privacy in measurable exterior surface heat of a residence. Instead, there is the bald statement that, "In the home, our cases show, *all* details are intimate details, because the entire area is held safe from prying eyes."[38] (Scalia J.'s emphasis).

47. Applying Harlan J's test in *Katz,* it can readily be seen that expectations of privacy in exterior surface heat are not reasonable. As one commentator has remarked in arguing that "Exposure to the Public Renders Privacy Interests Unprotected Under the Fourth Amendment"[39]:

> Similarly, in *Kyllo,* the heat rays emanating from Kyllo's home should not have warranted special Fourth Amendment protection because they were knowingly exposed to the public. Although the infra-red images were unavailable to the general public, ordinary use of the senses could have enabled a passerby or neighbour to notice the heat emanating from the home. The increased heat could manifest itself physically by melting snow on the warmer side of the home, or by evaporating rainwater more quickly, as the dissent pointed out. Such an exposure to the public renders any privacy interest that Kyllo may have had unreasonable.

48. The Court of Appeal in the case at bar committed the same error as the majority in *Kyllo*: it failed to distinguish between information in the public domain, and information in the private domain. Stevens J. in *Kyllo* referred to this important difference at the outset of his dissenting reasons:

> There is, in my judgment, a distinction of constitutional magnitude between "through-the-wall surveillance" that gives the observer or listener direct access to information in a private area, on the one hand, and the thought processes used to draw inferences from information in the public domain, on the other hand.[40]

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[38] *Kyllo,* supra, (p. 37) As well, the proposition that all details are intimate details is contrary to the views expressed by this court in *Plant* as is argued below.
[39] Groskopfl, "If it Ain't Broke, Don't Fix It: The Supreme Court's Unnecessary Departure from Precedent", 52 De Paul Law Review 201 (2002), at 237
[40] *Kyllo,* supra, (p. 41)

49. These and other comments by the strong dissent in *Kyllo* warranted a far more intensive examination of the United States caselaw than that undertaken by the Court of Appeal. At the very least, the fact that the Court in *Kyllo* was trying to apply an "intimate details" test that had not been well-defined in the United States should have led the Court of Appeal to scrutinize their jurisprudence with greater care.

e) A Correct Evaluation of the Capabilities of the FLIR Based on the Evidence and Based on the Jurisprudence of this Court Leads to the Conclusion that its Use Without Prior Authorization is not an Unreasonable Search or Seizure Within the Meaning of Section 8

i) The Jurisprudence of this Court

50. In *R. v. Dyment*[41], La Forest J., together with Chief Justice Dickson, set out a two-step analysis to determine first, whether the handing over of a blood sample by a doctor to a police officer without the patient's consent was a seizure, and secondly, whether it was an unreasonable seizure. With respect to the first branch of the analysis, La Forest J. said: "If I were to draw the line between a seizure and a mere finding of evidence, I would draw it logically and purposefully at the point at which it can reasonably be said that the individual had ceased to have a privacy interest in the subject-matter allegedly seized."[42]

51. This concept was repeated by this Court in *Law* in regard to the definition of a search where the majority of this Court found that an investigative action does

[41] *R. v. Dyment,* [1988] 2 S.C.R. 417
[42] Ibid., at p. 435.

not constitute a search within the meaning of s. 8 unless it intrudes on a reasonable expectation of privacy.[43]

52. In *Plant*[44] Sopinka J. proposed a "contextual approach" to the scope of section 8 protection. This approach included an evaluation of the seriousness of the crime being investigated.

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

53. With respect to the nature of the information, Sopinka J. said:

> ...in order for constitutional protection to be extended, the information seized must be of a "personal and confidential" nature. In fostering the underlying values of dignity, integrity and autonomy, it is fitting that s. 8 of the Charter should seek to protect a biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state. This would include information which tends to reveal intimate details of the lifestyle and personal choices of the individual. The computer records investigated in the case at bar while revealing the pattern of electricity consumption in the residence cannot reasonably be said to reveal intimate details of the appellant's life since electricity consumption reveals very little about the personal lifestyle or private decisions of the occupant of the residence.[45]

54. Thus, it is not all personal information which is entitled to constitutional protection but, rather, only core biographical information of a personal and

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[43] *R. v. Law*, supra, note 20
[44] *R. v. Plant,* supra, note 21 at 293
[45] Ibid., at 293

confidential nature that tends to reveal intimate details about one's lifestyle or personal choices.

55. In *Edwards*[46], Cory J. set out a list of factors to assess whether an accused in any given case had a reasonable expectation of privacy. He noted that "s. 8 is a personal right. It protects people and not places". As a consequence, "the legality of a search depends on the accused establishing that his personal rights to privacy have been violated". Establishing this requires a demonstration by the accused of "the existence of a subjective expectation of privacy", and "the objective reasonableness of the expectation."[47]

56. From the cases referred to above, three clear and consistent guiding principles can be drawn:[48]

a) section 8 is meant to protect people, not places and consequently protects only the biographical core of personal and confidential information that tends to reveal intimate details about one's lifestyle or personal choices;

b) a subjective expectation of privacy which is objectively reasonable must be established by the person claiming section 8 protection in regard to the specific information in issue;

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[46] *R. v. Edwards,* supra, note 18
[47] Ibid., at pp 145-6
[48] See Hubbard, DeFreitas and Magotiaux, "The Internet – Expectations of Privacy in a New Context", [2001] 45 CLQ 170 and Hubbard, "Expectations of Privacy and New Technology", Proceedings of the 2001 Criminal Law and Charter Conference

c) even where a reasonable expectation of privacy is established, the public interest in being left alone may have to give way to the governmental interest in effective law enforcement.

ii) Application of the Jurisprudence of this Court to the Case at Bar

a) Section 8 is meant to protect people and not places and consequently protects only the biographical core of personal information that tends to reveal intimate details about one's lifestyle or personal choices.

57. It cannot be said that the detecting and recording of information that certain exterior areas of the home are hotter in comparison to other surface areas of the home itself or to comparable areas of neighbouring homes reveals any biographical core of personal information which individuals in a free society wish to maintain. The comparative exterior surface heat of a residence provides no such protected private information. The FLIR, in and of itself, captures no confidential details about one's lifestyle or personal choices.[49] While the FLIR, in combination with other information may allow for inferences to be drawn about private activities, s.8 does not prohibit inferences being drawn from investigative techniques which are not, in and of themselves, unreasonable searches or seizures.

58. The use of comparative data, which may have great evidentiary significance when combined with other information, does not intrude on any protected area of

[49] In similar circumstances, the dissenting judges in *Kyllo* found that "the countervailing privacy interest is at best trivial". (p. 45) Citing an earlier judgment, they noted, "The concept of an interest in privacy that society is prepared to recognize as reasonable is, by its very nature, critically different from the mere expectation, however justified, that certain facts will not come to the attention of authorities". (pp. 45-46)

privacy because it does not itself reveal any confidential or private information. This was recently noted by this Court in *S.A.B.*, in assessing DNA analysis:[50]

> The DNA warrant scheme limits the intrusion into informational privacy by using only non-coding DNA for forensic DNA analysis. ...In other words, the DNA analysis is conducted solely for forensic purposes and does not reveal any medical, physical or mental characteristics; its only use is the provision of identifying information that can be compared to an existing sample.

59. Consequently, based on the jurisprudence of this Court, there is no principled basis to extend s. 8 protection to the non-private and non-confidential information detected and recorded by the FLIR camera employed in this case.

b) A subjective expectation of privacy which is objectively reasonable must be established by the person claiming section 8 protection in regard to the specific information in issue.

60. The Respondent called no evidence on the s. 8 *voir dire* of his subjective expectation of privacy in the comparative external surface heat in his residence, and thus failed to discharge his onus. There was no other evidentiary basis from which it could be inferred that he had a subjective expectation of privacy in regard to the comparative exterior surface heat of his residence.

61. Further, there was no evidence adduced on the *voir dire* to discharge the Respondent's burden of establishing an objective expectation of privacy in the limited comparative information that the FLIR captures. As argued in more detail above, nor could a general objective expectation be inferred. Generally, Canadians take no steps to maintain the privacy of the comparative exterior surface heat of their residences. Generally, they take no steps to mask the signs

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[50] Supra, at note 33, para. 49

of surface heat such as snow melting on the roof, or steam or frost residue on windows, or steam or smoke coming from chimneys or vents, just as they do not seek to mask the odours of burning wood in a fireplace or the odours of cooking.

62. Generally, Canadians take no steps to maintain as private any of the obvious signs of the normal heat generating activities occurring within a residence such as the activities of cooking, washing, or burning wood in a fireplace. Indeed, it is difficult to imagine anyone other than a marihuana producer who would even care that the comparative surface heat of the exterior of their house had been measured and recorded.

63. The lack of any subjective or objectively reasonable privacy interest in surface heat is apparent when one compares this to the interests protected in *Duarte*[51] and *Wong*[52], namely the fundamental rights to speak and act free from the state recording one's speech and actions without prior authorization. Unlike the clear subjective and objective interests in the privacy of free speech, the measurement of a structure's surface heat reveals nothing comparable. The FLIR, standing alone, simply does not capture or reveal the core biographical information which Canadians subjectively and objectively expect to be protected by section 8.

64. Moreover, the record of a person's words or actions obtained through the use of a wiretapping or personal recording device, or the use of a video camera will often, standing alone, constitute the proof of the *actus reus* of the offence, or a

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[51] *R. v. Duarte,* [1990] 1 S.C.R. 30
[52] *R. v. Wong,* [1990] 3 S.C.R. 36

necessary element of the offence. Measuring and recording a building's surface heat in itself proves nothing of comparable significance. At most, it furnishes some evidence which, with other evidence, may provide sufficient grounds for a warrant to issue. It could not standing alone even provide grounds for the issuance of a warrant.

65. The consistent privacy analysis of this Court, as set out above, provided the basis for Sopinka J., in *Evans,*[53] to classify the use of the FLIR as being an investigative technique that did not intrude on any subjective or objective expectation of privacy and therefore did violate the *Charter*. In this regard, he stated:

> The evidence at issue in this appeal was clearly "discoverable" without recourse to a Charter violation. Several lawful investigatory techniques were available to the police, including surveillance of the appellants' house, searches through the appellants' garbage, overhead infrared photography or a further inquiry to B.C. Hydro. [54] (emphasis added)

66. It is submitted that the clear finding of this Court in *Evans,* as set out above, which flows from the consistent approach taken by this Court in regard to the available scope of s. 8 protection, continues to be compelling and is dispositive of this appeal. The warrantless detecting and recording of a residence's comparative exterior surface heat from a public thoroughfare simply does not intrude on any reasonable privacy expectation and consequently does not violate s. 8.

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[53] *R. v. Evans,* supra, note 19
[54] Ibid., p. 26

c) Even where a reasonable expectation of privacy is engaged, the public interest in being left alone may have to give way to the governmental interest in effective law enforcement.

67. In regard to third party hydro records, this Court in *Plant* concluded that the seriousness of the offence in the case at bar required the minimal privacy interest in the information contained in such records to give way to the governmental interest in law enforcement. In this regard, Sopinka J stated:[55]

> In addition to the fact that the manner and place of the search are indicative of a minimally intrusive search, the seriousness of the offence militates in favour of the conclusion that the requirements of law enforcement outweigh the privacy interest claimed by the appellant. As this Court previously concluded in *Kokesch, supra,*while participation in the illicit trade of marihuana may not be as serious as the trade in other narcotics such as cocaine, it remains an offence which is taken seriously by law enforcement agents.
>
> Overall, I have concluded from the nature of the information, the relationship between the appellant and the [utility] Commission, the place and manner of the search and the seriousness of the offence under investigation, that the appellant cannot be said to have held a reasonable expectation of privacy in relation to the computerized electricity records which outweighs the state interest in enforcing the laws related to narcotics offences. As such, the appellant has failed to bring this search within the parameters of s. 8 of the Charter. This information was, therefore, available to the police to support the application for a search warrant. (emphasis added)

68. Following *Plant*, this Court in *Smith,* refused to find a s. 8 violation in regard to the release of personal information in Custom's records noting that the appellant there "cannot be said to have held a reasonable expectation of privacy

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[55] *R. v. Plant,* supra, note 21 at 295-96

in relation to the disclosed portion of the E-311 Customs Information which outweighs the Canada Unemployment Insurance Commission's interest in ensuring compliance with the self-reporting obligations of the Unemployment Insurance benefit program".[56]

69. The judgment of this Court in *Plant* remains dispositive of the issue that there is a compelling governmental interest in investigating this very serious offence that outweighs the minimal privacy interests in the comparative surface heat at the exterior of a private residence.

70. As argued above, the privacy interests, if any, intruded upon by the use of the FLIR camera are even more minimal than the privacy interests intruded upon by access to records of residential electricity consumption or Customs forms. Consequently, based on the jurisprudence of this Court, the same conclusion as reached in *Plant* and *Smith* should be reached here, namely, "the appellant has failed to bring this search within the parameters of s. 8 of the Charter".[57]

d) Conclusion

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[56] *Smith*, supra, note 32 at 903

[57] Evidence was not placed before the trial Court or the appellate Court by the Respondent to challenge the currency of this Court's conclusion in *Plant* regarding the seriousness of this offence. There is, however a considerable amount of publicly available materials that suggest that the seriousness of this offence has increased. See for instance the evidence of the Minister of Justice before the Special Committee on the Non-medical Use of Drugs (Bill C-38) or "Drug Situation in Canada - 2002, A Report Prepared by the Organized Crime Analysis Section, Royal Canadian Mounted Police" , http://www.rcmp-grc.gc.ca/crimint/drugs_2002_e.htm - marihuana Book of Authorities Tabs 25, 28, 30, 31.

71. Properly applying the jurisprudence of this Court as outlined above to the actual FLIR camera utilized in this case, the conclusion must be that its use without prior judicial authorization does not violate s. 8 of the *Charter* based on:

a) the minimally intrusive capabilities of the FLIR which do not capture or record any biographical core of personal information which would reveal intimate details of lifestyle or personal choices;

b) the lack of any subjective or objective expectation of privacy in any of the information the FLIR is capable of capturing;

c) the compelling governmental interest in detecting, investigating and prosecuting indoor marihuana grow operations.

ISSUE 3 - DID THE COURT OF APPEAL FOR ONTARIO ERR IN EXCLUDING THE EVIDENCE AGAINST THE RESPONDENT UNDER SECTION 24(2) OF THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS?

a) The Court of Appeal Ought to Have Shown Deference to the Trial Judge's s. 24(2) decision.

72. Although the trial judge found that no *Charter* breach had occurred, in making his findings under section 24(2) he assumed a breach, and found, as the Court of Appeal ultimately did, that because the breach related to a dwelling it was serious. However the trial judge found that the police had not acted in bad faith and that excluding the evidence would bring the administration of justice into disrepute. The Court of Appeal, without explanation, ignored this conclusion and conducted its own *de novo* s. 24(2) analysis.

73. This Court has repeatedly held that a trial judge's decision under section 24(2) should not be reversed unless it is unreasonable or based on an error in law. Recently, this principle was re-affirmed by this Court in *Buhay*, where Arbour J. stated:[58]

> While the decision to exclude must be a reasonable one, a reviewing court will not interfere with a trial judge's conclusions on s. 24(2) absent an "apparent error as to the applicable principles or rules of law" or an "unreasonable finding" . . .
>
> ....
>
> [46] On the s. 24(2) issue as on all others, the trial judge hears evidence and is thus better placed to weigh the credibility of witnesses and gauge the effect of their testimony. Iacobucci J., dissenting in part in Belnavis, supra, at para. 76, explained cogently the rationale for deference to the findings of trial judges:
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> The reasons for this principle of deference are apparent and compelling. Trial judges hear witnesses directly. They observe their demeanour on the witness stand and hear the tone of their responses. They therefore acquire a great deal of information which is not necessarily evident from a written transcript, no matter how complete. Even if it were logistically possible for appellate courts to re-hear witnesses on a regular basis in order to get at this information, they would not do so; the sifting and weighing of this kind of evidence is the particular expertise of the trial court. The further up the appellate chain one goes, the more of this institutional expertise is lost and the greater the risk of a decision which does not reflect the realities of the situation.
>
> [47] The findings of the trial judge which are based on an appreciation of the testimony of witnesses will therefore be shown considerable deference. In s. 24(2) findings, this will be especially true with respect to the assessment of the seriousness of the breach, which depends on factors generally established through testimony, such as good faith and the existence of a situation of necessity or urgency (Law, supra, at paras. 38-41).

74. In the case at bar, Abella J.A. made no mention of this principle. Abella J.A. did not explain why the trial judge's s. 24(2) ruling was unreasonable, nor how

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[58] *R. v. Buhay,* 2003 SCC 30 at paras. 41 - 47

the trial judge had erred in principle. Abella J.A. simply made her own independent s. 24(2) determination, without reference to the trial judge's findings on the issue.

75. While an appellate court need not explicitly refer to the deference principle, it is apparent that it was not applied in the case at bar. The Court of Appeal's decision to exclude the evidence shares the same underpinnings (police good faith versus an intrusive breach) as the trial judge's decision to admit the evidence. It is thus difficult to understand how the Court of Appeal could have found the trial judge's decision to be unreasonable in light of this similarity.

b) The Court of Appeal Gave Inadequate Weight to the Good Faith of the Police

76. The Court of Appeal, like the trial judge, found that the police acted in good faith. Indeed, in finding that the police did not act in bad faith, the Court of Appeal observed that "[t]he law on FLIR technology in this country is embryonic, with both a Supreme Court of Canada reference in *Evans*, albeit fleeting and in *obiter*, and an appellate court in *Hutchings*,[59] *supra*, appearing to cast no doubt on its legality."

77. In determining the seriousness of the violation as a whole, a court must consider not only the intrusiveness of the impugned investigative technique, but

[59] *R. v. Hutchings* (1996) 111 C.C.C. (3d) 215 (B.C.C.A.)

the fact that the police in carrying out that technique, acted in good faith in reliance on a validly issued court order.[60]

78. The significance of the police's reliance in good faith on what they believe to be lawful authority cannot be overstated. This principle allows for the admission of evidence where police obtain evidence by placing reasonable reliance on a warrant, even if that warrant is subsequently adjudged as defective.[61] This principle was re-affirmed by this Court in *R. v. Goncalves* (which reversed the Alberta Court of Appeal's ruling, relying on the dissenting justice's opinion which made use of this principle).

79. In the case at bar, the police had no indication that the warrantless use of the FLIR as an investigative technique was unlawful. Indeed, the police had only two sources of legal guidance – this Court's comments in *Evans*, and the B.C. Court of Appeal's decision in *Hutchings*. In light of this very authoritative approval, and more importantly, in the total absence of any disapproval of its use without a warrant, the police had no reason to believe their conduct was constitutionally unsound. The good faith of the police significantly mitigates the overall seriousness of the breach in this case. Moreover, where the police have no reason to believe that their conduct is improper, and rather have a positive

[60] See *R. v. Evans,* supra, note 19 and *R. v. Goncalves*, [1993] 2. S.C.R. 3.
[61] The good faith exception does not apply where the police are dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause.

indication that it is proper, the exclusion of evidence can only bring the administration of justice into disrepute.

80. The Court of Appeal's section 24(2) analysis represents a significant departure from the approach consistently taken by this Court in cases where police rely on an investigative technique in good faith. In the cases of *Duarte* and *Wong*, this Court admitted evidence that was obtained as a result of very serious *Charter* breaches.

R. v. Duarte:[62] The police had unconstitutionally intercepted private communications without an authorization. They did so on the basis of their mis-understanding of the law that such interceptions were permissible so long as one party to the private communication consented to it. Despite calling electronic surveillance "the greatest leveller of human privacy ever known" this Court did not exclude the evidence. This Court admitted the evidence because the breach was in no way deliberate, wilful or flagrant. Rather it was the good faith acts of officers acting in accordance with what they had good reason to believe was the law.

R. v. Wong:[63] The police videotaped the occupants of a hotel room without first obtaining a warrant. Despite finding that an intrusive invasion of privacy had occurred, this Court nonetheless admitted the evidence because of the good faith conduct of the police:

> ....as was the case in *R. v. Duarte* it can in fairness be said that the police, in conducting themselves as they did, acted in accordance with what they had good reason to believe was the law, and before they had had a

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[62] Supra, at note 52 at 59
[63] Supra, note 53

reasonable opportunity to assess the consequences of the Charter on their established practices.

c) The Court of Appeal Failed to Take Into Account the Nature of the Device Utilized and its Minimal Intrusion

81. In *Wise*, this Court noted that the device in question in that case, a tracking beeper, was nothing more than a "rudimentary extension of physical surveillance" and that as such "very different ...in its operation and in its effect on the individual, from a hidden video camera or an electronic monitor that surreptitiously intercepts private communications".[64] Those same observations are apposite to the FLIR camera.

82. As a result of the minimal intrusion in *Wise*, this Court concluded:[65]

> In this case, the use of the beeper merely assisted the police to gather evidence which, to a great extent, they had obtained by visually observing the vehicle. It is difficult to determine from the transcript what evidence was obtained from the beeper and what was obtained from observation. In light of the unsophisticated nature of the beeper, it seems that the essential evidence was obtained by direct observation. In any event, evidence as to movement of the vehicle was certainly not "undiscoverable". It follows that the admission of the evidence as to the location of the car could not be said to affect the fairness of the trial.

83. The Court of Appeal for Ontario failed to engage in this necessary analysis. Consequently, their conclusion on exclusion is flawed. Had they properly addressed this issue, based on the minimal intrusiveness of the FLIR camera,

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[64] *R. v. Wise,* [1992] 1 S.C.R. 527 at 535
[65] Ibid, at 543-4

which was also nothing more than a "rudimentary extension of physical surveillance", a different conclusion should have been reached.

d) The Court of Appeal Erred in Concluding that Exclusion of the Evidence Would Not Bring the Administration of Justice into Disrepute

84. In concluding that the exclusion of the evidence would not bring the administration of justice into disrepute, the Court of Appeal erred in two respects. First, the Court of Appeal virtually ignored the very serious firearms offences the Respondent committed. Secondly, the Court of Appeal, without any evidence, held that the seriousness of marihuana offences had recently diminished.

i) The Court of Appeal Ignored the Firearms Offences

85. In its section 24(2) analysis, the Court of Appeal appears to have focussed almost exclusively on the marihuana offences. Indeed, the fact that firearms were found at the Respondent's residence receives only brief mention in the Court's judgment.[66] In not considering the presence of the loaded prohibited firearm, and the possession of a firearm without a license (among other weapons offences), the Court of Appeal seriously erred in assessing whether the exclusion of the evidence would bring the administration of justice into disrepute.

ii) Marihuana Production and Trafficking Remains a Serious Offence

86. The Court of Appeal found that due to "public, judicial and political recognition that marihuana is at the lower end of the hierarchy of harmful drugs",

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[66] At para. 13 of the Court of Appeal's judgment, Abella J.A. describes the crimes as follows: "When the police entered the home, the found a large quantity of marihuana, two sets of scales, and freezer bags. They also found some weapons." [emphasis added].

this Court's finding in *Plant* about the seriousness of marihuana trafficking was now out of date.

87. It is difficult to respond to the above finding based on "judicial" recognition since Abella J.A. did not identify the "judicial" pronouncements she relied on. Whatever they might be, clearly, they could not overrule the clear judicial pronouncement of this Court in *Plant* acknowledging the very serious nature of this offence.

88. It is equally difficult to respond to the unidentified "public" or "political" support Abella J.A. claims as justification for her views. It is submitted, however, that contrary to the Court of Appeal's view of the relative lack of seriousness of marihuana offences, there has been widespread public and political recognition that marihuana grow operations bring with them a panoply of law enforcement and public safety concerns. The seriousness of the problem surrounding marihuana grow operations is evidenced by the following:[67]

- The Minister of Justice recognizing the growing problem of marihuana grow operations, and their link to organized crime and has with the Canadian Association of Chiefs of Police adopted resolutions to prevent the proliferation of marihuana grow operations.
- The National Post, a nationally circulated newspaper, recently published a series of reports focussing on the proliferation of marihuana grow operations and their connection to organized crime.

89. As noted in "Drug Situation in Canada - 2002", a report prepared by the Organized Crime Analysis Section of the Royal Canadian Mounted Police, "for the last five years, Canadian law enforcement agencies seized an average of 1.1

[67] Book of Authorities, Tabs 27 at 9-10, 30, 33 at 27-8

million marihuana plants, a six fold increase since 1993" :[68] The report also estimates that over 2002-03, the expected Canadian domestic production of marihuana will be about 800 tonnes with U.S. Customs seizures of marihuana originating in Canada increasing from 1,874 kg. in 2000 to 9,487 kg. in 2002. The consequences of this phenomenal growth are also noted as follows

> This criminal activity has reached levels that could be deemed epidemic in the provinces of British Columbia, Ontario and Quebec. ... Today, almost every large-scale grow operation is linked in varying degrees to organized crime. Even independent growers end up having to deal with criminal organizations if they want to expand beyond a certain point.
>
> .....
>
> Violence has always been an intrinsic part of the production, trafficking and distribution of illicit drugs, and marihuana is no exception. The general consensus among law enforcement is that violent incidents are on the rise in most areas of the country, although this increase cannot be quantified through hard data at this point. Home invasions, drug rip-offs, burglaries, assaults, and murders, are only a few examples of the dangers that are par for the course when dealing in drugs. Booby traps of all sorts, usually intended to protect the grow operations from thieves, are reported on a regular basis.
>
> Due to its profitability, marihuana cultivation has become a staple for all crime groups. Targets of major drug investigations are very often involved in marihuana cultivation though the focus of the investigation may not be related to the marihuana issue. Proceeds derived from marihuana cultivation serve not only to increase wealth but also to finance other illicit activities, such as the importation of Ecstasy, liquid hashish and cocaine.

90. This is evidence of the increased seriousness of marihuana production since *Plant* and suggests a contrary conclusion should be reached from that of the Court of Appeal for Ontario.

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[68] "Drug Situation in Canada - 2002, A Report Prepared by the Organized Crime Analysis Section, Royal Canadian Mounted Police" at 5-6, http://www.rcmp-grc.gc.ca/crimint/drugs_2002_e.htm - marihuana

PART IV: SUBMISSIONS ON COSTS

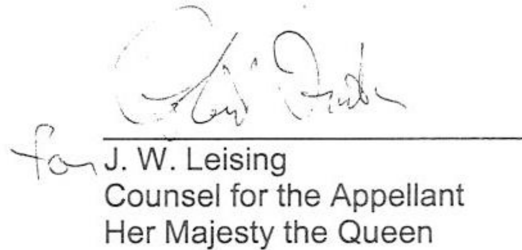
91. The Appellant does not seek its costs.

PART V: ORDER SOUGHT

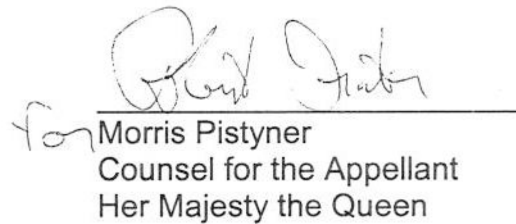
92. The Appellant seeks an order that the appeal be allowed and the conviction restored.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Toronto, this 16th day of December 2003



for J. W. Leising
Counsel for the Appellant
Her Majesty the Queen



for Morris Pistyner
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Her Majesty the Queen

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PART VII : STATUTORY PROVISIONS

Canadian Charter of Rights and Freedoms, Schedule B
Constitution Act, 1982, Sections 8 and 24

Section 8

Search or seizure	Everyone has the right to be secure against unreasonable search or seizure.	Chacun a droit à la protection contre les fouilles, les perquisitions ou les saisies abusives.	Fouilles, perquisitions ou saisies

Section 24

Enforcement of guaranteed rights and freedoms	(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.	(1) Toute personne, victime de violation ou de négation des droits ou libertés qui lui sont garantis par la présente charte, peut s'addresser à un tribunal compétent pour obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances.	Recours en cas d'atteinte aux droits et libertés
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.	(1) Lorsque, dans une instance visée au paragraph (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.	Irrecevabilité d'éléments de preuve qui risqueraient de déconsidérer l'administration de la justice