

# What is privacy?

- End in itself?

“the right to be let alone”

*Olmstead v. U.S.* (1928)

# What is privacy?

- Means to other ends

“privacy is grounded in physical and moral autonomy – the freedom to engage in one’s own thoughts, actions, decisions”

*R. v. Dagg*, [1997] 2 S.C.R. 403 at para. 65

# What is privacy?

- Bodily
- Territorial
- Informational

## Bodily privacy

- "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."

*R. v. Dyment*, [1988] 2 S.C.R. 417 at 431-2

- "... 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*, [1987] 1 S.C.R. 945 at 949

## Territorial privacy

"... 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] 3 S.C.R. 432 at 15

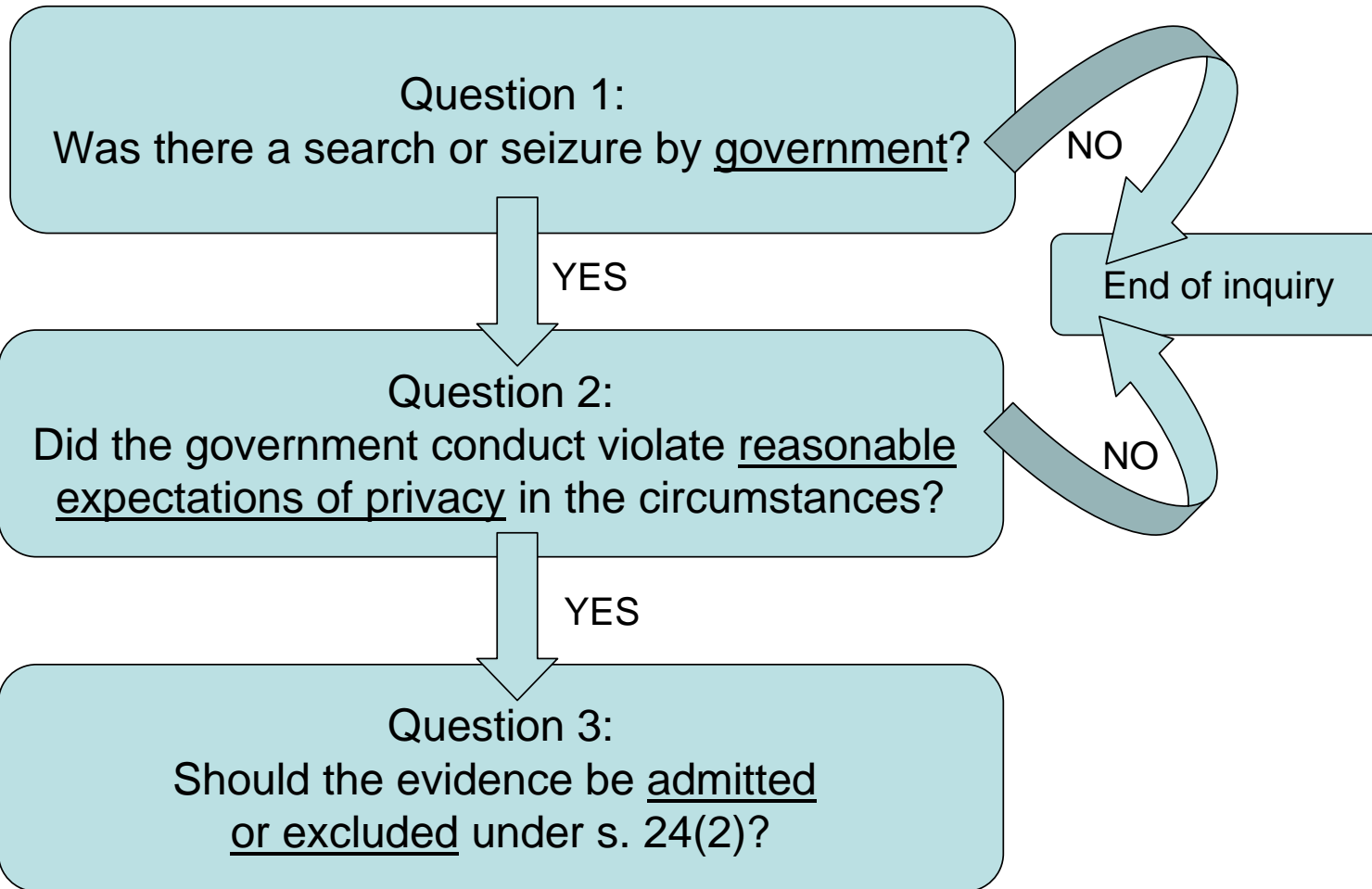
## Informational privacy

“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*, [1988] 2 S.C.R. 417 at 431-2

## Section 8

“Everyone has the right to be secure against unreasonable search and seizure.”



# Question 1

## search or seizure?

- (a) Was there a search or seizure by government or its agent(s)?
- (b) "Totality of the circumstances" test (*Edwards & Tessling*):

Did the accused have a reasonable expectation of privacy?

- Did the accused have a subjective expectation of privacy?
- Was that subjective expectation objectively reasonable, having regard for:
  - place/subject matter
  - public view
  - abandonment
  - third party access/control
  - reasonableness of technology
  - nature of information revealed by technology

## Question 1

### “Government” search or seizure?

- Acts of private parties not acting as agents of the state not covered:
  - *Weir* – ISP
  - *M(MR)* – principal
  - *Maffei & Pohoretsky* – doctor

# Question 1

## Subjective Expectation of Privacy

- notionally burden on the accused to prove, but,  
(*R. v. Edwards*, [1996] 1 S.C.R. 128 at para. 45)
- may presume occupants of a home expect information about what happens inside the home to be private  
(*R. v. Tessling*, [2004] 3 S.C.R. 432 at para. 38)

# Question 1

## Objective reasonableness: place and subject matter

- Place & subject matter:

(*R. v. Edwards*, [1996] 1 S.C.R. 128 at para. 45(6))

- nature of the place or subject matter
- presence at time of search
- possession, control (ability to regulate access to), ownership (not mandatory), historical use of property or place searched

# Question 1

## Objective reasonableness: place and subject matter

- Notional hierarchy:
  - Bodily – strip search vs. external frisk  
(*R. v. Golden*, [2001] 3 S.C.R. 679)
  - Territorial spectrum – home, home perimeter, commercial space, private cars, school, prison  
(*R. v. Tessling*, [2004] 3 S.C.R. 432)
  - Informational – biographical core of information, intimate lifestyle details  
(*R. v. Plant*, [1993] 3 S.C.R. 281)

# Question 1

## Objective reasonableness: place and subject matter

- Examples:
  - » *Edwards* – friend's apartment
  - » *Boersma* – crown land
  - » *Mann* – pockets
  - » *Belnavis* – car
  - » *Aucoin* - computer

# Question 1

## Objective reasonableness: in public view?

- Less likely to be a reasonable expectation of privacy in relation to things that are in public view/access:
  - » *Tessling* – heat emanation
  - » *Plant* – hydro records

# Question 1

## Objective reasonableness: abandonment

- Less likely to be a reasonable expectation of privacy where subject matter seized was abandoned:
  - » *DMF* – cigarette butt
  - » *Krist* – garbage bags

# Question 1

## Objective reasonableness: third parties

- Less likely to be a reasonable expectation of privacy where information in the hands of third parties with no obligation to maintain confidentiality:
  - » *Hutchings* – phone number
  - » *Ryan* – counseling records
  - » *Dersch* – blood samples
  - » *Weir* - email

# Question 1

## Objective reasonableness: police technique

- Less likely to be a reasonable expectation of privacy where police techniques are unintrusive:
  - » *Tessling* – FLIR
  - » *Wong* – video surveillance
  - » *Duarte* – audio surveillance
  - » *Evans* – air sniffing

## Question 1: Objective reasonableness: surveillance technology & results

- Less likely to be a reasonable expectation of privacy where nature and quality of information police are able to obtain falls short of core biographical or intimate information
  - *Tessling*:
    - » general use
    - » effect of placing inside of home

If a reasonable expectation of privacy is established, then ask whether state conduct violated that expectation.

## Question 2

### reasonable expectation of privacy violated?

- (a) Prior authorization of search or seizure?
- (b) If prior authorization, presumed reasonable, unless accused can establish otherwise.
- (c) If no prior authorization, presumed unreasonable unless government can show:  
(Collins)
  - (i) authorized by law;
  - (ii) the law is reasonable; and
  - (iii) search carried out in a reasonable manner.

## Question 2

# Reasonableness of police conduct: prior authorization

- “Prior authorization”: (*Hunter and Thomson*)
  - neutral and impartial arbiter able to act judicially;
  - reasonable grounds, established under oath, to believe that an offence has been committed;
  - reasonable grounds to believe will recover something affording evidence of the particular offence under investigation; AND
  - only seize documents strictly relevant to the offence under investigation.

## Question 2

### challenging prior authorization

- inadequacy/defect in information to obtain the authorization
  - *Araujo* – minor drafting errors
  - *Plant* – information obtained in violation of s. 8
  - *Wiebe* – admissions taken in violation of s. 10(b)
- unreasonableness of law under which prior authorization was granted (*Hunter*)
  - *Lavallee* – search of solicitor's office
  - *SAB* – DNA sample procedures
  - *Thomson* – compelled production of business records

## Question 2

# Reasonableness without prior authorization

- Once accused shows search &/or seizure were warrantless, considered unreasonable unless crown can prove:
  - authorized by law;
    - *Mann* - common law
    - *Collins, Grant, Kokesch, Plant* – statutory provision
  - law was reasonable; and
    - *Grant* – exigent circumstances
  - conduct was reasonable.
    - *Collins, Kokesch*– no r&p grounds
    - *Grant, Plant* – no exigent circumstances

Given an unreasonable search and/or seizure should the evidence obtained be excluded or admitted under s. 24(2)?

## Question 3

### exclude or admit evidence?

- Would admission of the evidence bring the administration of justice into disrepute, having regard for (*Collins*):
  - trial fairness
  - seriousness of Charter violation
  - factors escalating violation
  - effect of excluding evidence

## Question 3

### Admit or exclude: trial fairness

- Trial fairness:
  - nature of evidence & nature of right violated
    - conscriptive vs. non-conscriptive
      - drugs seized during search (*Plant, Collins*)
  - vs.
  - statements obtained in violation of right to counsel (*Therens*)

### Question 3

## Admit or exclude: seriousness & escalation of Charter violation

- Seriousness of Charter violation:
  - flagrant/wilful vs. good faith/non-deliberate
    - *Collins* – tackle and throat hold
    - *Daley* – consent of accused
    - *Aucoin* – outside of warrant
    - *Smith* – intentional wrongdoing
  - non-exigent circumstance vs. urgent situation (e.g. to prevent loss of evidence)
  - no alternative non-violative measures available vs. less intrusive measures available
- Escalated by choice of intrusive option

## Question 3

### Admit or exclude: effect of excluding evidence

- Effect of excluding evidence:
  - necessary to substantiate charge?
  - seriousness of offence
    - *Smith* – child pornography

# Recap

1. Was there a search or seizure? (depends on existence of REP)
2. Did the state violate the REP?
3. Should the evidence be excluded or admitted under s. 24(2)?