The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference

Volume 40 Article 5

2008

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Citation Information

Quigley, Tim. "The Impact of the Charter on the Law of Search and Seizure." *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 40. (2008).
DOI: https://doi.org/10.60082/2563-8505.1112
https://digitalcommons.osgoode.yorku.ca/sclr/vol40/iss1/5

The Impact of the Charter on the Law of Search and Seizure

Tim Quigley[*]

I. INTRODUCTION

The enactment of the *Canadian Charter of Rights and Freedoms*[1] in 1982 brought about major changes in the content and protection of individual rights. This has been particularly pronounced in respect of the legal rights contained in sections 7 to 14 of the Charter, and perhaps even more so in the case of section 8, which protects us all from unreasonable search or seizure. Indeed, the mere fact of section 8's inclusion in the Charter and the attendant possibility of the exclusion of evidence where it has been violated immediately resulted in a sea change from the previous law.

Prior to 1982, the law of search and seizure was a combination of statutory provisions and common law rules relating to search, seizure and police powers, and often overstated statements of the supposed common law tradition of respecting individual rights. The harsh reality was that evidence obtained through illegality or impropriety by the authorities was nonetheless admissible in criminal proceedings. The Supreme Court of Canada plainly said so in *R. v. Wray*[2] and, although the case turned on the admissibility of evidence derived from an involuntary confession, it was clear that this rule also applied to illegal or unreasonable searches and seizures.

Since 1982, there have been many developments in the law of search and seizure. Some of these were seminal decisions by the Supreme Court of Canada. Others have consisted of statutory responses by the federal

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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] [1970] S.C.J. No. 80, 11 C.R.N.S. 235 (S.C.C.).

and provincial governments to Charter jurisprudence.[3] One striking consequence of the passage of section 8 is that there is considerably more law on search and seizure than previously. This paper will provide an overview of these changes in the law and an assessment of the impact that the Charter has had in this area of the law. It will not be a comprehensive analysis of all of the law on search and seizure. Instead, I have attempted to choose and discuss the highlights from the extensive jurisprudence in the area.

Because I am critical of some of the legal developments in this area, a couple of points are worth making at the outset. First, virtually all of the litigation concerning Charter legal rights and especially in relation to searches and seizures concerns individuals who are factually guilty. Thus, there is often a temptation to side with the state authorities when evidence of culpability has been located despite flaws in the manner in which it was located. This temptation should be resisted because we must recognize that innocent persons subjected to the same police behaviour have no effective remedies and therefore seldom challenge the conduct. Moreover, an extremely high proportion of criminal cases are disposed of without going to trial and therefore there is no opportunity to assert the violation of rights. As a consequence, constitutional safeguards must be examined in cases where the individual might otherwise be found guilty. If we are to be fair minded about constitutional rights, we would be well advised to attempt to put out of our minds what the police actually discovered and assess the constitutional position as if the individual were factually innocent.

Second, where the courts have found that constitutional rights trump police efficiency, they have frequently been accused of "judicial activism". In truth, however, because the judiciary has been charged with the oversight of constitutional safeguards but the document itself is necessarily framed in general language, judges are obliged to both interpret and apply Charter provisions. In that sense, of course, they are activists. But it is a role forced upon them by the nature of their positions and the absence of any other means of upholding constitutional rights. Later in this paper, I will suggest that there is another, in my view more dangerous, form of judicial activism through the creation or extension of common law police powers. There are two sides to the coinage of judicial activism.

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[3] Due to the sheer number of provincial and territorial statutory search and seizure powers, the emphasis of this paper will be on federal enactments. However, for illustrative purposes, reference will occasionally be made to provincial statutes.

II. THE PRE-CHARTER POSITION

Before 1982, the Canadian law on search and seizure was not devoid of legal principle or standards upon which the police and other state authorities could act. However, in light of the reality that evidence was admissible no matter how it was obtained, there was relatively little jurisprudence relating to search and seizure powers and there was no mechanism by which the judiciary could assess the lawfulness or reasonableness of such powers. Moreover, in the absence of constitutional standards and constraints, there were relatively few such laws, certainly by comparison with the present day.

For instance, what is now section 487 of the *Criminal Code*[4] has long required that, to justify the issuance of a search warrant, there must be reasonable grounds both to believe that evidence will be located in the premises and that the evidence would relate to an offence. Provisions containing similar standards were included in the old *Narcotic Control Act*[5] and the *Food and Drugs Act*,[6] although, perhaps consistent with our ongoing "war on drugs", these Acts permitted warrantless searches of places other than dwelling houses. These were presumably enacted in the tradition of protecting the sanctity of one's home — the oft-repeated though patriarchal, "A man's home is his castle",[7] which, in turn, was largely premised on the protection of property rights against trespass.[8]

However, in spite of those legal requirements, a study by the then Law Reform Commission of Canada found that almost 60 per cent of search warrants should not have been issued due to non-compliance with the legal standards.[9] The absence of meaningful remedies for non-compliance was

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4 R.S.C. 1985, c. C-46, s. 487 [hereinafter "the Code"]. The version in effect just prior to passage of the Charter was R.S.C. 1970, c. C-34, s. 443. Although there have been several amendments over time, the essential requirements for the obtaining of a warrant under this provision have remained the same.

5 *Narcotic Control Act*, R.S.C. 1985, c. N-1, s. 12 [rep. S.C. 1996, c. 19, s. 94].

6 *Food and Drugs Act*, R.S.C. 1985, c. F-27, s. 42 [rep. S.C. 1996, c. 19, s. 81].

7 *Semayne's Case* (1604), 77 E.R. 194, [1558-1774] All E.R. Rep. 62 (K.B.).

8 *Entick v. Carrington* (1765), 95 E.R. 807, [1558-1774] All E.R. Rep. 41 (K.B.). Even at this early stage, there was, however, concern expressed about the importance of protecting privacy in relation to Entick's personal papers.

9 Law Reform Commission of Canada, *Police Powers: Search and Seizure in Criminal Law Enforcement* (Working Paper 30) (Ottawa: Supply and Services Canada, 1983), at 83-91 documented the extent to which police failed to follow proper legal procedures in effecting searches and seizures. The Commission engaged a panel of judges to evaluate a sample of warrants; the judges found that only about 40 per cent of the warrants were validly issued. Unfortunately, the presence of Charter protection and the possibility of excluding evidence obtained through an improperly issued warrant have apparently not improved the situation. In a study conducted in

undoubtedly a factor in this slipshoddiness of the authorities. Challenges to search warrants via *certiorari* were only of utility in narrow circumstances, such as where the applicant learned of the warrant's existence prior to its execution and in time to launch proceedings. Where a search and seizure had already occurred, ordering the return of the seized items was not (nor is it now) inevitable.[10] The *Wray*[11] approach ruled out any challenges to admissibility at a criminal trial. Thus, a failure to abide by the statutory requirements or even to obtain a search warrant in the first place had no adverse consequences for the Crown.

Apart from statutory search warrant provisions, there were other search and seizure powers, both statutory and under the common law. The aforementioned *Narcotic Control Act*[12] in sections 10 and 11 and *Food and Drugs Act*[13] in section 42, for example, permitted warrantless search and seizure powers in respect of places other than dwellings and for individuals found therein. Again, probably influenced by the common law tradition, these powers were premised on reasonable grounds, a not unusual standard for the exercise of police powers.

But without means of challenging the standards themselves, it was not inevitable that such provisions would incorporate objectively verifiable grounds. A good example was section 131 of the then Saskatchewan *Liquor Act*,[14] which permitted a warrantless search of and seizure from a motor vehicle on the subjective belief of a peace officer, fettered neither by a quantitative standard nor an objective assessment of the belief.[15]

Even more draconian in their breadth were writs of assistance, essentially *carte blanche* search warrants issued under four statutes to peace officers or other state authorities without judicial control or scrutiny

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Toronto, it was discovered that 69 per cent of the warrants issued should not have been because of defects: Casey Hill, Scott Hutchinson & Leslie Pringle, "Search Warrants: Protection or Illusion?" (2000) 28 C.R. (5th) 89.

[10] It was relatively late in the pre-Charter jurisprudence that courts began ordering the return of seized items: *e.g., R. v. Black* (1973), 24 C.R.N.S. 203 (B.C.S.C.); *Bergeron v. Deschamps*, [1977] S.C.J. No. 45, 73 D.L.R. (3d) 765 (S.C.C.). As Hill *et al.* in "Search Warrants: Protection or Illusion?" (2000) 28 C.R. (5th) 89 have pointed out, even today successful *certiorari* applications often do not result in the return of the items and, even if they do, the police will frequently obtain a new warrant on proper grounds and seize the items once again.

[11] *R. v. Wray*, [1970] S.C.J. No. 80, 11 C.R.N.S. 235 (S.C.C.).

[12] R.S.C. 1985, c. N-1 [rep. S.C. 1996, c. 19, s. 94].

[13] R.S.C. 1985, c. F-27, s. 42 [rep. S.C. 1996, c. 19, s. 18].

[14] *Liquor Act*, R.S.S. 1978, c. L-18, s. 131.

[15] After the enactment of the Charter, the provision was found to be unconstitutional in *R. v. D. (I.D.)*, [1987] S.J. No. 653, 61 C.R. (3d) 292 (Sask. C.A.).

once issued by a judge.[16] The possessor of a writ of assistance could therefore search and seize at will. After the Charter came into effect, Parliament repealed these provisions because lower courts had already noted their obvious non-compliance with constitutional principles.[17]

Two common law doctrines were also thin on definition or principle: searches incident to arrest and consent searches. The power to search a person as an incident of lawful arrest was (and largely still is) a common law power. Again, because of the *Wray*[18] approach, it was not necessary in terms of the admissibility of the fruits of such searches to establish legal parameters. Thus, in *R. v. Brezack*,[19] a throat hold search for drugs was upheld as a valid exercise of police duty. In the same case, a further search of the accused's car attracted no comment whatsoever, either about whether it was within the ambit of a search incident to arrest or whether the accused had "consented" to the search. It is now well accepted, of course, that a person may waive constitutional or legal rights by consenting to a search or other process but only if certain requirements are met — free and unequivocal consent with knowledge of the right and the consequence of foregoing it.[20] In the pre-Charter period, as *Brezack* implicitly illustrates, consent was more or less equated with obedience to authority, although late in that period, the Supreme Court accepted that the equation was not an accurate conception of consent.[21]

Another common law police power had been shaped to a great extent by the judiciary. That was the power for police to enter premises in order to make an arrest. In recognition that such an entry is a trespass upon the property of the possessor or owner, certain requirements were established by *Eccles v. Bourque*[22] and *R. v. Landry*.[23] First, there must have been the requisite grounds for arrest, usually reasonable and probable grounds. Second, unless the entry was in hot pursuit or other exigent

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16 *Narcotic Control Act*, R.S.C. 1970, c. N-1, s. 10; *Food and Drugs Act*, R.S.C. 1970, c. F-27, s. 22; *Customs Act*, R.S.C. 1970, c. C-40, ss. 133 and 134; and *Excise Act*, R.S.C. 1970, c. E-12, ss. 70 and 71.

17 For example, *R. v. Noble*, [1984] O.J. No. 3395, 42 C.R. (3d) 209 (Ont. C.A.).

18 *R. v. Wray*, [1970] S.C.J. No. 80, 11 C.R.N.S. 235 (S.C.C.).

19 [1949] O.J. No. 492, 9 C.R. 73 (Ont. C.A.).

20 For example, *Korponay v. Canada (Attorney General)*, [1982] S.C.J. No. 111, 26 C.R. (3d) 343 (S.C.C.); *R. v. Clarkson*, [1986] S.C.J. No. 20, 50 C.R. (3d) 289 (S.C.C.); *R. v. Borden*, [1994] S.C.J. No. 82, 33 C.R. (4th) 147 (S.C.C.).

21 For example, *R. v. Goldman*, [1979] S.C.J. No. 136, 13 C.R. (3d) 228 (S.C.C.); *R. v. Dedman*, [1985] S.C.J. No. 45, 46 C.R. (3d) 193 (S.C.C.).

22 [1974] S.C.J. No. 123, 19 C.C.C. (2d) 129 (S.C.C.).

23 [1986] S.C.J. No. 10, 50 C.R. (3d) 55 (S.C.C.).

circumstances, the police must have provided proper announcement before entering, such announcement including their status as police officers, notice of their purpose, and a request to enter. This power was even extended to summary conviction provincial offences in *R. v. Macooh*.[24]

Another area of law in which search and seizure concepts have now been applied is the regulatory sphere, a topic that will not be dealt with at length in this paper. Many regulatory schemes depend upon inspections by authorities, demands to produce licences or other documentation, filing of reports, *etc*. These now are subject to Charter analysis, albeit in a less stringent manner than for criminal prosecutions.[25] Previously, however, there were few constraints other than political to fetter the discretion of state authorities. Therefore, statutory schemes might, but in no way were required to, contain standards for or constraints upon the exercise of such powers.

This is not to suggest that Parliament and legislatures were oblivious to privacy concerns. As already indicated, in general, search and seizure powers often were framed in terms of reasonableness. Moreover, Parliament was attentive to the invasion of privacy brought about by technology. Wiretap legislation enacted in 1974 was explicitly framed in terms of protecting privacy and permitting its invasion under the scrutiny of judges.[26] Indeed, the original legislation provided for the automatic exclusion of evidence obtained without a lawful authorization well before the constitution provided such a remedy.

In conclusion, the pre-Charter period was one where legal standards existed but where meaningful remedies for their breach were nearly non-existent. At the same time, as the advent of the Charter approached, the courts and Parliament became increasingly attentive to privacy concerns. This in turn must surely have influenced the interpretation of section 8 that soon followed.

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[24] [1993] S.C.J. No. 28, 22 C.R. (4th) 70 (S.C.C.).

[25] For a brief analysis of the current position, see: Tim Quigley, *Procedure in Canadian Criminal Law*, 2d ed., looseleaf (Toronto: Carswell, 2005), at 8-55–8-58.

[26] *Protection of Privacy Act*, S.C. 1973-74, c. 50, now Part VI of the *Criminal Code*, R.S.C. 1985, c. C-46 entitled "Invasion of Privacy"; the legislative scheme has frequently been amended. The United States Supreme Court in *Katz v. U.S.*, 389 U.S. 347 (1967) had already recognized the threat to privacy posed by wiretaps and had also insisted on judicial authorization, undoubtedly influencing Parliament to move in the same direction. As originally enacted, an exception to judicial authorization was permitted where one of the parties to a conversation consented to its interception. This was found to be unconstitutional in *R. v. Duarte*, [1990] S.C.J. No. 2, 74 C.R. (3d) 281 (S.C.C.).

III. Search and Seizure under the Charter

1. The Framework for Section 8 Analysis

Before embarking on an analysis of the post-Charter position, it may be useful to set out the text of section 8: "Everyone has the right to be secure against unreasonable search or seizure."

Given its vague and general wording, section 8 might have been interpreted as permitting any state intrusion that was considered reasonable in its context, premised on a relatively narrow property rights perspective, and, perhaps, confined to the type of state conduct most stereotypically associated with the terminology of "search" and "seizure". This approach was essentially the argument advanced by the federal government in *Hunter v. Southam*.[27] Happily, in what remains the leading judgment on search and seizure law, the Court took a broader and more purposive approach.

Justice Dickson (as he then was) made several important pronouncements about the interpretation of the Charter in general and the specific guarantee in section 8. First, in keeping with the theory that the Charter must be interpreted in a manner related to its purpose of protecting rights that are primarily individual in nature, section 8 and other legal rights must be viewed as constraining, rather than authorizing, government action. That is, rather than providing authority to the state to engage in searches and seizures, the section is to be read as limiting laws authorizing such measures to what is reasonable.

From there, Dickson J. went on to hold that the purpose behind section 8 is to protect a reasonable expectation of privacy from unreasonable state intrusion. Drawing upon the American jurisprudence under their Fourth Amendment protection in relation to search and seizure, he explicitly rejected a property-based approach to the right. As the United States Supreme Court held in *Katz v. U.S.*,[28] the protected interest is "the right to be let alone by other people" and therefore protects "people, not places". The difference between a property-based approach and this broader privacy approach is well illustrated by the facts in *Katz*. The case involved police interception of conversations made from a public telephone booth. Under a property rights analysis, it would be difficult to see what constitutional protection might be afforded such conversations.

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[27] *Canada (Combines Investigation Act, Director of Investigation and Research) v. Southam Inc.*, [1984] S.C.J. No. 36, 41 C.R. (3d) 97 (S.C.C.) [hereinafter "*Hunter v. Southam*"].

[28] 389 U.S. 347, at 350-51 (1967).

However, under a privacy approach, it is readily apparent that electronic eavesdropping on a conversation is an infringement of privacy even if the conversation was conducted from a public phone. This is not to say that protection of places is not a part of privacy, merely that section 8 protects more than places.

The distinction between protecting privacy and protecting property is important. An interest in privacy is consistent with the purpose behind the Charter, namely, to constrain governmental action that is inconsistent with Charter rights. A property-based approach would do so in a much more limited way since only those having an interest in property could avail themselves of the right. Moreover, protecting privacy is far more consistent with the overall tenets of a liberal democracy such as Canada's under which citizens are freed from governmental constraint as they carry on their lives unless the law indicates otherwise. It might be supposed that there is a shared value among Canadians that our privacy should be respected within reasonable limits. The purposive approach taken in *Hunter v. Southam*[29] reflects this shared value.

Indeed, it is possible that section 8 may be construed so as to protect interests broader than privacy. Both the United States Supreme Court in *Katz*[30] and our Supreme Court in *Hunter v. Southam*[31] alluded to protection other than merely for privacy but did not find it necessary to elaborate upon that theme for the purposes of the decisions. The effect, however, was at a minimum to jettison the law of trespass as the basis for assessing whether a search or seizure is reasonable. Implicitly, this approach also means that the conduct that amounts to a search or seizure must include state action beyond just the typical entry into a home or business premises to look for evidence.

In *Hunter v. Southam*,[32] Dickson J. went on to hold that the point at which the state interest in law enforcement or other objectives may supersede that of the individual's privacy interest occurs when there is a "credibly-based probability" that evidence would be located in the place sought to be searched. This expresses the constitutional standard as reasonable and probable grounds for believing that evidence related to an offence will be discovered.[33]

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29 [1984] S.C.J. No. 36, 41 C.R. (3d) 97 (S.C.C.).

30 *Katz v. U.S.*, 389 U.S. 347 (1967).

31 [1984] S.C.J. No. 36, 41 C.R. (3d) 97 (S.C.C.).

32 [1984] S.C.J. No. 36, 41 C.R. (3d) 97 (S.C.C.).

33 It is not, however, a rigid standard. As subsequent discussion will show, some intrusions on privacy are permitted on a lower standard yet are very likely constitutional.

He then turned to the means by which the existence of such grounds should be determined. Expressing a preference for a warrant or other prior authorization whenever it is feasible, he held that an independent and impartial person must provide that authorization after receiving evidence on oath that meets the reasonable and probable grounds standard. As a consequence of this formulation, where a warrantless search or seizure has occurred, the state bears the burden of showing that a warrant was not feasible, that is, that the search was nonetheless reasonable.

The subsequent case of *R. v. Collins*[34] built on *Hunter v. Southam*.[35] In a case whose facts are strikingly similar to those in *Brezack*[36] in involving a choke hold search of an individual's mouth, then Lamer J. reiterated the placement of the burden on the Crown to show that a warrantless search was reasonable. He provided criteria for this assessment: "A search will be reasonable if it is authorized by law, the law itself is reasonable and if the manner in which the search was carried out is reasonable."[37]

Although it was contingent upon the evidence to be adduced at the new trial that the Court ordered, Lamer J. also engaged in an analysis of the exclusion or admission of evidence under section 24(2) of the Charter, the principles for which still largely govern this area of the law. In striking contrast to the approach in *Brezack*,[38] he found that the use of a throat hold search would be an unreasonable manner of search absent very clear evidence in support of its necessity.

These two cases have provided the foundation for section 8 analysis ever since. They did not, however, address all issues. For instance, the terms "search" and "seizure" were not defined nor was guidance given as to when a reasonable expectation of privacy exists, when a warrant is not feasible, or when variance from the reasonable and probable grounds standard is justified. These issues awaited answers in later cases. As will be seen, some of the answers have indicated regression from the purposive privacy-based analysis in *Hunter v. Southam*.[39]

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34 [1987] S.C.J. No. 15, 56 C.R. (3d) 193 (S.C.C.).

35 [1984] S.C.J. No. 36, 41 C.R. (3d) 97 (S.C.C.).

36 *R. v. Brezack*, [1949] O.J. No. 492, 9 C.R. 73 (Ont. C.A.).

37 *R. v. Collins*, [1987] S.C.J. No. 15, 56 C.R. (3d) 193, at 206 (S.C.C.).

38 *R. v. Brezack*, [1949] O.J. No. 492, 9 C.R. 73 (Ont. C.A.).

39 [1984] S.C.J. No. 36, 41 C.R. (3d) 97 (S.C.C.).

2. The Heritage of the *Hunter v. Southam* and *Collins* Framework

(a) Developments in the Case Law Consistent with the Framework

In the short term after *Hunter v. Southam*[40] and *Collins*,[41] however, the decisions generally held true to the principles established in those cases. In *R. v. Duarte*,[42] the Supreme Court held that the same standards apply to intercepted communications and therefore struck down the exception to judicial authorization where one of the parties consented to the interception. In *R. v. Wong*,[43] the Court found that video surveillance amounts to a search requiring prior authorization and, in *R. v. Wise*,[44] came to the same conclusion in respect of the installation of a tracking device on a car. Several cases held that police walking around the perimeter of private property were engaging in a search.[45]

To be sure, some nuances were involved. In *R. v. Evans*,[46] although the Court held that the police, like any private citizen, have an implied licence to approach the front door of a house, if they do so with the intention of smelling marijuana, they are engaging in a search, which was conceived of as involving a form of examination by the state that invades a reasonable expectation of privacy. As subsequent cases have revealed, the key to defining a search is the second aspect — the existence of a reasonable expectation of privacy — rather than merely whether there was some form of examination. Thus, walking along public land in order to detect marijuana cultivation on private property was held not to be a search,[47] nor was the observation of illegal gambling machines upon entering business premises open to the public.[48] To this point, although

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[40] [1984] S.C.J. No. 36, 41 C.R. (3d) 97 (S.C.C.).

[41] *R. v. Collins*, [1987] S.C.J. No. 15, 56 C.R. (3d) 193 (S.C.C.).

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

[43] [1990] S.C.J. No. 118, 1 C.R. (4th) 1 (S.C.C.).

[44] [1992] S.C.J. No. 16, 11 C.R. (4th) 253 (S.C.C.). There were, however, suggestions in this case that something less than reasonable and probable grounds might suffice for such lesser intrusions on privacy. Parliament picked up on these suggestions in drafting ss. 492.1 and 492.2 of the *Criminal Code*, R.S.C. 1985, c. C-46 dealing with tracking device warrants and telephone number recorder warrants, respectively.

[45] For example, *R. v. Kokesch*, [1990] S.C.J. No. 117, 1 C.R. (4th) 62 (S.C.C.); *R. v. Grant*, [1993] S.C.J. No. 98, 24 C.R. (4th) 1 (S.C.C.); *R. v. Plant*, [1993] S.C.J. No. 97, 24 C.R. (4th) 47 (S.C.C.); *R. v. Wiley*, [1993] S.C.J. No. 96, 24 C.R. (4th) 34 (S.C.C.).

[46] [1996] S.C.J. No. 1, 45 C.R. (4th) 210 (S.C.C.).

[47] *R. v. Boersma*, [1994] S.C.J. No. 63, 31 C.R. (4th) 386 (S.C.C.).

[48] *R. v. Fitt*, [1995] N.S.J. No. 83, 38 C.R. (4th) 52 (N.S.C.A.), affd on other grounds [1996] S.C.J. No. 6, 46 C.R. (4th) 267 (S.C.C.).

the Supreme Court had not comprehensively defined what state conduct amounts to a search, decisions such as *Evans* had begun to construct such a definition. However, that project awaited the development of a means of determining when there was a reasonable expectation of privacy, a topic that will be discussed in more depth later on in this article.

In the meantime, in an earlier case, *R. v. Dyment*,[49] the Court had defined a seizure as the taking of something by a state authority without the consent of the owner of the item if the individual from whom the item was seized had a reasonable expectation of privacy in it. The seizing of the accused's blood in *Dyment* obviously fell within this definition. Before long, the definition had been extended to the regulatory sphere in relation to taking copies of documents or requiring their production.[50] It was also applied in the criminal law sphere to embrace the taking of various bodily samples such as breath, blood, DNA, *etc*.,[51] although the Court did not always make clear whether the state conduct was a search or a seizure.

Interestingly, in *R. v. Hufsky*,[52] the Court held that a requirement to produce a driver's licence and registration was not a search because driving is a licensed activity with no reasonable expectation of privacy in the documents. The Court did not consider whether the production of such documents might be construed as a seizure and, in light of the jurisprudence relating to the regulatory sphere,[53] it might be suggested that the preferred reasoning would have been that a seizure was involved but, due to driving being a licensed activity, standards lower than *Hunter v. Southam*[54] are appropriate.

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49 [1988] S.C.J. No. 82, 66 C.R. (3d) 348 (S.C.C.).

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

51 For example, *R. v. Bernshaw*, [1995] S.C.J. No. 87, 35 C.R. (4th) 201 (S.C.C.) and *R. v. Wills*, [1992] O.J. No. 294, 70 C.C.C. (3d) 529 (Ont. C.A.) (breath samples); *R. v. Dyment*, [1998] S.C.J. No. 82, 66 C.R. (3d) 348 (S.C.C.); and *R. v. Colarusso*, [1994] S.C.J. No. 2, 26 C.R. (4th) 289 (S.C.C.) (blood samples); *R. v. Stillman*, [1997] S.C.J. No. 34, 5 C.R. (5th) 1 (S.C.C.) (DNA, hair, dental impressions, *etc*.).

52 [1988] S.C.J. No. 30, 63 C.R. (3d) 14 (S.C.C.).

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

54 [1984] S.C.J. No. 36, 41 C.R. (3d) 97 (S.C.C.).

This approach to licensed areas of endeavour soon carried over into the regulatory sphere. The Supreme Court has been consistent in holding that inspections, production or copying of documents, and similar state conduct will be assessed under section 8.[55] Building on that approach, the Court has also constructed a means of distinguishing regulatory processes from criminal investigatory processes in the same statute. In *R. v. Jarvis*,[56] the Court upheld the administrative processes for auditing and verifying income and expenses that are set out in the *Income Tax Act*,[57] even though they do not meet *Hunter v. Southam*[58] standards. However, at the point that a criminal investigation is undertaken, the authorities must obtain a warrant and meet those standards. *Jarvis* also held that the information obtained at the administrative stage may be used in the later investigative stage, with the distinction between the stages occurring when the purpose has changed from regulation to determining criminal liability. Although the distinction may be difficult to assess in some circumstances, in a theoretical sense, the Court provided a sensible way of balancing the societal interest in maintaining a relatively simple self-reporting taxation scheme with the protection of privacy.

The issue of the feasibility of obtaining a warrant has also been addressed by the courts. *Hunter v. Southam*[59] had not taken an absolutist position to the warrant requirement but did not attempt to stipulate when a warrantless search or seizure might nonetheless be constitutional. The allocation of the burden on the Crown to demonstrate the requisite reasonableness whenever a search or seizure was shown to have been conducted without a warrant was and is an important rule, as is the three-pronged test set out in *Collins*.[60] A case decided early in the Charter era, *R. v. Rao*,[61] had held that a warrantless search might be reasonable in exigent circumstances and read down what was then section 10(1)(a)

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

56 [2002] S.C.J. No. 76, 6 C.R. (6th) 23 (S.C.C.). See also: *R. v. Ling*, [2002] S.C.J. No. 75, 6 C.R. (6th) 64 (S.C.C.).

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

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. v. Collins*, [1987] S.C.J. No. 15, 56 C.R. (3d) 193 (S.C.C.).

61 [1984] O.J. No. 3180, 40 C.R. (3d) 1 (Ont. C.A.), leave to appeal refused, [1984] 2 S.C.R. ix, 40 C.R. (3d) xxvi (S.C.C.).

of the *Narcotic Control Act*[62] to comply with that approach. The Court noted that warrantless searches or seizures of motor vehicles would often be more justifiable because of their mobility. Subsequently, in *R. v. Grant*, the Supreme Court approved of this approach and defined exigent circumstances for the purposes of the same section as:

> . . . an imminent danger of the loss, removal, destruction or disappearance of the evidence sought in a narcotics investigation if the search or seizure is delayed in order to obtain a warrant. [63]

Obviously, whether a warrant was feasible is a factual determination in any given case. Hence, where there is imminent danger to a person or other similar emergency, a warrantless search or seizure would undoubtedly be permitted.

The Supreme Court also has modified the previous common law position in respect of entry into dwellings in order to make an arrest. The common law permitted such entries without a warrant, provided that a proper announcement was made.[64] However, in *R. v. Feeney*,[65] the Court held that an entry warrant would now be required except where the entry was in hot pursuit of the suspect. The Court left open whether other exigent circumstances might also justify a warrantless entry. The Parliamentary response to *Feeney* will be discussed in the next section.

Two other spheres of government action warrant brief mention. These concern customs and border crossings and prisons.[66] Early in the Charter jurisprudence, the Supreme Court held that there is a lower expectation of privacy at border crossings.[67] In a later case, the Court also approved the reasonable suspicion standard for searching a vehicle to detect smuggling[68] and for a passive bedpan vigil of someone suspected of importing drugs.[69] The prison context remains somewhat unsettled. In

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62 R.S.C. 1970, c. N-1.

63 *R. v. Grant*, [1993] S.C.J. No. 98, 24 C.R. (4th) 1, at 19 (S.C.C.).

64 See *Eccles v. Bourque*, [1974] S.C.J. No. 123, 19 C.C.C. (2d) 129 (S.C.C.); *R. v. Landry*, [1986] S.C.J. No. 10, 50 C.R. (3d) 55 (S.C.C.); *R. v. Macooh*, [1993] S.C.J. No. 28, 22 C.R. (4th) 70 (S.C.C.) and text on pp. 119-20.

65 [1997] S.C.J. No. 49, 7 C.R. (5th) 101 (S.C.C.).

66 Schools are another sphere but will be discussed later in conjunction with common law search and seizure powers, and powers derived from more general statutory provisions.

67 *R. v. Simmons*, [1988] S.C.J. No. 86, 66 C.R. (3d) 297 (S.C.C.). The case considered the *Customs Act*, R.S.C. 1970, c. C-40, now replaced by the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.).

68 *R. v. Jacques*, [1996] S.C.J. No. 88, 1 C.R. (5th) 229 (S.C.C.).

69 *R. v. Monney*, [1996] S.C.J. No. 18, 24 C.R. (5th) 97 (S.C.C.).

Conway v. R.,[70] the Supreme Court spoke rather cursorily of a greatly reduced expectation of privacy within prisons and held that no such expectation attached to searches of male prisoners by female guards. In *R. v. Tessling*,[71] an *obiter* suggested a low level of protected privacy. The Ontario Court of Appeal, in *R. v. Major*,[72] ruled that there is a reasonable expectation of privacy, albeit low, for a prisoner and his family in a conjugal living unit. In both contexts, cautious support may be given to accepting a lower expectation of privacy, although the *Conway* ruling would be worrisome if it meant that prisoners had no privacy protection whatsoever.

In general, the section 8 jurisprudence just discussed has been consistent with the framework established in the two leading cases. The exceptions to the warrant requirement in exigent circumstances and reduced levels of privacy in the regulatory, customs and prisons spheres are generally sensible and an appropriate balance between protecting privacy and the practical necessities of law enforcement and regulation. The lead taken by the courts has also prompted legislative responses that are frequently, although not always, in compliance with the framework.

Two topics have not yet been discussed. One concerns what might be viewed as departures from this framework that have unfortunately weakened the protection for privacy that seemingly lies behind section 8. The other topic concerns areas where the legislative branch has not acted but where the Supreme Court and lower courts have constructed police powers or tests for the exercise of such powers from the common law, or by implication, from more general statutory provisions. These initiatives by the judiciary have almost certainly resulted in making legislative action unlikely in these spheres. But before tackling those subjects, let me move to the legislative responses to the section 8 framework.

(b) Legislative Responses to the Framework

On many occasions, Parliament has been obliged to respond to case law that has struck down a law or indicated that a new law is needed. In general, these legislative responses have been of three types. Some have

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[70] *Weatherall v. Canada (Attorney General)*, [1993] S.C.J. No. 81, 23 C.R. (4th) 1 (S.C.C.) [hereinafter "*Conway v. R.*"].

[71] [2004] S.C.J. No. 63, 23 C.R. (6th) 207, at para. 29 (S.C.C.).

[72] [2004] O.J. No. 2651, 23 C.R. (6th) 294 (Ont. C.A.), leave to appeal refused, [2005] S.C.C.A. No. 106 (S.C.C.).

been direct responses to the jurisprudence, usually in the form of new warrant provisions or amendments to existing provisions to render them constitutional. The second category consists of what might be termed anticipatory responses in that Parliament draws upon aspects of the case law, such as *obiter dicta* or issues deliberately left open by the courts, to enact legislation to cover such situations.[73] The final class of response consists of what has been termed "in your face" responses that are in at least some respects beyond what the Supreme Court of Canada has mandated.[74] On some occasions, legislative responses have embraced two or even all three categories. Provincial and territorial legislatures have also acted in these ways, at least in the first two areas.

Thus, we have seen a plethora of new search and seizure provisions enacted by Parliament in response to Supreme Court decisions. *Duarte*[75] led to amendments to the wiretap provisions in Part VI of the *Criminal Code*,[76] first, to eliminate the consent interception route found wanting by the Court and, second, to bring the issue of exclusion or admission of wiretap evidence into line with section 24(2) of the Charter, rather than providing for automatic exclusion where Part VI has not been complied with. *Wong*[77] led to the passage of section 487.01 of the Code, although the provision is much broader than merely permitting video surveillance.[78] *Wise* resulted in the enactment of section 492.1 to permit tracking device warrants; in so doing, Parliament evidently relied on an *obiter* in *Wise* that suggested that the permissible standard for such warrants might be at the level of a reasonable suspicion.[79] Parliament also created telephone number recorder warrants in section 492.2 on the same reasonable suspicion standard. After *R. v. Stillman*[80] held that a warrant was required in order to obtain DNA and other bodily samples, Parliament responded

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[73] For a far more comprehensive discussion of the interplay between the judiciary and Parliament than I am able to provide in this short article, see: James Stribopoulos, "In Search of Dialogue: The Supreme Court, Police Powers, and the Charter" (2005) 31 Queen's L.J. 1, especially at 61-73.

[74] The term appears to have been used first by Don Stuart, in "*Mills*: Dialogue with Parliament and Equality by Assertion at What Cost?" (2000) 28 C.R. (5th) 275, although a computer search reveals that the term has now been adopted by several other academic criminal lawyers.

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

[76] R.S.C. 1985, c. C-46.

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

[78] Indeed, the section is so generally worded that it has been held to authorize a wide range of investigative intrusions. For a criticism, see: Steve Coughlan, "General Warrants at the Crossroads: Limit or Licence?" (2003) 10 C.R. (6th) 269.

[79] *R. v. Wise*, [1992] S.C.J. No. 16, 11 C.R. (4th) 253, at 285 (S.C.C.).

[80] [1997] S.C.J. No. 34, 5 C.R. (5th) 1 (S.C.C.).

with a series of warrant provisions in sections 487.04-487.092 to permit such measures. Parliament reacted to *Feeney*[81] by passing sections 529-529.5. In addition to providing for entry warrants, these provisions provide for warrantless entry in exigent circumstances, a matter left open by the Court, and, in the case of imminent bodily harm or death, permit entry on the lower standard of a reasonable suspicion.

Parliament has also paid heed to what has been decided about the warrant requirement. The design of legislative provisions now generally permits warrantless searches or seizures where the grounds for a warrant exist but where there are also exigent circumstances.[82] Section 487.11 of the Code, for example, applies this regime to section 487 and section 492.1 tracking device warrants, although not for the more intrusive DNA and bodily sample warrants. A similar provision is contained in section 11(7) of the *Controlled Drugs and Substances Act*.[83] However, Parliament has also enacted section 487.1 of the Code, which permits the use of telewarrants where it would not be practicable to obtain a regular warrant. Therefore, before exercising a warrantless search or seizure power, the police ought to consider whether a telewarrant would be feasible and the exercise of a warrantless power should be assessed in that light.

With the exception of the overly broad general warrant provision in section 487.01, these statutory provisions are supportable even where they depart from full *Hunter v. Southam*[84] standards. The lower level of intrusion of tracking device and number recorder warrants and the reduced expectation of privacy involved in moving about in public both lend justification to a lower standard, the key being that in each case the technological device monitors only the location of a vehicle or telephone numbers, respectively, rather than activities or conversations. Similarly, the aim of preventing bodily harm or death is sufficient to justify entry on the lesser reasonable suspicion standard.

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81 *R. v. Feeney*, [1997] S.C.J. No. 49, 7 C.R. (5th) 101 (S.C.C.).

82 Provinces and territories have also paid heed to the warrant requirement, telewarrants, and allowing warrantless searches in exigent circumstances. See, *e.g.*, *Alcohol and Gaming Regulation Act, 1997*, S.S. 1997, c. A-18.011, s. 153; *Provincial Offences Act*, R.S.O. 1990, c. P.33, s. 158.1.

83 S.C. 1996, c. 19, s. 11(7).

84 [1984] S.C.J. No. 36, 41 C.R. (3d) 97 (S.C.C.).

(c) Departures from the Privacy Framework

Unfortunately, despite the efforts of the Court in *Hunter v. Southam*[85] to at a minimum protect an interest in privacy, there is a line of cases since then that is not entirely consistent with the rejection of the narrower property-based approach. These cases have restricted the establishment of a reasonable expectation of privacy in two ways: first, by narrowing the informational aspect of privacy and, second, by giving more primacy to the existence of a possessory or proprietary interest.

Although *Dyment*[86] is itself consistent with the privacy approach, it may have been the genesis of some of this regression. There, the Court found that an unreasonable seizure occurred when a medical practitioner turned a blood sample over to the police. This was primarily because of the violation of the sanctity of Dyment's body but also because of another aspect of privacy, information about a person.[87] As La Forest J. put it:

> In modern society, especially, retention of information about oneself is extremely important. We may, for one reason or another, wish or be compelled to reveal such information, but situations abound where the reasonable expectations of the individual that the information shall remain confidential to the persons to whom, and restricted to the purposes for which it is divulged must be protected. Governments at all levels have in recent years recognized this and have devised rules and regulations to restrict the uses of information collected by them to those for which it was obtained; see, for example, the *Privacy Act*, S.C. 1980-81-82-83, c. 111.[88]

This was a strong statement in support of protecting personal information from state scrutiny. Unfortunately, it was soon distinguished.

In *R. v. Plant*,[89] a majority of the Court held that computer records showing the electrical consumption at a suspect's house were not sufficiently personal and confidential to attract section 8 scrutiny. In other words, there was no expectation of privacy in the computer records. The majority reiterated the three facets of privacy — personal, territorial and

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85 [1984] S.C.J. No. 36, 41 C.R. (3d) 97 (S.C.C.).

86 *R. v. Dyment*, [1988] S.C.J. No. 82, 66 C.R. (3d) 348 (S.C.C.).

87 The Court also referred to a third aspect not as important on the facts of the case. This was the territorial or spatial aspect, that is, the narrower property-based approach earlier discussed.

88 *R. v. Dyment*, [1988] S.C.J. No. 82, 66 C.R. (3d) 348, at para. 22 (S.C.C.).

89 [1993] S.C.J. No. 97, 24 C.R. (4th) 47 (S.C.C.).

informational — that had been referred to in *Dyment*[90] and, in relation to the informational aspect, restricted its ambit to

> a biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state. This would include information which tends to reveal intimate details of the lifestyle and personal choices of the individual.[91]

Justice McLachlin (as she then was) dissented on this point, noting that the computer records in question were not available to the public and therefore required a warrant to infringe upon the expectation of privacy in them.

The Court soon also moved more in the direction of a territorial-based approach to determining whether an individual has a reasonable expectation of privacy. This occurred in *R. v. Edwards*.[92] The accused sought to assert such an expectation of privacy in his girlfriend's apartment. He stayed there from time to time, kept clothes and other belongings there, and had a key to the premises. The Court rejected his argument, largely on the basis that he did not have the ability to regulate access to the premises and did not contribute to the rent or other living expenses. In coming to this conclusion, the Court indicated that the determination of whether or not a reasonable expectation of privacy existed should be based on the "totality of the circumstances", which should include consideration of the following factors:

(i) presence at the time of the search;

(ii) possession or control of the property or place searched;

(iii) ownership of the property or place;

(iv) historical use of the property or item;

(v) the ability to regulate access, including the right to admit or exclude others from the place;

(vi) the existence of a subjective expectation of privacy; and

(vii) the objective reasonableness of the expectation.[93]

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90 *R. v. Dyment*, [1988] S.C.J. No. 82, 66 C.R. (3d) 348 (S.C.C.).

91 *R. v. Plant*, [1993] S.C.J. No. 97, 24 C.R. (4th) 47, at para. 20 (S.C.C.).

92 [1996] S.C.J. No. 11, 45 C.R. (4th) 307 (S.C.C.).

93 *R. v. Edwards*, [1996] S.C.J. No. 11, 45 C.R. (4th) 307, at para. 45 (S.C.C.).

Edwards has therefore defined a search as a form of examination by the state but only where there is a reasonable expectation of privacy that is determined in this property-oriented manner. This had the unfortunate effect of shifting the focus of attention back in the direction of the law of trespass that underlay the pre-Charter law and which was rejected in *Hunter v. Southam*.[94] It is also reminiscent of the risk analysis that the Court had firmly rejected in *Duarte*[95] and *Wong*,[96] that is, the notion that an interest in privacy ceases to exist when a person does not have control over the place in which the authorities are undertaking what otherwise would be a search or seizure. *Edwards* is therefore in some sense a reversal of previous but relatively recent jurisprudence.

This approach was reinforced in *R. v. Belnavis*,[97] in which the Court held that a passenger in a motor vehicle has a reasonable expectation of privacy only if she has some degree of control over the vehicle, such as prior use or a relationship with the driver or owner that indicates a degree of access or privilege over the car. It is, of course, both true and commonsensical that there should be a reduced expectation of privacy in a vehicle relative to a dwelling. However, the effect of *Belnavis* and *Edwards*[98] is to restrict privacy interests to a very great extent such that an accused who does not demonstrate some proprietary or possessory interest will have difficulty in establishing the necessary reasonable expectation of privacy to invoke section 8 protection.[99] By way of illustration, one commentator has suggested that a child living in her parents' home may not have a reasonable expectation of privacy in her own bedroom.[100] Moreover, to deny privacy protection for most passengers in motor vehicles provides great latitude to the police to conduct random

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94 [1984] S.C.J. No. 36, 41 C.R. (3d) 97 (S.C.C.).

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

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

97 [1997] S.C.J. No. 81, 10 C.R. (5th) 65 (S.C.C.).

98 *R. v. Edwards*, [1996] S.C.J. No. 11, 45 C.R. (4th) 307 (S.C.C.).

99 It is extremely difficult to assess the extent to which this has occurred through legal research tools. In an electronic search, I discovered far more cases that followed *Belnavis* than distinguished it. However, the *Edwards* and *Belnavis* approach is by definition fact-based, hence, it is not easy to assess the strength or weakness of the claim in each case. Moreover, there will undoubtedly be unreported decisions and cases where, in the face of evidence that is similar to the facts of *Edwards* or *Belnavis*, an accused has pleaded guilty. Suffice it to say that passengers in vehicles or occasional visitors to premises will have an uphill battle in asserting constitutional protection.

100 D.J. Schwartz, "*Edwards* and *Belnavis*: Front and Rear Door Exceptions to the Right to be Secure from Unreasonable Search and Seizure" (1997) 10 C.R. (5th) 100.

searches of both vehicles and passengers with the knowledge that their conduct will very likely be beyond constitutional scrutiny.

As a result of these developments, it was but a short step for the Court to follow *Plant*[101] in *Tessling*[102] to hold that infrared technology used by an airplane to detect heat emanating from a home also did not infringe the informational sphere of privacy protected by section 8. The Court did indicate that the issue could be revisited in light of future technological advances but these decisions are troubling. It is highly debatable whether a person's confidentiality is invaded through knowledge of electrical consumption or heat emanations. More troubling, however, is the tendency of lower courts to build upon the reasoning to find that other forms of investigation are also not within the ambit of section 8.

This has recently come to the fore through a series of sniffer dog cases. Most such cases have involved the use of dogs specially trained to detect illegal drugs to sniff luggage in public transportation facilities.[103] The courts have been fairly consistent in applying *Plant*[104] and *Tessling*[105] to hold that there is no reasonable expectation of privacy in such situations since an odour of marijuana or other drugs is seemingly not a part of the biographical core of an individual.[106] In one case, *R. v. M. (A.)*,[107] the Court held that a random use of a sniffer dog on the personal belongings of students in a school was a search attracting Charter scrutiny because of the randomness and breadth of the police action. *M. (A.)* and one of the other cases, *R. v. Brown*,[108] have been appealed to the Supreme Court of Canada and decisions are pending. Although *Plant*[109] and *Tessling*[110] are unlikely to be overruled, it is to be hoped that the Supreme Court does not sanction extensions from those cases and provides greater guidance

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101 *R. v. Plant*, [1993] S.C.J. No. 97, 24 C.R. (4th) 47 (S.C.C.).

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

103 For example, *R. v. Taylor*, [2006] N.J. No. 218, 40 C.R. (6th) 21 (N.L.C.A.); *R. v. Brown*, [2006] A.J. No. 755, 39 C.R. (6th) 282 (Alta. C.A.); *R. v. Gallant* (2006), 2006 CarswellNB 175 (N.B.Q.B.).

104 *R. v. Plant*, [1993] S.C.J. No. 97, 24 C.R. (4th) 47 (S.C.C.).

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

106 But see the dissent by Paperny J.A. in *R. v. Brown*, [2006] A.J. No. 755, 39 C.R. (6th) 282 (Alta. C.A.).

107 [2006] O.J. No. 1663, 37 C.R. (6th) 372 (Ont. C.A.). See also: *R. v. Le*, [2005] A.J. No. 338, 30 C.R. (6th) 124 (Alta. Prov. Ct.); *R. v. Nguyen*, 2006 CarswellAlta 1378 (Alta. Q.B.); and *R. v. Cheung*, 2007 CarswellSask 203 (Sask. C.A.), all of which found that the police installation of a digital recording ammeter to monitor electronic supply does amount to a search.

108 [2006] A.J. No. 755, 39 C.R. (6th) 282 (Alta. C.A.).

109 *R. v. Plant*, [1993] S.C.J. No. 97, 24 C.R. (4th) 47 (S.C.C.).

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

for determining when technological surveillance techniques amount to a search by intruding upon a reasonable expectation of privacy.

The trend through these cases has been to regress from the broad, purposive approach to the protection of privacy taken in *Hunter v. Southam*.[111] This is unfortunate. We should not hastily rule out an expectation of privacy. It is entirely understandable that the extent of the expectation might vary with the context, thus permitting warrantless searches in some situations and searches on something less than reasonable and probable grounds in others. Consider an illustration to make this point: typically, garbage is taken to be an abandonment of a reasonable expectation of privacy.[112] What, however, of the citizen who herself or through a family member inadvertently throws important financial or other personal information into the garbage? Could it safely be said that she has given up her expectation of privacy? To guard against snooping by the authorities, should all citizens be advised to buy shredders to shred the myriad papers containing personal information that we all throw into the garbage on a regular basis? If not, we should also seriously consider whether luggage or other personal belongings, even if in a public place, or heat and electrical consumption information similarly give rise to privacy protection. As I suggested at the beginning of this paper, in considering these issues, the operative question should be whether a person not carrying or growing drugs should be free from state scrutiny in the absence of reasonable and probable grounds and, absent exigent circumstances, a search warrant.

(d) Judicial Activism of a Different Type

A recurrent criticism of the courts, particularly the Supreme Court of Canada, is that they engage in "judicial activism". The charge is, as McLachlin C.J.C. has put it, "usurping the functions of Parliament; of making the law rather than interpreting and applying it".[113] As the Chief Justice has noted, those advancing the criticism may come from all points

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[111] [1984] S.C.J. No. 36, 41 C.R. (3d) 97 (S.C.C.).

[112] For example, *R. v. Krist*, [1995] B.C.J. No. 1606, 42 C.R. (4th) 159 (B.C.C.A.); *R. v. Tam*, [1993] B.C.J. No. 781 (B.C.S.C.); *R. v. Kennedy*, [1996] O.J. No. 4401, 3 C.R. (5th) 170 (Ont. C.A.).

[113] Remarks of the Right Honourable Beverley McLachlin, P.C., given at the 2005 Lord Cooke Lecture in Wellington, New Zealand, December 1, 2005, online: Supreme Court of Canada <http://www.scc-csc.gc.ca/aboutcourt/judges/speeches/UnwrittenPrinciples_e.asp>.

on the political spectrum.[114] The allegation should be assessed with some understanding of the role of the judiciary in the common law legal tradition and sympathy for the fact that judges have been obliged to interpret and make sense of constitutional guarantees that are framed in vague and general language. In respect of the first, the long-standing heritage of the judiciary incrementally changing judge-made common law to suit contemporary demands is largely acceptable because Parliament and legislatures have sometimes chosen not to enact statutes or pass regulations to change the common law. The second is simply a fact of legal life in a country with a written constitution that must be interpreted and applied in a changing world.

In this section, judicial activism is discussed in two much narrower forms: the creation of common law search and seizure powers through the ancillary powers doctrine, and the extension of such powers from general statutory provisions. My submission is that these are areas where judicial activism is inappropriate.

The Supreme Court of Canada has now created police powers through the ancillary powers doctrine on several occasions, mostly through the approach taken in an obscure English case, *R. v. Waterfield*,[115] a case which itself rejected the creation of a police power on its facts and which has been little considered in England. Thus, in *R. v. Godoy*,[116] the Court held that there was a common law power for the police to enter a dwelling to investigate a 911 phone call that had been disconnected. In *R. v. Mann*,[117] the same Court approved the power to briefly detain an individual for investigative purposes on the reduced standard of a reasonable suspicion of criminality. As a part of this new power, the Court granted police the power to search for weapons, although on the higher standard of reasonable and probable grounds. More recently, in *R. v. Clayton*,[118] the Supreme Court extended *Mann* to the extent of permitting a roadblock to stop and search vehicles in response to a complaint about firearms even though the accused's vehicle did not match the description of the suspect vehicles.

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114 Remarks of the Right Honourable Beverley McLachlin, P.C., given at the 2005 Lord Cooke Lecture in Wellington, New Zealand, December 1, 2005, online: Supreme Court of Canada <http://www.scc-csc.gc.ca/aboutcourt/judges/speeches/UnwrittenPrinciples_e.asp>, at endnote 38.

115 [1963] 3 All E.R. 659, [1964] 1 Q.B. 164 (C.A.).

116 [1998] S.C.J. No. 85, 21 C.R. (5th) 205 (S.C.C.).

117 [2004] S.C.J. No. 49, 21 C.R. (6th) 1 (S.C.C.).

118 [2007] S.C.J. No. 32, 2007 SCC 32 (S.C.C.).

In other contexts, the Court has denied that it is creating a new police power but has extended existing powers through implication from more general statutes. This occurred, for instance, in *R. v. M. (M.R.)*,[119] where the Court held that school officials have the power to search students and their belongings by inference from more general education statutes. These searches may be conducted without a warrant and on the loose standard that there must be reasonable grounds to believe that a breach of school rules or discipline has occurred. In a situation much less directly related to search and seizure law, *R. v. Orbanski*,[120] a majority of the Court found that the police have the power to request a citizen to perform physical sobriety tests or ask questions about alcohol consumption, even though there was no statutory basis for either.[121] The reasoning was that these were section 1 limitations on the right to counsel by necessary implication from or the operating requirements of the legislation governing drinking and driving.

All of these decisions have attracted a groundswell of criticism from academic and practising lawyers that is so voluminous that I will not cite it here. There are, however, some telling arguments against this trend: whether or not to grant the police certain powers to search, seize or do other things should be a democratic decision for legislators; if, as *Hunter v. Southam* held, the purpose of the Charter is to constrain government action, surely it is wrong for the courts to grant governments more powers. We should recall that the Court in that case struck down the legislation in question, refusing to consider the alternative remedies of reading in or reading down:

> While the courts are guardians of the Constitution and of individuals' rights under it, it is the legislature's responsibility to enact legislation that embodies appropriate safeguards to comply with the Constitution's

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119 [1998] S.C.J. No. 83, 20 C.R. (5th) 197 (S.C.C.).

120 [2005] S.C.J. No. 37, 29 C.R. (6th) 205 (S.C.C.).

121 Given that this paper deals only with search and seizure, I should add that asking questions about alcohol consumption does not concern this topic since it relates to self-incrimination protection and the right to counsel. Performing physical impairment tests also implicates self-incrimination protection after *R. v. Stillman*, [1997] S.C.J. No. 34, 5 C.R. (5th) 1 (S.C.C.), but it arguably leads to a seizure since failing the tests will undoubtedly lead to providing breath samples or other bodily samples which have been construed as seizures. See *R. v. Bernshaw*, [1994] S.C.J. No. 87, 35 C.R. (4th) 201 (S.C.C.) and *R. v. Wills*, [1992] O.J. No. 294, 70 C.C.C. (3d) 529 (Ont. C.A.) (breath samples); *R. v. Dyment*, [1988] S.C.J. No. 82, 66 C.R. (3d) 348 (S.C.C.) and *R. v. Colarusso* (1994), 26 C.R. (4th) 289 (S.C.C.) (blood samples); *R. v. Stillman*, [1997] S.C.J. No. 34, 5 C.R. (5th) 1 (S.C.C.) (DNA, hair, dental impressions, *etc.*).

> requirements. It should not fall to the courts to fill in the details that will render legislative lacunae constitutional.[122]

The creation of common law powers by the Court is an unfortunate betrayal of that position. It is also after-the-fact reasoning that by definition renders the law unknowable until the courts create the powers; by fashioning such powers, the courts deny citizens a real opportunity to challenge the constitutionality of the law in question (after all, would the Supreme Court of Canada recognize that it had previously created an unconstitutional law?); and, finally, it renders the law arbitrary because it cannot be known in advance when the courts will approve of police conduct in this manner. If the ability to know the law in advance is seen to be a component of the rule of law, the Supreme Court has been remiss in not at least admitting that the rule of law has been weakened through this line of cases. Moreover, the trend is clearly in the wrong direction of creating and expanding such powers. *Clayton*[123] is worrisome because it appears as though the Supreme Court will now retroactively approve of police conduct that is considered to be reasonably necessary in the circumstances.[124]

The granddaddy of common law police powers is, of course, the search and seizure power most frequently exercised: the power to search an individual who has been lawfully arrested. Because it precedes *Waterfield*[125] and is so deeply entrenched, the courts have not had to rely upon the tests developed in that case. Instead, the police are entitled to frisk search an arrestee without a warrant and virtually automatically, so long as it is for a valid objective in pursuit of the ends of criminal justice, is not conducted in an abusive manner and does not extend beyond safety concerns, preventing escape or preserving evidence.[126] Happily, in *R. v. Golden*,[127] the Supreme Court held that, to justify a strip search, there must be reasonable and probable grounds for believing that evidence

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122 [1984] S.C.J. No. 36, 41 C.R. (3d) 97, at para. 44 (S.C.C.).

123 *R. v. Clayton*, [2007] S.C.J. No. 32, 2007 SCC 32 (S.C.C.).

124 Criticism of *R. v. Clayton*, [2007] S.C.J. No. 32, 2007 SCC 32 (S.C.C.) has come quickly. See, *e.g.*, Steve Coughlan, "Common Law Police Powers and the Rule of Law" (2007) 47 C.R. (6th) 266 and Alan N. Young, "Clayton Revisited" July 27, 2007, online: *The Court* <http://www.thecourt.ca/2007/07/27/clayton-revisited/>.

125 *R. v. Waterfield*, [1963] 3 All E.R. 659, [1964] 1 Q.B. 164 (C.A.).

126 The law has evolved through *Cloutier v. Langlois*, [1990] S.C.J. No. 10, 74 C.R. (3d) 316 (S.C.C.); *R. v. Stillman*, [1997] S.C.J. No. 34, 5 C.R. (5th) 1 (S.C.C.); and *R. v. Caslake*, [1998] S.C.J. No. 3, 13 C.R. (5th) 1 (S.C.C.).

127 [2001] S.C.J. No. 81, 47 C.R. (5th) 1 (S.C.C.).

would be located. As previously noted, *Stillman*[128] caused Parliament to enact warrant provisions for the taking of bodily samples but, otherwise, Parliament has been content to permit the courts to make the law in this area. Grey areas remain, however, about other measures, such as body cavity searches. It is an area that should be legislated with clear standards for the police that can then be assessed by the courts.

These developments have occurred in part because the Supreme Court and lower courts have failed to notice the extent to which they have expanded the arsenal of police powers and the problems engendered by doing so. They have also happened because Parliament and legislatures have not acted to pass legislation that could then be tested through the courts in the usual manner. Due to the frequent invocation of the *Waterfield*[129] test, I am skeptical that these decisions will be reconsidered. I would hope, however, that recognition will be given to the problems inherent in this type of judicial activism and that therefore the Supreme Court will refrain from creating any additional powers or extensions of them.

Parliament should also assert its authority and legislate in some of these areas. It is not unknown in the common law world for there to be legislation and regulations governing police investigations, including interrogations of suspects and search and seizure issues. For instance, both the United Kingdom[130] and the Australian state of Queensland have done so for some years.[131] In addition to providing welcome clarity and prior announcement of the law, this would afford litigants the opportunity to have such legislation assessed by the courts. For the judiciary, it would place them in their proper role as guardians and interpreters of the Constitution, rather than as the makers of the law.[132]

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128 *R. v. Stillman*, [1997] S.C.J. No. 34, 5 C.R. (5th) 1 (S.C.C.).

129 *R. v. Waterfield*, [1963] 3 All E.R. 659, [1964] 1 Q.B. 164 (C.A.).

130 *Police and Criminal Evidence Act 1984* (U.K.), 1984, c. 60.

131 *Police Powers and Responsibilities Act 2000* (Qld.) and *Police Powers and Responsibilities Regulation 2000* (Qld.).

132 This is hardly an original proposition. See, *e.g.*, James Stribopoulos, "In Search of Dialogue: The Supreme Court, Police Powers, and the Charter" (2005) 31 Queen's L.J. 1; Tim Quigley, "Brief Investigatory Detentions: A Critique of *R. v. Simpson*" (2004) 41 Alta. L.R. 935, at 939; Glen Luther, "Police Power and the Charter of Rights and Freedoms: Creation or Control" (1986/87) 51 Sask. L. Rev. 217; Aman S. Patel, "Detention and Articulable Cause: Arbitrariness and Growing Judicial Deference to Police Judgment" (2000) 45 Crim. L.Q. 198.

(e) The Impact of Section 24(2) of the Charter

It will be recalled that the pre-Charter law on search and seizure was not devoid of legal standards. The difficulty in enforcing those standards was, however, in the lack of meaningful remedies. The advent of the Charter provided for remedies, including, as was seen in *Hunter v. Southam*,[133] the striking down of legislation that is not in compliance with Charter requirements. For the most part, however, the most appropriate and frequent remedy that is sought is the exclusion of evidence pursuant to section 24(2). *Collins*[134] established the framework for this analysis, although there was a terminological shift to conscriptive and non-conscriptive evidence in *Stillman*.[135] The question is whether the exclusion of evidence is an effective remedy to buttress the protection of privacy that has been afforded through the myriad and confusing cases just discussed.

In *Collins*,[136] Lamer J. indicated that the purpose behind excluding evidence obtained through a Charter breach was not to deter improper police conduct. Rather, it was to avoid the courts becoming further implicated in that misconduct, thereby reflecting badly on the administration of justice. Nevertheless, it would be naïve to suppose that disapproval of police conduct is not a consideration when evidence is excluded. The Supreme Court has said as much on several occasions.[137] In the search and seizure context, however, the evidence is frequently placed in the non-conscriptive category, with the result that the virtually automatic exclusion that occurs under the trial fairness rubric is not applicable.[138] In such cases, whether the evidence is excluded or admitted is determined under the factors relating to the seriousness of the violation and the balancing of the effects of exclusion or admission on the administration of justice. The frequency of exclusion has changed over time with the result that exclusion now appears to occur more often, although still not nearly as often as in the case of conscriptive evidence.[139] Is this, however,

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[133] [1984] S.C.J. No. 36, 41 C.R. (3d) 97 (S.C.C.).

[134] *R. v. Collins*, [1987] S.C.J. No. 15, 56 C.R. (3d) 193 (S.C.C.).

[135] *R. v. Stillman*, [1997] S.C.J. No. 34, 5 C.R. (5th) 1 (S.C.C.).

[136] *R. v. Collins*, [1987] S.C.J. No. 15, 56 C.R. (3d) 193 (S.C.C.).

[137] For example, *R. v. Genest*, [1989] S.C.J. No. 5, 45 C.C.C. (3d) 385, at 409 (S.C.C.); *R. v. Kokesch*, [1990] S.C.J. No. 117, 1 C.R. (4th) 62, at 73-74 (S.C.C.); *R. v. Burlingham*, [1995] S.C.J. No. 39, 38 C.R. (4th) 265, at 290 (S.C.C.).

[138] Of course, where the accused has been obliged to participate in the creation or discovery of the evidence, it will fall into the conscriptive category: *R. v. Stillman*, [1997] S.C.J. No. 34, 5 C.R. (5th) 1 (S.C.C.).

[139] See, *e.g.*, Don Stuart, "Eight Plus Twenty-Four Two Equals Zero" (1998) 13 C.R. (5th) 50; Nathan Gorham, "Eight Plus Twenty-Four Two Equals Zero-Point-Five" (2003) 6 C.R. (6th) 257;

a sufficient development to enable us to achieve some measure of deterrence of misconduct? The answer is probably not but it also does not mean that we should abandon the effort.

One of the problems is to whom deterrence is to be directed in the search and seizure context. Were the issue solely whether the police or other state officials involved in gathering evidence might be deterred from impropriety, there might be at least a degree of sharpness to the debate. Failure to abide by known legal requirements might (and should) elevate the seriousness of the violation to the point where exclusion should be the presumptive remedy. Unfortunately, in a legal regime where common law powers have been frequently developed, it is very difficult to assume the requisite knowledge. Instead, there is an incentive for the police to do what they consider to be necessary in the circumstances in the hope that the courts will later find it to be reasonable. *Clayton*[140] has now enshrined this approach.

But it is a more complicated issue than that. Judges issue search warrants or assess whether a warrant should have been required and, according to the available data, do not rigorously insist upon adherence to required legal standards.[141] But there are no legal consequences for a justice or judge who has failed to insist on the legal requirements for the issuance of a search warrant nor, in a system that requires the independence of the judiciary, should there be. Unless the judiciary is meticulous in requiring compliance with legal standards, its involvement in the process diffuses whatever deterrent effect there might be from excluding evidence that was improperly obtained.[142] That is, it would be necessary to both

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Don Stuart, *Charter Justice in Canadian Criminal Law*, 4th ed. (Toronto: Carswell, 2005), at 570-78; Don Stuart, "*Buhay*: No Automatic Inclusionary Rule under Section 24(2) When Evidence Is Non-conscripted and Essential to Crown's Case" (2003) 10 C.R. (6th) 233; *R. v. Buhay*, [2003] S.C.J. No. 30, 10 C.R. (6th) 205 (S.C.C.); *R. v. Mann*, [2004] S.C.J. No. 49, 21 C.R. (6th) 1 (S.C.C.).

[140] *R. v. Clayton*, [2007] S.C.J. No. 32, 2007 SCC 32 (S.C.C.).

[141] See Law Reform Commission of Canada, *Police Powers: Search and Seizure in Criminal Law Enforcement* (Working Paper 30) (Ottawa: Supply and Services Canada, 1983); Casey Hill, Scott Hutchinson & Leslie Pringle, "Search Warrants: Protection or Illusion?" (2000) 28 C.R. (5th) 89.

[142] I am using the term "deterrence" deliberately. In the sentencing context where deterrence is explicitly an aim, it is well recognized, at least outside the legal system, that deterrence of improper conduct is very difficult to achieve. Contrary to the prevailing public and political mood, more severe sentences have little deterrent effect. The factors more likely to achieve deterrence of future bad conduct are certainty in apprehension and conviction, and administering the deterrence measure in a timely way. See, *e.g.*, E.A. Fattah, "Deterrence: A Review of the Literature" in *Fear of Punishment: Deterrence* (Ottawa: Supply and Services Canada, 1976); Paul H. Robinson & John M. Darley, "Does Criminal Law Deter? A Behavioural Science Investigation" (2004) 24 Oxford J. Legal Stud. 173; Andrew von Hirsch *et al.*, *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research* (Portland, Or.: Hart, 1999).

deter improper police misconduct and improper application of the law by judges, a tall order indeed since we are rather hapless at achieving deterrence through the sentencing process where there is a far more direct connection between the misconduct and a sanction.

Although it is apparent that efforts to achieve compliance with the law of search and seizure will be imperfect, the answer may lie as a combination of two steps. First, more frequent exclusion of non-conscriptive evidence, particularly where there has been a failure to abide by well-established requirements, would be useful even if it is acknowledged that a greater likelihood of exclusion will not cause an overnight change in police behaviour. Second, in spite of the comments by the majority in *Clayton*[143] that it should not be considered in relation to section 24(2) of the Charter, we might devote much more attention and resources to the training of police and other investigative officials so that they are more cognizant of their legal responsibilities. We could also provide for greater training, particularly of justices of the peace, who are often charged with the responsibility for issuing search warrants to see that they are familiar with the legal requirements that they must oversee.[144] If we did so and there were still instances of failing to abide by well-known requirements, the likelihood of exclusion of evidence should surely be increased.[145] At the very least, the police should not be rewarded by having non-conscriptive evidence obtained through non-compliance with known law admitted.

IV. CONCLUSION

Much has happened in the 25 years that have passed since the Charter came into force. This is certainly apparent in the law of search and seizure, whose pre-Charter form is scarcely recognizable today. That said, a promising beginning has had mixed developments since. The framework

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143 *R. v. Clayton*, [2007] S.C.J. No. 32, 2007 SCC 32 (S.C.C.).

144 Most jurisdictions in Canada do not require legal training for justices of the peace. For a discussion of the efforts being made in this regard in Ontario, see: Paul Hong, "A Second Look at Justice of the Peace Reform in Ontario" (2006) 38 C.R. (6th) 22.

145 There has been an unfortunate tendency in the case law to assess a failure to abide by legal requirements as not being serious enough to warrant exclusion. If the police have not acted with malice or have acted with an honest belief, too often their actions have been seen as violations in good faith, thus increasing the likelihood that the evidence will nonetheless be admitted. See, *e.g.*, Steve Coughlan, "Good Faith and Exclusion of Evidence Under the Charter" (1992) 11 C.R. (4th) 304.

established early on in *Hunter v. Southam*[146] and *Collins*[147] was sound and led to other improvements in protecting privacy. Nevertheless, the retrenchment that has occurred through decisions such as *Tessling*,[148] *Edwards*,[149] and *Belnavis*[150] is disappointing and regressive. While it is generally true that legislatures have paid heed to what the courts have required, this has not always occurred. Some of the responsibility lies with the judiciary for stepping too quickly into the breach and creating common law police and other powers. Some of it lies with the legislators, who have too often been content for the courts to assume that role. In assessing the state of the present search and seizure law, we would do well to recall the beginnings of the Charter era and attempt to return to the broader perspective of protecting against undue infringements of privacy.

146 [1984] S.C.J. No. 36, 41 C.R. (3d) 97 (S.C.C.).
147 *R. v. Collins*, [1987] S.C.J. No. 15, 56 C.R. (3d) 193 (S.C.C.).
148 *R. v. Tessling*, [2004] S.C.J. No. 63, 23 C.R. (6th) 207 (S.C.C.).
149 *R. v. Edwards*, [1996] S.C.J. No. 11, 45 C.R. (4th) 307 (S.C.C.).
150 *R. v. Belnavis*, [1997] S.C.J. No. 81, 10 C.R. (5th) 65 (S.C.C.).