

# Privacy, Technology and Search and Seizure Law in Canada

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# Introduction & Overview

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- Discuss evolution of 'privacy' organizing principle for constitutional search and seizure law in Canada
- Suggest Canada has crossed bit of a doctrinal threshold and entered new stage in evaluation of search issues
- Well positioned to wrestle with technologies in the future
- [NB - Case citations appear on final slide]

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- Section 8:

Everyone has the right to be secure against unreasonable search or seizure

# Evolution of Privacy

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- “Three Generations” of issues
- 1. Places or privacy?
- 2. Social Conventions or Normative Expectations?
- 3. Articulating and applying the Normative Core approach as concept organizing s.8

# Places or Privacy?

# Stage One

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- Pre-1982 search law almost exclusively organized around trespass and protection of property
- Wiretapping provisions (all of 9 years old in 1982) were only exception to this
- Protection of privacy was a limited side-effect of property based set of principles.

# Places or Privacy?

## Stage One

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- Constitutional protection against ‘unreasonable search or seizure’
- What is a ‘search’?
- 1984 *Hunter v . Southam*
- Holds that s. 8 protects ‘reasonable expectation of privacy’
- Driven by “purposive approach” to Charter

# Social Conventions v. Normative Values

## Stage Two

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- Determination that reasonable expectation of privacy is organizing principle is only first stage of exercise.
- Critical first step, as this frees law from using property as proxy for what were often privacy analyses.
- Requires the resolution of another set of questions: what sort of expectations of privacy are protected?

# Social Conventions v. Normative Values

## Stage Two

- U.S. approach, which had fostered modern use of privacy as organizing principle, two stage:
  - What was the subjective expectation of the particular individual who asserts the right as to whether their actions might become known
  - What is society prepared to consider as a reasonable expectation in the circumstances
- Essentially a 'social conventions' test in which looks at what people could realistically expect
- \*3d party disclosure usually fatal to claim

# Social Conventions v. Normative Values

## Stage Two

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- Between 1984 (*Hunter*) and 1990 (*Duarte* and *Wong*) weight of authority trended towards adoption of American approach
- In *Duarte* court examined participant surveillance of private communications (state agent recording conversation)
- US rule based on social conventions says risk of the 'tattletale' means no reasonable expectation.

# Social Conventions v. Normative Values

## Stage Two

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- In *Duarte* and *Wong* Supreme Court of Canada rejects social conventions as test
- REP should be assessed not of what people actually do expect (or even notionally expect) but upon assessment of what *should* be expected by people in free and democratic society
- Is distinctly focused on what limits *should be* placed on the ***state actors***, not on what people expect about privacy in general

# Social Conventions v. Normative Values

## Stage Two

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*...whether the persons whose privacy was intruded upon could legitimately claim that in the circumstances it should not have been open to the agents of the state to act as they did without prior judicial authorization.*

...the courts [should] assess whether giving their sanction to the particular form of unauthorized surveillance in question would see the amount of privacy and freedom remaining to citizens diminished to a compass inconsistent with the aims of a free and open society.  
(Wong 1990)

# Social Conventions v. Normative Values

## Stage Two

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- *Duarte* (participant surveillance) and *Wong* (video surveillance in hotel room used for illegal casino) both resolved in favour of accused under normative approach
- Under social conventions test both likely to be resolved against accused.

# Social Conventions v. Normative Values

## Stage Two

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- Difficult to sustain normative approach
- In a number of *post-Duarte* cases Supreme Court of Canada seemed to drift back to social conventions approach (*Edwards; Buhay; MRM*) (Note reasons of Justice LaForest in *Edwards*)

# Social Conventions v. Normative Values

## Stage Two

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- By late 1990's seemed to be *de facto* return to social conventions approach –
- *Edwards* (1996) in particular reads like a very American decision dealing with privacy interests of passengers in a car
- Seen in some circles as retreat from strong positions in *Duarte* and *Wong*

# Social Conventions v. Normative Values

## Stage Two

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- *Tessling* (2004)
- Use of crude technological surveillance device,
- FLIR, which is able to read and translate into digital photograph-like presentation amount of waste heat from any location
- Used in variety of private applications – search and rescue, energy audits, etc.
- Also used to corroborate information suggesting grow-ops in residences
- Heat profile of grow op house is distinct

# *Tessling*

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- Ont CA had held that the use of such an investigative technique was a search because it allowed the state to, in combination with other information, draw inferences about what was taking place within home
- Home is place with high privacy interest
- Any intrusion onto that privacy interest likely to be called a search
- Ont CA only offer limited analysis of what actual device did or did not do

# *Tessling*

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- Supreme Court of Canada approaches problem in what seems to be blend of both a social convention and normative approach (though Binnie J. seems to articulate normative approach *through* social expectations)
- Frame analysis using three forms of privacy interests that are often engaged
  - Personal or bodily privacy
  - Territorial or geographic privacy
  - Informational privacy

# *Tessling*

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- Personal privacy exists at highest order
- Virtual complete overlap between social conventions and normative approaches
- *Golden* (strip searches)
- *Stillman* (bodily samples/dental impressions)

# *Tessling*

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- Territorial privacy has long history
- Historically rooted in law of trespass
- In *Tessling* court notes that this historical root in law of property is misleading – property was ancient articulation of *privacy rights*
- Place becomes analytical tool to assess reasonableness of one's expectation of privacy within hierarchy of places and privacy

# *Tessling*

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- Informational privacy presents “thorny question” in context of an age driven by explosion of information record keeping and new conceptions of privacy
- Where does right to control information become reasonable or necessary bar to *casual* state intrusion?
- Consider these words from Sopinka J. in *Plant*

# *Tessling*

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- In *Plant* Supreme Court of Canada had articulated a normative approach to informational privacy issue:
- “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.”

# *Tessling*

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- Court then adopts a “totality of the circumstances” test
- Repeats list from Edwards that had seemed to return to social conventions analysis but includes in his “laundry list” of considerations:

# *Tessling*

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- d. whether the information was already in the hands of third parties; If so, was it subject to an obligation of confidentiality?
- e. whether the police technique was intrusive in relation to the privacy interest;
- f. whether the use of surveillance technology was itself objectively unreasonable;
- g. whether the [technique] exposed any intimate details of the respondent's lifestyle, or information of a biographical nature.

# *Tessling* and Normative Core

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- Points “e” (intrusive re privacy) and “g” (reveal intimate details) restore normative core approach
- Social conventions test seems alive for ‘easy’ cases, normative test layered onto that as check against unacceptable expansion of state intrusiveness

# *Tessling*

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- Supreme Court of Canada resolves issue in favour of state noting that
  - “FLIR technology at this stage of its development is both non-intrusive in its operations and mundane in the data it is capable of producing.

# Where to Now?

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- Number of issues still to be addressed, particularly with respect to technology
- Consider these two outstanding issues making their way through the system and apply principles from *Tessling*

# Where to Now?

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- Review of all data upon seizure of machine readable media
  - With explosion of media capacity seizure of laptop to look for a few emails (which might be a justifiable search) can be devastating for privacy
- Does the warrantless review of everything on my laptop “expose... intimate details of my lifestyle, or information of a biographical nature.”
- Two step warrants, or minimization clauses

# Where to Now?

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- Revisiting issue of ‘dog sniff’ cases (use of targeted or random dog sniff of luggage, backpacks, school lockers, etc., to develop grounds to search container)
  - Does the warrantless detection (by a dog) of the smells coming from my backpack “expose any intimate details of my lifestyle, or information of a biographical nature.”
  - Alta CA and Ont CA have taken different views (*Brown and A.M.*)
- Probably not, that’s where weight of authority moving post-Tessling

# Where to Now?

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Current framework sets up debate for third generation of issues

In absence of meaningful law reform by legislature much of this work has to be done in the courts in context of constitutional litigation

# Citations

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- *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, 14 C.C.C. (3d) 97
- *R. v. Edwards*, [1996] 1 S.C.R. 128, 104 C.C.C. (3d) 136,
- *R. v. Plant*, [1993] 3 S.C.R. 281, 84 C.C.C. (3d) 203,
- *Schreiber v. Canada (Attorney General)*, [1998] 1 S.C.R. 841, 124 C.C.C. (3d) 129,
- *R. v. M. (M.R.)*, [1998] 3 S.C.R. 393, 129 C.C.C. (3d) 361
- *R. v. Buhay* (2003), 174 C.C.C. (3d) 97
- Stringham, “Reasonable Expectations Reconsidered” (2005), 23 C.R.(6th) 245
- *R. v. Brown* (2006) 210 C.C.C. (3d) 317 (Alta.CA);
- *R. v. A.M.* (2006) 79 O.R. (3d) 481 (Ont.C.A.)