File number: 29670

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

BETWEEN:

HER MAJESTY THE QUEEN

Appellant
(Respondent)

and

WALTER TESSLING

Respondent
(Appellant)

APPELLANT'S FACTUM
HER MAJESTY THE QUEEN, APPELLANT
(Rule 42(1) of the *Rules of the Supreme Court of Canada*)

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PART I: STATEMENT OF FACTS

Overview

1. The primary issue raised by this case is whether the use of the FLIR camera for law enforcement purposes, without prior judicial authorization, violates s. 8 of the *Canadian Charter of Rights and Freedoms*.

2. The FLIR (Forward Looking Infra-Red) Camera is a commonly available device[1] used by various industries, rescue services, the military, fire departments and law enforcement agencies to detect and record surface heat. The FLIR is a passive device[2] and cannot penetrate exterior surfaces or "see into" the interior

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[1] They can be purchased on eBay or from other direct selling manufacturers. See, for instance www.flir.com.

[2] This means that it does not emit any radiation in the way an x-ray does. It simply passively detects and records existing exterior surface heat.

beyond the surface, even where the surface is transparent. When directed at a building's exterior the FLIR merely detects and records the surface heat at any given spot in comparison to the surface heat at other spots on the building or on other buildings.

3. The FLIR does not provide any information as to the cause or causes of the surface heat it detects and records. The evidence before the trial Court was that there "could be any number of things"[3] causing the comparatively high surface heat that the FLIR detected at the exterior of the building in question. Among those mentioned were poor insulation, the presence of a wood burning stove, a fireplace, a sauna, a car engine running or a concentration of halide lights.[4] The FLIR does not indicate or exclude these or any of the other "number of things" that could be possible reasons for the detection of comparatively high surface heat.[5]

4. Because there were any number of possible causes for the comparatively high surface heat at the exterior of the building and because the FLIR provided no information as to any specific cause, the Ontario Court of Appeal correctly concluded that what the FLIR detected and recorded was, on its own, "meaningless". [6]

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[3] Transcript of Evidence December 4, 2000, pp. 54 – 59, *Record* Tab 6
[4] Transcript of Evidence December 4, 2000, p. 55 *Record* Tab 6.
[5] There was no evidence that the FLIR could detect low heat generating activities such as bathing or using ordinary lights at unusual hours. Abella J.A.'s suggestion that it could was speculative and unsupported by the evidence. The FLIR is in fact not able to detect or record the minimal amount of surface heat generated by bathing or the use of ordinary lights.
[6] Reasons for Judgment, Ontario Court of Appeal, p. 26, para. 66 *Record* Tab 4

5. Nevertheless, the Court of Appeal concluded that the warrantless use of the FLIR violated s. 8 of the *Charter of Rights and Freedoms.*[7] They reached this conclusion by basing their evaluation on what the FLIR camera detected and recorded in combination with all of the other information available to the investigators from other sources. The Court of Appeal held that because the information captured and recorded by the FLIR camera, when used in combination with that other information, allowed for inferences to be drawn as to what might be occurring within the home, its use, without prior judicial authorization, was an unreasonable invasion of the privacy interests of the occupants of the building.

6. The trial Court more correctly held that the warrantless use of the FLIR camera to detect and record the comparatively high exterior surface heat at the Respondent's residence did not, in and of itself, violate any privacy interest protected by s. 8 of the *Charter*. The trial Court viewed the detection and recording of comparatively high surface heat as the detection and recording of information which was essentially in the public realm and akin to visual surveillance with sense enhancing instruments such as binoculars or a camera with a telephoto lens.

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[7] Reasons for Judgment, Ontario Court of Appeal, p. 25, para. 61 *Record* Tab 4.

7. The Appellant asks that the findings of the trial Court be restored and submits that the Ontario Court of Appeal:

a) failed to evaluate whether the warrantless use of the FLIR camera itself, rather than the inferences that could be drawn from its use in combination with other information, constituted an unreasonable search or seizure in violation of s. 8 of the *Charter*;

b) reached conclusions about the activities that the FLIR could detect within a residence that were unsupported by the evidence and incorrect;

c) failed to evaluate the privacy interests of the Respondent in a manner consistent with the clear direction given by this Court in regard to what constitutes a reasonable expectation of privacy and what constitutes an unreasonable search or seizure.

8. Further, notwithstanding an acknowledgment by the trial Court that the police acted in good faith and that the law in this area is "embryonic", the Court of Appeal reversed the trial judge's discretionary ruling not to exclude the evidence under section 24(2) of the *Charter* without giving any reason as to why it did not afford the ordinary deference to the trial Court's findings in this regard.

The Evidence at Trial

9. The police began investigating the Respondent (and another individual) based on information provided by two informers who identified the Respondent and another individual as being involved in the production and trafficking of marihuana. After discovering that the Respondent's residential electricity usage was not unusual, and being unable to otherwise confirm the informant information regarding the production of marihuana, the investigators conceded they did not have enough evidence to obtain a search warrant for the Respondent's residence. In order to obtain the necessary additional information to obtain a warrant, the police sent a plane equipped with a FLIR camera over the Respondent's property.[8]

10. The FLIR captures an image of the surface heat at the exterior of a building. Its capabilities and use in indoor marihuana grow investigations are helpfully summarized in the information to obtain the warrant for the Respondent's property, excerpted at paragraph 9 of the Court of Appeal's judgment:

> Thermal infrared systems are often used to conduct "structure profiles". These devices are passive instruments which are sensitive to only thermal surface radiant temperature. The devices do not see into, or through structures. The FLIR system detects only energy which is radiated from the outside surface of an object. Internal heat which is transmitted to the outside surface of an object is detectable. This device ... is essentially a camera that takes photographs of heat instead of light... The rooms of marijuana growing operations with halide lights are warmer than the average room in a residence. The walls of these rooms emanate this heat to

[8] See Transcript of Evidence of December 4, 2000 pp. 44 and 62, *Record* Tab 6 and Information to Obtain Search Warrant, Exhibit 2, *Record* Tab 9.

> the outside, and are therefore detectable by the FLIR. Heat in a residence is usually evenly distributed throughout the building's exterior. By comparing the pattern of heat emanating from the structure, it is possible to detect patterns of heat showing rooms or sections of a structure that may be housing the marijuana growing operation.

11. The undisputed evidence at the Respondent's trial was that the FLIR's capability to glean information about what was going on inside a structure was very limited. The evidence clearly established that the FLIR camera did not allow the police to "see into the house". Moreover, it could not provide any information as to what the cause or causes of any comparatively high external surface heat reading might be. In this regard, the evidence revealed that the FLIR could not distinguish whether the cause of a comparatively high heat reading was, among any number of possibilities, intense lighting, a sauna, a car engine running in the structure, a wood burning stove or simply poor insulation at that spot on the building.[9]

12. The comparatively high surface heat at one spot on the exterior of the Respondent's residence was consistent, *inter alia*, with the heat generated from the intense lights commonly used in marihuana grow operations. Based on the informer information, investigation confirming some of its details, and the information gleaned from the FLIR, the police obtained a warrant from a justice of the peace to search the Respondent's home.[10]

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[9] Transcript of Evidence of December 4, 2000, p. 55 *Record* Tab 6.
[10] Information to Obtain Search Warrant, Exhibit 2, *Record* Tab 9.

13. Upon execution of the warrant, the police located and seized in the Respondent's residence a loaded prohibited weapon, namely a Sauer M38H 7.6 calibre semi-automatic pistol, an unregistered weapon, namely a Soviet 7.62mm Simonov Semi-Automatic Carbine and three shotguns and ammunition for them which were not properly stored. As well, the police located and seized 15 marihuana cigarettes, 5 grams of hashish and approximately 120 healthy marihuana plants which were estimated to be likely to produce 7.5 pounds of usable marihuana which was valued by expert evidence to be worth $15,000 - $22,000.[11]

14. The Respondent brought an application under s. 24(2) of the *Charter* to exclude the evidence obtained during the search of his house. He alleged, *inter alia*, that the FLIR's detection of the comparatively high surface heat at the exterior of his house, without prior judicial authorization, violated his rights under s. 8.[12] He argued that, once information obtained from the FLIR was excised from the affidavit used to obtain the warrant, there were insufficient grounds for its issuance.

The Trial Judge's Ruling on the 24(2) Application

15. The trial judge dismissed the Respondent's application to exclude evidence. The trial judge held that the warrantless use of the FLIR did not violate section 8

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[11] Transcript of Evidence of December 5, 2000, pp. 30–31, and 61; *Record* Tab 7 and Exhibit Report, Exhibit 3, *Record* Tab 10.

[12] The Respondent also argued that the affidavit supporting the search warrant did not disclose reasonable grounds even with the information obtained from the FLIR. He did not pursue this line of argument on appeal.

of the *Charter* because it did "not constitute an unwarranted transgression or intrusion into the reasonably expected privacy of an occupant of a residence." [13]

16. Notwithstanding his finding that there was no breach of section 8, the trial judge went on to consider whether, if there had been a breach, the evidence should be excluded. The trial judge found that the evidence should be admitted. The trial judge found that the nature of the intrusion was serious, since a dwelling was involved. However, the trial judge recognized that the police acted in good faith since they believed that they were using a lawful investigative technique and were acting in accordance with a lawfully issued search warrant.[14]

Judgment of the Court of Appeal for Ontario

17. The Court of Appeal disagreed with the trial judge's assessment of the FLIR camera, and held, contrary to the evidence, and contrary to the findings of the trial judge, that the warrantless use of the FLIR constituted an unreasonable search "because it reveals what cannot otherwise be seen and detects activities inside the home that would be undetected without the use of sophisticated technology."[15]

18. Abella J.A., writing for the Court, found that the measurement of external heat at the surface of a house is "the measurement of inherently private activities," and that the technology permits more than mere observation by "disclosing information that would not otherwise be available and tracking

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[13] Reasons of the Trial Judge, p. 14-15 *Record* Tab 2
[14] Reasons of the Trial Judge, p. 15-17 *Record* Tab 2.
[15] Reasons for Judgment, Ontario Court of Appeal, p. 27, para. 67 *Record* Tab 4.

external reflections of what is happening internally." The Court therefore concluded that:

> before the state is permitted to use technology that has the capacity for generating information which permits public inferences to be drawn about private activities carried on in a home, it should be required to obtain judicial authorization to ensure that the intrusion is warranted.[16]

19. After finding a breach of the Respondent's rights, Abella J.A. excluded the evidence of the drugs and firearms found by the police during the search. Abella J.A. held that, although the police acted in good faith, and the law on the use of the FLIR is "embryonic," the breach was serious because it involved a dwelling. Abella J.A. acknowledged this Court's statement in *Plant*, that there is a compelling state interest in preventing marihuana cultivation. She also acknowledged that this Court had earlier found in *Evans* that the warrantless use of this device was permissible and non-intrusive.

20. Nevertheless, Abella J.A. concluded, without having heard any evidence on the point, that given her perception of what she termed the "public, judicial and political recognition that marihuana is at the lower end of the hierarchy of harmful drugs," the weight of this offence is "lighter on the scales" than may have been previously held by this Court in *Plant* when conducting the judicial balancing under s. 24(2). In conducting the s. 24(2) analysis, Abella J.A. made no mention of the serious firearms offences which included possession of a loaded prohibited

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[16] Reasons for Judgment, Ontario Court of Appeal, p. 27-28, para. 69 *Record* Tab 4.

firearm, possession of a firearm without appropriate registration and the unsafe storage of firearms.[17]

PART II: QUESTIONS IN ISSUE

21. The appellant says the questions in issue are:

a) Did the use of the FLIR Camera employed by the investigators in the case at bar to detect and record surface heat at the exterior of a private residence constitute a search or seizure within the meaning of section 8 of the *Canadian Charter of Rights and Freedoms*?

b) Did the use of the FLIR Camera employed by the investigators in the case at bar to detect and record surface heat at the exterior of a private residence without prior judicial authorization constitute an unreasonable search or seizure contrary to section 8 of the *Canadian Charter of Rights and Freedoms*?

c) If the use of the FLIR Camera in the case at bar was an unreasonable search, did the Court of Appeal err in excluding the evidence of the weapons and drugs pursuant to section 24(2) of the *Canadian Charter of Rights and Freedoms*?

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[17] Reasons for Judgment, Ontario Court of Appeal, p. 27, paras. 73-83 *Record* Tab 4.

PART III: ARGUMENT

ISSUE 1: DOES THE USE OF A DEVICE THAT MEASURES AND RECORDS THE EXTERIOR SURFACE HEAT OF A PRIVATE RESIDENCE, WITHOUT "SEEING INTO" THE RESIDENCE, CONSTITUTE A SEARCH OR A SEIZURE WITHIN THE MEANING OF S. 8 OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS?*

22. The Court of Appeal for Ontario failed to address this threshold issue.

23. In order to claim the protections afforded by s. 8, the onus is on the party asserting the right to establish that the investigative action complained of is either a search or a seizure within the meaning of that section.[18]

24. As noted by this Court in *Evans* "not every investigative technique used by the police is a search within the meaning of s. 8. ...On the contrary, only where those state examinations constitute an intrusion upon some reasonable privacy interest of individuals does the government action in question constitute a 'search' within the meaning of s. 8".[19] This requirement was reaffirmed in *Law*, where this Court noted that only "police conduct interfering with a reasonable expectation of privacy is said to constitute a 'search' within the meaning of the provision".[20]

25. Further, not all seizures of information are within the protections afforded by s. 8. As this Court noted in *Plant*, constitutional protection is only afforded to information of a "personal and confidential" nature which would reveal intimate details of the lifestyle and personal choices of the individual.[21]

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[18] *R. v. Edwards,* [1996] 1 S.C.R. 128 at 145
[19] *R.* v. *Evans,* [1996] 1 S.C.R. 8 at 15 - 16 and 30 - 33
[20] *R. v. Law,* [2002] 1 S.C.R. 227 at 236, para. 15
[21] *R. v. Plant,* [1993] 3 S.C.R. 281 at 293

26. The *Canadian Oxford Dictionary* defines search as follows:

> **search** v. 1. look through or go over thoroughly to find something 2. examine to find anything concealed 3. to make a search or investigation 4. locate a specified piece of information or text in a table, file, document etc. 5. examine or question thoroughly, probe 6. look probingly for, seek out n. 1. an act of searching; an investigation 2. the locating of a specified piece of information or text

27. Each sub-definition that might relate to a structure includes the concept of finding or seeking out something concealed to find something that is confidential. Significantly, neither the act of observing something from a public place, or recording that observation is included in the definition. Where something is not concealed or maintained as "confidential", as that term was used by this Court in *Plant*, the act of observing it from a public place, or even recording that observation is not a search. Equally, it is not a seizure of constitutionally protected information within the meaning of s. 8 because nothing of a personal or confidential nature is revealed by the act of observing or by recording the observation.

28. What is observable at the exterior surface of a building from a public thoroughfare is clearly not "personal or confidential". Consequently capturing and recording what is observable at the exterior of a building is not a search or a seizure of constitutionally protected information. More specifically, observing apparent signs of surface heat at the exterior of a building such as snow melting on a roof or steam on windows or steam escaping from a furnace or dryer vent and recording it with a camera is not a search or seizure of constitutionally

protected information because it does not intrude into any protected realm of privacy.

29. This requirement of concealment and finding information of a personal and confidential nature has informed the law relating to the definition of a search and seizure both in the common law of the United Kingdom and in the jurisprudence of the United States where the Supreme Court has held that "the fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing a home on public thoroughfares".[22] This extends to apparent signs of surface heat observable from public thoroughfares.

30. It is submitted that, if observing the exterior of a house from a public thoroughfare and detecting and recording the apparent manifestations of comparatively high or low surface heat such as melting snow or steam from vents does not constitute a search, or a seizure of constitutionally protected information, observing the exterior of a house with the aid of a device that enhances the ability to conduct such observation, such as binoculars, or a high powered telephoto lens or a FLIR camera equally does not constitute a search, or a seizure of constitutionally protected information.[23]

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[22] *Entick v. Carrington*, (1765)19 How. St. Tr. 1029, 95 E.R. 807 (K.B.); *Boyd v. United States*, 116 U.S. 616 (1886); *California v. Ciraolo* 476 U.S. 207 (1986); *Air Pollution Variance Board of Colorado v. Western Alfalfa Corp.*, 416 U.S. 861, 864-865 (1974),

[23] *Dow Chemical Co. v. United States* 476 U.S. 104 (1986); *Florida v. Riley*, 488 U.S. 445 (1989).

31. When one observes a house from a public thoroughfare and observes snow melting on a roof or steam escaping from vents or smoke from a chimney, one does not conceptualize this activity as conducting a search or seizure because the observation only captures what is in the public realm. Using a sense enhancing device such as the FLIR, does not convert this observation into a search because all the device does is allow for the better detection of what is in the public realm.[24] It is therefore submitted that use of the FLIR camera to detect and record comparatively high surface heat does not attract the protections afforded by s. 8 of the *Charter* since it is not, to use the language employed by this Court in *Law,* "police conduct interfering with a reasonable expectation of privacy".[25]

ISSUE 2 - DOES THE USE OF THE FLIR CAMERA TO DETECT AND RECORD SURFACE HEAT AT THE EXTERIOR OF A PRIVATE RESIDENCE WITHOUT PRIOR JUDICIAL AUTHORIZATION CONSTITUTE AN UNREASONABLE SEARCH OR SEIZURE CONTRARY TO SECTION 8 OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*?

32. The Court of Appeal for Ontario made four fundamental errors in their analysis of this issue.

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[24] See *R. v. Wise,* [1992] 1 S.C.R. 527 at 542 to the effect that "visual surveillance may properly be augmented by the use of binoculars". See also: *United States v. Lee*, 274 U.S. 559 (1927), *Texas v. Brown*, 460 U.S. 730, 739-740 (1983) and *On Lee v. United States*, 343 U.S. 747, 754 (1952) "The use of bifocals, field glasses, or the telescope to magnify the object of a witness' vision is not a forbidden search or seizure, even if they focus without his knowledge or consent upon what one supposes to be private indiscretions".

[25] *R. v. Law*, supra, note 20

a) The Court of Appeal for Ontario Misapprehended the Evidence and Reached Conclusions about the Capability of the FLIR Camera that Grossly Exaggerated its Capacity

33. There was no evidence that the FLIR Camera used by the police investigators in this case had the capacity to do any of the intrusive things that Abella J.A. found that it could.[26] Abella J.A. found that the FLIR:

a. "reveals information about activities that are carried on inside the home";

b. "detects activities inside the home that would be undetectable without the aid of sophisticated technology"; and

c. "permits public inferences to be drawn about private activities carried on in a home" (taking a bath or using lights at unusual hours).

34. The evidence simply did not support any of those speculative and factually incorrect conclusions. Rather, the evidence was that the FLIR could detect comparatively high exterior surface heat but could not determine what caused it. Consequently, in and of itself, it provided no information about any specific activity that might be occurring within the residence.[27]

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[26] This error is similar to the error made by the majority of the United States Supreme Court in *Kyllo v. United States,* 533 U.S. 27 (2001) which involved their evaluating the future potential of the FLIR rather than the current device used in the case. This approach was criticized by the minority opinion in the following terms: "Instead of concentrating on the rather mundane issue that is actually presented by the case before it, the Court has endeavoured to craft an all-encompassing rule for the future".(p. 51)

[27] Again, the error made by Abella J.A. is similar to an error made by the majority in *Kyllo* and criticized by the dissenting judgment which noted that this device could not and did not enable its user to identify the lady of the house, the rug on the vestibule floor, or anything else inside the house. (p. 50)

35. Indeed, the cause of comparatively high surface heat may have been an external radiation of heat to the surface rather than an internal emanation. If an internal emanation, any number of things, from poor insulation to fireplaces to the presence of an indoor sauna could cause comparatively high surface heat readings. Given the numerous possible causes for the exterior reading, nothing is revealed by the reading itself as to the internal cause. Consequently, the Court was correct in its seemingly contradictory conclusion that "the surface emanations are, on their own, meaningless".

36. Properly understood, with its very limited capacity, the FLIR, in and of itself, reveals nothing of significance about the private internal activities occurring within a residence. The information it detects and records standing alone has little independent evidentiary value. For instance, the FLIR could not, on its own, ever provide sufficient information to obtain a search warrant or constitute the evidence of the *actus reus* of an offence.[28] It is only when FLIR information about comparatively high external surface heat is coupled with other information and evidence that it obtains meaning.

b) The Court of Appeal for Ontario Erred in Failing to Evaluate the Use of the FLIR as a Stand Alone Investigative Technique and Instead Evaluated its Effect When Used in Combination with Other Information and Investigative Techniques.

37. While it is clear that the FLIR, in combination with other investigative techniques or information, allows inferences to be drawn about what occurs

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[28] It is this key difference that makes the comparison to detecting and recording private communications with detecting and recording comparatively high external surface heat so very distinct. See paragraphs 63 and 64 below.

within a residence, that does not make the use of the FLIR in and of itself an unreasonable invasion of the privacy rights of the occupants of the residence in violation of the *Charter*. The *Charter* protects against unreasonable searches and seizures, not from inferences that can be drawn from lawful and reasonable police investigative activities.[29]

38. Many other non intrusive investigative procedures[30] which do not violate s. 8 of the *Charter*, in combination with other investigative techniques or information, allow for inferences to be drawn about what occurs within a residence. That does not make any one of the investigative techniques standing alone an unreasonable invasion of privacy. The very essence of good police work is the combining of "clues", i.e. information from a number of sources, without violating any *Charter* protected right, to determine inferentially what occurred within a sphere that the criminal wishes to, and is entitled to, keep private. Merely because one of those investigative techniques, in combination with other investigative techniques or information is effective in allowing law enforcement officers to determine inferentially what has occurred within a private area, does not make it an unreasonable search or seizure in violation of s. 8 of the *Charter*.

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[29] In *Kyllo*, the same point was made by the dissenting judges who noted, "It would be quite absurd to characterize their (the investigator's) thought processes as 'searches'", (p. 44) and, "..even if the device could reliably show extraordinary differences in the amounts of heat leaving his home, drawing the inference that there was something suspicious occurring inside the residence – a conclusion that officers far less gifted that Sherlock Holmes would readily draw – does not qualify as a 'through the wall surveillance', much less a Fourth amendment violation." (emphasis added) (p. 51)

[30] For example, surveillance of the exterior of a residence from a public vantage point, reviewing publicly available records about the residence such as title deeds or architectural plans, obtaining publicly available records about utility consumption etc.

39. What is required is an evaluation of the investigative technique, standing alone, to determine if it, in and of itself, violates the *Charter*. The Ontario Court of Appeal failed to conduct this stand alone evaluation of the FLIR camera used in the case at bar.

c) The Court of Appeal for Ontario Erred in Failing to Take into Account the Seriousness of the Crime Being Investigated in the Case at Bar and the Resulting Compelling Governmental interest in Investigating and Prosecuting It.

40. The jurisprudence from this Court requires that any evaluation of whether or not the warrantless use of an investigative technique violates s. 8 of the *Charter* take into account and balance the governmental interest at stake. In the seminal case of *Hunter v. Southam*,[31] and more recently in *R. v. S.A.B.*,[32] this Court framed the issue as follows:

> The guarantee of security from unreasonable search and seizure only protects a reasonable expectation. This limitation on the right guaranteed by s. 8, whether it is expressed negatively as freedom from "unreasonable" search and seizure, or positively as an entitlement to a 'reasonable" expectation of privacy, indicates that an assessment must be made as to whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement. (emphasis added)

41. In the case at bar, the Court of Appeal for Ontario failed to conduct this threshold assessment. While that Court did advert to the governmental interest in conducting its s. 24(2) analysis, it failed to advert to the need to balance the governmental interest in its evaluation as to whether or not the warrantless use of

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[31] *Hunter v. Southam* [1984] 2 S.C.R. 145 at 159-60

[32] *R. v. S.A.B.*, 2003 SCC 60 at para. 38. See also *Smith v. Canada (Attorney General)* [2001] 3 S.C.R. 902

the FLIR violated s. 8 of the *Charter*. Instead, the Court of Appeal for Ontario simply found that the privacy interest in the residence was violated by the detection and recording of the comparatively high surface heat and that, without any evaluation or balancing of the governmental interest, violated s. 8 of the *Charter*.

d) The Court of Appeal for Ontario Erred in Following and Relying on the Decision of *Kyllo v. United States*

42. The Court of Appeal reviewed the decision of the United States Supreme Court in *Kyllo*[33] at length. The analysis of the majority had an obvious impact. In paragraph 69 of her reasons, Justice Abella made use of Scalia J.'s example of "the lady of the house taking her daily sauna and bath" (quoted in paragraph 51 of her reasons) in saying:

> Some perfectly innocent internal activities in the home can create the external emanations detected and measured by the FLIR, and many of them, such as taking a bath or using lights at unusual hours, are intensely personal. It seems to me, therefore, that before the state is permitted to use technology that has the capacity for generating information which permits public inferences to be drawn about private activities carried on in a home, it should be required to obtain judicial authorization to ensure that the intrusion is warranted.

43. One of the difficulties with Scalia J.'s example and the analysis that flowed from it is that it disregarded the limited capabilities of the thermal imaging technology used by the police in that case. As in the case at bar, the findings of fact in the lower court were contrary to the conclusion reached by the majority of the Supreme Court. This is noted by the dissenting judges who refer to the

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[33] Supra, note 26

finding of the trial court to the effect that "the device cannot penetrate walls or windows to reveal conversations or human activities".[34]

44. The apparent concern of the majority was that the use of the technology might, somehow in the future, reveal activities taking place inside a home. Towards the end of his reasons, Scalia J. acknowledges the limited intrusive capacities of the thermal imager, and says why its use must nonetheless be circumscribed by a warrant requirement[35] :

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

45. Further, the majority misapplied the rule in *Katz.* The rule, which has found acceptance by this Court (see, for example, *Edwards*[36]), was stated by Harlan J. as follows[37]:

> My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation or privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable." Thus a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the "plain view" of outsiders are not "protected" because no intention to keep them to himself has been exhibited. (emphasis added)

46. As with the Court of Appeal's decision in the instant case, the majority in *Kyllo* did not analyze whether the occupant of a dwelling has any expectation of

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[34] Ibid., Footnote 1 (p. 41)
[35] Supra, note 26 (p.40)
[36] Note 18, supra.
[37] *Katz v. United States,* 389 U.S. 347 (1967) at 361.