right. Therefore, this Honourable Court must consider whether the evidence seized from the Appellant's dwelling-house should be excluded pursuant to s. 24(2) of the *Charter*.

IV. Exclusion of the Evidence – Section 24(2) of the Charter

93. Unlike *Plant*, *Grant*, and *Wiley*, where the warrants to search the residences were valid and the issue was whether the warrantless perimeter searches themselves should result in the exclusion of evidence, the s.24(2) analysis in the Appellant's case relates directly to the warrantless search of his dwelling-house. The additional breaches of s. 8 of the *Charter* by the six Warrantless Searches cannot be used to mitigate the seriousness of the violation to the sanctity of the Appellant's dwelling-house. Rather, the additional s. 8 *Charter* violations by the Warrantless Searches support the conclusion that the evidence ought to be excluded.

Ref: *Plant, supra*, at paras 32 and 33, B.A. [Tab 22]

94. The Appellant submits that the evidence seized from the his dwelling-house should be excluded pursuant to s. 24(2), given the seriousness of the *Charter* breaches and the effect of the admission of the evidence on the administration of justice.

Ref: *R. v. Collins*, [1987] 1 S.C.R. 265, B.A. [Tab 8]

(a) Seriousness of the Breaches

95. The following factors reflect the seriousness of the breaches:

(i) The high degree of privacy: the s.8 breach involved the violation of the high expectation of privacy in one’s dwelling-house. In order to secure the autonomy and personal integrity of individuals in a free and democratic state, this right must be vigorously protected.

Ref: Dissent Judgment, *supra*, App. Rec. Vol. I. at paras 88 and 90 [Tab 2C]

Kokesch, supra, at para 47, B.A. [Tab 20]

R. v. Feeney, [1997] 2 SCR 13, at paras 43 and 77, B.A. [Tab 14]

Hunter v. Southam, supra, at para 21, B.A. [Tab 1]

The factual circumstances of the Warrantless Searches cannot be used to minimize the violation, because as LaForest J. warned in *Evans*, a “seemingly minor” intrusion lead to a more intrusive search of his dwelling-house.

Ref: *Evans, supra*, at para 3 B.A. [Tab 13]

(ii) No reasonable grounds: the Police had no reasonable and probable grounds to obtain a search warrant and therefore had the obligation to leave the Appellant alone. In fact, the Police were acting on suspicion based on minimal association between the Appellant and Gowing, the target of the investigation.

Ref: *Kokesch, supra*, at paras 46 and 50, B.A. [Tab 20]

Buhay, supra, at paras 60 and 61, B.A.[Tab 5]

Fry, supra, at para 50, B.A. [Tab 15]

(iii) Absence of good faith: the Police knew they did not have reasonable grounds to obtain a search warrant for the Appellant’s dwelling-house. The Police also knew that they were not allowed to trespass upon the Appellant’s property to obtain information in support of an application for a search warrant as established by this Court in *Kokesch*. In light of

Kokesch, any belief of the Police that they did not require a warrant, absent clear statutory authority conferring such power, was unreasonable.

Ref: *Kokesch, supra*, at para 52 and 53, B.A. [Tab 20]
Buhay, supra, at para 59, B.A. [Tab 5]

The fact that the Police attended in the darkness of the early hours to conduct the Warrantless Searches and that they concealed their actions by putting neighbour's garbage in the Appellant's garbage container, indicated the Police knew the use of the Warrantless Searches was not authorized in law.

Ref: Dissent Judgment, *supra*, App. Rec. Vol. I. at para 88 [Tab 2C]

Further, the Police are deemed to know the powers conferred by the *Criminal Code*. Where the Police know they have no authority to trespass or obtain information from private property that is not in plain view, the Police must seek authorization under s. 487.01 of the *Criminal Code*.

Ref: *Criminal Code*, R.S.C. 1985, c.C-46, s. 487.01

(iv) Intrusiveness of Warrantless Searches: Any search of a dwelling-house without a valid search warrant is a serious breach as it violates the sanctity of the home. Additionally, the Warrantless Searches were intrusive as the Police trespassed upon private property and interfered with garbage bags stored thereon. The Police intruded further by searching the contents of the garbage bags and obtaining information through chemical analysis. The Warrantless Searches revealed information regarding the intimate activities of the Appellant within his dwelling-house which formed the grounds to obtain the Search Warrant for the Appellant's dwelling-house.

- v Casual attitude towards the Appellant's Charter rights: from the inception of the investigation of the Appellant, the Police illustrated a casual attitude towards his *Charter* rights. The facts in support include:
 - a. the thought of a search warrant did not cross the officer's mind,

- b. although the Police believed they would have discussed the garbage searches, they could not recall the details of those discussions and they made no notes of the discussions,
 - c. the Police did not seek judicial guidance under s. 487.01 of the *Criminal Code*,
 - d. the Police continuously breached the Appellant's rights by performing 6 Warrantless Searches,
 - e. the Police indiscriminately interfered with the rights of other citizens by, on at least one occasion, taking garbage of another individual and putting it on the Appellant's property to cover-up their conduct, and
 - f. the Police did not have a copy of the Search Warrant when executing the search of the dwelling-house and made no effort to provide a copy to the Appellant when Cst. Smart entered 45 minutes after initial entry.
- Ref: Evidence of Peter Hearty, App. Rec. Vol. I. at pp. 135,144, 149 and 151 [**Tab 4C**]
 Evidence of Valerie Lynn Bouey, App. Rec. Vol. I. at p.127[**Tab 4B**]
 Evidence of Ryan Joshua Smart, App. Rec. Vol. I. at pp. 169-170, 175-176, and 186 - 189 [**Tab 4D**]
 Evidence of Audrey Elaine Robinson, App. Rec. Vol. I. at pp. 98, 112-113, 119 - 121[**Tab 4A**]
Buhay, supra, at paras 53, 57, 58 and 68, B.A. [**Tab 5**]
- vi Flagrant breach: the Police did not attempt to determine whether the Warrantless Searches involved a trespass upon private property and ignored the obvious physical indications that the Receptacle was on private property. The Police did not review the *Petty Trespass Act* or discuss the particulars of this seizure in determining whether a warrant was required.
- Ref: Trial Judgment, *supra*, App. Rec. Vol. I, at paras 7 and 14 [**Tab 2A**]
 Evidence of Audrey Elaine Robinson, App. Rec. Vol. I. at pp.92, 94, 104 – 110, and 112 and 113 [**Tab 4A**]
 Evidence of Ryan Joshua Smart, App. Rec. Vol. I. at pp. 159, 163 -165 [**Tab 4D**]
 Evidence of Peter Hearty, App. Rec. Vol. I. at pp. 144, 145 and 148 [**Tab 4C**]
- vii No urgency or necessity: the Crown did not lead evidence that there was any urgency or necessity. In fact, the Warrantless Searches were conducted 7 months after the initiation of the investigation and the Search

Warrant for the dwelling-house was not obtained until 5 days after the last of the Warrantless Searches.

Ref: *Buhay, supra*, at para 52, B.A. [Tab 5]

96. Further, the seriousness of the breach is not mitigated by (a) the implied licence to municipal garbage collectors, (b) risk of interference by others, or (c) the degree of intrusion onto private property for the Warrantless searches because of the reasons discussed above.

Ref: Dissent Judgment, *supra*, App. Rec. Vol. I. at para 89 [Tab 2C]
Evans, supra, at paras 14 - 21, B.A. [Tab 13]

(b) Administration of Justice

97. The production and trafficking in drugs is a serious concern in Canada, although the drug MDA is less serious than the hard drugs of cocaine and heroin and even less serious than methamphetamines and LSD. However, warrantless intrusion by the state into the private lives of its citizens and the activities conducted in the privacy of their dwelling-homes is also a serious concern and goes to the essence of a free and democratic state.

Ref: Evidence of Mark Thomas Anderson, App. Rec. Vol. I. at p. 196 [Tab 4G]

98. It is respectfully submitted that the admission of the evidence in this case would bring the administration of justice into greater disrepute than its excision, particularly where the Police had no reasonable grounds for the Warrantless Searches. In explaining the significance of the lack of reasonable grounds, Justice Sopinka in *Kokesch* explained:

Where the police have nothing but suspicion and no legal way to obtain other evidence, it follows that they must leave the suspect alone, not charge ahead and obtain other evidence illegally and unconstitutionally. Where they take this latter course, the *Charter* violation is plainly more serious than it would be otherwise, not less. Any other conclusion leads to an indirect but substantial erosion of the *Hunter* Standards: the Crown would happily concede s. 8 violations if they could routinely achieve admission under s. 24(2) with the claim that the police did not obtain a warrant because they did not have reasonable and probable grounds. The irony of this result is self-evident. It should not be forgotten that *ex post facto* justification for searches by their results is precisely what the *Hunter* standards were designed to prevent: see *Hunter, supra*, per Dickson J. (as he then was), at p. 160; and *Greffe, supra*, per Lamer J., at pp. 790 and 798.

Ref: *Kokesch, supra*, at paras 43 and 46, B.A. [Tab 20]

99. The Court must be cautious not to erode the protection afforded by our system of prior authorization by allowing evidence that could only be obtained with a search warrant to be admitted despite the warrantless searches. This is particularly concerning where the Criminal Code provides for judicial authorization of an investigative technique that would otherwise constitute an unreasonable search or seizure.

Ref: *Kokesch, supra*, at para 46, B.A. [Tab 20]

100. Further, the admissibility of the evidence in the Appellant's case would amount to judicial condonation of unacceptable conduct by police and encourage similar conduct of the police in the future. As indicated by the evidence of Cst. Hearty, garbage searches were a common practice and there was no discussion about whether this technique interfered with the private property of individuals. In fact, there was little concern regarding the rights of individuals which were exemplified by the taking of other's garbage bags and placing them on the Appellant's property.

Ref: *Buhay, supra*, at para 70, B.A. [Tab 5]
Kokesch, supra, at paras 43 and 58, B.A. [Tab 20]

101. Condoning police short-cuts which infringe on individuals' rights, especially when the police are acting without reasonable grounds, unduly sacrifices the long-term viability of the justice system. In the words of Iacobucci J. in *R. v. Burlingham*, [1995] 2 S.C.R. 206:

...we should never lose sight of the fact that even a person accused of the most heinous crimes, and no matter the likelihood that he or she actually committed those crimes, is entitled to the full protection of the *Charter*. Short-cutting or short-circuiting those rights affects not only the accused, but also the entire reputation of the criminal justice system. It must be emphasized that the goals of preserving the integrity of the criminal justice system as well as promoting the decency of investigatory techniques are of fundamental importance in applying s. 24(2).

Ref: *R. v. Burlingham*, [1995] 2 S.C.R. 206 at para 50, B.A. [Tab 6]

102. Based on the seriousness of the breach and the effect of the admission of the evidence on the administration of justice, the Appellant respectfully submits that the evidence obtained in the search of the Appellant's dwelling-house ought to be excluded pursuant to s. 24(2) of the *Charter* and verdicts of acquittal be entered on all charges.

PART IV – SUBMISSIONS CONCERNING COSTS

103. The Appellant has no submissions as to costs.

PART V – ORDER SOUGHT

104. It is respectfully requested that the appeal be allowed, the convictions quashed, and acquittals be entered on all counts.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated this 5th day of February, 2008

Jennifer Ruttan
Ruttan Bates
Barristers and Solicitors

Counsel for the Appellant,
Russell Stephen Patrick

PART VI – TABLE OF AUTHORITIES

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| 12. <i>R. v. Edwards</i> , [1996] 1 S.C.R. 128 | 33, 36, 37, 38, 40, 41, 42, 70 |
| 13. <i>R. v. Evans</i> , [1996] 1 S.C.R. 8 | 28, 30, 31, 38, 47, 52, 53, 56, 70, 74, 86, 90, 95, 96 |
| 14. <i>R. v. Feeney</i> , [1997] 2 SCR 13 | 95 |
| 15. <i>R. v. Fry</i> , [1999] N.J. No. 352 (Nfld. C.A.) | 30, 37, 41, 95 |
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| 17. <i>R. v. Grant</i> , [1993] 3 S.C.R. 223 | 38, 47, 70, 86, 90, 93 |
| 18. <i>R. v. Kelly</i> , [1999] N.B.J. No. 98(N.B.C.A.) | 38, 42 |
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PART VII – STATUTORY PROVISIONS

Petty Trespass Act, RSA 2000, c, P-11

Notice

2.1(1) Entry on land may be prohibited by notice to that effect, and entry is prohibited without any notice on land

- (a) that is a lawn, garden or land that is under cultivation,
- (b) that is surrounded by a fence, a natural boundary or a combination of a fence and a natural boundary, or
- (c) that is enclosed in a manner that indicates the owner's or occupier's intention to keep persons off the land or to keep animals on the land.

Criminal Code, R.S.C. 1985, c.C-46, ss.29, s. 487.01, 492.1, 492.2,

Duty of person arresting

29. (1) It is the duty of every one who executes a process or warrant to have it with him, where it is feasible to do so, and to produce it when requested to do so.

Notice

(2) It is the duty of every one who arrests a person, whether with or without a warrant, to give notice to that person, where it is feasible to do so, of

- (a) the process or warrant under which he makes the arrest; or
- (b) the reason for the arrest.

Failure to comply

(3) Failure to comply with subsection (1) or (2) does not of itself deprive a person who executes a process or warrant, or a person who makes an arrest, or those who assist them, of protection from criminal responsibility.

R.S., c. C-34, s. 29.

Obligation de la personne qui opère une arrestation

29. (1) Quiconque exécute un acte judiciaire ou un mandat est tenu de l'avoir sur soi, si la chose est possible, et de le produire lorsque demande lui en est faite.

Avis

(2) Quiconque arrête une personne avec ou sans mandat est tenu de donner à cette personne, si la chose est possible, avis :

a) soit de l'acte judiciaire ou du mandat aux termes duquel il opère l'arrestation;

b) soit du motif de l'arrestation.

Inobservation

(3) L'omission de se conformer aux paragraphes (1) ou (2) ne prive pas, d'elle-même, une personne qui exécute un acte judiciaire ou un mandat, ou une personne qui opère une arrestation, ou celles qui lui prêtent main-forte, de la protection contre la responsabilité pénale.

S.R., ch. C-34, art. 29.

Information for
general warrant

487.01 (1) A provincial court judge, a judge of a superior court of criminal jurisdiction or a judge as defined in section 552 may issue a warrant in writing authorizing a peace officer to, subject to this section, use any device or investigative technique or procedure or do any thing described in the warrant that would, if not authorized, constitute an unreasonable search or seizure in respect of a person or a person's property if

(a) the judge is satisfied by information on oath in writing that there are reasonable grounds to believe that an offence against this or any other Act of Parliament has been or will be committed and that information concerning the offence will be obtained through the use of the technique, procedure or device or the doing of the thing;

(b) the judge is satisfied that it is in the best interests of the administration of justice to issue the warrant; and

(c) there is no other provision in this or any other Act of Parliament that would provide for a warrant, authorization or order permitting the technique, procedure or device to be used or the thing to be done.

Limitation

(2) Nothing in subsection (1) shall be construed as to permit interference with the bodily integrity of any person.

Search or seizure to
be reasonable

(3) A warrant issued under subsection (1) shall contain such terms and conditions as the judge considers advisable to ensure that any search or seizure authorized by the warrant is reasonable in the circumstances.

Video surveillance

(4) A warrant issued under subsection (1) that authorizes a peace officer to observe, by means of a television camera or other similar electronic device, any person who is engaged in activity in circumstances in which the person has a reasonable expectation of privacy shall contain such terms and conditions as the judge considers advisable to ensure that the privacy of the person or of any other person is respected as much as possible.

Other provisions to apply

(5) The definition “offence” in section 183 and sections 183.1, 184.2, 184.3 and 185 to 188.2, subsection 189(5), and sections 190, 193 and 194 to 196 apply, with such modifications as the circumstances require, to a warrant referred to in subsection (4) as though references in those provisions to interceptions of private communications were read as references to observations by peace officers by means of television cameras or similar electronic devices of activities in circumstances in which persons had reasonable expectations of privacy.

Notice after covert entry

(5.1) A warrant issued under subsection (1) that authorizes a peace officer to enter and search a place covertly shall require, as part of the terms and conditions referred to in subsection (3), that notice of the entry and search be given within any time after the execution of the warrant that the judge considers reasonable in the circumstances.

Extension of period for giving notice

(5.2) Where the judge who issues a warrant under subsection (1) or any other judge having jurisdiction to issue such a warrant is, on the basis of an affidavit submitted in support of an application to vary the period within which the notice referred to in subsection (5.1) is to be given, is satisfied that the interests of justice warrant the granting of the application, the judge may grant an extension, or a subsequent extension, of the period, but no extension may exceed three years.

Provisions to apply

(6) Subsections 487(2) and (4) apply, with such modifications as the circumstances require, to a warrant issued under subsection (1).

Telewarrant provisions to apply

(7) Where a peace officer believes that it would be impracticable to appear personally before a judge to make an application for a warrant under this section, a warrant may be issued under this section on an information submitted by telephone or other means of telecommunication and, for that purpose, section 487.1 applies, with such modifications as the circumstances require, to the warrant.

1993, c. 40, s. 15; 1997, c. 18, s. 42, c. 23, s. 13.

Dénonciation pour mandat général

487.01 (1) Un juge de la cour provinciale, un juge de la cour supérieure de juridiction criminelle ou un juge au sens de l’article 552 peut décerner un mandat par écrit autorisant un agent de la paix, sous réserve du présent article, à utiliser un dispositif ou une technique ou une méthode d’enquête, ou à accomplir tout acte qui y est mentionné, qui constituerait sans cette autorisation une fouille, une perquisition ou une saisie abusive à l’égard d’une personne ou d’un bien :

a) si le juge est convaincu, à la suite d’une dénonciation par écrit faite sous serment, qu’il existe des motifs raisonnables de croire qu’une infraction à la

présente loi ou à toute autre loi fédérale a été ou sera commise et que des renseignements relatifs à l'infraction seront obtenus grâce à une telle utilisation ou à l'accomplissement d'un tel acte;

b) s'il est convaincu que la délivrance du mandat servirait au mieux l'administration de la justice;

c) s'il n'y a aucune disposition dans la présente loi ou toute autre loi fédérale qui prévoit un mandat, une autorisation ou une ordonnance permettant une telle utilisation ou l'accomplissement d'un tel acte.

Limite

(2) Le paragraphe (1) n'a pas pour effet de permettre de porter atteinte à l'intégrité physique d'une personne.

Fouilles,
perquisitions ou
saisies raisonnables

(3) Le mandat doit énoncer les modalités que le juge estime opportunes pour que la fouille, la perquisition ou la saisie soit raisonnable dans les circonstances.

Surveillance vidéo

(4) Le mandat qui autorise l'agent de la paix à observer, au moyen d'une caméra de télévision ou d'un autre dispositif électronique semblable, les activités d'une personne dans des circonstances telles que celle-ci peut raisonnablement s'attendre au respect de sa vie privée doit énoncer les modalités que le juge estime opportunes pour s'assurer de ce respect autant que possible.

Autres dispositions
applicables

(5) La définition de « infraction » à l'article 183 et les articles 183.1, 184.2, 184.3 et 185 à 188.2, le paragraphe 189(5) et les articles 190, 193 et 194 à 196 s'appliquent, avec les adaptations nécessaires, au mandat visé au paragraphe (4) comme si toute mention relative à l'interception d'une communication privée valait mention de la surveillance par un agent de la paix, au moyen d'une caméra de télévision ou d'un dispositif électronique semblable, des activités d'une personne dans des circonstances telles que celle-ci peut raisonnablement s'attendre au respect de sa vie privée.

Avis

(5.1) Le mandat qui autorise l'agent de la paix à perquisitionner secrètement doit exiger, dans le cadre des modalités visées au paragraphe (3), qu'un avis de la perquisition soit donné dans le délai suivant son exécution que le juge estime indiqué dans les circonstances.

Prolongation

(5.2) Le juge qui décerne un mandat dans le cadre du paragraphe (1) ou un juge compétent pour décerner un tel mandat peut accorder une prolongation — initiale ou ultérieure — du délai visé au paragraphe (5.1), d'une durée maximale de trois ans, s'il est convaincu par l'affidavit appuyant la demande de prolongation que les intérêts de la justice justifient la prolongation.

Dispositions
applicables

(6) Les paragraphes 487(2) et (4) s'appliquent, avec les adaptations nécessaires, au mandat décerné en vertu du paragraphe (1).

Télémandats

(7) Un mandat peut être décerné sous le régime du présent article sur le fondement d'une dénonciation transmise par téléphone ou autre moyen de télécommunication lorsque l'agent de la paix considère qu'il serait peu commode de se présenter en personne devant un juge; l'article 487.1 s'applique alors avec les adaptations nécessaires.

1993, ch. 40, art. 15; 1997, ch. 18, art. 42, ch. 23, art. 13.

492.1 (1) A justice who is satisfied by information on oath in writing 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 is relevant to the commission of the offence, including the whereabouts of any person, can be obtained through the use of a tracking device, may at any time issue a warrant authorizing a peace officer or a public officer who has been appointed or designated to administer or enforce a federal or provincial law and whose duties include the enforcement of this Act or any other Act of Parliament and who is named in the warrant

(a) to install, maintain and remove a tracking device in or on any thing, including a thing carried, used or worn by any person; and

(b) to monitor, or to have monitored, a tracking device installed in or on any thing.

Time limit for warrant

(2) A warrant issued under subsection (1) is valid for the period, not exceeding sixty days, mentioned in it.

Further warrants

(3) A justice may issue further warrants under this section.

Definition of "tracking device"

(4) For the purposes of this section, "tracking device" means any device that, when installed in or on any thing, may be used to help ascertain, by electronic or other means, the location of any thing or person.

Removal after expiry of warrant

(5) On *ex parte* application in writing supported by affidavit, the justice who issued a warrant under subsection (1) or a further warrant under subsection (3) or any other justice having jurisdiction to issue such warrants may authorize that the tracking device be covertly removed after the expiry of the warrant

(a) under any terms or conditions that the justice considers advisable in the public interest; and

(b) during any specified period of not more than sixty days.

1993, c. 40, s. 18; 1999, c. 5, s. 18

Dénonciation pour mandat de localisation

492.1 (1) Le juge de paix qui est convaincu, à la suite d'une dénonciation par écrit faite sous serment, qu'il existe des motifs raisonnables de soupçonner qu'une infraction à la présente loi ou à toute autre loi fédérale a été ou sera commise et que des renseignements utiles à cet égard, notamment sur le lieu où peut se trouver une

personne, peuvent être obtenus au moyen d'un dispositif de localisation peut décerner un mandat autorisant un agent de la paix ou, dans le cas d'un fonctionnaire public nommé ou désigné pour l'application ou l'exécution d'une loi fédérale ou provinciale et chargé notamment de faire observer la présente loi ou toute autre loi fédérale, celui qui y est nommé :

a) à installer un dispositif de localisation dans ou sur toute chose, notamment une chose transportée, utilisée ou portée par une personne, à l'entretenir et à l'enlever;

b) à surveiller ou faire surveiller ce dispositif.

Période de validité du mandat

(2) Le mandat est valide pour la période, d'au plus soixante jours, qui y est indiquée.

Nouveaux mandats

(3) Le juge de paix peut décerner de nouveaux mandats en vertu du présent article.

Définition de « dispositif de localisation »

(4) Pour l'application du présent article, « dispositif de localisation » s'entend d'un dispositif qui, lorsqu'il est placé dans ou sur une chose, peut servir à localiser une chose ou une personne par des moyens électroniques ou autres.

Enlèvement après l'expiration du mandat

(5) Sur demande écrite ex parte, accompagnée d'un affidavit, le juge de paix qui a décerné le mandat visé aux paragraphes (1) ou (3) ou un juge de paix compétent pour décerner un tel mandat peut permettre que le dispositif de localisation soit enlevé secrètement après l'expiration du mandat :

a) selon les modalités qu'il estime opportunes;

b) au cours de la période, d'au plus soixante jours, qu'il spécifie.

1993, ch. 40, art. 18; 1999, ch. 5, art. 18.

Information re number recorder

492.2 (1) A justice who is satisfied by information on oath in writing 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, may at any time issue a warrant authorizing a peace officer or a public officer who has been appointed or designated to administer or enforce a federal or provincial law and whose duties include the enforcement of this Act or any other Act of Parliament and who is named in the warrant

(a) to install, maintain and remove a number recorder in relation to any telephone or telephone line; and

(b) to monitor, or to have monitored, the number recorder.

Order re telephone records

(2) When the circumstances referred to in subsection (1) exist, a justice may order that any person or body that lawfully possesses records of telephone calls

originated from, or received or intended to be received at, any telephone give the records, or a copy of the records, to a person named in the order.

Other provisions to apply

(3) Subsections 492.1(2) and (3) apply to warrants and orders issued under this section, with such modifications as the circumstances require.

Definition of “number recorder”

(4) For the purposes of this section, “number recorder” means any device that can be used to record or identify the telephone number or location of the telephone from which a telephone call originates, or at which it is received or is intended to be received.

1993, c. 40, s. 18; 1999, c. 5, s. 19.

Dénonciation :
enregistreur de
numéro

492.2 (1) Le juge de paix qui est convaincu, à la suite d’une dénonciation par écrit faite sous serment, qu’il existe des motifs raisonnables de soupçonner qu’une infraction à la présente loi ou à toute autre loi fédérale a été ou sera commise et que des renseignements utiles à l’enquête relative à l’infraction pourraient être obtenus au moyen d’un enregistreur de numéro peut décerner un mandat autorisant un agent de la paix ou, dans le cas d’un fonctionnaire public nommé ou désigné pour l’application ou l’exécution d’une loi fédérale ou provinciale et chargé notamment de faire observer la présente loi ou toute autre loi fédérale, celui qui y est nommé :

- a) à placer sous enregistreur de numéro un téléphone ou une ligne téléphonique, à entretenir l’enregistreur et à les en dégager;
- b) à surveiller ou faire surveiller l’enregistreur.

Ordonnance : registre
de téléphone

(2) Dans les circonstances visées au paragraphe (1), le juge peut ordonner à la personne ou à l’organisme qui possède légalement un registre des appels provenant d’un téléphone ou reçus ou destinés à être reçus à ce téléphone de donner le registre ou une copie de celui-ci à toute personne nommée dans l’ordonnance.

Autres dispositions applicables

(3) Les paragraphes 492.1(2) et (3) s’appliquent, avec les adaptations nécessaires, aux mandats décernés et aux ordonnances rendues en vertu du présent article.

Définition de
« enregistreur de
numéro »

(4) Pour l’application du présent article, « enregistreur de numéro » s’entend d’un dispositif qui peut enregistrer ou identifier le numéro ou la localisation du téléphone d’où provient un appel ou auquel l’appel est reçu ou destiné à être reçu.

1993, ch. 40, art. 18; 1999, ch. 5, art. 19.

The Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

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|------------------------------------------------------------------------------------------------------------|------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Search or seizure | 8. | Everyone has the right to be secure against unreasonable search or seizure. |
| Fouilles, perquisitions ou saisies | 8. | Chacun a droit à la protection contre les fouilles, les perquisitions ou les saisies abusives. |
| Enforcement of guaranteed rights and freedoms | 24. | (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances. |
| Exclusion of evidence bringing administration of justice into disrepute | | (2) 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. |
| Recours en cas d'atteinte aux droits et libertés | 24. | (1) Toute personne, victime de violation ou de négation des droits ou libertés qui lui sont garantis par la présente charte, peut s'adresser à un tribunal compétent pour obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances. |
| Irrecevabilité d'éléments de preuve qui risqueraient de déconsidérer l'administration de la justice | | (2) 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. |