

I AM WHERE I AM: SEEING MOBILITY RIGHTS THROUGH THE LENS OF PRIVACY



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PART 1: INTRODUCTION

The Charter of Rights and Freedom affords (1) “Every citizen of Canada ... the right to enter, remain in and leave Canada” and (2) “Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right *a*) to move to and take up residence in any province; and *b*) to pursue the gaining of a livelihood in any province.” Historically, the Courts had the opportunity to examine mobility rights in the context of employment and economic terms.

In the days of the Charter’s inception, Lee and Trebilcock wrote that there are three rationales for the protection of economic mobility and that the rationale adopted demarcates the scope of constitutional protection being sought¹. The rationales are as follows: 1) privacy and personhood, 2) mobility is a characteristic of citizenship, and 3) mobility of goods and services benefits economic efficiency. In arguing that privacy and personhood are a rationale for mobility rights, Lee and Trebilcock primarily rely on the writing of American constitutional scholar Laurence Tribe. Tribe believes that the American ‘right to travel’ is premised on a privacy/personhood rationale². Tribe’s conclusion is founded on a reading of U.S. Supreme Court Justice Stewart’s description that a right to travel as “not a mere constitutional liberty subject to regulation and control under conventional due process or equal protection standards’ but ‘a virtually unconditional personal right’”³. Lee and Trebilcock went so far as to declare that “[t]he main thrust of section 6, modified slightly by some provincial concerns, is to protect those

¹ Tanya Lee & Michael Trebilcock, “Economic Mobility and Constitutional Reform” (1987) 37 U.T.L.J.268 at 281.

² See, Laurence Tribe, *American Constitutional Law* (Mineola, NY: Foundation Press, 1978), 953-4.

³ *Shapiro v. Thompson* 394 U.S. 618, 642-3, 89 S.Ct. 1322 (1969).

mobility rights that are most closely tied to the concept of personhood.”⁴ While the arguments of Lee and Trebilcock may have established a personhood argument, their assertion that privacy is a rationale for the protection of economic mobility is not made clear within their text. The conceptions of personhood are not raised in light of actual privacy values, nor are personhood claims to privacy. Lee and Trebilcock fail to make a connection between any of the other common conceptions of privacy: to be free from interference, secrecy, control of personal information, and intimacy⁵. What stems from Lee and Trebilcock’s discourse is an argument for an individual right, which then is enshrined with an economic right centred on the ability to earn a livelihood.

Writing in 1987, Lee and Trebilcock were on to something. There is value in conceiving of a connection between mobility rights and privacy. However, Lee and Trebilcock’s argument seems unable to stand up in the face of the ensuing years of Charter. This paper’s discourse presents an alternatively formulated argument that there is a connection between mobility rights and privacy. The power of technology to reveal facets of personal information seems to be constantly increasing. Presently, technological measures to identify and authenticate individuals and their personal information are being built into the technologies that surround us. Such technology is being deployed in a myriad of objects that surround, including cell phones, clothing, the walls of buildings, and automobiles. Resulting from the spreading of the systems and applications of these technologies is the ensnaring of an individual’s movement and activities – their personal mobility.

Personal mobility has seen little, if any, interpretation beyond its stance as an economic right in the interprovincial sense. However, the lens of privacy makes it possible to assert a

⁴ Lee, *supra* note 1 at 283.

⁵ For a discussion on the conceptions of privacy see Daniel Solove, “Conceptualizing Privacy” (2002) 90 Calif. L. Rev. 1087 at 1099-1124.

right to personal mobility, regardless of the jurisdictional origin of a law or action. Mobility is a personal right to move about unobstructed and free from barriers, be they laws or actions of government. Barriers, however, can some times be subtle in form. They can be systems that can contain an individual. Seeing mobility rights through the lens of privacy allows for a reformulation of the rights, for within mobility there are privacy interests.

This paper's discourse begins with an overview of the role of mobility rights in Canada in Part 2. In Part 3, the discourse the moves in a different direction to present how the advancement of location-based systems and applications create barriers to mobility. This section illuminates the connection between the underlying privacy interests of the containment of mobility. Part 4 offers a new interpretation of s.6 of the Charter, the right of personal mobility, which results from an expanded view of mobility rights in light privacy as a Charter value. Finally, Part 5 demonstrates how this expanded mobility right benefits existing privacy values. The paper concludes in Part 6 by showing that s.6 of the Charter, as is a sleeper provision, and there is more to it than meets the eye.

PART 2: MOBILITY RIGHTS IN CANADA

Section 6 of the Charter grants a right a measure of individual freedom with the right to depart from and return to the country and to move about it freely. This right is a vital component to national citizenship as it affords Canadians the ability to move from province to province to seek employment without any prejudice. Mobility rights are meant to prevent government infringements that can range from harsh and overt acts such as banishment and confinement to more discreet barriers to an ability to move about freely, such as passenger 'watch' lists requiring screening of passengers prior to airline travel .

Section 6 provides Canadians with a right to re-enter the country, which is also a component of citizenship. Primarily this right has been used as a vehicle of the employment residence right established by s.6(2). However, mobility rights have additional capacities that have yet to be challenged.

Section 6 of the *Charter* reads as follows:

- (1) Every citizen of Canada has the right to enter, remain in and leave Canada.
- (2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right
 - a) to move to and take up residence in any province; and
 - b) to pursue the gaining of a livelihood in any province.
- (3) The rights specified in subsection (2) are subject to
 - a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and
 - b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.
- (4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

(i.) Application

A closer examination of the language in s.6, specifically of ss.6(3) and (4), anticipates the governments rather than being the protectors of mobility rights may be the prospective infringers⁶. The language is not one that would compel either the federal or provincial governments to take any measures to protect these rights. As with all other provisions of the Charter, s.6 is a means of instituting a degree of human dignity in the face of government power.⁷

Section 6 enjoys a level of special status compared to most other Charter provisions. It cannot be superseded by the s.33 legislative override, and the enactment of a notwithstanding clause cannot trump the right. Only two other Charter rights enjoy this status, democratic rights

⁶ Emilio Binavince, "The Impact of the Mobility Rights: The Canadian Economic Union – A Boom or A Bust?" 4 (1982) 14 Ottawa L. Rev. 340 at 347.

⁷ *Ibid.*

in s.3 and the minority language educational rights in s.23. As with any other Charter protection, however, a right to mobility is not an absolute right and an infringement can be justified under s.1.

Unlike other guarantees within the Charter, mobility rights do not have a connection to the *Bill of Rights*⁸. Without any direct or equivalent provision, s.6 of the Charter escapes a history of case law prior to its entrenchment⁹.

Central to the application of s.6 is that it applies only to Canadian citizens. This is the case of s.6(1). Non-citizens, including permanent residents, who may try to enter the country, do not have guaranteed protection for international mobility. Section 6(2), on the other hand, provides for a more expanded entrenchment of mobility rights as it extends the right to domestic mobility to permanent residents. Reference to the definition of a permanent resident in the *Citizenship Act*¹⁰ is used to determine who “permanent resident” is¹¹. Another wrinkle to the use of the words “every citizen of Canada” in s.6 is the exclusion of corporations from enjoying mobility rights¹². If the Charter adopted language such as “everyone” or “any person” in the place of “every citizen”, then corporations would be able to enjoy mobility rights. While a corporation’s access to mobility rights has yet to be tested before the courts, this is the overwhelming opinion of legal commentary.¹³

(ii.) International movement: the right to enter and leave Canada

⁸ R.S.C. 1960, c.44.

⁹ John Laskin, “Mobility Rights Under the Charter” (1982) 4:89 SC L.R. at 91.

¹⁰ R.S.C. 1985, c. C-29.

¹¹ *Solis v. Canada (Minister of Citizenship and Immigration)* (2000), 186 D.L.R. (4th) 512. (F.C.A.). The court held that the meaning of this section’s use of “citizen” is not independent of the meaning under the *Citizenship Act*.

¹² The Federal Court Trial Division in *Parkdale Hotel Ltd. v. Attorney-General of Canada et al.* (1986), 27 D.L.R. (4th) 19, [1986] 2 F.C., held that only natural persons can benefit from the rights guaranteed under s.6(2) as they do not continue to corporations.

¹³ Peter Hogg, *Constitutional Law of Canada* (Scarborough, ON: Carswell, 2002) at 43.1(c); *Laskin, supra* note 9 at 96; Blache, “The mobility rights” in Tarnopolsky et al., eds., *Canadian Charter of Rights and Freedoms: Commentary* (1982) at 242.

Section 6(1) constitutionalizes a protection against government law or action that may exile or deport a Canadian citizen.¹⁴ Prior to the enactment of the *Charter*, the freedom to leave the country was not entirely clear.¹⁵ While the language of s.6(1) only provides citizens for the right to enter and leave the country, it is, however, possible for a non-citizen to enjoy some form of a limited right to remain in Canada.¹⁶ The Supreme Court of Canada in *Singh v. Minister of Employment and Immigration*¹⁷ ruled that any non-citizen, legal or illegal, who claims refugee status, is entitled to the procedural requirements of fundamental justice. Until a refugee claimant has the result of their hearing, they benefit from a constitutional right to stay in Canada.

(ii.) Interprovincial mobility

With the dual spheres of governmental authority institutionalized in a federal system, drafters of the Charter were concerned for the need to establish a protection for the fluid movement of citizens between provincial borders. Section 6(2) originates from a series of dialogues, debates and negotiations from the Charter drafting days¹⁸ to address these concerns. During the constitutional debates leading up to the drafting of the Charter, interprovincial mobility rights were characterized as principally being “... the cement that holds our economic union together”¹⁹. Section 6(2) is seen as a right to move about the country freely in order to secure and maintain a livelihood. This right, however, does not confer a guaranteed right to

¹⁴ This paper does not address the matter of international mobility, which has formed the lineage of jurisprudence surrounding s.6(1) for it mainly pertains to matters of extradition. See, for e.g., *United States v. Burns*, [2001] 1 S.C.R. 283, 175 D.L.R. (4th) 1; *Chiarelli v. Canada* (Minister of Employment and Immigration), [1992] 1 S.C.R. 711, 90 D.L.R. (4th) 289; *United States v. Cotroni*, [1989] 1 S.C.R. 1469, 96 N.R. 321.

¹⁵ *Hogg*, *supra* note 13 at 43.1(b).

¹⁶ *Ibid.* at 43.1(c).

¹⁷ [1985] 1 S.C.R. 177.

¹⁸ *Binavince*, *supra* note 6 at 341-342.

¹⁹ H.C. Deb., 32nd Parl., 1st sess., at 8288 (16 Mar. 1981).

work.²⁰ An issue of infringement of mobility must be triggered in order for an infringement of s.6 to take shape.

The right protected by s.6(2)(a) encompasses a desire to prevent a provincial law that would discriminate against new residents of the province. Section 6(3)(a) would be of no assistance to such a law as it establishes an exception for new residents and discriminates on the basis of previous or present residence, and would not be a law of general application.

*Black v. Law Society of Alberta*²¹ and *Canadian Egg Marketing Agency v. Richardson*²² are the two leading cases on the interpretation of section 6(2) and section 6(3). *Black* challenged two rules of the Law Society of Alberta undertaken to prevent the formation of interprovincial law firms in the province. With the first rule, the Law Society prohibited partnerships between an Alberta resident lawyer and a non-resident. The second rule prevented members of the Alberta Bar from being partners in more than one firm. The rules were challenged by members of the Alberta Bar, some of whom resided outside of the province.

The Supreme Court, in examining the Law Society's rules, held that the Law Society infringed s.6(2)(b). The rules impaired the ability of non-resident lawyers to earn a livelihood in Alberta. As the rules fell outside of s.6(3) they could not be saved by it as their purpose was to discriminate between lawyers on the basis of their residence. Further, the court considered the rules in light of s.1, concluding that they were not within reasonable limits. The Law Society could have achieved its goals through means that did not infringe s.6(2)(b).

The issue of the connection between s.6(2)(b) and s.6(3)(a) received consideration by the Supreme Court of Canada in *Canadian Egg*. The case pertains to a federal regulation involving

²⁰ In *Law Society of Upper Canada v. Skapinker* [1984] 1 S.C.R. 357 [*Skapinker* cited to S.C.R.], the Supreme Court ruled that a separate right to work, which is distinct from a mobility right, is not established by subsec. 2(b). paras. (a) and (b) relate to transfer and mobility to another province, either for residence or employment.

²¹ [1989] 1 S.C.R. 591 [*Black* cited to S.C.R.].

²² [1998] 3 S.C.R. 157 [*Canadian Egg* cited to S.C.R.].

the marketing scheme for eggs. Contained in the scheme was a regulation that denied egg producers of the Northwest Territories from interprovincial marketing and export of their product. The constitutionality of the regulation was called into question as it was an obvious denial of the right to pursue the gaining of a livelihood. Without a quota allocation granted by the scheme, Northwest Territories egg producers could not participate in interprovincial trade. In reaching its decision, the Court examined the case in light of s.6(3)(a). The Court found that s.6(3)(a) was not like s.6(3)(b) and 6(4), which are “saving” provisions, like s.1 of the Charter. Rather, s.6(3)(a) is to be read in conjunction with s.6(2), thereby forming a single right, to examine the question of whether the matter is based primarily on province, or in this case territory, of residence. The majority held the regulation was valid and non-discriminatory and that the marketing scheme did not discriminate on the basis of residence. The discrimination was on the basis of applying the quotas which were based on historical production patterns that existed before egg production occurred in the territories.

The Court’s exposure to matters of s.6(2) mobility rights is limited, with issues pertaining to restrictions on employment forming the majority of jurisprudence²³. In early days of Charter commentary, s.6 has been described as the “sleeper” provision²⁴. All that is required is a catalyst to redefine and expand the right.

²³ See, for e.g., *Malartic Hygrade Gold Mines Ltd. v. The Queen in right of Quebec et al.* (1982) 142 D.L.R. (3d) 512 (Que. S.C.); *Re Demaere and The Queen in right of Canada* (1984), 11 D.L.R. (4th) 193, [1983] F.C. 755 (C.A.); *Law Society of Upper Canada v. Skapinker* (1984), 1 S.C.R. 357; 9 D.L.R. (4th) 161; *Mia v. British Columbia (Medical Services Commission)* (1985), 17 D.L.R. (4th) 385, 61 B.C.L.R. 273 (S.C.); *Ford v. Saskatchewan Land Surveyors Assn.* (1992), 91 D.L.R. (4th) 391; *Waldman v. British Columbia (Medical Services Commission)* (1999), 177 D.L.R. (4th) 321, [1999] 12 W.W.R. 542, 67 B.C.L.R. (3d) 21 (C.A.); *Archibald v. Canada* (2000), 188 D.L.R. (4th) 538 (F.C.A.).

²⁴ *Binavince*, *supra* note 6 at 365.

PART 2: MOVEMENT AND ACTIVITIES

A. THE TECHNOLOGY OF LOCATION

GPS (global positioning system) satellite tracking and e-911 (enhanced 911) are three of the core buzzwords surrounding the hype of location-aware technologies²⁵. What these technological systems have in common is not that they are location-aware or location-based technologies; rather it is that they are wireless and mobile technologies. The following section details some of the technologies and systems that underlie location-based technology in order to establish a functional understanding of the technological subject matter for the discourse.

(i.) RFID Tags

The concept behind RFID tags is to have a minute and inexpensive means of uniquely identifying the objects that they are attached to. RFID tags can be both passive and active, and operate at both low and high frequencies. An RFID tag, at its most basic level, is composed of an antenna and a computer chip that contains the unique identifier. Low frequency RFID tags are read from close distances and often have the difficulty of identifying specific items if there are many tags nearby.²⁶ Passive tags operate at low frequencies and use small electronic circuits that operate without an internal power source.²⁷ To transmit its identification, a passive tag receives an electric current broadcasted from the RFID reader, which powers the tag to transmit²⁸. Active tags, on the other hand, operate at a higher frequency, which allows them to be read from a greater distance. A requisite for an active tag is that they contain their own

²⁵ Tim Weber, "Talking barcodes that change our lives" *BBC News* (28 April 2004), online BBC <<http://news.bbc.co.uk/1/hi/business/3632015.stm>>; Alorie Gilbert "RFID goes to war" *C/Net News* (22 March 2004), online: News.com <<http://news.com.com/2008-1006-5176246.html>>; Daniel Terdiman "Making Wireless Roaming Fun" *Wired News*, online: Wired.com <<http://www.wired.com/news/games/0,2101,63011,00.html>>.

²⁶ Roy Want, "RFID A Key to Automating Everything" *Scientific American* 290:1 (January 2004) at p.59.

²⁷ *Ibid.* at 58.

²⁸ *Ibid.*

power source.²⁹ New data can be transmitted to the tags as they have greater memory and can be combined with other sensors.³⁰ Readers themselves are location-aware. Once a tag's is gleaned, that data can be combined with the reader's location information and processed or stored.³¹

(ii.) Mobile Phone Automatic Location Identification

The term Automatic Location identification ("ALI") is a popular term for location awareness in mobile phones. Behind ALI are various ways of identifying the location of a mobile user. These systems are based upon either handset-based or network-based positioning systems. In the first category, handsets are manufactured with GPS reader chips to facilitate the determination of a user's location with an accuracy of 5 to 40 meters.³² GPS systems are found in both mobile handsets and handheld devices such as PDA's. Network-based positioning solutions include two methods for location identification. The first is "Time of Arrival" and the second is "Cell Global Identity and Timing Advance", which is used in conjunction with handset-based systems.³³ Network-based positioning solutions, which generally identify the location of a cell-phone tower, understandably do not have the accuracy that handset-based systems do as there can be large distance between towers. However, GPS handsets combine their data with tower data for greater accuracy.

(iii.) Wi-Fi

Wi-Fi, short for "wireless fidelity", recently emerged as a viable technology for wireless data access. Devices such as laptops and PDA's provide users with a fast mobile internet

²⁹ "RFID", *Wikipedia*, online: Wikipedia <<http://en.wikipedia.org/wiki/RFID>>.

³⁰ Mark Brand, "RFID Gussied Up With Biosensors" *Wired News* (26 August 2003), online: Wired.com <<http://www.wired.com/news/privacy/0,1848,60156,00.html>>.

³¹ Declan McCullagh, "RFID tags: Big Brother in small packages" *C/Net News* (13 January 2003), online: News.com <<http://news.com.com/2010-1069-980325.html>>.

³² Norman Sadeh, *M-Commerce: Technologies, Services and Business Models* (New York: Wiley computer publishing, 2002) at 191.

³³ *Ibid.* at 193.

experience. Wi-Fi began to grow in market popularity in the latter half of 2002. Initially the technology was used for wireless internet access within offices and buildings. However, this mode of delivery is now evolving with nodes, or hotspots as they are known³⁴, springing up in locations such as Starbucks, hotels and airports.³⁵

With a Wi-Fi base station, known as a router, connected to a broadband connection, such as DSL or cable high speed, devices such as notebooks and PDA's equipped with Wi-Fi wireless network cards can share the internet connection emanating from the base station.³⁶ A single router is not designed to allow multiple user access³⁷; however, with hotspots coming online in a large variety of locations, wireless internet service providers ("WIPS's")³⁸ hope to create meshed networks of hotspots to provide continuous wireless internet access. These mesh networks create interconnected grids of hotspots to facilitate seamless delivery of access.³⁹ With a simple software upgrade, Wi-Fi enabled devices can be location-aware and provide location of users on that network.⁴⁰

(iv.) GPS

GPS was originally an initiative by the United States Department of Defence (DoD) in the 1970's.⁴¹ Today, it still is primarily funded and controlled by the DoD, even though there is civilian access to the system. The European Union is in the process of developing its own GPS

³⁴ John Borland, "Is Wi-Fi the Missing Link?" *C/Net News* (4 February 2003), online: News.com <<http://news.com.com/2009-1033-982113.html>>.

³⁵ D. Akin, "Do You Want Wi-Fi to go with those Fries?" *The Globe and Mail* (12 March 2003) B5.

³⁶ "Wi-Fi Deserves a Chance" *C/Net News* (13 October 2002), online: News.com <<http://news.com.com/2009-1069-961391.html>>.

³⁷ *Borland, supra* note 34.

³⁸ Ben Charny, "Wi-Fi for Handhelds Gets a Push" *C/Net News* (14 November 2002), online: News.com <<http://news.com.com/2100-1033-965875.html>>.

³⁹ *Borland, supra* note 34.

⁴⁰ There is a variety of software products available to track the physical location on those connected to a Wi-Fi network. See, e.g. Newbury Networks' Wi-Fi Watchdog, <<http://www.newburynetworks.com/>>; Airespace's Control System: Location Tracking <http://www.airespace.com/products/AS_ACS_location_tracking.php?AIRE=f91647c46213d2775839dfabc7e6dc>.

⁴¹ "GPS", *Wikipedia*, online: <<http://en.wikipedia.org/wiki/GPS>> ["GPS"].

system, known as Galileo⁴², which should be fully functional in 2008. Initially, non-military adoption of GPS receivers was for navigation and scientific research. However, there is now a growing consumer market as the cost for receivers shrinks and more commercial uses are being developed.

The GPS system is composed of a pattern of 24 satellites orbiting the Earth. Each satellite incorporates a computer, an atomic clock and radio transmission equipment.⁴³ The satellite transmits a specially encoded signal that is picked up by a GPS receiver. The receiver translates the signal and is able to ascertain accurate readings of time, velocity, elevation, longitude and latitude.⁴⁴ The accuracy of location information varies from 10 meters down to 1.⁴⁵

(v.) The beginning of locationhood

While radio-frequency identification, mobile telephony and GPS have been existence in some form for decades, it is in the recent development and deployment of the systems and applications where novelty exists. What presents a mobility-sensitive reality is not that there are so many instances of location-based technologies, systems and applications. Rather, it is that there are so many instances that can be interconnected. Advances in hardware, fuelled by Moore's Law⁴⁶, is the prominent force behind the expansion of location-based systems. Currently, many of the individual nodes behind the location systems exist as objects that surround the individual: the car, clothing, mobile phones, transit systems and walls with tag readers. The next logical step in development is for these technologies to enter the body.

⁴² "What is Galileo" ESA (European Space Agency), online: ESA
<http://www.esa.int/export/esaSA/GGGMX650NDC_navigation_0.html>

⁴³ "Global Positioning System", *Searchmobilecomputing* online: Whatis.com
<http://searchmobilecomputing.techtarget.com/sDefinition/0,,sid40_gci213986,00.html> ["Global Positioning"].

⁴⁴ "GPS", *supra* note 41.

⁴⁵ "Global Positioning", *supra* note 43.

⁴⁶ Moore's Law states that that the number of transistors on computer chips doubles every 18 months. This translates to a doubling of computer power every in that time period, while conversely the cost of computing power drops. This 'law' was coined by Intel co-founder Gordon Moore. See, "Intel – Moore's Law"
<<http://www.intel.com/research/silicon/mooreslaw.htm>>.

Research into implantable identification chips has been underway for quite some time.⁴⁷ Thus, with an identification chip inside the body, anyone's identity can be authenticated and their movements and actions surveilled by the things that are around them: the things in locationhood.

B. CONTAINING MOBILITY

It has been observed that mobility is "...often viewed in terms of risk to the safe and static containers of space, territory and social order."⁴⁸ In the face of the continuous development and deployment of location-aware technologies, there is an invisible movement to re-impose containers of space, territory and social order. As this ubiquitous lattice of a pervasive multimedia location-aware technology permeates across the global village, a neighborhood is being created around the individual. The neighborhood forming around an individual is a neighborhood of location: locationhood. The existence of locationhood arises due to a renaissance in mobile technologies, which have the capacity to identify the location of an individual, existing in conjunction with the unfolding of public, semi-private and private systems that seek to identify the comings-and goings of the public. This cross-pollination of location-identification technologies and applications produces the ability for an individual, their movements and activities to be recognized and ensnared by the neighborhood of the things around them. The essence of this neighborhood is to surveil and authenticate the identity or, at the very least, some personally identifiable information of a person as it relates to their movement within space and time.

⁴⁷ "GPS implant designed for humans 'tested'" *New Scientist* (16 May 2003), online: *New Scientist* <<http://www.newscientist.com/news/news.jsp?id=ns99993740>> ["GPS implant"].

⁴⁸ Peter Adey, "Secured and Sorted Mobilities: Examples from the Airport" (2004) 1:4 *Surveillance and Society* 449, online: *Surveillance and Society* <[http://www.surveillance-and-society.org/articles1\(4\)/sorted.pdf](http://www.surveillance-and-society.org/articles1(4)/sorted.pdf)> at 502.

The neighborhood created by locationhood moves as the person moves, for it is a neighborhood established by the location-aware objects that surround a person. The information gleaned by these nodes seamlessly pass through databases for collection and retention of an individual's mobility. Locationhood comes alive as a person moves about in the environment. Mobility within a location-aware 'neighborhood' is the driving force of its reality.

The preceding section provides brief descriptions of current enabling location-aware technologies. These technologies in of themselves, save for RFID, were not designed to be tracking technologies; their primary purpose is something else. However, the location-aware functionality built into these technologies acts as the foundation for a plethora of location-based services, systems and applications that will emerge in years to come. As will be seen in this section, there is a propensity within these systems to identify, authenticate and surveil. The ramification of these three occurrences is that an individual's mobility can be contained.

(i.) RFID based location systems and applications

As the cost of RFID tags continues to drop, the promise of their adoption for new uses and applications grows.⁴⁹ In commercial sectors, there is a push behind RFID tags as costs are such where it is possible for them to replace UPC barcodes.⁵⁰ However, the future of RFID extends beyond the stock room⁵¹ and shelves. Being so thin, small and cheap RFID tags have the ability to be incorporated into most objects. Consider the following examples:

⁴⁹ Howard Rheingold, "RFID Zeitgeist" *TheFeature* (15 October 2003), online: TheFeature <<http://www.thefeature.com/article?articleid=100132&ref=986263>>.

⁵⁰ *Want*, *supra* note 26 at 58.

⁵¹ "Wal-Mart's RFID Plans to be Put to the Test" *Information Week* (29 March 2004), online: Information Week <<http://www.informationweek.com/story/showArticle.jhtml?articleID=18402888>>.

- The European Central Bank has entered into an agreement with Hitachi to embed RFID chips into euro bills, as a means of thwarting counterfeiting.⁵² The contents of these RFID chip might only reveal its serial number, place of origin and denomination.⁵³ However, the possibility for “smart” cash raises serious concerns over the diminishment of anonymity from the cash system. As cash passes through the money system, moving from reader to reader, the velocity and flow of a particular bank note can tracked, stored and compared against other databases. The potential exists for records to be collected to narrow down, or even accurately ascertain, who had contact with a specific bill at a point in time. Furthermore, it is feasible for readers, which could be placed anywhere, to scan and individual and determine how much cash they are carrying at any given point in time.

- Location-enabled newspapers: Advances in printing technology could bring about printed conducive inks which will allow for an entire newspaper to be “smart”. They will be able to “understand what’s getting bought where, when.”⁵⁴

- Knowledgeable books: Libraries are already looking to track their books. The San Francisco library says that it will deactivate the passive tags before they leave a branch.⁵⁵ However, what if a tag is not disabled, or purposefully re-enabled once it is outside a library? The tag on the book will know, at the very least, what the title of a book is and which library branch it is from. However, the book could have an active tag and contain information on who signed out the book.

⁵² Junko Yoshida, “Euro bank notes to embed RFID chips by 2005” *EE Times* (19 December 2001), online: *EE Times* <<http://www.eetimes.com/story/OEG20011219S0016>>; Janis Mara, “Euro Scheme Makes Money Talk” (9 July 2003) *Wired News*, online: *Wired.com* <<http://www.eetimes.com/story/OEG20011219S0016>>.

⁵³ Winston Chai, “Euro notes may be radio tagged” *C/Net Asia* (22 May 2003), online: *ZDNet UK* <<http://news.zdnet.co.uk/business/0,39020645,2135074,00.htm>>.

⁵⁴ Jim Rosenberg, “Printable Radio Tags Could be Used to Track Newspapers” *Editor & Publisher* (15 October 2003), online: *Editor & Publisher* <http://www.editorandpublisher.com/eandp/news/article_display.jsp?vnu_content_id=2001992>.

⁵⁵ Ron Harris, “SF library wants to track books with computer chips” *Associated Press* (3 November 2003), online: *USA Today* <http://www.usatoday.com/tech/news/internetprivacy/2003-10-03-sf-library-rfid_x.htm>.

(ii.) Non-RFID location-based systems and applications

- Smart mail: The 2003 President's Commission on the United States Postal System recommended⁵⁶ that the U.S. Postal Service actively pursue the development of an intelligent mail system.⁵⁷ Behind this initiative is a means of using barcodes, special stamps and other means of uniquely identifying mail to effectively track at minimum information regarding the sender, destination and class of mail.⁵⁸ Once successfully deployed, Intelligent Mail will provide for real-time tracking of individual pieces of mail. Now imagine smart mailboxes that can read information from a piece of mail, instantly knowing who the sender and recipient of the mail are. This information is catalogued in a database along with the location of the mailbox and time/date information. Or, consider the same mailbox tracking letters to or from a person, or type of person, that has been flagged in a database and maintaining records of their mail from a point of origin. This information can be flagged and transmitted to authorities.
- Black box in a car: The genesis of wide-spread adoption of "black boxes" for cars is underway. The devices operate based on mobile phone and GPS systems to track the location of vehicles, along with speed, acceleration and deceleration. If a vehicle gets into an accident, a microprocessor recognizes, times the event and transmits a distress signal, which can be picked up by authorities and insurance companies.⁵⁹ On November 6, 2003, the Irish government announced an agreement to implement a black box system for the nation's cars that is linked to

⁵⁶ U.S., President's Commission on the United States Postal Service, *Making Tough Choices to Preserve Universal Mail Service* (July 31, 2003), online: United States Department of Treasury <<http://www.ustreas.gov/offices/domestic-finance/usps/pdf/freport.pdf>> ["Making Tough Choices"].

⁵⁷ Alorie Gilbert, "Postal ID plan creates privacy fears" *C/Net News* (12 August 2003), online: News.com <<http://news.com.com/2100-1028-5062617.html>>.

⁵⁸ "Making Tough Choices", *supra* note 56 at p.143.

⁵⁹ Peggy Anne Saltz, "Every Move You Make" *TheFeature* (17 November 2003), online: TheFeature <<http://www.thefeature.com/article?articleid=100214&ref=991571>>.

an emergency notification system⁶⁰. It has been reported that one Nordic government anticipates being able to use the technology to monitor drivers and how economically they drive them. Driving patterns would affect the tax rate that a consumer pays at the gas pump.⁶¹ The British government is exploring a similar possibility, but for road toll charges.⁶² Now consider that in the not-so-distant future, telematics-based⁶³ systems combined with black box systems that are connected to a central Transportation Ministry system. If a car is found to be speeding, the system can either alert nearby law enforcement, or transmit a signal to the car's computer forcing it to slow down.

- Personal locators: A desire to be connected to those around you, fear of losing a loved one, especially a child, and employee monitoring are some of the main reasons driving the development of location tracking applications. Depending on the service and device used, tracking technology uses an amalgamation of GPS, mobile phone and even Wi-Fi. It will not be long for location tracking chips to be implanted within the body, to allow for ubiquitous and continuous tracking.⁶⁴ Legoland⁶⁵, for example, allows parents to use a hybrid RFID/Wi-Fi device to be worn by children, so that parents can track their movements inside of the park^{66 67}.

The city of Murakami, Japan is planning a program allow parents to track their children's

⁶⁰ "A Flight Data Recorder for Your Car" *Business Week Online* (7 November 2003), online: Business Week <http://www.businessweek.com/technology/content/nov2003/tc2003117_1963_tc119.htm>.

⁶¹ Saltz, *supra* note 59.

⁶² Juliette Jowett, "Black box in car to trap speed drivers" *The Observer* (3 August 2003), online: Guardian Unlimited <http://observer.guardian.co.uk/uk_news/story/0,6903,1011463,00.html>.

⁶³ Telematics is a combination of wireless data and telecommunications technologies. System providers are able to provide location-based services, along with and secure voice, data and entertainment features. The technology and devices are embedded within the vehicle. See "Tomorrow's Technology Today: Telematics is driving automotive communications into the 21st century" *Motorola*, online: <<http://www.motorola.com/mot/documents/0,1028,91,00.doc>>; "Microsoft Software in Every Car?" *Associate Press* (30 November 2003), online: Wired.com <<http://www.wired.com/news/autotech/0,2554,61412,00.html>>.

⁶⁴ "GPS implant", *supra* note 47.

⁶⁵ Legoland Billund, Denmark, is one of Europe's largest theme parks.

⁶⁶ Jonathan Collins, "Lost and Found in Legoland" *RFID Journal* (28 April 2004), online: RFID Journal <<http://www.rfidjournal.com/article/articleview/921/1/1/>>.

⁶⁷ The child wears a wrist band with the tracking device. If a parent and child are separated, the parent sends a SMS (short-message-service) text message to the system to ascertain their child's location within the park, see Kidspotter, <<http://www.lego.com/legoland/billund/whatsNew/default.asp?locale=2057>>.

movements through a website. The service will use a GPS-enabled device that will be subsidized by the city.⁶⁸ Mobile phone providers offer a “find a friend” type service, where users can locate friends and acquaintances within certain proximity and get their location.⁶⁹ Application providers are springing up to provide a variety of location-based services such as dating⁷⁰, location-based mobile gaming⁷¹ and family finding⁷².

- ALI in the United States: The United States Government’s Enhanced 911 (“e-911”) initiative is spurring further development in the accuracy of location tracking. The United States *Wireless Communication and Public Safety Act of 1999*⁷³ ⁷⁴ (“WCPSA”), creates e-911 as a method of identifying a user and their location when they place a 911 emergency calling, as is the case with wired calls using caller-ID⁷⁵. Through the guise of a Federal Communications Commission (“FCC”) mandate, e-911 is divided into two phases.⁷⁶ Phase 1 requires that carriers upon request from a Public Safety Answering Points (“PSAPs”), which are 911 operators, convey the telephone number of the mobile user placing the call, along with the location of the

⁶⁸ “Japan plans GPS tracker for teens” *Associated Press* (2 October 2003), online: Globe and Mail <<http://www.globetechnology.com/servlet/story/RTGAM.20031002.gtgpsoct2/BNSStory/Technology/>>.

⁶⁹ Mark Ward, “Being tracked down by your mobile” *BBC News* (23 June 2003), online: <<http://news.bbc.co.uk/1/hi/technology/3012170.stm>>; Jorgen Sundgot, “mMode get location service” *infoSync World* (27 June 2002), online: infoSync World <<http://www.infosyncworld.com/news/n/1993.html>>.

⁷⁰ Ben Charny, “Tracking manufacturers map out future” *C/Net News* (27 February 2003), online: News.com <<http://news.com.com/2100-1039-990473.html>>, see Findtheone.com <<http://www.findtheone.com/>>.

⁷¹ Justin Hall, “Mogi: Second Generation Location-Based Gaming” *TheFeature* (1 April 2004), online: *TheFeature* <<http://www.thefeature.com/article?articleid=100501&ref=991571>>; Elisa Batista, “U.S. Set for Mobile Game Invasion” *Wired News* (6 March 2003), online: *Wired* <<http://www.wired.com/news/wireless/0,1382,57889,00.html>>.

⁷² See TruePosition <http://www.trueposition.com/tech_app_ent.html>.

⁷³ Pub. L. 106-81, § 3(b) [WCPSA],

⁷⁴ The coverage of the WCPSA extends beyond the implementation of location tracking for wireless means. However, such matters are beyond the scope of this paper. For an extensive discussion of the Act, see: P. Ten Eyck “Dial 911 and Report a Congressional Empty Promise: The Wireless Communications and Public Safety Act of 1999” FCLJ 53, Online: WESTLAW 54 Fed. Comm. L.J. 53.

⁷⁵ United States Federal Trade Commission, *The Mobile Wireless Web, Data Services and Beyond: Emerging Technologies and Consumer Issues* (12 December 2000), online: <<http://www.ftc.gov/bcp/workshops/wireless/001212.htm>> at Mr. Schlichting’s first instance [“FTC Day 2”].

⁷⁶ *Eyck, supra* note 74 at pg. 58.

antennae/cell site that routes the call.⁷⁷ Phase 2 aims to placate concerns over the weakness in accuracy of location identification by requiring returned location information (“LI”) be precise to 50 to 100 meters.⁷⁸ Phase 1 is now complete and the FCC mandate instils that carriers must implement Phase 2 accuracy in network equipment and handsets by 2005.⁷⁹ Under e-911 carriers must bear the cost of upgrading their networks. As such, location based m-commerce services are seen as a significant way to re-coup the hundreds of millions of dollars in upgrade costs for each carrier.⁸⁰

- ALI in Canada: The telecommunications industry in Canada operates an e-911 initiative. However, it is mainly for wireline carriers and not wireless operators. Unlike the approach taken by the FCC, The Canadian Radio-Television Telecommunications Commission (CRTC) does not have an e-911 requirement. However, if a wireless service provider applies to become a fully regulated service provider, then it must meet certain e-911 stipulations.⁸¹ The Canadian Wireless Telecommunications Association (“CWTA”) spearheads its own location identification initiative.⁸² The industry group is experimenting with matching e-911 call identification data with cell-site locations, and where possible sector LI⁸³ to generate location identification results. Additionally, GPS-based location identification occurs. As such, Canada’s development and deployment of ALI technology remains behind that of other nations.

- Tracking Transit Use: Transport for London, the city’s transit system operator, in 2003 instituted use of the Oystercard smartcard system as a means of payment. Transit users, who

⁷⁷ United States Federal Communications Commission, *Enhanced 911*, online: FCC <<http://www.fcc.gov/911/enhanced/>> (last modified: 3 March 2003) [“FCC e-911”].

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

⁸⁰ Ellen Traupman, “Who Knows Where You Are? Privacy and Wireless Services” (2001) 10 *Comlcon* 133 2001 at 133.

⁸¹ See 9-1-1 Service - Rates for Wireless Service Providers, Centrex Customers and Multi-Line Customers/Manual Access to the Automatic Location Identification Database (29 October 1999), Telecom Decision 99-17, online: CRTC <<http://www.crtc.gc.ca/archive/eng/Decisions/1999/DT99-17.htm>>.

⁸² See “CWTA E9-1-1 Overview”, online <<http://www.cwta.ca/CWTA%20Site/english/E911.html>>.

⁸³ *Ibid.*

opt to use the card, pay a lower fare and avoid some time in lines.⁸⁴ To use the card, users must provide information such as their name, address and phone number. All of which must be confirmed in person if purchased online.⁸⁵ What brings this system into the realm of locationhood is that Transport London tracks the movements of passengers through the system with the card.⁸⁶ Each card has a unique ID number and non pre-pay cards are linked to a specific individual.⁸⁷ Those who choose to pay-per-use and pay either in coin or purchasing tickets will pay a higher rate for fares.⁸⁸ When a card is read, either at a tube station or on a bus, its ID number and location information is sent to a central database.⁸⁹

The preceding descriptions are by no means meant to provide a comprehensive list of location-based systems and applications that are either in use or in research and development today. Rather, they are just a sampling of some key applications, especially those that revolve around the spheres of governments and public services. In actuality, there is a multiplicity of location-aware technologies, systems and applications that are be mixed and matched producing new outlets for location-based products.

C. PRIVACY INTERESTS IN PERSONAL MOBILITY

The growth of the city, advancements in air travel, to developments of portable electronics and computing have all contributed to the shaping of a present mobile society. Intertwined with today's mobile world is information technology. Manuel Castells, in his study

⁸⁴ "What is Oyster?", online: Oystercard <<http://www.oystercard.com/love.php>>.

⁸⁵ See registration page for the Oystercard, online: Oystercard <<https://sales.oystercard.com/oyster/lul/entry.do>>.

⁸⁶ Aaron Scullion, "Smart cards track commuters" *BBC News* (25 September 2003), online: BBC <<http://news.bbc.co.uk/2/hi/technology/3121652.stm>>.

⁸⁷ *Ibid.*

⁸⁸ See, Transport for London 2004 fares, online: Transport for London <<http://www.transportforlondon.gov.uk/common/downloads/2004-fares-revised.pdf>>.

⁸⁹ *Scullion, supra* note 86.

of space and time, theorized that the society exists in a space of flows.⁹⁰ “Our society is constructed around flows: flows of capital, flows of information, flows of technology, flows of organizational interaction, flows of images, sounds, and symbols.”⁹¹ As people are no longer confined to specific locations, such as the village, mobility within space and time is the norm.⁹² Resulting from a society that is shaped by a space of flows is that both privacy and surveillance now correspond to a world of flows.⁹³ Workers and families flow through cities, people flow across borders and information flows through networked and telecommunications systems. “The means of communication are increasingly mobile, and people on the move cannot thus hope to evade surveillance.”⁹⁴

Surveillance seeks to determine who is where and what they are doing at a given point in time.⁹⁵ Tracking the movement of an individual is a central aspect to surveillance systems as they seek to monitor the physical and virtual activities to ascertain their place in space and time.⁹⁶ Concern for surveillance of mobility is all the more pressing with the likelihood of personal mobility data being combined with other databases of activity, such as Internet usage, social insurance and health data. Locationhood technology imposes barriers to personal mobility. As it is a pervasive interconnected system of mobility, which is growing towards ubiquity, anonymity disintegrates in a system of surveillance. Mobility - one’s movement and actions - is the concern of surveillance. Perhaps the composition of a person’s character is formed on the spot, based on their identity and the things that are around them. *I am where I am.*

⁹⁰ Manuel Castells, *The Rise of the Network Society* 3rd ed. (Oxford, Malden, MA: Blackwell Publishers, 2000) at 408.

⁹¹ Manuel Castells, *The Rise of the Network Society* 1st ed. (Cambridge, Mass: Blackwell Publishers, 1996) at 412.

⁹² Collin Bennett & Patricia Regan, “Surveillance and Mobilities” *Editorial* (2004) 1:4 *Surveillance and Society* 449, online: *Surveillance and Society* < [http://www.surveillance-and-society.org/articles1\(4\)/editorial.pdf](http://www.surveillance-and-society.org/articles1(4)/editorial.pdf) > at 451.

⁹³ David Lyons, “Surveillance Studies: Understanding visibility, mobility and the phonetic fix” *Editorial* (2002) 1:1 *Surveillance and Society* 1, online: *Surveillance and Society* <<http://www.surveillance-and-society.org/articles1/editorial.pdf>> at 3.

⁹⁴ *Ibid.*

⁹⁵ *Bennett, supra* at note 92 at 452.

⁹⁶ *Ibid.*

Surveillance is a cardinal means of controlling mobility.⁹⁷ This connects to Michel Foucault's focus on the Panopticon.⁹⁸ Foucault applied the Panopticon as a metaphor to society in general. Foucault surmised that people restricted their actions and policed themselves, for they felt they were always being watched and want to avoid punishment.⁹⁹ Foucault, however, felt it was not the state that was doing the watching. Rather it was the networks of power that people have.¹⁰⁰ The Panopticon, however, is a very powerful metaphor and is all the more applicable in a technologically networked society for "the machinery of the worldwide communications network constitutes a kind of camouflaged Panopticon."¹⁰¹ Information flows between the state, its agents and corporations. Thus, with the permeation of location-based surveillance systems, mobility is being contain and controlled. This panoptic effect, which is implicit in locationhood, is that there is a chilling effect on what may be lawful activities. If a person is aware that technological networks are monitoring one's mobility and locations, then they may be concerned with who knows what and when they may use that information.

Locationhood is a neighborhood of location-based systems and applications that identify movement and activities, the mobility, of those inside it. In accomplishing this, locationhood presents barriers to mobility. In connecting the dots in a burgeoning, but still substantial, location-aware environment technology no longer allows individuals to move about freely. Rather, histories of movement are being established, thus containing an individual. The data extrapolated from location-based systems and applications can be collected and matched in real-time against other surveillance data, including earlier instances of mobility, online traffic

⁹⁷ Adey, *supra* note 48.

⁹⁸ The Panopticon was a 19th Century prison design by Jeremy Bentham. The prison was designed to instil a sense of discipline and social order, as inmates were aware that they could be observed at any point in time.

⁹⁹ Michel Foucault, *Discipline and Punish*, trans. Alan Sheridan (New York: Vantage, 1995).

¹⁰⁰ *Ibid.* at 195-228.

¹⁰¹ Howard Rheingold, *The virtual community: homesteading on the electronic frontier* (Cambridge, Mass: MIT Press, 2000) at 285.

data and CCTV¹⁰² cameras that are enabled with face-recognition software. The net result of surveillance through mobility data is the amplification of the verves of locationhood, which are the containment of mobility and the provision of rich mobility data that can be used for any number of future purposes.

The supposition of locationhood is that an individual's privacy, as it is understood in a myriad of ways, is eroded due to the voluminous amount of information pertaining to their movement and activities, which can be collected and retained to be used for in any number of ways. It is not difficult to imagine acts of prejudicial action based on location identification, ascertained by mobility that can affect access to services, the democratic process or equality. This, however, is not the limit of the nexus between personal privacy and location-enabled technology. Such devices and systems can be used to contain an individual within locationhood. By identifying location and a person's identification, the devices and systems can respond in a variety of ways: they can alert officials of a person's activities, they can record movement and other information to be used as evidence later on and access to places and objects can be slowed or blocked. An individual can be contained.

Locationhood is a form of 'peer-to-peer' surveillance concerned with the movement and activities of an individual. This form of surveillance affects mobility not necessarily because it exists as a likely affront to privacy. Rather, locationhood creates barriers to mobility. The specter of privacy is material to this matter as there is a privacy interest in personal mobility due to the formation of the barriers. A person may be fearful of visiting a relative in an AIDS hospice out of concern of being tagged for having been at that location. A chef, having just purchased a new knife, will think twice about bringing the RFID tagged package through a transit system on her

¹⁰² Closed-Circuit Television surveillance cameras are sophisticated enough to pan, tilt and zoom in on a specific person.

way to work, as an info system will be aware that she carries such objects in public. A university student writing a report on political criticism and terrorism will avoid walking past government buildings with research materials that are checked out of the library. Locationhood can impose chilling effects to mobility impinge on a person's unhindered mobility.

PART 4: MOBILIZING MOBILITY RIGHTS IN CANADA

The previous section's discourse demonstrates how locationhood technologies are imposing barriers to mobility and how they may no longer permit individuals to move about with unhindered access. What is gained from this is an understanding is that there can be chilling effects to what would be otherwise lawful movement and activity or that there might be acts by government that surveil individuals, which is a containment on mobility. This understanding only comes into focus in light of privacy interests and considerations. The lens of privacy allows for a greater understanding of mobility rights, which offers a new interpretation and or expansion of the rights contained in s.6. The following section will offer an interpretation for a right to personal mobility, which is to be able to move about the country unhindered, as understood by privacy values.

A. INTERPRETING A CHARTER RIGHT

The Charter is a living document and is meant to be read in a progressive manner that eschews a search for the original intent of Parliament. Charter rights are meant to be interpreted in a contemporary manner as the meaning of rights change over time. The Charter is also meant to be interpreted in a purposive manner as its purpose is to guarantee and protect rights. Furthermore, the Charter is meant to be considered in a generous matter, as the Courts prefer to err on the side of generosity as the original intent of the framers of the Charter is to limit state

power, and give full effect to the rights of the Charter. In *Hill v. Church of Scientology*¹⁰³, the Supreme Court of Canada opened the door to the possibility for protecting a Charter value, even though it may not be specifically enumerated in the language of the Charter. The Court felt that in interpreting the Charter in light of the values entrenched in it, the Court should look at the right and the basic values that arise from that right, and not the reverse.

Privacy is a right that underlies many of our Charter rights and holds constitutional significance.¹⁰⁴ As was observed in *R. v. Eurocopter*¹⁰⁵, privacy rights attract the protection of the Charter that is equal to other Charter values.¹⁰⁶ Privacy is a hallmark of the Charter. The Supreme Court of Canada in *R. v. Dyment*¹⁰⁷, in obiter, adopts the view that privacy is at the heart of liberty in a modern state.¹⁰⁸

Grounded in man's physical and moral autonomy, privacy is essential for the well-being of the individual. For this reason alone, it is worthy of constitutional protection, but it also has profound significance for the public order. The restraints imposed on government to pry into the lives of the citizen go to the essence of a democratic state¹⁰⁹.

What emerges from the Court's value of privacy is that it underlies many of our Charter values and it ranks high in the hierarchy of values meriting protection in a free and democratic society.¹¹⁰ Privacy has been invoked as a right to be protected in the face of Charter violation in several different instances. In *R. v. Beare*¹¹¹, privacy was invoked in the context of the s.7 right to liberty and security of the person.¹¹² In *R. v. O'Connor*¹¹³, while the majority felt that privacy was a constitutional right, they however, did not indicate its source. The dissent, however, held that

¹⁰³ [1995] 2 S.C.R. 1130; [1995] S.C.J. No. 64 [*Hill* cited to S.C.R.].

¹⁰⁴ *Edmonton Journal v. Alberta [Attorney General]* [1989] 2 S.C.R. 1326; [1989] S.C.J. No. 124 [*Edmonton Journal* cited to S.C.R.] at para. 90.

¹⁰⁵ *R. v. Eurocopter Canada Ltd* [2003] O.J. No. 4238.

¹⁰⁶ *Ibid.* at para. 91.

¹⁰⁷ [1988] 2 S.C.R. 417 [1988] S.C.J. No. 82 [*Dyment* cited to S.C.R.].

¹⁰⁸ *Ibid.* at 427.

¹⁰⁹ *Ibid.* at 427-428.

¹¹⁰ *Edmonton Journal*, *supra* note 104 at para. 90.

¹¹¹ [1988] 2 S.C.R. 387, at paras. 58-61.

¹¹² [1988] 2 S.C.R. 387, at p. 412.

¹¹³ [1995] 4 S.C.R. 411.

liberty includes privacy.¹¹⁴ In *Hunter v. Southam*¹¹⁵, the Supreme Court of Canada held that privacy rights, specifically a reasonable expectation of privacy, underlie the protection of the s.8 right against unreasonable search and seizure. Thus, there is a clear resolute desire by the courts to protect constitutional rights in light of a privacy interest.

B. PRIVACY RIGHTS BENEFITING MOBILITY RIGHTS

Privacy allows the worth of mobility rights to come to the fore as Justice Cory wrote, in *R. v. Edwards*¹¹⁶: “[t]he right to be free from intrusion or interference is a key element of privacy”¹¹⁷. If one’s ability to move about freely is obstructed because one’s privacy is deteriorated in a location, i.e. movement, sensitive surveillance society, then how could one expect to have a freedom of mobility?

The Supreme Court of Canada informs us that there are situations and places that raise certain sensitivity for requiring privacy¹¹⁸. Personal mobility is premised on being able to move between these zones without any barriers. The Court observes in *Hunter* that privacy moves with the individual.¹¹⁹ The Court in *Dyment* acknowledges this decision by commenting that *Hunter* “ruptured the shackles that confined these [privacy] claims to property.”¹²⁰ A significant amount of information about a person can be gleaned from their movements and actions in the world. Thus, the monitoring of one’s location is no longer minimally intrusive.

..the threat to privacy inherent in subjecting ourselves to the ordinary observations of others pales by comparison with the threat to privacy posed by allowing the state to make permanent electronic records of our words or activities.¹²¹

¹¹⁴ *Ibid.* at para.. 111.

¹¹⁵ [1084] 2 S.C.R. 145 [*“Hunter”*] at 159.

¹¹⁶ [1996] 1 S.C.R. 128.

¹¹⁷ *Ibid.* at para. 50.

¹¹⁸ *R. v. Dyment*, [1988] 2 S.C.R. 417, at p. 428-29 [*Dyment* cited to S.C.R.].

¹¹⁹ *Hunter*, *supra* note 115.

¹²⁰ *Dyment*, *supra* note 118 at para.. 20.

¹²¹ *R. v. Wong* [1990] 3 S.C.R. 36; [1990] S.C.J. No. 118 at para. 16.

As previously stated, one possible barrier to mobility are the chilling effects in otherwise lawful activity that may result from a Panopticon-like mentality in a locationhood environment.¹²² However, one other barrier that exists is the concern for the information that may be retained and used at a later point in time. This goes beyond being observed, tracked and authenticated at any given point in time. Rather this is a concern for an ensuing retention of information, which is a by-product of one's mobility. Bundled in the information about are mobility inferences and conclusions. Such things may affect a person's dignity and reputation.

While not mentioned in the Charter, good reputation of a person is inherent to dignity. Dignity is another matter that underlies Charter rights.¹²³ As seen in *Hill*, protection of a person's good reputation is of fundamental importance to Canada's democratic society. Reputation is intimately related to the right to privacy.¹²⁴ The information that emerges from the containment from one's mobility is a by-product of an infringement of what should be a reasonable expectation of privacy in personal mobility. As was seen in Part 3 C, concerns for inferences of activities, which can have stigma that affects reputation, can have chilling effects on lawful activity. Having too many locationhood dots connecting to each other is an affront to mobility as it relates to privacy and dignity. Underlying privacy interests in mobility allow for an interpretation of personal mobility that will allow an individual to move about unhindered.

It has been argued that intraprovincial mobility is a requisite for personal mobility and that s.6(2) does not create such a right.¹²⁵ In *McDermott v. Nackawic*¹²⁶ the court felt bound by the Supreme Court's decision in *Skapinker* that s.6(2)(a) and (b) do not establish a distinct right

¹²² See Part 3.

¹²³ *Hill*, *supra* note 103 at para. 107.

¹²⁴ *Ibid.* at para. 121.

¹²⁵ Armand de Mestral and Jan Winter, "Mobility Rights in the European Union and Canada"(2001) 46 McGill L.J. 979 at 989.

¹²⁶ *McDermott v. Nackawic (Town)* [1987] N.B.J. No. 950; *McDermott v. Nackawic (Town)* (1988) 53 D.L.R. (4th) 150.

to work that is not connected to mobility and that these rights are for the movement to another province to either work or establish a residence from which to seek work. The New Brunswick Court of Appeal affirmed the lower courts finding and agreed that the Town of Nackawic's by-law of requiring permanent employees of the town to live in the town.

The *McDermott* decision does not, however, close the door to the possibility of the *Charter* affirming a form of intraprovincial rights. The *McDermott* court relied on the decision of *Skapinker* to apply it to an argument for intraprovincial mobility under s.6(2), as it relates to mobility in the context of employment. The Court in *Skapinker* examined s.6(2)(b) and determined that a free-standing right to employment does not exist. *Skapinker* declared that s.6(2)(b) cannot be read in isolation; it must be considered in light of ss. 2(a) and the heading of "mobility rights". While this case history does dampen arguments for intraprovincial mobility, it does not close the door to them.

The *Skapinker* and *McDermott* courts did not expound upon the possibility that s.6(2)(a) in of itself creates an intraprovincial mobility right on its own. A literal reading of the language of s.6(2)(a) does not provide for a guarantee of freedom to intraprovincial mobility. However, the argument has been put forth that reading s.6(2)(a) in connection with the provision of s.6(3)(a) connotes that a right to intraprovincial mobility exists as well¹²⁷. S.6(3)(a) applies to discriminatory treatment, i.e. actions or laws, that is based on residence that is within the province. If s.6(2)(a) was meant to apply strictly to inter-provincial mobility, then s.6(3)(a) would be unnecessary as it is an exception for laws or practices of general application¹²⁸.

Intraprovincial mobility allows for the essence of mobility rights to be transposed to small spheres of movement and negates the need for the crossing of territorial borders. They,

¹²⁷ *Binavince*, *supra* note 6 at 361.

¹²⁸ *Ibid.*

however, are not a requisite to personal mobility as privacy values allow for an expanded understanding of personal mobility as a Charter right. While it is arguable that an intraprovincial right does exist, there is an interest in being able to move about geographical space, either within a province or across the country. The privacy interests arising from mobility rights bolster the interpretation of a right that is connected to intraprovincial mobility. The language of s.6(2) contains the words “to move to and take up residence”. While not yet interpreted by the courts, the supposition is made that taking up one’s residence includes being able to enjoy one’s residence with regards to unobstructed mobility. Furthermore, such a reading would extend to s.6(1), with respect to being able to “remain in” Canada. In the words of Justice Estey in *Skapinker*, “mobility rights” must mean rights of the person to move about, *within* [emphasis mine] and outside the national boundaries.”¹²⁹ Thus, while being in Canada, no matter where, one is free to move about freely. This right includes being free from barriers imposed by government and as demonstrated throughout this paper, new technologies, systems and applications that are location-based have the power to establish such barriers.

There is the criticism is that mobility rights, which apply only to citizens and, in the case of s.6(2) permanent residents restrict mobility rights from being seen as a human right.¹³⁰ However, the right to personal mobility, as argued by this paper, is connected primarily to s.6(2)(a), which applies to citizens and permanent residents. Granted, this language leaves out refugees, visitors to the country and other non-permanent residents. However, as with any Charter right, s.6 is not an absolute right. While privacy is a treasured right in Canada, there are instances where one’s right to privacy must be balanced with the interests of society. However, this does not mean that they are not entitled to any protections in regards to the barriers to

¹²⁹ *Skapinker*, *supra* note 20 at 377,

¹³⁰ *Lee*, *supra* note 1 at 990-91.

mobility that are linked to privacy. Personal mobility is connected to the enjoyment of one's place in a nation and being able to move about freely, which is linked to notions of liberty and being free from government interference, such as illegal searches. Thus, a privacy interest in personal mobility is linked to other Charter rights that are granted to every person.

PART 5: MOBILITY RIGHTS BENEFITING PRIVACY VALUES

The connection between personal mobility and privacy is a reciprocal one. Privacy allows for an expanded understanding of mobility rights, because of underlying privacy interests. Mobility rights can inform privacy values as they relate to other Charter rights. The right to mobility is a right that does not exist in isolation; rather it raises a bundle of issues that can encompass accompanying Charter rights.¹³¹ The notion of the right to move freely involves a substantial level of liberty and freedom from government intrusion, such as illegal search. When the specter of an infringement of mobility rights materializes, the infringement of other rights and freedoms is likely linked.¹³² Connections to the s.7 right to life, liberty and security of the person readily springs to mind in consideration that s.6 (2) deals with the ability to take up residence anywhere in Canada. It is in the s.8 protection against unreasonable search and seizure that the expanded right to personal mobility, offers an understanding of privacy interests greater gravitas.

In *R v. Wise*¹³³, it was found that the installation of an electronic tracking device inside of the appellant's vehicle constituted an unreasonable search. The subsequent monitoring of that location information violated a reasonable expectation of privacy and, without any prior authorization was a violation of s.8 of the Charter. The majority of the Court, however, felt that

¹³¹ *Binavince*, *supra* note 6 at 340.

¹³² *Ibid.*

¹³³ [1992] 1 S.C.R. 527; [1992] S.C.J. No. 16 [*Wise*, cited to S.C.R.].

one has a lower expectation of privacy while in one's car. As such the admissibility of the resulting evidence would not bring the administration of justice into disrepute

The court in *Wise* may have concluded that the search that resulted from installing a tracking device was only "minimally intrusive"¹³⁴. The Supreme Court of Canada observed that the tracking device used was very crude and was attached to the appellant's vehicle and not to appellant himself¹³⁵. The Court felt that the effects on the individual, from such a basic device, are different from those of hidden video camera or the surreptitious interception of private communications.¹³⁶ Such an observation allowed for the Court to make the finding that the location monitoring in this instance was minimally intrusive and justified.¹³⁷

Justice La Forest's dissent in *Wise* stated that "[a]n individual has a reasonable expectation of privacy not only in the communications he makes, but in his movements as well"¹³⁸. This sentiment was repeated, again in a dissenting opinion, in *Dagg v. Canada*¹³⁹. Such sentiment can be better understood light of a scheme for surveillance that is more sophisticated as targets the individual and not one specific object; it is concerned with their movement and activities. The underlying privacy interest in a mobility right, to move about unhindered and free from barriers, surely converges with a reasonable expectation of privacy in one's movement. The majority in *Wise* contends that a person has lesser expectation of privacy in a motor vehicle¹⁴⁰ than compared to that of the home or office. However, with the advancements in pervasive, location-aware, that moves as a person moves, privacy is at risk for privacy and personal mobility are becoming interconnected. Privacy is no longer static. Rather it is dynamic

¹³⁴ *Ibid.* at para. 18.

¹³⁵ *Ibid.* at para. 11.

¹³⁶ *Ibid.*

¹³⁷ *Ibid.* at para. 18.

¹³⁸ *Ibid.* at para. 70.

¹³⁹ *Dagg v. Canada [Minister of Finance]* [1997] 2 S.C.R. 403; [1997] S.C.J. No. 63 at 74.

¹⁴⁰ *Wong*, *supra* note 121 at 533-534.

as it is no longer anchored in a fixed place as techniques for infringing person's privacy are spiraling with advancements in surveillance. The Supreme Court of Canada has recognized that individuals have a right to be free from various forms of state surveillance. In *Wong*, the court felt that it inconceivable that the state would have an unqualified discretion in targeting whomever it wishes for surreptitious video surveillance^{141 142}. Perhaps, in light of the privacy concerns that the containment of personal mobility presents, the understanding of privacy in public will change and a greater link between privacy interests in movement will be achieved in light of mobility and other Charter rights. This need for a greater expectation of privacy becomes clear with the appreciation the connection between mobility rights and privacy.

PART 6: CONCLUSION

Mobility rights exist to protect an individual from laws or actions that affect their ability to move about freely. Mobility is more than just an economic right – it is a right to take up residence wherever one chooses. How could one enjoy the benefit of the autonomy that comes with residence if one's mobility is contained? How could one enjoy moving about the country? Or “remaining in”, to use the language of s.6(1)?

Privacy is a right that underlies the Charter and influences many of its rights. As has been demonstrated, privacy has been invoked to protect rights such as s.7 and 8 and the court has placed a value on the importance of protecting information of an individual's movements and activities in the face of surveillance. Through privacy concerns, it possible to see how systems that seek to monitor individuals' movement through society, and the information that is a by-product from such systems, affects one's reasonable expectation of privacy in one's

¹⁴¹ *Ibid.* at para 15.

¹⁴² See, also *R. v. Duarte* [1990] 1 S.C.R. 30; [1990] S.C.J. No. 2.

personal mobility as it is understood by an ability to have unrestricted movement through territory, be it inter or intraprovincially.

Mobility rights are better understood in light of privacy. In understanding the connection between mobility and privacy, exemplified by locationhood, the argument that a right to privacy underlies mobility rights, as it does other Charter rights, solidifies. Conversely, an expanded view of mobility rights permits a more enriched understanding of the privacy implications in light of information and surveillance systems that encroach on mobility. Mobility is matter of autonomy in being able to be mobile in society without any interference from government action. While it has been read primarily as an economic right, through the lens of privacy mobility rights can move in a new direction for the protection of barriers to personal mobility for there is more to s.6 than meets the eye.

“Because unceasingly we are bombarded with pseudorealities manufactured by very sophisticated people using very sophisticated electronic mechanisms. I do not distrust their motives. I distrust their power.”

Phillip K. Dick,
How to Build a Universe That Doesn't Fall Apart Two Days Later
1978¹⁴³

¹⁴³ Phillip K. Dick, “How to Build a Universe That Doesn't Fall Apart Two Days Later”, in Mark Hurst and Paul Williams, eds., *I Hope I Shall Arrive Soon* (New York: Doubleday, 1985), online: Deoxy.org <http://deoxy.org/pkd_how2build.htm>.