SCC Court File No: 37971

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

B E T W E E N:

TOM LE

Appellant
(Appellant)

-and-

HER MAJESTY THE QUEEN

Respondent
(Respondent)

FACTUM OF THE INTERVENERS, CANADA WITHOUT POVERTY, THE CANADIAN MENTAL HEALTH ASSOCIATION MANITOBA AND WINNIPEG, THE ABORIGINAL COUNCIL OF WINNIPEG, INC., AND END HOMELESSNESS WINNIPEG INC.

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I. OVERVIEW

1. Section 8 of the *Charter*[1] "does not merely prohibit unreasonable searches or seizures, but also guarantees to everyone the right to be secure against such unjustified state action."[2] However, not everyone is equal when it comes to enjoying this protection:

> The zones of privacy (of territory, of body and of home) ... fundamental to dignity and autonomy, look very different for the economically privileged and the economically marginalized; privacy is not distributed equitably. The economically marginalized are rarely in the position of being able to claim their privacy in order to keep others from transgressing the boundaries that they do not want crossed.[3]

While more affluent individuals can buy their privacy by building higher walls and fences, those living in poverty do not have that option. The law should not further punish this lack of choice with diminished privacy protection.

2. While section 8 has been interpreted broadly and purposively to preserve "a protected sphere of privacy"[4] free from state surveillance, a line of territorial privacy cases has linked privacy to control and ownership. This is at odds with the general evolution of the section 8 analysis and the purpose behind the privacy right. The inevitable consequence is inequality for persons living in poverty, made vulnerable by a smaller sphere of privacy protection.

3. The immediate issue in this proceeding is whether an invited guest in a friend's backyard has a reasonable expectation of being secure from uninvited police intrusion. The broader

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1 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, s. 8 (emphasis added).

2 *R v Edwards* [1996] 1 SCR 128 at para 59, La Forest J, dissenting *[R v Edwards]*.

3 Janet Mosher, "The Shrinking of the Public and Private Spaces of the Poor" in Joe Hermer & Janet Mosher, eds, *Disorderly People: Law and the Politics of Exclusion in Ontario* (Halifax: Fernwood Publishing, 2002) at 52 at **Tab 1** of the Coalition's Book of Authorities [Mosher]. See also Bill O'Grady, Stephen Gaetz & Kristy Buccieri, *Can I See your ID?: The Policing of Youth Homeless in Toronto* (Toronto: Justice for Children and Youth, and Homeless Hub Press, 2011) [O'Grady et al].

4 *R v Tessling*, 2004 SCC 67 at para 16 [*R v Tessling*].

question is whether a privacy interest premised upon control over property can be meaningful for individuals who lack the resources and often the authority to proactively secure their dignity.

4. The judgment in *R v Le*[5] highlights the perils of a mechanistic approach to privacy that is oblivious to the impacts of state intrusion upon dignity and autonomy and is focused exclusively on concepts of possession and control. A friend's backyard, which should be a sanctuary from unreasonable police surveillance, becomes an unprotected realm that police can invade at will to collect personal information from household guests.

5. By including the perspective of communities overburdened by poverty, the Coalition seeks to amplify voices that have often gone unheard in section 8 dialogue. Coalition members represent persons living in poverty, urban Indigenous people, persons living with mental illness and persons experiencing homelessness. For many, these intersecting grounds of inequality exacerbate the frequency and severity of state intrusion in their lives. Based on its experience, the Coalition recognizes not just the material deprivation of poverty but also the debilitating effect on dignity that flows from a lack of control over life's basic decisions.

6. The Coalition's submission highlights how an emphasis on the privilege of control is out of step with the general development of section 8 analysis. It warns that the logic of a single-minded focus on control is that persons who are experiencing housing insecurity may have no reasonable expectations of privacy in the spaces they live and visit – simply because they do not have control over lock and key. The Coalition proposes a non-categorical, broadly applicable purposive framework that does not focus on control and is alive to the enduring vulnerability of certain communities.

PART II. THE COALITION'S POSITION ON THE QUESTION IN ISSUE

7. A narrow control and ownership-based approach to section 8 is not appropriate. A broadly applicable and adaptable purposive analysis that respects the fundamental purpose of the right to privacy and to be protected against unreasonable search and seizure is required.

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[5] *R v Le*, 2018 ONCA 56 [*R v Le*].

PART III. STATEMENT OF ARGUMENT

A. The Purpose of Section 8 is to Protect a Sphere of Dignity and Autonomy

8. Section 8 is grounded in the understanding that "restraints imposed on government to pry into the lives of the citizen go to the essence of a democratic state."[6] Driven by this Court's reluctance to accept that "the sphere of protection for private life must shrink",[7] the analysis has focused on preserving a "meaningful residuum to the right to live free from surveillance"[8] and fostering "the underlying values of dignity, integrity and autonomy."[9] Variously described as a protected "sphere"[10], "zone"[11] or "bubble"[12] of privacy, section 8 demarks for everyone "certain areas of personal autonomy where 'all the forces of the crown' cannot enter."[13]

9. Consistent with the underlying purpose of the constitutional protection, this sphere of privacy travels with persons when they leave their home,[14] or even if they do not have a home, although its exact ambit may be modified in the totality of circumstances. Despite a lack of control over public spaces, a person appearing in public "does not automatically forfeit" their privacy.[15] They do not invite surveillance that is more than "fleeting in nature."[16]

10. Similarly, by gathering in public view in a friend's backyard over which they do not exercise control, individuals do not relinquish their right to be free from sustained surveillance by the prying eyes of the state, much less an uninvited police entrance. Rather, a constitutionally protected sphere remains. Section 8 demands that a gathering among friends in a social housing

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6 *R v Dyment* [1988] 2 SCR 417 at 427-428 [*R v Dyment*].
7 *R v Tessling* at para 16.
8 *R v Duarte* [1990] 1 SCR 30 at 44 [*R v Duarte*].
9 *R v Plant* [1993] 3 SCR 281 at 293 [*R v Plant]*.
10 *R v Plant* at 292.
11 *R v Marakah*, 2017 SCC 59 at para 37 [*R v Marakah]*.
12 *Ontario (Attorney General) v Dielemen* (1994), 20 OR (3d) 229 (ONSC) at 78.
13 *R v Tessling*, citing Lord H. Brougham, *Historical Sketches of Statesmen Who Flourished in the Time of George III*, vol. I, (1855) at para 14.
14 *R v A.M.*,2008 SCC 19 at para 61. See also *Alberta (Information and Privacy Commissioner) v United Food and Commercial Workers, Local 401*, 2013 SCC 62 at para 27 [*Alberta v UFCW*].
15 *Alberta v UFCW* at para 27. See also *R v Rudiger* ,2011 BCSC 1397 at para 107 [*R v Rudiger*].
16 *R v Rudiger* at para 107.

cooperative should offer no more justification for an intrusive police entrance than a backyard barbeque or a garden party to celebrate a law school graduation.

B. The Dichotomy in the Case Law is No Longer Sustainable

11. An undue emphasis on control of property in territorial privacy cases is out of step with the purposive approach applied in other section 8 cases. This Court has warned against "mechanical approaches"[17] or "narrow legalistic classifications" that constrain "the spirit" of section 8.[18]

12. *R v Edwards* established a non-exhaustive territorial privacy test based on notions of possession, control, ownership and regulation of access.[19] As a result, and while the applicable considerations were expanded in *R v Tessling*,[20] a dichotomy has emerged in the case law. Control has been noted to be "particularly salient in territorial privacy cases".[21] But in the informational privacy context "control is not dispositive, but only one factor to be considered in the totality of the circumstances."[22] This dichotomy should be corrected.

13. *R v Le* illustrates the challenge in emphasizing control while trying to honour the underlying constitutional purpose. In holding that the Appellant did not have a reasonable expectation of privacy, the majority characterized the privacy interest as "exclusively territorial"[23] and placed great weight on the finding that the Appellant had no control over the backyard and no ability to regulate access to the property. This mechanistic focus on the concept of control sidesteps a true examination of the nature of the privacy interest impacted and the consequences for the underlying values of autonomy and dignity. By placing primacy on control, the majority mischaracterizes a friend as a mere transient guest[24] and fails to examine the need to ensure a protected sphere for friendship to flourish free from state surveillance.

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17 *R v Marakah* at para 17.
18 *R v Duarte* at 43 citing *R v Dyment* at 426.
19 *R v Edwards* at 145-146.
20 *R v Tessling* at para 31-32.
21 *R v Jones*, 2017 SCC 60 at para 40 [*R v Jones*].
22 *R v Marakah* at para 44.
23 *R v Le* at para 37.
24 *R v Le* at para 41.

14. Speaking in dissent in *R v Edwards* at the Ontario Court of Appeal, Abella, J.A. (as she then was) highlighted the importance of looking beyond the issue of property control to consider "the qualitative extent of the access and the character of the governing relationship."[25] A focus on whether the guest controls access to the property ignores the nature of the relationship with the resident and whether that relationship is worthy of section 8 protection. While a gardener or a pool maintenance person[26] also may lack control over the property, surely there is a quantum qualitative distance between the reasonable privacy expectations of a contractor making business visits as compared to the reasonable expectations of a group of friends gathered in a backyard.

15. The uneven emphasis given to control has continued despite this Court's confirmation that the lines between informational and territorial privacy have been blurred by momentous technological change.[27] While the lines between categories are often indistinct, the dichotomy in the case law means that a finding of a reasonable expectation of privacy can turn on the assessment of which category of privacy is implicated. This begs the question of whether a mechanistic consideration of which category is engaged by a particular state action is analytically defensible.

16. Giving true meaning to the particular context of an individual case means that a court can recognize that "a privacy interest may overlap among categories."[28] The categories are simply analytical tools that should not govern the assessment or its outcome: "[t]he question always comes back to what the individual, in all of the circumstances, should reasonably have expected."[29]

C. Lack of Choice and its Adverse Effects on Persons Living in Poverty

17. Embedded in the continuing primacy of control and access factors in territorial privacy cases is an assumption that "land owners and tenants have a practical ability to exclude visitors from their territory and maintain a choice to be left alone by controlling access to their

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25 *R v Edwards* (1994), 29 OR (3d) 239 at 24 [1994] OJ No, 1390, Abella J.A dissenting. [*R v Edwards (ONCA)*]
26 Respondent's Factum, para 56.
27 *R v Marakah* at paras 27-28.
28 *R v Tessling* at para 24.
29 *R v Marakah* at para 30.

domicile."[30] This raises fundamental questions about whether a privacy interest premised upon control over property can be meaningful for individuals who lack the resources or the authority to proactively secure their dignity.

18. There is a divide between those with the means to secure their privacy, and those who lack the autonomy or the resources to do so.[31] This is exemplified in *R v Le* by the Court's emphasis on the "central role" of control in assessing a claim for a reasonable expectation of privacy and by the respondent's focus on the lack of a gate as well as the low height of the fence.[32] Absent from this analysis is any consideration of whether the residents of this social housing property had the financial means or even the permission of their landlord to erect a gate, heighten a fence or affix a sign.

19. If the right to "choose to be left alone" is premised exclusively on the ability to admit or exclude[33] then what protected sphere remains for those living or visiting social housing, without the same level of control over property as a land owner? What kind of sphere of protection from state surveillance exists for the homeless individual seeking warmth and safety as the guest of a shelter or for an individual with no fixed address surfing from couch to couch and reliant on friends for a roof over their head? Should the absence of meaningful control over her space in a shelter deny a single mother fleeing intimate violence a protected sphere free from state surveillance? Or does such a mechanistic focus on control unreasonably compound the deprivation of an individual seeking refuge from circumstances in which she has very little security, control, dignity, or autonomy?

20. For those living in poverty, the fiction of choice and the absence of tools to assert privacy is often compounded by the heavy state presence of social and child welfare agencies[34] as well as

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30 *R v Jones* at para 40 (emphasis added).

31 Mosher at 44 and 52 **[TAB 1]**. See also Martha Jackman "The Protection of Welfare Rights Under the Charter" (1988) 20 Ottawa L. Rev. 257 at 326; O'Grady et al.

32 *R v Le* at para 36; Respondent's Factum, para 65

33 Respondent's Factum, para 51.

34 In the social welfare context, see *Falkiner v Ontario (Director, Income Maintenance Branch Ministry of Community and Social Services* (2000), 188 DLR (4th) 52 at para 124, 134 OAC 324 (ON SCDC). In the child welfare context, see *Winnipeg Child and Family Services v KLW*, 2000 SCC 48 at para 97; *Manitoba (Director of Child and Family Services) v HH and CG*, 2017 MBCA 33 at para 88.

the police. The over-representation of Indigenous and other racialized communities among those living in poverty is well-established, as is the reality that these communities are over-policed and consequently over-represented in the justice system.[35] As this Court found in *R v Grant*, "[a] growing body of evidence and opinion suggests that visible minorities and marginalized individuals are at particular risk from unjustified "low visibility" police interventions in their lives."[36]

21. Unreasonable state intrusions impair not only the dignity and autonomy of those living in poverty but their relationship with others – both state actors and friends. Efforts to reduce police interaction and scrutiny "often comes at the expense of individual and collective well-being by precluding social interaction, exacerbating stigma, and contributing to animosity in public space".[37] The chilling effects of an intrusive state upon those living in poverty oblige our courts to be alert for state actions that unreasonably play upon these vulnerabilities.[38]

D. The Coalition's Proposed Framework

22. The dichotomy in the evolution of section 8 jurisprudence and the diminished sphere of protection for those living in poverty suggests a need to eliminate the inordinate emphasis on control and ownership under territorial privacy through a new analytical framework. Without these necessary adjustments, the privacy protection that may inure to a claimant living in poverty will depend upon which side of the "blurred" lines between categories is selected by the court.

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35 Suzanne Bouclin, "Identifying Pathways to and Experiences of Street Involvement through Case Law" (2015) 38:1 Dal LJ 345 at 357–358; Report of the Aboriginal Justice Inquiry of Manitoba (Manitoba: The Inquiry, 1991), ch 16; Report of the Commission on Systemic Racism in the Ontario Justice System (Toronto: Queen's Printer for Ontario, 1995) at 358; *R v Jackson*, 2018 ONSC 2527 at para 46; *McKay v. Toronto Police Services Board*, 2011 HRTO 499 at para 103; *R v Brown* (2003), 64 OR (3d) 161 at para 9, [2003] OJ No 1251 (ONCA); *R v Golden*, 2001 SCC 83 at para 93; *R v S (RD)* [1997] 3 SCR 484 at para 47.

36 *R v Grant*, 2009 SCC 32 at para 154.

37 Forrest Stuart, "Becoming Copwise: Policing, Culture and the Collateral Consequences of Street-Level Criminalization" (2016) 50:2 Law & Soc'y Rev 279 at 279.

38 See for example, Dana Raigrodski, "Property, Privacy and Power: Rethinking the Fourth Amendment in the wake of U.S. v. Jones" (2013) 22:1 Boston University Public Interest LJ 67 [Raigrodski].

23. The Coalition's proposed framework relies on existing jurisprudence confirming the contextual approach to section 8 analysis while drawing on perspectives that are missing from the evolution of the law. The framework does not situate the specific nature of the privacy interest within one of the identified categories of privacy. Rather the approach uses a broadly applicable and adaptable purposive analysis as a means of returning to a respect for the fundamental purpose of the right. At each stage of the analysis, the assessment is centred on dignity and autonomy, recognizing that the considerations applied should promote those fundamental values:

1. The Subject Matter of the Search: The appropriate question to ask is what the police (or other state actor) were really after, in keeping with the approach to the assessment of the subject matter of the search as set out by the Court in *R v Marakah*.[39]

2. The Subjective Expectation of Privacy: This normative inquiry is from the perspective of the claimant's lived realities – meaning that it both acknowledges and accounts for the experiences of the claimant.

3. The Objective Reasonableness of the Expectation of Privacy: While the Coalition proposes retaining an assessment that is contextual and adaptable in the circumstances of each case, the new framework addresses both gaps and rigidities in the existing factors which have contributed to the marginalization of certain individuals and populations.[40] The proposed factors are:

- Whether there is a significant power imbalance between the state and privacy claimant, recognizing the inherent imbalance experienced by individuals from vulnerable communities;

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39 *R v Marakah* at para 15.

40 See for example Raigrodski; Elizabeth Schultz, "The Fourth Amendment Rights of the Homeless" (1992) 60:5 Fordham L Rev 1003 at 1028–30; Gregory Townsend, "Cardboard Castles: The Fourth Amendment's Protection of the Homeless's Makeshift Shelters in Public Areas" (1999) 35:2 Cal WL Rev 223 at 233; Lindsay J Gus, "The Forgotten Residents: Defining the Fourth Amendment House to the Detriment of the Homeless" (2016) 2016:1 U Chicago Legal F 769 at 784–785.

- What the social realities, practices, and customs are in relationships and communities related to the subject matter of the search, including any particular vulnerabilities in those relationships and communities. This incorporates an assessment of the character of the governing relationship; [41]

- The manner of the search, including a qualitative assessment of the level of intrusiveness of the search and whether the state can demonstrate that the power imbalance between the state and the claimant did not compromise the existence of the protected right, including in the manner and circumstances of the search and/or seizure;

- Where the subject matter of the search could be accessed by third parties, whether that access is limited or constrained to certain uses or purposes;

- Whether the subject matter of the search is exposed to the public, and if so, whether that exposure is informed and voluntary;

- Whether the claimant made efforts to indicate or demonstrate an expectation of privacy, such as precautions taken to maintain privacy, which would lead an outside observer to understand that a degree of privacy was sought; and,

- The uses of the subject matter of the search and whether the community and/or the state displayed acquiescence to that use, regardless of legality. In a dignity-centred approach, the existence of acquiescence supports the objective reasonableness of the expectation of privacy, but a lack of acquiescence is not determinative.

24. Adoption of the proposed framework rather than a mechanistic application of an analysis premised on control will ensure a focus on dignity and autonomy and assist in restoring a more robust sphere of privacy for those living in poverty.

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41 *R v Edwards* (ONCA) at 24.

PART IV. SUBMISSIONS ON COSTS

25. The Coalition does not seek costs and should not be liable to pay costs to any party.

PART V. ORDER SOUGHT

26. The Coalition takes no position regarding the disposition of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 20th day of August, 2018.

A Fenske

Byron Williams, Allison Fenske and Dayna Steinfeld

PART VI. TABLE OF AUTHORITIES

Case Law	Paragraph(s)
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Legislation	**Paragraph(s)**
Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act***,** 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c. 11, s. 8, *Charte canadienne des droits et libertés,* partie I de la *Loi constitutionelle de 1982, constitutant l'annexe B de la Loi de 1982 sur le Canada (R-U)*, 1982, c 11, art. 8.	1

Secondary Sources	**Paragraph(s)**
Bill O'Grady, Stephen Gaetz & Kristy Buccieri, *Can I See your ID?: The Policing of Youth Homeless in Toronto* (Toronto: Justice for Children and Youth, and Homeless Hub Press, 2011)	1, 18
Dana Raigrodski, "Property, Privacy and Power: Rethinking the Fourth Amendment in the wake of U.S. v. Jones" (2013) 22:1 Boston University Public Interest LJ 67	21, 23
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