Le droit à la vie privée au Canada n’est pas explicitement protégé par la Charte, mais il est protégé indirectement par d’autres droits constitutionnels, entre autres, par la section 8 de la Charte qui porte sur la protection contre les fouilles, les perquisitions ou les saisies abusives. C’est principalement lorsque des accusés ont contesté les fouilles, les perquisitions et les saisies en vertu de la section 8 que les concepts de la vie privée et de la protection constitutionnelle canadienne ont surgi. Le point important de l’enquête touchant la section 8 est de déterminer si une attente en matière de protection de la vie privée doit être considérée comme raisonnable dans le cas de la contestation d’une fouille, d’une perquisition ou d’une saisie menée par des agents de l’État. Tandis que des catégories de renseignements (personnels, territoriaux et informationnelles) établies par le passé peuvent avoir joué un rôle pratique pour déterminer si les attentes en matière de protection de la vie privée étaient raisonnables, les nouvelles technologies de renseignements et de surveillance offertes aux agents rendent de plus en plus floues les distinctions entre ces catégories. Dans le futur, une bonne protection de la vie privée pourrait dépendre de l’aide apportée aux tribunaux pour reconnaître les répercussions sociales plus importantes du profilage invasif rendu possible grâce au regroupement de données apparemment non pertinentes ayant été recueillies individuellement.

Mots clés: vie privée, loi constitutionnelle, fouille, perquisition et saisie

The right to privacy in Canada is not explicitly protected by the Charter. Rather, privacy is protected indirectly through other constitutional rights. Leading among these is the section 8 Charter right against unreasonable search and seizure. It is predominantly within the context of accused persons’ section 8 challenges to state searches and seizures that the Canadian constitutional protection and conception of privacy have developed. Key to the section 8 inquiry is a determination of whether an expectation of privacy should be considered reasonable in the circumstances of a challenged search or seizure by state agents. While previously introduced categories of bodily, territorial, and informational privacy may have historically played a useful role in assessing the reasonableness of expectations of privacy, emerging...
information and surveillance technologies available to state agents increasingly blur the lines among these categories. Robust protection of privacy in the future may depend upon assisting courts in recognizing the broader social implications of the invasive profiling made possible through the aggregation of seemingly non-revealing and individually collected pieces of data.

Keywords: privacy, constitutional law, search and seizure

**Introduction**

Privacy is not an enumerated constitutional right under the Canadian Charter of Rights and Freedoms (“Charter”). Perhaps this is what the Ontario Court of Appeal meant when it starkly stated in *Euteneier v. Lee*,

> [It was] properly conceded in oral argument before this court that there is no free-standing right to dignity or privacy under the *Charter* or at common law. (para. 63)

Indeed, the foundational legal concept of when citizens may reasonably expect privacy has been developed almost entirely within the context of determining whether a legally relevant “search” has occurred, thereby triggering the section 8 Charter right against unreasonable search and seizure.

Given the circumstances in which section 8 challenges occur, it is unsurprising to find that articulations of privacy for purposes of Canadian law have been fundamentally oriented toward the negative right of individuals to be left alone by the state. The section 8 focus on limiting intrusion by the state leaves little room for discussion of the positive entitlements to state intervention that may in some cases be necessary to ensure a more equitable distribution and enjoyment of privacy for all citizens (Gotell 2006). While presenting what is perhaps a rather flat conception of privacy, the paradigm reflected and developed in the context of section 8 challenges reflects the individualistic one dominating Western approaches to privacy (Bennett and Raab 2006) and is central to understanding the extent and dimensions of the constitutional protection of privacy in Canada.

This paper examines key aspects of the section 8 jurisprudence relying on the Western paradigm in two parts. Part 1 highlights discussions
of the meaning and purposes of privacy found within the Canadian section 8 jurisprudence. Part 2 sets out the three-part framework outlined in Canadian case law for determining section 8 claims, with special emphasis on the first component in which expectations of privacy and their reasonableness are assessed. The Conclusion reflects upon some of the effects of the section 8 framework and emerging information technologies on the substantive conception of privacy in Canada.

I. What is privacy?

Privacy, as noted by Binnie J. in R. v. Tessling (2004), is “a protean concept.” In Western philosophy it has been approached both as an intrinsic and an instrumental value – as both a good in and of itself (Mill 1869) and as a producer of other goods both for individuals and society generally (Allen 1988; Gavison 1980; Westin 1967). The focus, however, has tended to be privacy’s value to individuals (Bennett and Raab 2006), and this has been no less true in Canadian law. As Bennett and Raab describe it,

The privacy paradigm rests on a conception of society as comprising relatively autonomous *individuals*. It rests on an atomistic conception of society; the community is no more than the sum total of the individuals that make it up. Further, it rests on notions of differences between the privacy claims and interests of different individuals. Individuals, with their liberty, autonomy, rationality, and privacy, are assumed to know their interests, and should be allowed a private sphere untouched by others. (4)

The notion of the intrinsic good of a “right to be left alone” articulated by the U.S. Supreme Court in *Olmstead v. United States* has also found its way into decisions of Canadian courts (R. v. Dagg). However, the Supreme Court of Canada (“SCC”) has also construed privacy as being grounded in fundamental aspects of humanity:

*Privacy is grounded in physical and moral autonomy – the freedom to engage in one’s own thoughts, actions, decisions.*

(R. v. Dagg at para. 65)

Privacy, from this perspective, is instrumental to independence of thought, action, and decision making – its key value being in erecting spaces of refuge within which the individual is able to withdraw from
society in order to develop and assert his or her own autonomous convictions. These spaces of refuge, however, have not been confined to physicality. Nonetheless, the ideal of physical zones of freedom from scrutiny and intrusion underlie two of the three privacy categories focused upon in Canadian case law – bodily, territorial, and informational.

While the lines between these categories are often unclear, Canadian courts have tended toward a hierarchy among these categories and even within the categories themselves, generally placing bodily privacy at the pinnacle:

[A] violation of the sanctity of a person’s body is much more serious than that of his office or even of his home. (R. v. Pohoretsky at 949)

Tellingly, the seemingly prized place of bodily integrity in the privacy hierarchy seems to play out quite unequally for those most marginalized in our society – particularly for poor, racialized women like Linda Euteneier and for the seven women protestors in Guelph who were strip searched after engaging in a political protest in 1997 (Euteneier v. Lee; Corp. of the Canadian Civil Liberties Assn. v. Ontario).

Recognizing the link between bodily and informational privacy made obvious through technologies enabling scientific determinations to be made from bodily samples, LaForest J. stated in R. v. Dyment,

The use of a person’s body without his consent to obtain information about him, invades an area of personal privacy essential to the maintenance of his human dignity. (para. 27)

Territorial notions of privacy, developed in the context of early common law entitlements against state intrusion in the home that were premised largely on proprietary analyses, have given way to more fully explicated reasons connecting the home with personal and intimate activities:

The original notion of territorial privacy (“the house of everyone is to him as his castle and fortress”: Semayne’s Case …) developed into a more nuanced hierarchy protecting privacy in the home, being the place where our most intimate and private activities are most likely to take place … per Cory J.: “[t]here is no place on
earth where persons can have a greater expectation of privacy than within their ‘dwelling-house.’” (R. v. Tessling 2004 at para. 22)

Protections of territorial privacy associated with the home have also been extended to judicial analyses of artifacts within the home – including computers (R. v. Aucoin). Here, territorial concerns overlap informational ones, raising important issues about, among other things, the impact of the collection, and use and dissemination of data at increasingly rapid rates on increasingly rapid scales made possible by technology:

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. (R. v. Dyment at para. 22)

One of the most perplexing problems associated with emerging technologies, however, has been the degree to which they create novel privacy concerns by making knowable and meaningful information and data that previously existed but weren’t susceptible to being captured or conclusively comprehended through ordinary human senses. Take, for example, the distribution of heat emanating from the exterior of one’s home. Observations with the naked eye that require no physical intrusion (such as patterns of snow melting on roofs) have always made it possible to detect heat escaping from a home, and perhaps even to determine that more heat is escaping from some parts of the home than others. What more recent technologies like the forward-looking infrared (FLIR) technology at issue in R. v. Tessling (2004) make possible is the permanent capture of that information through images capable of supporting more exacting inferences about the nature and distribution of heat-generating activities going on inside that home.

Fact patterns may arise that raise concerns overlapping the traditional categories relating to bodily, territorial, and informational privacy. Further, as will be discussed in more detail below, emerging surveillance and other technologies used by law-enforcement agents increasingly blur the line between the categories and the concerns that underlie them. For example, breathalyzers involve taking a bodily sample and extracting information in relation to the individual
whose physical integrity is intervened upon, however minimally. Where lines between traditional categories are blurred, courts may nevertheless be tempted to place the privacy interest at stake within one category or another. Despite the seemingly protective words of LaForest J. in *R. v. Dyment* about the centrality of personal information to privacy, conceptual detachment of information from the more traditionally venerated categories of bodily and territorial privacy may lead to lesser protections. This risk is manifest in the case law analyzing section 8 claims and the framework underlying them.

**II. Section 8 framework**

Section 8 of the Charter provides that “[e]veryone has the right to be secure against unreasonable search and seizure.”

Before proceeding to a detailed discussion of the framework adopted by the SCC to address section 8 claims, at least two preliminary issues merit mention. First, the right is listed as the second of eight “legal rights” under the Charter. Although not explicitly framed as a “freedom from” something, section 8 has largely been interpreted as a right to be free from unreasonable search and seizure by the state, which leads to the second preliminary point. The section 8 right is a right against *unreasonable* search and seizure – a qualified right inevitably leading into an analysis of what “reasonable” means and what factors are relevant in determining whether the line between reasonable and unreasonable has been crossed in any situation confronted by a court.

The section 8 framework set out by the SCC generally focuses on three inquiries to assist in determining whether that line has been crossed and, if so, whether the material seized as a result of that violation ought nevertheless to be admitted into evidence:

1. Was there a search or seizure by government?
2. Did the government conduct violate reasonable expectations of privacy in the circumstances?
3. Should the evidence be admitted or excluded under section 24(2)?

The analysis proceeds to question 2 only if question 1 is answered affirmatively. A negative answer to either question 1 or question 2 ends the inquiry – no violation will be found and materials seized will be assumed admissible in evidence, absent other independent reasons.
for their exclusion. As is evident from the hundreds of section 8 cases summarized by members of the University of Ottawa’s On the Identity Trail research team in the summer of 2006, a considerable body of jurisprudence has developed on each aspect of the framework. Only a representative sampling of case law will be discussed below, with primary focus placed on SCC decisions and the first aspect of the section 8 inquiry, which delves into the question of reasonable expectations of privacy.

**A. Was there a search or seizure by government?**

The first phase of the framework focuses on the question of whether events triggering the section 8 right have occurred. Where an accused asserts a violation in relation to a search, the inquiry focuses primarily on: (i) whether that search or seizure was carried out by government or its agents, and (ii) an examination of the “totality of the circumstances” to determine whether there was a “search” of relevance to the section 8 inquiry.

**(i) Search by government or its agents**

Where the search in question is carried out directly by state agents, such as law-enforcement officials, this aspect of the first inquiry in the section 8 test will be easily satisfied. However, searches by other agents and officials of government acting in their official capacity (including school principals conducting searches of students for drugs (R. v. M. (M.R.)), also constitute searches under section 8.

Further, where the state gains access to information or places by virtue of a private party, the nature of the relationship between the state and that private party must be assessed in order to determine whether a search of relevance under section 8 has occurred. Key to the assessment is whether the search by the private party “would have taken place, in the form and in the manner in which it did, but for the involvement of the police” (R. v. M. (M.R.) at para. 29). Canadian courts have found that where private actors such as Internet service providers (R. v. Weir), computer repair persons (R. v. Morelli), and doctors (R. v. Maffei) acting in the regular scope of their duties, without requests by police, obtain information that is subsequently provided to police, no search or seizure has occurred within the meaning of section 8.

If it is determined that a search or seizure by government or its agents has occurred, the inquiry then turns to whether the section 8 claimant
held a reasonable expectation of privacy in the place searched or the thing seized, having regard for the “totality of the circumstances.”

(ii) “Totality of the circumstances”

Dickson, J. (as he then was) held in *Hunter v. Southam Inc.* (para. 23) that the section 8 right was not confined to property owned by the section 8 claimant, finding that section 8 “protected people, not places.” Nonetheless, he noted that the right related only to unreasonable search and seizure and held that that right is triggered only where the impugned search related to something in which the section 8 claimant held a reasonable expectation of privacy (*Hunter v. Southam Inc.* at 159–160). Later, following on Dickson J.’s reasons in *Hunter v. Southam Inc.* as well as subsequent SCC decisions in *R. v. Colarusso* (205) and *R. v. Wong* (62, at para. 47), the SCC held in *R. v. Edwards* (para. 31) that whether a section 8 claimant had a reasonable expectation of privacy should be determined in light of the “totality of the circumstances” in each case.

Building on its decisions in *R. v. Edwards* and *R. v. Plant*, the SCC in *R. v. Tessling* tailored the components of the assessment for circumstances relating to allegedly violative searches that are facilitated by technology:

- identification of the subject matter of the alleged search;
- whether the s. 8 claimant had a direct interest in the subject matter;
- whether the s. 8 claimant subjectively expected privacy, and, if so;
- whether that subjective expectation was reasonable having regard for the “totality of the circumstances,” including:
  - place and subject matter of the alleged search;
  - whether the place and subject matter were in public view;
  - whether the subject matter had been abandoned;
  - whether the subject matter was subject to third party control;
  - the reasonableness of any technology used in the alleged search; and
  - the nature of the information revealed by the technology. (2004 at para. 32)
Identification of the subject matter

In many cases, this aspect of the analysis will be simple. If the issue is a warrantless search within a home, the subject matter of the search is the home. New technologies, however, have made it necessary for Canadian courts to actually explicitly consider what the subject matter of the search is, since some of them seem to defy categorization within what may previously have seemed to be the relatively discrete and distinguishable compartments focusing on bodily, territorial, and informational privacy. As Binnie J. noted in the SCC’s decision in *R. v. Tessling* on the use of FLIR technology in that case,

> The distinction between personal, territorial and informational privacy provides useful analytical tools, but of course in a given case, the privacy interest may overlap the categories. Here, for example, the privacy interest is essentially informational (i.e., about the respondent’s activities) but it also implicates his territorial privacy because although the police did not actually enter his house, that is where the activities of interest to them took place. (2004 at para. 24)

The characterization of the subject matter at issue can be crucial for resolution of the section 8 claim. Given the hierarchy among the analytic categories, in which bodily or personal privacy seems to have been notionally placed at the top, closely followed by a long and established common law tradition in which the home has been reified as sanctuary, the first-stage analysis of the subject matter can be critical. Subject matters characterized as primarily informational, rather than directly associated with the autonomy and dignity concerns historically associated with privacy in the body and the home, may not stand up as well in the balancing against the allegedly competing objectives of law enforcement and public security. Indeed, this seems to have been a critical factor in *R. v. Tessling* (2004).

Once the subject matter of the images of heat emanating from the outer walls of Tessling’s residence was determined by the SCC to be primarily informational, the images lost the benefit of the rhetorical power of the home as sanctuary. As such, this first-stage characterization may have made it easier to discount the invasiveness of the capturing of the information, thereby allowing competing law-enforcement objectives to prevail. Since informational privacy is a comparatively recent concept, and the extent of the invasiveness of data gathering and analysis facilitated by emerging technologies has
not been fully grasped by most of us, it may be necessary for courts to hear expert testimony that can assist in illuminating the link between informational subject matters and the historically more established and venerated categories relating to the body and the home. Since this kind of evidence is arguably most relevant to the objective reasonableness criterion, I will return to it in sub-part (d) below.

(b) Direct interest in the subject matter

The obligation for a section 8 claimant to demonstrate a direct or personal interest in the subject matter of the search may be simple to satisfy (as in Tessling 2004) where the home of the accused was searched, or more complex (as in R. v. Edwards at para. 44) where the apartment of the girlfriend of the accused was searched and the accused denied any possessory interest in or knowledge of the drugs seized. In the latter case, the SCC clearly confirmed that property rights in the place searched or the thing seized may be sufficient to establish a section 8 claimant’s direct interest therein, but are not required in order to establish that interest (R. v. Edwards at para. 43). Consistent with the concept that privacy rights attach to people and not places, Cory J. in R. v. Edwards (para. 45) listed a number of factors apart from property rights that might be used by an individual to demonstrate the direct interest requisite to establishing a privacy claim: presence at the time of the search, possession or control over the place searched, historical use of the property searched or item seized, and the ability to regulate others’ access to the property or item.

With the two essential but preliminary criteria in sub-parts (a) and (b) determined, the inquiry then shifts directly into “expectations of privacy” – first assessing the section 8 claimant’s subjective expectation and then determining whether that expectation is sufficiently objectively reasonable to merit its recognition in law. A “search” of relevance to the section 8 inquiry will be established only if the expectation of privacy relating to the place searched or the subject matter seized was both subjectively held and objectively reasonable, having regard for the surrounding social context.

(c) Subjective expectation of privacy

The section 8 claimant bears the burden of establishing that he or she held a subjective expectation of privacy in the place searched or the subject matter seized (R. v. Edwards at para. 45). Nonetheless, in many,
if not in most, cases the claimant does not lead any direct evidence as to his or her subjective expectations. Instead, those expectations tend to be presumed from the circumstances – in particular the nature of the place searched or subject matter seized and the directness of the claimant’s interest in relation to one or both of those things. In *R. v. Tessling* the SCC established a rebuttable presumption that privacy is subjectively expected in relation to activities within the home:

> [I]t may be presumed unless the contrary is shown in a particular case that information about what happens inside the home is regarded by the occupants as private. (2004 at para. 38)

The Court, however, left open the prospect that the presumption may be rebutted with evidence supporting a voluntary abandonment to the public domain of information tending to reveal occurrences within the home. Importantly, however, Binnie J. was crystal clear in cautioning against the weakening of privacy protections due to subjective fears among ordinary people that technologies are being used to survey their private conversations and activities:

> 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.* (R. v. Tessling 2004 at para. 42; emphasis added)

If a subjective expectation of privacy is established, the analysis then turns to a consideration of the objective reasonableness of that expectation.

*(d) Objective reasonableness of subjective expectation*

That a section 8 claimant subjectively expected privacy in relation to a given place or subject matter is not determinative of the expectation of privacy aspect of the section 8 inquiry. That subjective expectation will be given effect in law only if it is also found to be “objectively reasonable.” The SCC in *R. v. Tessling* (2004) summarized a list of factors for consideration, which effectively allow us to assess the
reasonableness of the claimant’s expectation within the broader social context surrounding the search and seizure in issue. It would appear that no single factor is determinative. The relative significance of each factor seems somewhat difficult to predict and would appear to be heavily dependent upon the facts of each case.

i. Place and subject matter of the search

Certain of the factors relevant to assessing whether the section 8 claimant subjectively expected privacy (in the absence of direct evidence on this point) also come into play in thinking about the place and subject matter of the alleged search. At this stage, it is essential for the attention of the court to focus on what was searched and seized as a basis for thinking about whether there is anything about the place or subject matter that would support or undermine the reasonableness of expecting privacy in relation to it.

Relevant factors might include whether the claimant was present at the time of the search and whether the claimant had any sort of controlling or possessory interest in the place that would make it reasonable to expect some type of ongoing ability to exclude or regulate access to it (R. v. Edwards at paras. 45–46). The reasonableness of expecting privacy, given the nature of the place or the subject matter of the search, is notionally subject to a hierarchy prioritizing the body over territorial locales over information (R. v. Tessling 2004 at para. 22). Further hierarchies are apparent within each of these categories.

In the context of bodily searches, the SCC has suggested that strip searches evoke stronger claims for expectations of privacy than do external frisks (R. v. Golden). With respect to territorial locales, the SCC in R. v. Tessling (2004 at para. 22) suggested the reasonableness of expectations of privacy declines when one moves from the home to the home’s perimeter to commercial spaces to private cars to schools and to prisons. In terms of informational privacy, Sopinka J. in R. v. Plant held the reasonableness of expectations of privacy was affected by the nature of the information in issue, concluding,

[I]n order for constitutional protection to be extended, the information seized must be of a “personal and confidential” nature. In fostering the underlying values of dignity, integrity and autonomy, it is fitting that s. 8 of the Charter should seek to protect a biographical core of personal information which individuals
in a free and democratic society would wish to maintain and control from dissemination to the state. This would include information which tends to reveal intimate details of the lifestyle and personal choices of the individual. (293; emphasis added)

Expectations of privacy in relation to the apartment of a friend (R. v. Edwards), and marijuana-growing operations on Crown land (R. v. Boersma) have been rejected as unreasonable, while expectations relating to one’s pockets following a legal pat-down (R. v. Mann), one’s car (R. v. Belnavis), one’s email (R. v. Weir), and one’s home computer (R. v. Aucoin) have all been accepted as reasonable.

ii. Public view

An expectation of privacy in relation to a place or thing that was in public view or publicly accessible may be less likely to be found reasonable than one relating to a place or thing that is not. In R. v. Plant, for example, the fact that information relating to hydro usage at a particular address was accessible to the public through a simple telephone call weighed in favour of a determination that privacy could not reasonably be expected in relation to that information. Similarly, in R. v. Tessling (2004 at paras. 46–48) the fact that heat emanations from a building are casually observable seemed to weigh in favour of a conclusion that an expectation of privacy in relation to those emanations was not reasonable, although this conclusion was tempered somewhat by the fact that the FLIR images in issue provided information about heat distribution that was not observable by the naked eye.

iii. Abandonment

The rationale for the abandonment criterion appears to be that where someone voluntarily abandons the place or thing searched or seized, it is more difficult to conclude that he or she reasonably expected privacy in relation to that place or thing. In R. v. D.M.F (para. 141) a cigarette butt left behind during a meeting with police, from which a DNA sample was later taken, was considered to have been abandoned by the section 8 claimant, thus undermining the reasonableness of any expectation of privacy in relation to it. Similarly, in R. v. Krist (paras. 25–26) the court concluded that the section 8 claimant’s assertion that he held a reasonable expectation of privacy in relation to certain banking documents was undermined by the fact that he had placed them in a garbage bag, which he had deposited
for pickup at the edge of his property. The SCC in *R. v. Tessling* (2004 at paras. 40–41) distinguished these kinds of cases from the one before it — making clear that the standard for a finding of abandonment requires at least some measure of voluntary or conscious action on the part of the section 8 claimant. In that case, the Court concluded that simply knowing that heat emanates outside through cracks and crevices in the walls of one’s house and failing to take preventative measures was not tantamount to abandonment.

iv. Third party control

Where the subject matter of the search or seizure was in the possession or control of a third party bearing no obligation to maintain confidentiality in relation to it, this is likely to weigh against the reasonableness of an expectation of privacy in relation to it. As a result, expectations of privacy in relation to hydro-consumption records (*R. v. Plant*) and the phone number and identity of the person in whose name the number was registered (*R. v. Hutchings*) have been rejected as unreasonable. In contrast, reasonable expectations of privacy were held to have been established with respect to patient counselling records (*R. v. Ryan*), blood drawn by a physician without patient consent and later provided to police (*R. v. Dersch*), and email held on the server of a third party Internet service provider (*R. v. Weir*).

v. Reasonableness of technology

All else being equal, an expectation of privacy is less likely to be found reasonable where state agents employ unintrusive techniques in conducting the search. In the past, the “intrusiveness” of a search has tended to be defined largely in relation to physical conceptions of invasion associated with police presence within the space of the home (*R. v. Evans*), the intrusion of needles or other medical instruments in efforts to obtain bodily samples (*R. v. Dersch*), or the confinement and force related to bodily searches (*R. v. Collins; R. v. Golden*). However, as emerging technologies make the collection of information relating to highly personal locations increasingly simple, and with increasingly less need for physical intrusion, the analysis of intrusiveness has shifted to include considerations relating to dignity and autonomy not directly tied to the *physical* security of persons or premises.

For instance, in *R. v. Duarte* the SCC concluded that, despite advances in audio surveillance technologies, the law should assume that
individuals continue to have a reasonable expectation that their private conversations will not be recorded by state agents:

The reason for this protection is the realization that if the state were free, at its sole discretion, to make permanent electronic recordings of our private communications, there would be no meaningful residuum to our right to live our lives free from surveillance. The very efficacy of electronic surveillance is such that it has the potential, if left unregulated, to annihilate any expectation that our communications will remain private. A society which exposed us, at the whim of the state, to the risk of having a permanent electronic recording made of our words every time we opened our mouths might be superbly equipped to fight crime, but would be one in which privacy no longer had any meaning. (para. 22)

Similarly, in R. v. Wong, the SCC rejected arguments suggesting that it was unreasonable to expect privacy from video surveillance when engaged in activities (whether legal or illegal) in a privately rented hotel room:

I take it to be beyond dispute that just as we hold to the belief that a free and open society is one in which the state is not free to make unauthorized recordings of our conversations, so too it is no less an article of faith in a society that sets a premium on being left alone that its members presume that they are at liberty to go about their daily business without courting the risk that agents of the state will be surreptitiously filming their every movement. (para. 27)

The SCC further clarified in R. v. Tessling (2004) that whether the technology is in general public use is not determinative of whether its use was “reasonable” for section 8 purposes. In this regard, the SCC expressly rejected the reasoning of the U.S. Supreme Court majority in U.S. v. Kyllo, whose conclusion that FLIR images of heat emanating from the home of the accused violated reasonable expectations of privacy hinged on its conclusion that FLIR technology was not in “general public use.” The SCC’s rejection of this standard is consistent with its reasoning that expectations of privacy are normative, rather than descriptive. Under the general public use standard, whether individuals maintain the constitutional right to expect privacy unacceptably turns on the degree to which privacy invasive technologies have been taken up by other members of society.
The more pressing question in terms of the intrusiveness of data-gathering technologies such as FLIR is, according to the SCC, the degree to which the technology yields intimate information about the activities within the home under surveillance. Binnie J. concluded in this regard:

In my view, the issue is not whether FLIR technology puts the police inside the home, because it does not, or whether FLIR is in general public use (it is not), but rather the nature and quality of the information about activities in the home that the police are able to obtain. The evidence is that a FLIR image of heat emanations is, on its own, as Abella J.A. acknowledged, “meaningless.” That is the bottom line. (R. v. Tessling 2004 at para. 58)

Here the SCC seems to distinguish FLIR technologies from video and audio surveillance technologies. Video and audio surveillance put the state agent in a position similar to being in the space where the activity is occurring – listening to and observing the content of that activity. In contrast, the SCC suggested that the FLIR technology in issue simply yielded information from which inferences could be drawn about what heat-generating activities were occurring within Tessling’s home. In the latter situation, the SCC’s reasoning in R. v. Tessling (2004) ties the analysis of the degree of the technology’s intrusiveness directly to the nature and quality of the information that it yields.

vi. Nature of information revealed by technology

On the basis of SCC’s reasoning in R. v. Tessling (2004), it may be more difficult to establish a reasonable expectation of privacy in situations where authorities gather information that falls short of revealing core biographical information or intimate details of the life choices of the section 8 claimant. With respect to the information gathered through the FLIR technology at issue in that case, Binnie J. concluded,

Certainly FLIR imaging generates information about the home but s. 8 protects people, not places. The information generated by FLIR imaging about the respondent does not touch on “a biographical core of personal information,” nor does it “ten[d] to reveal intimate details of [his] lifestyle” (R. v. Plant at p. 293). It shows that some of the activities in the house generate heat. That is not enough to get the respondent over the constitutional threshold. (R. v. Tessling 2004 at para. 62)
Here, Binnie J. seems to have limited the information protected by section 8 to either core biographical details or intimate details of a claimant’s life choices, both of which were referred to in *R. v. Plant*. Binnie J. reached this rather narrow conclusion, notwithstanding the fact that in earlier paragraphs he had expressly noted that *R. v. Plant* specifically indicated that these two kinds of information fell within, but did not fully exhaust, the categories of information protected by section 8. Nevertheless, Binnie J. concluded in *R. v. Tessling* (2004 at para. 63), that the FLIR images of heat emanating from the exterior walls of a home did not generate a reasonable expectation of privacy in that they did not reveal a “biographical core of personal information” and could not be said to affect the autonomy and dignity of the homeowner.

As suggested in sub-part (a) above, in future cases, Canadian courts ought to be made better aware of transitions in our social and technological contexts that facilitate virtually effortless aggregation of bits of non-biographical data into intimately detailed profiles. As technologies develop that, for example, facilitate fast and easy identification of specific persons from a few pieces of seemingly disparate and otherwise anonymous data, it will perhaps be necessary to revisit the notion that informational rights under section 8 relate only (or even primarily) to data that, on their own, reveal intimate personal details of an individual’s life (Gandy 1993; Sweeney 1997).

If either the section 8 claimant is found not to have held a reasonable expectation of privacy, having regard for the totality of the circumstances, or the search was not carried out by government or its agents, then no “search” within the meaning of section 8 will have occurred and the section 8 claim will be dismissed. In the event that both aspects of the first inquiry are satisfied, however, the analysis proceeds to the second inquiry – the reasonableness of the government conduct in issue.

**B. Did the government conduct violate reasonable expectations of privacy in the circumstances?**

The second stage of the section 8 inquiry focuses on the state conduct at issue – and begins with the initial question of whether there was prior authorization in law for the search or seizure in issue. If prior authorization was given, the burden then shifts to the section 8 claimant to establish that the search or seizure was
nevertheless unreasonable. If no prior authorization existed for the search or seizure in issue, a presumption of unreasonableness arises that is subject to rebuttal by the Crown.

(i) Was there prior authorization?

Valid prior authorization in law need not be given by a judge per se in order to satisfy this criterion. In the context of searches and seizures pre-authorized by administrative bodies, the SCC in *Hunter v. Southam Inc.* and *Thomson Newspapers Co. v. Canada* held the following to be necessary in order to establish “prior authorization” within the meaning of section 8:

(a) prior authorization given by a neutral and impartial arbiter able to act judicially;

(b) prior authorization premised upon reasonable grounds, established under oath, to believe:

i. that an offence has been committed in the place or thing to be searched; and

ii. that something affording evidence of the particular offence under investigation would be recovered therein; and

(c) seizure only of documents and materials strictly relevant to the offence under investigation.

If prior authorization is established by the Crown, the section 8 claimant still has an opportunity to challenge the reasonableness of the search or seizure conducted pursuant to that pre-authorization.

(ii) Challenging prior authorization

The reasonableness of pre-authorized searches is susceptible to challenge in a number of ways. Two of the more prominent approaches appearing in the case law are challenges to the adequacy of the information used to obtain the prior authorization and challenges to the reasonableness of the law pursuant to which the prior authorization was made.

Allegations of defects within or assertions of the inadequacy of information used to obtain pre-authorization focus on the factual record before the party issuing the pre-authorization, such as a judge in the context of issuing a search warrant under the Criminal Code (1985). These can relate to significant errors made in the drafting
of the applications for warrants, where those errors led to a misrepresentation of the material facts upon which the reasonable and probable grounds of the applicant were premised (R. v. Araujo). Further, where section 8 claimants are able to establish that the evidence relied upon in support of the application for pre-authorization was, itself, obtained in violation of a Charter right, such as section 8 (as was the case in R. v. Plant) or section 10(b) (as was the case in R. v. Wiebe), they are entitled to argue that that evidence be expunged from the information relied upon in support of the pre-authorization. In effect, the reviewing court is asked to assess whether reasonable and probable grounds could have been established had the offending materials been removed from the warrant application.

Section 8 claimants may also challenge the reasonableness of the law pursuant to which a prior authorization was granted. Essentially, the claim in this regard is that prior authorization issued pursuant to an unreasonable law is, itself, unreasonable (Hunter v. Southam. Inc.). Challenges such as these have been launched in relation to legislative provisions setting out procedures for pre-authorized searches of solicitors’ offices (R. v. Lavallee), and seizures of DNA samples (R. v. S.A.B.), as well as for compelling production of business records (Thomson Newspapers Co. v. Canada).

If either it is conceded that no prior authorization was given, or the section 8 claimant succeeds in establishing that the prior authorization was unreasonable, then the search in issue will be considered a “warrantless” one. Warrantless searches are deemed unreasonable, subject to rebuttal by the Crown (R. v. Collins).

(iii) Reasonableness of a search without prior authorization

The Crown may rebut the presumed unreasonableness of a search conducted without prior authorization only if it establishes that: (a) the law permitted the search without prior authorization; (b) that law was reasonable; and (c) the state agents conducted themselves reasonably. As will be discussed in further detail below, it is at the third stage of this analysis that courts may have the opportunity to move beyond the individualistic Western privacy paradigm in order to consider the collective implications of emerging surveillance technologies and practices.

To establish that a search without prior authorization was permitted by law in the circumstances, the Crown may rely upon both statutory
provisions (R. v. Collins; R. v. Grant; R. v. Kokesch; R. v. Plant) and on policing powers established at common law, including the right to search incident to a lawful arrest: R. v. Mann (paras. 37, 66–67).

In analyzing the second factor – whether the law was reasonable – courts have focused on the tailoring of the relevant law. A statutory power to search without prior authorization that is exercisable only in exigent circumstances would, for example, be more likely to be found reasonable than one not tailored in this regard (R. v. Grant).

In analyzing the third factor – the reasonableness of the behaviour of the state agents, courts have taken a number of factors into account. A warrantless search conducted in exigent circumstances (such as where evidence might have been lost or destroyed (R. v. Grant; R. v. Plant) is more likely to be found reasonable than one conducted in non-urgent circumstances. Further, whether the state agents conducting the search had reasonable and probable grounds to believe an offence was being committed in the place that they searched without a warrant has also been considered relevant (R. v. Collins; R. v. Kokesch).

Any technology employed by the state agents involved may also figure into the analysis of the “reasonableness” of their behaviour. At this stage, a court’s frame of reference in assessing reasonableness can have a significant effect on the outcome of the analysis. Take, for example, a case involving FLIR technology in which a section 8 violation has been made out. To the extent that the use and implications of FLIR are confined to an analysis of the significance of the technology in relation to the particular individual claimant, the remote collection of infra-red images of emanating heat waves by state agents might seem relatively inobtrusive. The implications of a state agent practice of flying over residential areas in order to amass databases of such images seems far more ominous, but these broader social implications are likely to be left unanalyzed (or at least under-analyzed) in a paradigm that focuses solely on the immediate implications for the individual claimant.

In the event that a court concludes that the section 8 claimant’s expectations of privacy were unreasonably violated, but that violation was authorized by law, the Crown may argue that the search ought to be considered justifiable in a free and democratic society
pursuant to section 1 (Sheehy and Abell 2002: 378, citing Hunter v. Southam Inc. at paras. 45–46).

However, one would expect the situations in which this will arise will be rare – given that the court will already have had to determine that the law was unreasonable in order to find a violation of section 8. As such, it will not be discussed in further detail here.

Where a section 8 violation has been established and no section 1 justification proven by the Crown, section 24(2) of the Charter provides that the materials seized as a result of that violation (the “impugned materials”) ought to be excluded from the evidence in the proceeding “if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.” At this stage of the analysis, courts have the opportunity to address the social implications of surveillance technologies, as well as to take into account the degree to which their use in particular circumstances may promote related dignity and privacy interests of others affected by the offence in issue.

C. Should the evidence be admitted or excluded under section 24(2)?

The SCC has held that, in assessing whether the admission of the impugned materials into evidence would bring the administration of justice into disrepute, courts ought to have regard for: (i) trial fairness; (ii) the seriousness of the Charter violation; and (iii) the effect of excluding the evidence on the results of the proceedings (R. v. Collins at 18–21).

(i) Trial fairness

In assessing whether admission of impugned materials would tend to bring the administration of justice into disrepute, the SCC has focused its attention largely on two criteria: the nature of the evidence and the nature of the right violated. Where the impugned materials existed separate and apart from – and not as a result of – the violation, the SCC has held that the materials should be considered non-conscriptive (R. v. Collins at 19; R. v. Plant at para. 34). Generally, the admission of non-conscriptive evidence has been held less troublesome than the admission of materials conscripted from the section 8 claimant by virtue of a Charter violation (R. v. Therens).
(ii) Seriousness of the violation

The seriousness of a section 8 violation is to be assessed having regard for both the behaviour of the state agents involved and the exigencies of the situation in which the violation occurred. Where state agents behaved in ways that can be characterized as wilful or flagrant violations of the rights of a section 8 claimant, it is more likely that admission of the impugned materials would bring the administration of justice into disrepute than if the violation was made non-deliberately and in good faith.

Flagrant violations have been found in the context of state agents physically tackling and placing suspects in throat holds where no threat to the personal safety of others existed (R. v. Collins at 23), as well as in a context where police chose to conduct a search outside of the dates specified in the warrant they had obtained (R. v. Aucoin). Some courts have gone so far as to suggest that a finding of a flagrant and wilful violation should be made only where there is evidence of intentional wrongdoing by state agents (R. v. Smith at para. 61).

In contrast, suggestions of bad faith have been rejected by courts where state agents conducted a warrantless search relying upon a statutory provision authorizing them to do so, and it was only later determined that the provision relied upon was invalid (R. v. Plant at para. 30, citing R. v. Donaldson).

Other contextual factors, such as whether the state agents acted in exigent circumstances, are also taken into account. A violation is likely to be considered less serious if it was occasioned in the context of an attempt to prevent the imminent destruction of evidence or imminent risk of harm to another person (R. v. Plant; R. v. Collins). Similarly, a violation is likely to be considered more severe where it is determined that less intrusive options existed for obtaining the materials in issue, but state agents nevertheless chose to proceed in a rights-violating manner (without a warrant, for example) (R. v. Collins). The Ontario Court of Appeal concluded in R. v. Tessling (2003 at paras. 78–79) that the taking of FLIR images of the heat emanating from a home constituted a serious violation, noting that the technology allowed state agents access to information that would not otherwise be available without physical intrusion, permitting the state to “draw public inferences about private activities inside the home.” At this stage, it is open to Canadian courts to take into account the broader
social implications of the technology beyond the immediate interests of the individual claimant.

(iii) Effect of exclusion on results

Finally, courts are to consider the effect of exclusion of impugned materials on the results of the trial. The SCC in *R. v. Collins* explained this analysis as a function of the earlier aspects of the section 24(2) analysis. If the section 8 violation was relatively trivial and the impugned materials are necessary to substantiate the charge – that is, without their admission into evidence the section 8 claimant will be acquitted – this may heighten concern that their exclusion from the evidence will bring the administration of justice into disrepute (*R. v. Collins* at 20–21). This is likely to be particularly true where the offence is considered to be a serious one – such as a child pornography offence (*R. v. Aucoin*). In cases such as these, the privacy interests of those victimized by offences might also be weighed in the balance in terms of assessing the impact of surveillance practices within a social context that extends beyond the immediate interests of the individual section 8 claimant. In contrast, where a refusal to admit the evidence will result in an acquittal for a less serious offence, some Canadian courts have concluded admission of the impugned materials would bring the administration of justice into disrepute (*R. v. Tessling* (2003), OCA at para. 80). The SCC in *R. v. Collins* (21) was clear, however, that where both a serious offence and a serious section 8 violation are at issue, even evidence necessary to substantiate the charge ought to be excluded.

**Conclusion**

Canadian constitutional protection of privacy and, indeed, many key aspects of the legal conception of privacy within Canada have been developed within the context of criminal prosecutions in which accused persons assert their section 8 Charter right to be free from unreasonable search and seizure. Therefore, an understanding of the section 8 framework is central to understanding the constitutional protection of privacy in Canada.

Unsurprisingly, within the section 8 context, privacy has been conceptualized largely as a negative right against state intrusion on the individual. The nature and value of privacy have been described within the section 8 case law both as intrinsically associated with basic
human dignity and autonomy, and as being instrumental in enhancing individual freedom. One of the initial steps of the section 8 inquiry – the identification of the nature of the subject matter searched or seized – can have significant implications for the ultimate section 8 determination. The identification process is largely premised upon characterizing the thing seized and/or the place searched within the context of three categories: bodily, territorial, and informational.

These categories have, to some extent, been arranged within the case law into a hierarchy of descending importance – beginning with bodily, moving to territorial, and ending with informational. Technologies from breathalyzers to FLIR to sniffer dogs tend to blur the lines between what may traditionally have been thought of as three relatively discrete categories. To the extent that courts characterize existing and emerging data-collection technologies as primarily affecting informational privacy, and focus primarily on the immediate implications for the individual claimant, constitutional privacy protections may be weakened.

Canadian section 8 case law reflects the paradigmatic Western approach to privacy that tends to characterize it as the right of an individual to be left alone. In the context of emerging surveillance technologies, such an approach may well miss the proverbial forest for the trees. While law enforcement’s use of a surveillance technology in a single instance may seem relatively unconcerning when considered in the context of a single use against a single individual, the social implications of surveillance practices that involve the collection and assembly of seemingly harmless bits of information go largely unnoticed. Once a section 8 violation has been found, the current analysis seems to allow greater latitude for Canadian courts to move beyond the immediate implications for the individual claimant in order to take into account the broader social implications of the state surveillance practice involved. Unfortunately, the paradigmatically narrow individualistic focus that searches for personally or territorially intrusive practices vis-à-vis the individual claimant may reduce the chance of a court finding that a section 8 violation has occurred in relation to data gathering and collection in the first place.

Focus on the \textit{R. v. Tessling} finding that reasonable expectations of privacy are normative and not descriptive, as well as identifying connections between informational privacy and the historically more venerated categories of bodily and territorial privacy in the context of
cases involving state use of data-collection technologies, could play an important role in maintaining more robust privacy protection within Canadian constitutional law. Perhaps more pressing, however, is the need to further develop an understanding of the social value of privacy (Regan 1995) and the implications of surveillance practices beyond those understood to be immediately experienced by individual section 8 claimants.

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