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The Limits of Privacy: Some Reflections on Section 8 of the Charter

Croft Michaelson[*]

I. INTRODUCTION

On the 25th anniversary of the proclamation of the *Canadian Charter of Rights and Freedoms*,[1] we would do well to remember how very different our legal world was only a quarter-century ago. Police officers, acting under writs of assistance, were able at any time of night and day to enter homes to search for narcotics if they believed narcotics were on the premises, and could search any person found therein. If they suspected public washrooms might be used for "indecent" acts, police officers would not uncommonly hide themselves behind air ducts and the like, in order to surreptitiously observe individuals in washroom stalls, a distasteful form of surveillance that degraded both the watched and the watchers. And Fontana, in the first edition of his text, *The Law of Search Warrants in Canada*, recounted that defence counsel seldom fully explored the use of a search warrant by police officers,[2] which no doubt was the case because relevant evidence was always admissible even if illegally obtained.[3] It was a world unrecognizable to those who practise today.

I was one of those fortunate enough to enter law school shortly after the Charter came into effect, and I well remember both the enthusiasm with which we debated the ramifications of this new constitutional recognition of legal rights, and our sense of uncertainty as to where the

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[1] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act* (U.K.), 1982, c. 11 [hereinafter "the Charter"].

[2] James A. Fontana, *The Law of Search Warrants in Canada* (Toronto: Butterworths, 1974), at vii.

[3] *R. v. Wray*, [1970] S.C.J. No. 80, [1970] 4 C.C.C. 1 (S.C.C.), unless the evidence was "gravely prejudicial to the accused", of "tenuous" admissibility, and of "trifling" probative force, in which case the trial judge might have a discretion to exclude it: *per* Martland J., at 17.

Charter would take us. The early days did not, however, seem promising. I remember that one of my classmates tried to raise the implications of the Charter in evidence class on one occasion, and our law professor *refused to discuss it*, telling us that he did not think that the Charter would really have much impact. Our experiences in the student legal aid clinic seemed to confirm what our law professor was telling us. Although we were eager to embrace the Charter and sought to raise it in the summary trial courts whenever we could, trial judges seemed reluctant to find violations of the Charter and, even when they did, seemed even more reluctant to exclude the evidence. We found ourselves wondering at times whether the Charter was just another largely toothless *Bill of Rights*[4] dressed up in different guise.

But any fears that the Charter would be given a narrow and constrained interpretation were soon put to rest. In *Hunter v. Southam*,[5] Dickson J. (as he then was) held that the Charter was a purposive document intended to restrain government interference with individual rights and freedoms, and as such had to be given a broad and generous interpretation.[6] With this sweeping statement, it was clear that we were living in revolutionary times, and the door was opened to a re-examination of all of the old rules and approaches. We were, indeed, in new and uncharted territory.

The 25th anniversary of the Charter provides a fitting opportunity to re-examine the jurisprudence that has followed in the years after *Hunter v. Southam*.[7] In the discussion that follows, I will explore the framework which has been developed by the Supreme Court to determine whether an accused has a reasonable expectation of privacy, and whether there has been an unreasonable interference with that privacy interest. I will argue that the Court's current approach to the first question — whether the individual has a reasonable expectation of privacy — is largely adequate to the task, but that it is crucial, in addressing novel claims to privacy, that we maintain our focus on the underlying values that privacy protections seek to promote. With respect to the second question — whether there has been an unreasonable interference with the privacy interest — I will suggest that the Supreme Court has recently introduced some confusion and uncertainty into the law concerning administrative and regulatory searches. And, finally, I will argue that where the accused successfully

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4 *Canadian Bill of Rights*, S.C. 1960, c. 44.

5 *Canada (Combines Investigation Act, Director of Investigation and Research) v. Southam Inc.*, [1984] S.C.J. No. 36, 14 C.C.C. (3d) 97 (S.C.C.) [hereinafter "*Hunter v. Southam*"].

6 *Hunter v. Southam*, [1984] S.C.J. No. 36, 41 C.R. (3d) 97, at 105-06 (S.C.C.).

7 [1984] S.C.J. No. 36, 41 C.R. (3d) 97 (S.C.C.).

establishes a section 8 violation, the question whether or not to exclude the evidence should be decided by weighing the societal interests in truth-finding and suppression of crime against the particular privacy interest invaded, and will suggest that such a weighing process should ordinarily favour the admission of the evidence, save for instances where the police deliberately violated the offender's rights under section 8. Any discussion on section 8, however, has to start at the beginning and the seminal case of *Hunter v. Southam*.

II. *HUNTER V. SOUTHAM*

Hunter v. Southam[8] involved a challenge to a legislative provision under the *Combines Investigation Act*[9] which authorized the Director of Investigations and Research of the Combines Investigation Branch to enter premises in order to search for and seize any documents that were relevant to an inquiry under the Act. The only real limitation on the entry was that it could only be made pursuant to a certificate granted by a member of the Restrictive Trade Practices Commission ("RTPC"), who had to be satisfied that the Director reasonably believed that relevant documents might be found on the premises.

A number of important principles were laid down by Dickson J. First, he held that section 8 is aimed at protecting the individual's reasonable expectation of privacy, rather than places themselves. He then went on to hold that, although the state interest in law enforcement can override the individual's right to privacy, state intrusion can only occur if there is prior judicial authorization, given that the Charter gives preference to the individual's right to privacy. In other words, before any intrusion can occur, the competing interests of the state and individual have to be balanced by a judicial officer, an individual who must be able to decide the issue in a neutral and impartial manner. Moreover, the standard for judicial authorization, at least where the state's interest is law enforcement, is a credibly based probability that evidence will be found as a consequence of the intrusion. Searches conducted without prior judicial authorization, warrantless searches, were held *prima facie* unreasonable, with the state bearing the onus of demonstrating why the search was reasonable in the circumstances. Finally, any search or

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8 [1984] S.C.J. No. 36, 41 C.R. (3d) 97 (S.C.C.).

9 R.S.C. 1970, c. C-23.

seizure, to be found reasonable, must be authorized by a law which itself is reasonable, and executed in a reasonable manner.

The legislative provision at issue in *Hunter v. Southam*[10] was found to violate section 8 as it was not a reasonable law. There were two fundamental flaws in the legislation. First, certificates granted by a member of the RTPC did not amount to prior *judicial* authorization because it could not be said that they were granted by a neutral and impartial arbiter. Second, the issuance of a certificate under the Act was not based on reasonable and probable grounds that evidence would be found, and therefore failed to meet the minimum constitutional standard for prior judicial authorization.

After *Hunter v. Southam*,[11] it was clear that any search carried out by agents of the state had to have its basis in some grant of legal authority, either through some express legislative provision,[12] or under a common law rule.[13] If there was no lawful authority for a search, the search would be illegal and hence unreasonable. It was also clear that investigators had to obtain a warrant in order to conduct a search to advance the state's interest in "law enforcement", provided that it was feasible to do so. What was left unexplored was what a "reasonable expectation of privacy" encompassed, and although the Court alluded to the possibility that some standard other than that set out in *Hunter v. Southam* might suffice to justify a state intrusion where the interests were something other than law enforcement, it was left to another day to determine what those interests might be. In the years following, the courts wrestled with these issues and it is to those issues that I now turn.

III. WHAT IS A REASONABLE EXPECTATION OF PRIVACY?

Privacy, as many commentators have noted, is a rather elusive and malleable concept. What is relatively certain is that privacy is considered very important in free and democratic societies; indeed, the right to keep some aspects of our lives private is recognized as a fundamental human

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[10] [1984] S.C.J. No. 36, 41 C.R. (3d) 97 (S.C.C.).

[11] [1984] S.C.J. No. 36, 41 C.R. (3d) 97 (S.C.C.).

[12] See, *e.g.*, *R. v. Grant*, [1993] S.C.J. No. 98, 84 C.C.C. (3d) 173 (S.C.C.) — warrantless search of drugs authorized under s. 10 of the *Narcotic Control Act*, R.S.C. 1985, c. N-1 [rep. S.C. 1996, c. 19, s. 94].

[13] See, for example, *R. v. Godoy*, [1998] S.C.J. No. 85, 131 C.C.C. (3d) 129 (S.C.C.) — warrantless entry and search authorized under the common law *Waterfield* rule (*R. v. Waterfield*, [1963] 3 All E.R. 659, [1964] 1 Q.B. 164 (C.A.).

right in international human rights instruments.[14] Defining the scope of that right, however, is more problematic. While we all can agree that individuals should be entitled to maintain some private sphere from which they can exclude others, we must also readily acknowledge that no one lives a hermetically sealed existence, free from interaction with others and a public sphere of activity. Conduct which is private in one context, may well be public in another. The right to privacy, like other rights, can be relinquished or abandoned by the privacy claimant, in which case the question may well become whether the relinquishment was absolute, or limited in its effect to a particular purpose or audience. Determining where the public sphere ends and the private begins can be exceedingly difficult. As Binnie J. observed in the recent decision of *R. v. Tessling*,[15] "[p]rivacy is a protean concept."[16]

Even a cursory review of the vast body of literature on privacy and its theoretical underpinnings is well beyond the scope of this paper;[17] however, most conceptions of privacy appear to agree that privacy has two fundamental characteristics. First, by definition, a right to privacy confers on the individual the ability to exclude others from the "private" realm, whatever that realm may be. Second, in free and democratic societies, privacy is closely tied to the value our society places on the individual. We recognize that certain aspects of life are profoundly intimate and justify the grant of a right of privacy. Moreover, we recognize that each one of us should be permitted the right to control access to certain aspects of our lives, because the ability to exclude others is necessary to promote our sense of self and actualize our lives as distinct individuals. In a sense, we confer a right of privacy on individuals simply because it conforms with our society's ideal of what it means to be an individual. As La Forest J. put it in *R. v. Dyment*:[18]

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[14] See, for example, Article 17(1) of the *International Covenant on Civil and Political Rights*, December 19, 1966, 999 U.N.T.S. 171, arts. 9-14, Can. T.S. 1976 No. 47, 6 I.L.M. 368, which states: "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation."

[15] [2004] S.C.J. No. 63, 23 C.R. (6th) 207 (S.C.C.).

[16] *R. v. Tessling*, [2004] S.C.J. No. 63, 189 C.C.C. (3d) 129, at para. 25 (S.C.C.).

[17] See Richard B. Bruyer, "Privacy: A Review and Critique of the Literature" (2006) 43 Alta. L. Rev. 553 for such a review. Bruyer argues that all of the conceptions of privacy set out in the literature are grounded on notions of individual liberty, which he rejects in favour of a conception of privacy based on the entitlement of persons to equal treatment in respect of dignity and autonomy.

[18] [1988] S.C.J. No. 82, 45 C.C.C. (3d) 244 (S.C.C.).

> Grounded in man's physical and moral autonomy, privacy is essential for the well-being of the individual. For this reason alone, it is worthy of constitutional protection …[19]

We should, therefore, not find it surprising that the Supreme Court concluded that the purpose of privacy is to promote the dignity, integrity and autonomy of the individual.[20]

We then have to ask, though, what aspects of life promote the dignity, integrity and autonomy of individuals, and therefore fall within the "private" sphere. Rather than attempt to list all of the activities that are, or may be, private, the Supreme Court of Canada recognized early on in the section 8 jurisprudence that there are three distinct zones or realms of privacy: privacy as it relates to the person (the body); territorial or spatial privacy; and informational privacy.[21]

The basis for the first of these, privacy of the body, is readily understood, tied in as it is to societal notions of decency and bodily integrity. In our society, we place great weight on the right of individuals to make decisions as to who will be permitted to have access to their bodies and in what manner. Our bodies are who we are, and non-consensual invasions of our person will inevitably offend our sense of autonomy and diminish our dignity. For this reason, claims to privacy of the person have been said to have the greatest claim for protection.[22]

The rationale for the second zone of privacy is also easy to understand. We need to have private spaces within which we can pursue private acts. If individuals are to have a private realm from which they can

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[19] *R. v. Dyment*, [1988] S.C.J. No. 82, 45 C.C.C. (3d) 244, at 254 (S.C.C.).

[20] See *R. v. Plant*, [1993] S.C.J. No. 97, 84 C.C.C. (3d) 203, at 212 (S.C.C.), *per* Sopinka J.: "… such investigative practices as videotaping of events in a private hotel room (*R. v. Wong* (1990), 60 C.C.C. (3d) 460, [1990] 3 S.C.R. 36, 1 C.R. (4th) 1), and seizure by state agents of a blood sample taken by medical personnel for medical purposes (*R. v. Dyment*, [1988] S.C.J. No. 82, 45 C.C.C. (3d) 244 (S.C.C.)), have been found to run afoul of the s. 8 right against unreasonable search and seizure *in that the dignity, integrity and autonomy of the individual are directly compromised*" (emphasis added). See also *R. v. Dyment*, [1988] S.C.J. No. 82, 45 C.C.C. (3d) 244, at 255 (S.C.C.), *per* La Forest J. where he states that privacy "is based on the notion of the dignity and integrity of the individual".

[21] See *R. v. Dyment*, [1988] S.C.J. No. 82, 45 C.C.C. (3d) 244, at 255 (S.C.C.):

> The first challenge, then, is to find some means of identifying those situations where we should be most alert to privacy considerations. Those who have reflected on the matter have spoken of zones or realms of privacy: see, for example, Privacy and Computers, the Report of the Task Force established by the Department of Communications/Department of Justice (1972), especially at pp. 12-14. The report classifies these claims to privacy as those involving territorial or spatial aspects, those related to the person, and those that arise in the information context.

[22] *R. v. Tessling*, [2004] S.C.J. No. 63, 23 C.R. (6th) 207, at para. 21 (S.C.C.).

exclude others, one of the easiest ways to recognize that is by demarcating the "private" from the "public" through reference to traditional property rights. My property is "private"; hence, I can exclude others from it. In that sense, property functions as a proxy for the individual's right to privacy.[23]

The boundaries of these two zones of privacy are easy to discern — bodies are bodies and places are places. But even if places may be easy to define on the facts of a particular case, it is still necessary to determine whether the privacy claimant has a reasonable expectation of privacy in the particular place. After all, section 8 protects people, not places. If a person is lawfully in possession of a place, the answer seems clear that he or she is likely to have a reasonable expectation of privacy in respect of some aspect of that place.[24] But since private property is only a proxy for reasonable expectations of privacy, one has to exercise some care in the analysis. The boundaries of one's reasonable expectation of privacy and the territorial limits of the property in question may not coincide. Thus, I can assert a reasonable expectation of privacy within the confines of my house, but not necessarily my driveway.[25] And what if one's connection with the place in question is something less than lawful possession? Our common experience tells us that not everyone who has some connection, however tenuous, with a place can reasonably expect to find privacy there. The owner of an apartment building cannot reasonably claim that he has an expectation of privacy in an apartment which he has rented to another person.[26] The furnace repairman cannot be heard to say that he has a reasonable expectation of privacy in my home simply because he happens to be on my premises, or can he? And what about friends and family, who are my guests at a dinner party — do they have a reasonable expectation of privacy? What if they reside with me for the weekend? Can they then assert that an intrusion into my home trenches on *their* right to privacy and interferes with their dignity, integrity and autonomy? These are not easy questions to answer.

The boundaries of the third zone of privacy, informational privacy, are even more difficult to delineate. Not all information about an individual necessarily promotes dignity, integrity and autonomy. Some information

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[23] *R. v. Tessling*, [2004] S.C.J. No. 63, 23 C.R. (6th) 207, at para. 16 (S.C.C.).

[24] *R. v. Belnavis*, [1997] S.C.J. No. 81, 118 C.C.C. (3d) 405 (S.C.C.) — driver of motor vehicle has reasonable expectation of privacy in the vehicle; *R. v. Lauda*, [1999] O.J. No. 2180, 136 C.C.C. (3d) 358 (Ont. C.A.) — lessor of farmland has reasonable expectation of privacy in posted lands.

[25] *R. v. Lotozky*, [2006] O.J. No. 2516, 210 C.C.C. (3d) 509 (Ont. C.A.).

[26] *R. v. Pugliese*, [1992] O.J. No. 450, 71 C.C.C. (3d) 295 (Ont. C.A.).

pertaining to the individual may be so mundane or innocuous that its disclosure could not possibly affect the individual's dignity, integrity or autonomy. Furthermore, the disclosure of some information, such as information pertaining to one's taxable income, may well be required as a matter of course for civil society to function properly. And finally, some information about the individual, if kept hidden, may actually serve to undermine those values which privacy seeks to promote. I am thinking here of information concerning criminal acts that may have been committed by the individual, which typically will have resulted in the denigration of another person's dignity, integrity and autonomy, a point to which I will return to later.

The challenge then, whether we are speaking of territorial or informational privacy, is to decide whether an individual has a reasonable expectation of privacy in the circumstances. How are we to go about determining this? The Supreme Court, in the early years, approached this question by undertaking a normative analysis that was largely disconnected from the actual facts of the case. That is, rather than determining whether an individual had a reasonable expectation of privacy having regard to all of the circumstances of the case, the Court posed questions "framed in broad and neutral terms"[27] and asked whether individuals in our society should generally enjoy an expectation of privacy. The question was not whether the landlord had an expectation of privacy in the tenant's apartment, but whether individuals in society should enjoy an expectation of privacy inside apartments. And the question was not whether the furnace repairman had an expectation of privacy inside my home, but rather whether individuals generally should enjoy an expectation of privacy in homes.

This normative approach was first applied by the Supreme Court in *R. v. Duarte*,[28] a decision which surprised many of us at the time. The facts of the case are not complex. Duarte met with an informer and undercover police officer in an apartment which had been wired to intercept and record their conversations, and discussed a cocaine transaction. The informer and undercover police officer had both consented to the interception of their communications. On these facts, many of us thought that the outcome was obvious. Parliament had already sought to protect private communications from being surreptitiously intercepted

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27 *R. v. Wong*, [1990] S.C.J. No. 118, 60 C.C.C. (3d) 460, at 481 (S.C.C.).

28 [1990] S.C.J. No. 2, 53 C.C.C. (3d) 1 (S.C.C.).

by making it a criminal offence to do so,[29] but had expressly exempted the interception of private communications from the reach of the criminal sanction when one of the parties to the communication had consented to the interception.[30] Such a provision seemed reasonable and in accord with common sense. How could Duarte claim an expectation of *privacy* in his conversation with the informer and undercover police officer, when they were free to disclose the content of his conversation to anyone else?

The Crown's argument found favour with the Ontario Court of Appeal,[31] but was rejected by the Supreme Court. The question for the Supreme Court was not whether Duarte had a reasonable expectation of privacy in his communication with the undercover police officer, but rather whether individuals generally in society would expect that their private communications with others would not be intercepted by the state without prior judicial authorization. As La Forest J. explained a few months later in another case, *R. v. Wong*,[32] which applied the same type of generalized normative analysis:

> . . . *R. v. Duarte* approached the problem of determining whether a person had a reasonable expectation of privacy in given circumstances by attempting to assess whether, by the standards of privacy that persons can expect to enjoy in a free and democratic society, the agents of the state were bound to conform to the requirements of the *Charter* when effecting the intrusion in question. This involves asking whether the persons whose privacy was intruded upon could legitimately claim that in the circumstances it should not have been open to the agents of the state to act as they did without prior judicial authorization. To borrow from Professor Amsterdam's reflections, *supra*, at p. 403, the adoption of this standard invites the courts to assess whether giving their sanction to the particular form of unauthorized surveillance in question would see the amount of privacy and freedom remaining to citizens diminished to a compass inconsistent with the aims of a free and open society.

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[29] Then s. 178.11(1) of the *Criminal Code*, R.S.C. 1970, c. C-34 provided: "Every one who, by means of an electromagnetic, acoustic, mechanical or other device, wilfully intercepts a private communication is guilty of an indictable offence and liable to imprisonment for five years."

[30] Then s. 178.11(2)(a) of the *Criminal Code*, R.S.C. 1970, c. C-34 provided that s. 178.11(1) did not apply to "a person who has the consent to intercept, express or implied, of the originator of the private communication or of the person intended by the originator thereof to receive it".

[31] *R. v. Sanelli, Duarte and Fasciano*, [1987] O.J. No. 821, 38 C.C.C. (3d) 1 (Ont. C.A.).

[32] [1990] S.C.J. No. 118, 60 C.C.C. (3d) 460 (S.C.C.).

> When the intrusion takes the form of unauthorized and surreptitious electronic audio surveillance, *R. v. Duarte* makes it clear that to sanction such an intrusion would see our privacy diminished in just such an unacceptable manner. While there are societies in which persons have learned, to their cost, to expect that a microphone may be hidden in every wall, it is the hallmark of a society such as ours that its members hold to the belief that they are free to go about their daily business without running the risk that their words will be recorded at the sole discretion of agents of the state.
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> Accordingly, by the standards of privacy that prevail in a free and open society such as our own, Duarte was entitled to claim that judicially unauthorized participant surveillance did offend against his reasonable expectations of privacy when he engaged in what he had every reason to believe was an ordinary private conversation. To have held otherwise would have been tantamount to exposing any member of society whom the state might choose to target to the same risk of having his or her nominally private conversation become the subject of surreptitious recordings.[33]

R. v. Wong was another surprising case. The accused was alleged to have operated an illegal gaming house in a hotel room, to which he had invited members of the public by indiscriminately circulating notices at public bars and restaurants. The police gathered evidence of the illegal gambling enterprise through surreptitious video surveillance of the hotel room. In determining whether Wong had a reasonable expectation of privacy, the question for the majority was not whether Wong had a reasonable expectation of privacy in these particular circumstances. Rather, according to La Forest J., "the question must be framed in broad and neutral terms so as to become whether in a society such as ours persons who retire to a hotel room and close the door behind them have a reasonable expectation of privacy."[34]

There are several problems with the type of normative analysis adopted by the Court in both *Duarte*[35] and *Wong*.[36] The first problem is that the outcome of any particular inquiry into the existence of a reasonable expectation of privacy is largely driven by how one has framed the question, rather than the actual facts of the particular case. If we ask a question that is very general, we tend to find ourselves talking about

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33 *R. v. Wong*, [1990] S.C.J. No. 118, 60 C.C.C. (3d) 460, at 478 (S.C.C.).

34 *R. v. Wong*, [1990] S.C.J. No. 118, 60 C.C.C. (3d) 460, at 481 (S.C.C.).

35 *R. v. Duarte*, [1990] S.C.J. No. 2, 74 C.R. (3d) 281 (S.C.C.).

36 *R. v. Wong*, [1990] S.C.J. No. 118, 1 C.R. (4th) 1 (S.C.C.).

privacy generally and get an answer that is different than if we framed the question with more specificity. The greater the level of generality to the question posed, the more likely it is that one will find a reasonable expectation of privacy. So, returning to my example of the repairman in my home, we get one answer when we ask whether individuals behind closed doors in homes should have a reasonable expectation of privacy, and a different one when we ask whether a visiting repairman inside a home should have a reasonable expectation of privacy. This starts to look like results-driven reasoning.

A second problem flows from the first. If one adopts an approach that is too general and disconnected from the facts of a particular case, outcomes are no longer consonant with our common experience and societal expectations. One ends up extending privacy protection to situations that do not warrant it. For example, La Forest J. describes the drug-related conversation in *Duarte*[37] as an "ordinary private conversation", and yet I think most of us would regard the conversation as anything but. The drug trade is rife with informers and undercover police officers — could Duarte really *reasonably* expect that his conversation about the cocaine transaction would remain private and free from interception by the state?

A generalized approach to normative analysis also risks leading us astray from the concern which should lie at the heart of every inquiry into reasonable expectation of privacy: would the individual's dignity, integrity and autonomy be advanced or diminished in the instant case by validating the privacy claim? The point I am trying to make here is best illustrated by the case of *R. v. Babinski*.[38] Babinski sexually assaulted a woman, and later broke into her apartment. His victim went to the police, and told them that Babinski had said that he would be calling her. The police suggested recording the conversation in the hope that they would obtain incriminating evidence of the break-in. The victim consented to the recording of her conversation with Babinski. Under *Duarte*,[39] Babinski's communication with his victim[40] was protected under section 8 of the Charter and the consensual recording of the call in the absence of prior judicial authorization was a violation of Babinski's reasonable expectation of privacy. Babinski's conversation with his

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37 *R. v. Duarte*, [1990] S.C.J. No. 2, 74 C.R. (3d) 281 (S.C.C.).

38 [2005] O.J. No. 138, 193 C.C.C. (3d) 172 (Ont. C.A.).

39 *R. v. Duarte*, [1990] S.C.J. No. 2, 74 C.R. (3d) 281 (S.C.C.).

40 The victim was unavailable to testify at any trial of the break-in, since Babinski murdered her shortly thereafter.

victim became just another "ordinary private conversation". And yet one might ask how reasonable it is for the perpetrator of a crime to expect that his confession to his victim will remain private? One might also ask why Babinski's statements to his victim, acknowledging the break-in, should be subject to Charter protection. Babinski had violated his victim's dignity, integrity and autonomy by forcibly violating *her* reasonable expectation of privacy. How can it be that his admission to this effect promotes dignity, integrity and autonomy? The simple answer is that it does not. The content of Babinski's communications did not warrant protection under section 8, nor did Duarte's.

The final problem with a generalized normative approach to the determination of reasonable expectation of privacy is that it fails to provide police officers and prosecutors with sufficient guidance during investigations. Police and prosecutors often confront wildly varying factual scenarios and have to make decisions based on their common experiences and their understanding of societal expectations. Those who are expected to faithfully apply the terms of the Charter need at least some semblance of certainty and predictability from the courts, yet a broad and neutral normative analysis provides neither. One is left with only vague uncertainty until the question is ultimately framed and decided by the Supreme Court of Canada.

Fortunately, the Supreme Court subsequently abandoned its generalized approach to normative analysis, in favour of an approach that examined all of the circumstances in deciding whether an individual had a reasonable expectation of privacy. In *R. v. Edwards*,[41] the majority of the Court decided that the existence of a reasonable expectation of privacy would be determined on an assessment of the "totality of circumstances", which would include, for claims made to territorial or spatial privacy, circumstances such as: the accused's presence at the time of the search, possession or control of the property or place searched, ownership of the property or place, historical use of the property or item, ability to regulate access, existence of a subjective expectation of privacy and the objective reasonableness of the expectation.[42] The question thereafter was no longer whether individuals in our society generally enjoyed an expectation of privacy in apartments, but whether an "especially privileged guest", who had no authority to exclude others,

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41 [1996] S.C.J. No. 11, 104 C.C.C. (3d) 136 (S.C.C.).

42 *R. v. Edwards*, [1996] S.C.J. No. 11, 104 C.C.C. (3d) 136, at 150-51 (S.C.C.); *R. v. Buhay*, [2003] S.C.J. No. 30, 174 C.C.C. (3d) 97, at 107 (S.C.C.).

had a reasonable expectation of privacy when the owner of the premises granted the police access.[43] The question was no longer whether people in automobiles generally had a reasonable expectation of privacy, but rather whether a passenger in a car had a reasonable expectation of privacy in a bag stuffed with stolen clothing, when she did not assert any ownership interest in it.[44]

The *Edwards*[45] totality of the circumstances test has provided a flexible framework that has proven itself well suited to address the varied circumstances police and prosecutors face. More importantly, the test approaches the assessment of reasonable expectation of privacy in a manner that avoids the problems with a normative analysis disconnected from the actual facts of the case. Under the *Edwards* test, the outcome of any given fact scenario is likely to be more closely aligned with our common experience and societal expectations, and therefore, I would suggest, more likely to lead to predictable outcomes that we consider just.

In the context of informational privacy, the Supreme Court, *per* Sopinka J., adopted an approach somewhat similar to the *Edwards*[46] test in *R. v. Plant*,[47] a case concerned with whether an individual held a reasonable expectation of privacy in computer records of his electricity consumption. In assessing whether the accused had a reasonable expectation of privacy, Sopinka J. looked to a number of factors: 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 and the manner in which it was obtained. More importantly, Sopinka J. recognized that not all information is entitled to protection under section 8. Taking a purposive approach, he held that privacy protection is restricted to information which is personal and confidential and serves to promote the individual's dignity, integrity and autonomy:

> . . . 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

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43 *R. v. Edwards*, [1996] S.C.J. No. 11, 104 C.C.C. (3d) 136 (S.C.C.).

44 *R. v. Belnavis*, [1997] S.C.J. No. 81, 118 C.C.C. (3d) 405 (S.C.C.).

45 *R. v. Edwards*, [1996] S.C.J. No. 11, 104 C.C.C. (3d) 136 (S.C.C.).

46 *R. v. Edwards*, [1996] S.C.J. No. 11, 104 C.C.C. (3d) 136 (S.C.C.).

47 [1993] S.C.J. No. 97, 84 C.C.C. (3d) 203 (S.C.C.).

> information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state.[48]

The Supreme Court in *Tessling*[49] recently adapted the *Edwards* test in order to address reasonable expectations of privacy in the context of information privacy. Justice Binnie said that in approaching privacy claims in relation to information (which in *Tessling* was an image of heat emanating from the accused's house), one first must ascertain the nature of the information at stake, and determine whether the accused had a direct interest in the information. One then asks whether the accused had a subjective expectation of privacy in relation to the information, and whether that expectation was objectively reasonable. The objective reasonableness of an expectation of privacy is determined by examining the following factors: the place where the alleged "search" occurred; whether the information was in public view; whether the information had been abandoned; whether the information was in the hands of third parties and, if so, whether it was subject to an obligation of confidentiality; whether the investigative technique was intrusive, or objectively unreasonable; and whether the information exposed any of the intimate details of the accused's lifestyle, or was information of a biographical nature.[50]

One can quibble with the relevance of some of these factors. For example, one may well ask why the intrusiveness of the investigative technique should matter when we are assessing the reasonableness of the *expectation* of privacy. If one has an expectation of privacy in information, the objective reasonableness of that expectation should not ordinarily be dependent on whether the state has extracted the information in an intrusive manner. I would think that this factor, and the extent to which the investigative technique itself is objectively unreasonable (whatever that means), are best left to the second stage of the section 8 analysis, the inquiry into whether the search itself is unreasonable. And one may also ask why we even bother inquiring whether the accused has a subjective expectation of privacy, since the outcome seems largely dependent on whether the expectation of privacy was objectively reasonable. As Binnie J. aptly observes, the subjective expectation of privacy is of only limited import in any inquiry into reasonable expectation of privacy:

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48 *R. v. Plant*, [1993] S.C.J. No. 97, 84 C.C.C. (3d) 203, at 213 (S.C.C.).

49 *R. v. Tessling*, [2004] S.C.J. No. 63, 23 C.R. (6th) 207 (S.C.C.).

50 *R. v. Tessling*, [2004] S.C.J. No. 63, 189 C.C.C. (3d) 129, at para. 32 (S.C.C.).

> The subjective expectation of privacy is important but its absence should not be used too quickly to undermine the protection afforded by s. 8 to the values of a free and democratic society. In an age of expanding means for snooping readily available on the retail market, ordinary people may come to fear (with or without justification) that their telephones are wiretapped or their private correspondence is being read. One recalls the evidence at the Watergate Inquiry of conspirator Gordon Liddy who testified that he regularly cranked up the volume of his portable radio to mask (or drown out) private conversations because he feared being "bugged" by unknown forces. Whether or not he was justified in doing so, we should not wish on ourselves such an environment. Suggestions that a diminished subjective expectation of privacy should automatically result in a lowering of constitutional protection should therefore be opposed. It is one thing to say that a person who puts out the garbage has no reasonable expectation of privacy in it. It is quite another to say that someone who fears their telephone is bugged no longer has a subjective expectation of privacy and thereby forfeits the protection of s. 8. Expectation of privacy is a normative rather than a descriptive standard.[51]
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> (emphasis in original omitted)

This is clearly correct. While we may be free to relinquish our right to privacy, it is not extinguished simply because someone else has told us that they are going to regularly invade our privacy. Privacy cannot be lost as a result of a forcible taking by another.[52] So, I would agree that the absence of a subjective expectation of privacy, where it is the result of an actual or feared forced deprivation of privacy, cannot be used as the basis to deny someone a claim to protection under section 8. To this I would add the obvious point that the *presence* of a subjective expectation of privacy conversely does not automatically confer section 8 protection. At the end of the day, the question for determination on the first stage of every section 8 claim is simply whether our societal values are such that we are prepared to acknowledge that, in the circumstances of the case, the accused had a valid and enforceable expectation of privacy. In this sense, the section 8 inquiry still remains a normative one, but it is one that is always informed by the specific facts of the instant case.

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[51] *R. v. Tessling*, [2004] S.C.J. No. 63, 189 C.C.C. (3d) 129, at para. 42 (S.C.C.).

[52] See, for example, *R. v. Law*, [2002] S.C.J. No. 10, 160 C.C.C. (3d) 449 (S.C.C.); *R. v. Buhay*, [2003] S.C.J. No. 30, 174 C.C.C. (3d) 97 (S.C.C.).

The result in *Tessling*[53] turned on the fact that the information at issue did not form part of the accused's biographical core of personal information or reveal any intimate details of the accused's lifestyle. It was, therefore, not entitled to constitutional protection under section 8:

> External patterns of heat distribution on the external surfaces of a house is not information in which the respondent had a reasonable expectation of privacy. The heat distribution, as stated, offers no insight into his private life, and reveals nothing of his "biographical core of personal information". Its disclosure scarcely affects the "dignity, integrity and autonomy" of the person whose house is subject of the FLIR image (*Plant*, at p. 293).[54]

As Binnie J. acknowledges here, not all information promotes dignity, integrity and autonomy. Indeed, some information, such as information relating to criminal acts, undermines these values. The man who beats his spouse, the purveyor of child pornography, the drug trafficker who manufactures and distributes methamphetamine, none of these can legitimately claim that information concerning their conduct should remain private to promote their dignity, integrity and autonomy. In many instances, however, they may be able to shelter such information behind other proper privacy claims. Although the spouse beater may have no legitimate privacy claim in relation to the fact that he beats his spouse, he can nonetheless shelter himself behind his general right to privacy in his home.

I would argue, though, that technologies which reveal information pertaining to criminal acts, without also trenching upon legitimate privacy claims, do not interfere with any reasonable expectation of privacy. For example, technologies that reveal the existence of a marijuana grow operation inside a home, without intruding into the individual's biographical core of personal information or the intimate details of his or her life, do not give rise to viable section 8 claims. Thus, the Saskatchewan Court of Appeal, in the recent decision of *R. v. Cheung*,[55] was correct to hold that use of a digital recording ammeter to monitor electrical consumption in a home did not violate section 8, even though the information derived therefrom was probative of the fact that a marijuana grow operation was being conducted inside the house. Similarly, I would argue that the use of dogs to sniff for information of a

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53 *R. v. Tessling*, [2004] S.C.J. No. 63, 23 C.R. (6th) 207 (S.C.C.).

54 *R. v. Tessling*, [2004] S.C.J. No. 63, 189 C.C.C. (3d) 129, at para. 63 (S.C.C.).

55 [2007] S.J. No. 187, 2007 SKCA 51 (Sask. C.A.).

criminal nature — drugs, explosives, and the like — do not trench on the values which section 8 seeks to promote.

In coming to grips with novel technologies which may permit the police to gather information about some activities, it will always be crucial to ask whether the information in question, if protected from disclosure, serves to advance the values of dignity, integrity and autonomy. If it does not, privacy protection should not be provided under section 8. A purposive approach should always be central to the first stage of the analysis.

IV. WHAT IS A REASONABLE SEARCH?

Once an accused demonstrates that he or she held a reasonable expectation of privacy which was the subject of state intrusion, the question then becomes whether that intrusion was reasonable. There are several bases on which a search or seizure might be found unreasonable. The particular intrusion in question might not be authorized by law, because there is no specific statute or common law rule permitting the search.[56] The police may have overstepped the boundaries of the authority conferred upon them.[57] Or, the police may have used unreasonable force in executing a search warrant.

As set out above, *Hunter v. Southam*[58] established that, where the state interest is law enforcement, a reasonable search requires prior judicial authorization where feasible, and the standard which must be met before a search or seizure can be permitted is one of credibly based probability. Of course, implicit in the *Hunter v. Southam* standard was that a warrantless search might be reasonable, if it was not possible to obtain prior judicial authorization in the circumstances, or if the state interest was something other than law enforcement.

Four years after *Hunter v. Southam*,[59] the Court had to consider whether the *Hunter* standards were applicable to searches of the person at the border. Such searches were permissible under the *Customs Act*[60] without prior judicial authorization, on a standard less than reasonable

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56 *R. v. Caslake*, [1998] S.C.J. No. 3, 121 C.C.C. (3d) 97, at para. 12 (S.C.C.).

57 *R. v. Caslake*, [1998] S.C.J. No. 3, 121 C.C.C. (3d) 97, at para. 12 (S.C.C.).

58 [1984] S.C.J. No. 36, 41 C.R. (3d) 97 (S.C.C.).

59 [1984] S.C.J. No. 36, 41 C.R. (3d) 97 (S.C.C.).

60 R.S.C. 1970, c. C-40.

grounds to believe that the person was in possession of contraband.[61] The Court held, *per* Dickson C.J.C., that individuals entering Canada had a reduced expectation of privacy and, given the state interest in maintaining border integrity, searches of the person did not have to comply with the strict standards laid down in *Hunter v. Southam*. However, the Court also observed that departures from the *Hunter v. Southam* standards "will be exceedingly rare".[62]

In the years following *Hunter v. Southam*[63] and *Simmons*,[64] the Supreme Court has been very reluctant to depart from the *Hunter* standards, at least where the privacy interest is high and the police are pursuing a criminal investigation. Indeed, the court has only generally been prepared to find warrantless searches reasonable, where the police were acting pursuant to some lawful authority in compelling and urgent circumstances. Thus, in *R. v. Grant*, the Court decided that a warrantless search for drugs under section 10 of the *Narcotic Control Act*[65] was reasonable, but only if there was an "imminent danger of the loss, removal, destruction or disappearance of the evidence sought in a narcotics investigation".[66] In *R. v. Godoy*,[67] the warrantless entry and search of an apartment in response to a "911" call was held reasonable, given the compelling public interest in preserving life and health.[68] In the context of searches of the person conducted pursuant to the long-standing common law power of search as an incident of arrest, the Court held, in *R. v. Golden*,[69] that strip searches in the "field" will only be reasonable "where there is a demonstrated necessity and urgency to search for weapons or objects that could be used to threaten the safety of the accused, the arresting officers or other individuals".[70]

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61 *R. v. Simmons*, [1988] S.C.J. No. 86, 45 C.C.C. (3d) 296 (S.C.C.).

62 *R. v. Simmons*, [1988] S.C.J. No. 86, 45 C.C.C. (3d) 296, at 319 (S.C.C.).

63 [1984] S.C.J. No. 36, 41 C.R. (3d) 97 (S.C.C.).

64 *R. v. Simmons*, [1988] S.C.J. No. 86, 45 C.C.C. (3d) 296 (S.C.C.).

65 R.S.C. 1985, c. N-1.

66 *R. v. Grant*, [1993] S.C.J. No. 98, 84 C.C.C. (3d) 173, at 189 (S.C.C.).

67 [1998] S.C.J. No. 85, 131 C.C.C. (3d) 129 (S.C.C.).

68 See *R. v. Godoy*, [1998] S.C.J. No. 85, 131 C.C.C. (3d) 129 (S.C.C.). In *Godoy*, the police power to conduct the search was grounded in the *Waterfield* test (*R. v. Waterfield*, [1963] 3 All E.R. 659, [1964] 1 Q.B. 164 (C.A.)), which requires the prosecution to first demonstrate that the police were acting in the exercise of a lawful duty when they engaged in the conduct in issue, and then that the impugned conduct amounted to a justifiable use of police powers associated with that duty.

69 [2001] S.C.J. No. 81, 159 C.C.C. (3d) 449 (S.C.C.).

70 *R. v. Golden*, [2001] S.C.J. No. 81, 159 C.C.C. (3d) 449, at para. 102 (S.C.C.).

However, it seems that, even in the context of criminal investigations, departures from the *Hunter v. Southam*[71] standards may be justified if the reasonable expectation of privacy is low and the intrusion is minimal.[72] And, where the state interest is not the pursuit of a criminal investigation, but rather the investigation of regulatory offences, the Court has been more willing to relax the *Hunter v. Southam* standards. At least that seemed to be the case until the decision of *R. v. Jarvis*,[73] which has, in my view, added some uncertainty to what seemed a relatively well-settled area of the law.

In a developed and complex society, where many activities are necessarily regulated in the broader public interest, governments obviously need some means of ensuring that individuals are actually complying with the regulatory obligations imposed upon them. Many regulations would be rendered ineffective if government had no power to conduct random inspections or compel the production of books and records that one might be required to maintain. The Supreme Court has, therefore, recognized that some types of search and seizure in the regulatory sphere will not be subject to the *Hunter v. Southam*[74] standards. The rationale for this is two-fold: individuals typically hold a lower expectation of privacy in respect of regulated activities; and the regulatory standards would be practically unenforceable if investigators were required to demonstrate the existence of reasonable and probable grounds as a pre-condition to engaging their powers of search and seizure. In *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*,[75] La Forest J. stated:

> . . . the degree of privacy the citizen can reasonably expect may vary significantly depending upon the activity that brings him or her into contact with the state. In a modern industrial society, it is generally accepted that many activities in which individuals can engage must nevertheless to a greater or lesser extent be regulated by the state to ensure that the individual's pursuit of his or her self-interest is compatible with the community's interest in the realization of collective goals and aspirations. In many cases, this regulation must necessarily involve the

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71 [1984] S.C.J. No. 36, 41 C.R. (3d) 97 (S.C.C.).

72 See, for example, *R. v. Wise*, [1992] S.C.J. No. 16, [1992] 1 S.C.R. 527 (S.C.C.), where Cory J. stated that, given the reduced expectation of privacy in respect of vehicle movements, prior judicial authorization for a vehicle tracking device, which is minimally intrusive, could be granted on the basis of reasonable *suspicion*.

73 [2002] S.C.J. No. 76, 169 C.C.C. (3d) 1 (S.C.C.).

74 [1984] S.C.J. No. 36, 41 C.R. (3d) 97 (S.C.C.).

75 [1990] S.C.J. No. 23, 54 C.C.C. (3d) 417 (S.C.C.).

> inspection of private premises or documents by agents of the state. The restaurateur's compliance with public health regulations, the employer's compliance with employment standards and safety legislation, and the developer's or homeowner's compliance with building codes or zoning regulations, can only be tested by inspection, and perhaps unannounced inspection, of their premises. Similarly, compliance with minimum wage, employment equity and human rights legislation can often only be assessed by inspection of the employer's files and records.[76]

Thomson Newspapers[77] was concerned with whether the compelled production of documents in the context of an investigation into possible offences under anti-combines legislation violated section 8 of the Charter. The decision can be somewhat difficult to follow because each of the five members of the panel provided reasons. However, the decision was released at the same time as the Court's decision in *R. v. McKinlay Transport Ltd.*,[78] a case involving compelled production of information and documents under the *Income Tax Act*.[79] Reading both cases together, it is clear that a majority was of the view that compelled production of documents is a seizure under section 8, and that, while the individual's expectation of privacy may be high in relation to "criminal" investigations, it will be less so in the regulatory or administrative sphere. A majority of the Court also acknowledged that intrusions into expectations of privacy will be reasonable in the regulatory sphere, if they are necessary to ensure compliance with the regulatory framework and not too intrusive. In essence, the Court in each case balanced the state interest in enforcement of the regulatory scheme against the degree of expectation of privacy held in the circumstances. Given the relatively low expectation of privacy, the state interest in enforcement prevailed.

What was critical to the outcome in each case was the characterization of the nature of the investigative provisions at issue. In *McKinlay Transport*,[80] all were agreed that the *Income Tax Act*[81] and the powers of compulsion were regulatory in nature, and it was impracticable to insist on compliance with the *Hunter v. Southam*[82] standards. Tax officials

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[76] *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] S.C.J. No. 23, 54 C.C.C. (3d) 417, at 476 (S.C.C.).

[77] *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] S.C.J. No. 23, 54 C.C.C. (3d) 417 (S.C.C.).

[78] [1990] S.C.J. No. 25, [1990] 1 S.C.R. 627 (S.C.C.).

[79] R.S.C. 1952, c. 148, as am.

[80] *R. v. McKinlay Transport Ltd.*, [1990] S.C.J. No. 25, 76 C.R. (3d) 283 (S.C.C.).

[81] R.S.C. 1952, c. 148, as am.

[82] [1984] S.C.J. No. 36, 41 C.R. (3d) 97 (S.C.C.).

would be unable to effectively investigate and audit taxpayers if they were required to have reasonable and probable grounds. In *Thomson Newspapers*,[83] the minority was of the view that the provisions in question were "criminal" or "quasi-criminal", and therefore subject to the *Hunter v. Southam* standards. Justice La Forest, however, rejected this position, pointing out that offences are often included in regulatory schemes to promote compliance; that is, they are introduced for instrumental reasons. For La Forest J., there was a fundamental distinction between regulatory offences and "true crimes"; it was only where the latter arose that the individual enjoyed a heightened expectation of privacy warranting application of the *Hunter v. Southam* standards. As he explained:

> To recapitulate, the relevance of the regulatory character of the offences defined in the Act is that conviction for their violation does not really entail, and is not intended to entail, the kind of moral reprimand and stigma that undoubtedly accompanies conviction for the traditional "real" or "true" crimes. It follows that investigation for purposes of the Act does not cast the kind of suspicion that can affect one's standing in the community and that, as was explained above, entitles the citizen to a relatively high degree of respect for his or her privacy on the part of investigating authorities. This does not, of course, mean that those subject to investigation under the Act have no, or no significant, expectation of privacy in respect of such investigations. The decision of this court in *Hunter v. Southam Inc*., *supra*, makes clear that they do. But it does suggest that the degree of privacy that can reasonably be expected within the investigative scope of the Act is akin to that which can be expected by those subject to other administrative and regulatory legislation, rather than to that which can legitimately be expected by those subject to police investigation for what I have called "real" or "true" crimes.[84]

So, *Thomson Newspapers*[85] and *McKinlay Transport*[86] seemed to stand for the general proposition that regulatory or administrative searches and seizures would typically be found reasonable, even if warrantless, so long as the power in question was necessary to ensure and promote compliance with the regulatory scheme in question and was not overly

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[83] *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] S.C.J. No. 23, 54 C.C.C. (3d) 417 (S.C.C.).

[84] *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] S.C.J. No. 23, 54 C.C.C. (3d) 417, at 483 (S.C.C.).

[85] *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] S.C.J. No. 23, 76 C.R. (3d) 129 (S.C.C.).

[86] *R. v. McKinlay Transport Ltd.*, [1990] S.C.J. No. 25, 76 C.R. (3d) 283 (S.C.C.).

invasive. The jurisprudence, thereafter, was generally consistent with this approach. Inspections of business premises in a regulated industry, although characterized as "searches" under section 8, were upheld as reasonable, given that they were necessary to investigate complaints and ensure compliance.[87] Powers compelling individuals to appear before investigators inquiring into possible infractions of securities regulations, to testify under oath and produce documents and records, were found reasonable given the low expectation of privacy in business records held by those who chose to enter highly regulated industries.[88] And in *Del Zotto v. Canada*,[89] the Supreme Court agreed with Strayer J.A. in the Federal Court of Appeal[90] that an inquiry power under the *Income Tax Act*,[91] permitting compelled testimony from witnesses and compelled productions of documents, was not unreasonable, even if the inquiry was convened in contemplation of a potential prosecution. In coming to this conclusion, Strayer J.A. emphasized the regulatory nature of the *Income Tax Act*,[92] the fact that conduct such as tax evasion is made an offence under the Act for strictly instrumental reasons, the minor level of intrusion and the reduced expectation of privacy. Justice Strayer stated:

> There cannot be the exaggerated claims to privacy connected with the administration of the *Income Tax Act* which the appellants assert. The *Act* requires all manner of disclosure. The taxpayer must, for example, disclose: his place of residence; his age; his social insurance number; his marital status or whether he is living common law; his sources and amounts of income; his dependants, their ages and possible physical conditions if handicapped; the amounts and objects of his charitable or political donations, if he is to claim tax credits; whom he employs and entertains if he seeks to deduct the costs as business expenses; and details of his pension arrangements. If he is employed he must disclose many of these details not only to Revenue Canada but also to his employer so that mandatory tax deductions can be made.

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87 *Comité paritaire de l'industrie de la chemise v. Potash; Comité paritaire de l'industrie de la chemise v. Sélection Milton*, [1994] S.C.J. No. 7, 91 C.C.C. (3d) 315 (S.C.C.).

88 *British Columbia* (*Securities Commission*) *v. Branch*, [1995] S.C.J. No. 32, 97 C.C.C. (3d) 505 (S.C.C.).

89 [1999] S.C.J. No. 1, 131 C.C.C. (3d) 353 (S.C.C.).

90 See [1997] F.C.J. No. 795, 116 C.C.C. (3d) 123 (F.C.A.).

91 R.S.C. 1952, c. 148, as am.

92 R.S.C. 1952, c. 148, as am.

> A *subpoena duces tecum* is not a major intrusion of privacy as compared to a search.[93]

The Supreme Court, however, also made it clear in the years after *Thomson Newspapers*[94] and *McKinlay Transport*[95] that the determination whether a given regulatory search is reasonable is ultimately a balancing exercise. Where the individual's expectation of privacy is low, the state interest in enforcing compliance with regulatory standards will ordinarily prevail. But where the expectation of privacy is high, the Court will be more inclined to insist on strict compliance with the *Hunter v. Southam*[96] standards. Thus, in *Baron v. Canada*,[97] *per* Sopinka J., the Court decided that a search of private premises to gather evidence for the prosecution of a taxpayer under the *Income Tax Act*[98] did not justify a departure from the *Hunter v. Southam* standards.[99] This makes sense. Although the taxpayer may only have a relatively low expectation of privacy in records and documents themselves as against the Canada Revenue Agency, there are obviously other significant privacy interests engaged when tax investigators enter private premises, and it is appropriate for the authorities to obtain a warrant in order to intrude upon these latter interests.

Justice Sopinka did, however, make one curious statement in the course of deciding *Baron*.[100] He suggested that the *purpose* of the search, the gathering of evidence for a tax prosecution, was a relevant factor in holding the tax investigators to the *Hunter v. Southam*[101] standards. This is confusing and seems incorrect. *McKinlay Transport*[102] had affirmatively decided that the *Income Tax Act*[103] was regulatory legislation, and, as La Forest J. noted, tax offences were created for "instrumental" reasons. The expectation of privacy in relation to the books and records that one is expected to maintain under the *Income Tax Act*[104] is low. It cannot be the case that the taxpayer's expectation of privacy varies depending on

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93 *Del Zotto v. Canada*, [1997] F.C.J. No. 795, 116 C.C.C. (3d) 123, at 149 (F.C.A.).

94 *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] S.C.J. No. 23, 76 C.R. (3d) 129 (S.C.C.).

95 *R. v. McKinlay Transport Ltd.*, [1990] S.C.J. No. 25, 76 C.R. (3d) 283 (S.C.C.).

96 [1984] S.C.J. No. 36, 41 C.R. (3d) 97 (S.C.C.).

97 [1993] S.C.J. No. 6, [1993] 1 S.C.R. 416 (S.C.C.).

98 S.C. 1970-71-21, c. 63.

99 *Baron v. Canada*, [1993] S.C.J. No. 6, [1993] 1 S.C.R. 416 (S.C.C.).

100 *Baron v. Canada*, [1993] S.C.J. No. 6, [1993] 1 S.C.R. 416 (S.C.C.).

101 [1984] S.C.J. No. 36, 41 C.R. (3d) 97 (S.C.C.).

102 *R. v. McKinlay Transport Ltd.*, [1990] S.C.J. No. 25, 76 C.R. (3d) 283 (S.C.C.).

103 R.S.C. 1952, c. 148, as am.

104 R.S.C. 1985, c. 1 (5th Supp.).

the purpose for which those records are sought by tax officials. The expectation of privacy remains the same, whether the basis for the investigation is random spot monitoring, or information from a disgruntled ex-spouse which gives rise to grounds to believe that the taxpayer has been running personal expenses through his company for years. As long as the search remains within the "investigative scope" of the *Income Tax Act*, there is a reduced expectation of privacy in books and records.

Justice L'Heureux-Dubé added a further twist in *Comité paritaire*,[105] when she suggested in *obiter* that an inspection power under a regulatory scheme can be used to enter premises only up to the point that investigators have reasonable and probable grounds to believe that an offence has been committed.[106] Thereafter, the investigators must presumably resort to warrants to enter premises and search for evidence. This strikes me as a strange result, and perhaps only justified on the basis that since the investigators have reasonable and probable grounds, they may as well apply for warrants in any event. But one might ask what is accomplished by imposing a requirement of judicial authorization in such circumstances, for an application for prior judicial authorization serves little purpose if the legislator has already provided investigators with inspection powers. A simple example will suffice to make the point. Suppose investigators think that they have reasonable and probable grounds to believe that a regulatory offence has been committed and apply for a warrant. In such circumstances, the state interest in enforcing the regulatory scheme would ordinarily result in the issuance of a warrant permitting them entry. Yet, if the justice should find that the investigators do *not* have sufficient reasonable and probable grounds, then the investigators can resort to their powers of inspection and enter the premises. In each case, the investigators can enter the premises and intrude upon what is a relatively minimal expectation of privacy. The *Hunter v. Southam*[107] standards serve no practical purpose, if investigators can resort to a power permitting warrantless entry in the absence of reasonable grounds. I see no reason why investigators should have to suspend powers of inspection, simply because they may have reasonable and probable grounds to believe an offence was committed.

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[105] *Comité paritaire de l'industrie de la chemise v. Potash; Comité paritaire de l'industrie de la chemise v. Sélection Milton*, [1994] S.C.J. No. 7, 91 C.C.C. (3d) 315 (S.C.C.).

[106] *Comité paritaire de l'industrie de la chemise v. Potash; Comité paritaire de l'industrie de la chemise v. Sélection Milton*, [1994] S.C.J. No. 7, 91 C.C.C. (3d) 315, at 351 (S.C.C.).

[107] [1984] S.C.J. No. 36, 41 C.R. (3d) 97 (S.C.C.).

Jarvis[108] has added to the confusion, for although the case itself ultimately turns on a question of statutory construction concerning the ambit of certain powers under the *Income Tax Act*,[109] some language used by the Court may suggest that, even in the regulatory sphere, investigators have to surrender audit or inspection powers if they are intent on gathering evidence for prosecution purposes.

Tax officials have fairly broad inquiry powers under the *Income Tax Act*.[110] Under section 231.1, they can, for any purpose related to the administration or enforcement of the Act, enter without warrant any premises, except a dwelling house, to inspect, audit or examine the books and records of the taxpayer, as well as any other document that may be relevant to the determination of the amount owing by the taxpayer. Under section 231.2, the Minister of Revenue may, again for any purpose related to the administration or enforcement of the Act, require that any person provide information or documents. And, under section 231.3, a warrant may be obtained, if there are reasonable grounds to believe that an offence under the Act has been committed, to enter and search any place for evidence pertaining to the offence.

Jarvis[111] was concerned with whether the powers under sections 231.1 and 231.2 could be used to further a prosecutorial investigation without infringing Charter rights. Admittedly, the case is complicated somewhat by the fact that the accused challenged the provisions at issue under both section 7 and section 8 of the Charter, and much of the decision could be said to turn on the extent to which the protections against self-incrimination under section 7 were triggered as a result of certain utterances and productions that were compelled under sections 231.1 and 231.2. However, the Court made some observations that would seem directly applicable to the assessment of the reasonableness of the search under section 8.

The Court in *Jarvis*[112] ultimately concluded that the broad powers of inquiry could not be used to build a prosecution case against an accused, even though the *Income Tax Act*[113] was a regulatory statute and the taxpayer's expectation of privacy in the type of records and documents sought by tax officials is low. It is important to understand how the

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108 *R. v. Jarvis*, [2002] S.C.J. No. 76, 169 C.C.C. (3d) 1 (S.C.C.).

109 R.S.C. 1985, c. 1 (5th Supp.).

110 R.S.C. 1985, c. 1 (5th Supp.).

111 *R. v. Jarvis*, [2002] S.C.J. No. 76, 169 C.C.C. (3d) 1 (S.C.C.).

112 *R. v. Jarvis*, [2002] S.C.J. No. 76, 169 C.C.C. (3d) 1 (S.C.C.).

113 R.S.C. 1985, c. 1 (5th Supp.).

Court reached this conclusion. The Court's interpretation of Parliament's intent is, in my view, the determinative factor in the case. The Court's reasoning was that, since Parliament made it possible for the Minister to obtain warrants to investigate offences where reasonable and probable grounds exist, then Parliament must have intended that the warrantless powers be restricted in their use:

> The existence of a prior authorization procedure where the commission of an offence is suspected creates a strong inference that the separate statutory inspection and requirement powers are unavailable to further a prosecutorial investigation.[114]

The Court was also of the view that there had to be some separation between the audit and investigative functions because the individual's liberty interest is at stake during an investigation:

> Although the taxpayer and the CCRA are in opposing positions during an audit, when the CCRA exercises its investigative function they are in a more traditional adversarial relationship because of the liberty interest that is at stake. In these reasons, we refer to the latter as the adversarial relationship. It follows that there must be some measure of separation between the audit and investigative functions within the CCRA.[115]

Curiously, although the Court appeared to have found that Parliament must have intended that warrants be obtained once reasonable and probable grounds existed to believe that an offence under the Act had been committed, the Court did not follow L'Heureux-Dubé J.'s *obiter* comments in *Comité paritaire*[116] and require that tax officials actually obtain a warrant at that stage. Rather, the Court said that tax officials only had to relinquish their inspection and requirement powers once their inquiry engaged the "adversarial relationship" between the taxpayer and the state, that is, once the predominant purpose of a given inquiry became the determination of penal liability.[117] The Court reasoned that requiring that auditors obtain warrants whenever reasonable and probable grounds exist would be too problematic:

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114 *R. v. Jarvis*, [2002] S.C.J. No. 76, 169 C.C.C. (3d) 1, at para. 81 (S.C.C.).

115 *R. v. Jarvis*, [2002] S.C.J. No. 76, 169 C.C.C. (3d) 1, at para. 84 (S.C.C.).

116 *Comité paritaire de l'industrie de la chemise v. Potash; Comité paritaire de l'industrie de la chemise v. Sélection Milton*, [1994] S.C.J. No. 7, 168 N.R. 241 (S.C.C.).

117 *R. v. Jarvis*, [2002] S.C.J. No. 76, 169 C.C.C. (3d) 1, at para. 88 (S.C.C.).

> Even where reasonable grounds to suspect an offence exist, it will not always be true that the predominant purpose of an inquiry is the determination of penal liability. In this regard, courts must guard against creating procedural shackles on regulatory officials; it would be undesirable to "force the regulatory hand" by removing the possibility of seeking the lesser administrative penalties on every occasion in which reasonable grounds existed of more culpable conduct.[118]

Now, if *Jarvis*[119] is seen simply as a matter of statutory construction, I have no great difficulty with the result, even if I think that the reasoning given in support of the interpretation of Parliament's intent is rather strained and results-driven. If sections 231.1 and 231.2 must be restricted as a matter of statutory interpretation to audits, then use of those powers in furtherance of prosecutorial investigations oversteps the bounds of what the statute permits. Use of the powers in such circumstances, therefore, is not authorized as a matter of law, and amounts to an illegal search.

The real question, though, is whether *Jarvis*[120] represents something more than this, and whether the statements made by the Court have application beyond the case itself. Is it the case that whenever there is a prior authorization procedure available, that no resort can be made to other investigative powers of search or seizure if the adversarial relationship has been engaged? Moreover, does *Jarvis* stand for the principle that the *Hunter v. Southam*[121] standards will apply whenever the liberty interest of the subject is engaged in the course of a regulatory investigation, that is, whenever investigators shift their focus to the determination of penal liability? And if that is the case, how does one reconcile that with the results in *Thomson Newspapers*[122] and *Del Zotto*,[123] where the very purpose of each inquiry was to determine whether offences had been committed?

Jarvis[124] raises many questions. All we can say for certain at the present time is that, even in the regulatory context, investigators will need to be very cautious before using warrantless powers of search and seizure to build a case for prosecution purposes.

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118 *R. v. Jarvis*, [2002] S.C.J. No. 76, 169 C.C.C. (3d) 1, at para. 89 (S.C.C.).

119 *R. v. Jarvis*, [2002] S.C.J. No. 76, 169 C.C.C. (3d) 1 (S.C.C.).

120 *R. v. Jarvis*, [2002] S.C.J. No. 76, 169 C.C.C. (3d) 1 (S.C.C.).

121 [1984] S.C.J. No. 36, 41 C.R. (3d) 97 (S.C.C.).

122 *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] S.C.J. No. 23, 76 C.R. (3d) 129 (S.C.C.).

123 *Del Zotto v. Canada*, [1997] F.C.J. No. 795, 116 C.C.C. (3d) 123 (F.C.A.).

124 *R. v. Jarvis*, [2002] S.C.J. No. 76, 169 C.C.C. (3d) 1 (S.C.C.).

V. SHOULD THE PRIVACY CLAIM BE VALIDATED BY EXCLUDING THE EVIDENCE?

Of course, for every person accused of a crime, there is little comfort in successfully alleging a violation of the right to privacy, if it does not result in the exclusion of evidence under section 24(2) of the Charter. The decision whether to exclude evidence arising from a section 8 violation is simplified, in that the court will typically not need to consider the first step of the well-known *Collins*[125] analysis, whether the breach implicates the fairness of the trial. This follows from the fact that the seizure of real, non-conscriptive evidence is typically the result of a section 8 violation, and such evidence does not affect the fairness of the trial.

Decisions whether to exclude evidence obtained as a consequence of a violation of the right to privacy turn on the second and third steps of the *Collins*[126] analysis, the seriousness of the breach and the effect that exclusion would have on the repute of the administration of justice. Again, this really calls for the court to engage in yet another balancing exercise, weighing the infringement of the privacy interest against the state interest in effective law enforcement.

At the second step of the *Collins*[127] inquiry, one assesses the seriousness of the breach by considering factors such as the level of intrusiveness, the degree of expectation of privacy that was held by the accused, the good faith of the police, and whether reasonable and probable grounds existed in any event.[128] One then goes on, at the third step of the *Collins* inquiry, to consider whether vindication of the Charter right will extract "too great a toll" on the truth-seeking function of the criminal trial.[129]

In many instances, and particularly those where the evidence is probative of a serious offence, the administration of justice should ordinarily favour admission of the evidence, rather than exclusion. We recognize that privacy rights can be subordinated to the state interest in law enforcement. That is why privacy can be overridden to gather evidence of crimes. And I think that this is so because privacy rights are not the only means by which we promote dignity, integrity and autonomy. Conduct is usually criminalized because it causes harm to others, and

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125 *R. v. Collins*, [1987] S.C.J. No. 15, 33 C.C.C. (3d) 1 (S.C.C.).

126 *R. v. Collins*, [1987] S.C.J. No. 15, 33 C.C.C. (3d) 1 (S.C.C.).

127 *R. v. Collins*, [1987] S.C.J. No. 15, 33 C.C.C. (3d) 1 (S.C.C.).

128 *R. v. Mann*, [2004] S.C.J. No. 49, 185 C.C.C. (3d) 308, at para. 53 (S.C.C.).

129 *R. v. Buhay*, [2003] S.C.J. No. 30, [2003] 1 S.C.R. 631, at para. 73 (S.C.C.), quoting Doherty J.A. in *R. v. Kitaitchik*, [2002] O.J. No. 2476, 166 C.C.C. (3d) 14 (Ont. C.A.) with approval.

offends their rights to dignity, integrity and autonomy. The prosecution of offences, in a very real sense, validates the rights of those who were victimized by the accused. The individual who has committed an offence should not evade criminal liability for his acts, by being permitted to shield himself behind the rights he has himself invaded. So, the state interest in law enforcement should ordinarily prevail in the face of a claim of privacy infringement, unless the conduct of the state is so egregious that admission of the impugned evidence will actually bring the administration of justice into disrepute.

The conduct of the police, as recognized by Doherty J.A. in *Kitaitchik*,[130] will often then be determinative of the result. If the police acted in "good faith", in the sense that they believed they were acting pursuant to some grant of lawful authority, the evidence will ordinarily be admitted. If the police acted in "bad faith", in the sense that they deliberately infringed the accused's rights, the evidence will often be excluded because of the effect that judicial condonation of the violation would have on the administration of justice.[131]

What is problematic, however, is when the courts start examining police conduct and find an absence of good faith when there was no deliberate violation of the accused's privacy interests. The Supreme Court in *R. v. Mann*[132] stated that good faith cannot be claimed if the Charter violation was committed on the basis of a police officer's unreasonable error or ignorance as to the scope of his or her authority.[133] Yet this assumes that the legal rules propounded by the courts provide sufficient certainty and predictability, which is far from being true. Navigating the complexities of Charter jurisprudence is often a challenging task, and it can be exceedingly difficult for the police to determine whether a given course of action is Charter-compliant. This is particularly so when the police are required to make rapid decisions in fluid and highly charged environments, far removed from the calm detachment of a courtroom.

The current approach to the assessment of "good faith", however, leads to curious rulings to the effect that the police unreasonably interpreted the scope of their authority, when appellate judges cannot even agree among themselves whether the police conduct amounted to a Charter

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130 *R. v. Kitaitchik*, [2002] O.J. No. 2476, 166 C.C.C. (3d) 14 (Ont. C.A.).

131 *R. v. Buhay*, [2003] S.C.J. No. 30, [2003] 1 S.C.R. 631, at para. 70 (S.C.C.).

132 [2004] S.C.J. No. 49, 185 C.C.C. (3d) 308 (S.C.C.).

133 *R. v. Mann*, [2004] S.C.J. No. 49, 185 C.C.C. (3d) 308, at para. 55 (S.C.C.).

violation in the circumstances. So, in *R. v. Buhay*,[134] the police were ultimately found to have acted unreasonably, yet three members of the Manitoba Court of Appeal did not even think that the accused had established a reasonable expectation of privacy. In *R. v. Law*,[135] the officer's conduct was said to be "serious", although two members of the New Brunswick Court of Appeal thought there was no Charter violation. And in the recent decision of *R. v. Harris*,[136] the police officer was said to have displayed an unreasonable ignorance as to the scope of his authority, even though one member of the panel, in dissent, thought that the actions of the police officer complied with the Charter. If highly capable jurists can find themselves in disagreement on whether certain police conduct amounts to a Charter violation, it seems unfair to characterize the police actions as "unreasonable" and to hold the police to a standard of perfection which appellate judges cannot even achieve.

We would do well in future to abandon the concept of "good faith", and simply ask whether a violation of a Charter right was deliberate or wilful, since those are the types of violations that truly offend the rule of law and risk bringing the administration of justice into disrepute. Honest mistakes as to the scope of lawful authority, even if they might be said to be unreasonable, do not warrant exclusion of the evidence, since they do not reflect a lack of regard for the individual's constitutional rights.

134 [2003] S.C.J. No. 30, [2003] 1 S.C.R. 631 (S.C.C.).
135 [2002] S.C.J. No. 10, 160 C.C.C. (3d) 449 (S.C.C.).
136 [2007] O.J. No. 3185, 2007 ONCA 574 (Ont. C.A.).