



Bob Aaron bob@aaron.ca

June 7 2003

Infrared camera ruled an invasion of privacy

RCMP measured thermal energy

Marijuana trafficking charges laid

In 1967, Pierre Trudeau announced "the State has no business in the bedrooms of the nation." Recently, Ontario courts have been considering whether the State has any business in other rooms of the house.

The issue of just how much privacy individuals have a right to expect in their homes arose in the context of a marijuana growing operation in Walter Tessling's house in Windsor, back in 1999.

The RCMP received a tip that Tessling was involved in the production and trafficking of marijuana. They contacted Ontario Hydro and verified that electricity consumption at the property was normal. Visual surveillance revealed nothing suspicious.

Ultimately, police flew over the house in an RCMP aircraft and used a Forward Looking Infrared (FLIR) camera to conduct a "structure profile" of the property.

The FLIR camera takes an image of the thermal energy or heat radiating from the outside of a building. It can detect heat sources within a home depending on the location of the source and how well the house is insulated, but it cannot identify the exact nature of the source or see inside the building.

Essentially, the camera is a device that photographs heat instead of light.

The use of FLIR technology assumes that while heat usually emanates evenly from a building, the halide lights used in marijuana grow operations give off an unusual amount of heat.

In this case, the camera indicated heat output patterns that could indicate a marijuana growing operation. This information was used to obtain a warrant to search Tessling's home, where police found a quantity of marijuana, scales and freezer bags.

When the trafficking and other charges got to trial, Tessling brought an application to exclude from evidence all items found in the house on the basis that the FLIR search was unlawful and violated his Charter privacy rights.

Section 8 of the Charter of Rights and Freedoms states, "Everyone has the right to be secure against unreasonable search or seizure."

At trial, Mr. Justice Gordon Thomson stated, "It is well recognized that the home should be granted the highest degree of protection from unwanted state intrusions."

Nevertheless, he found that the FLIR technology, if properly used in a valid search warrant, "does not constitute an unwarranted transgression or intrusion into the reasonably expected privacy of an occupant of a residence."

Tessling was convicted and appealed on the basis that the search was illegal. In the Ontario Court of Appeal, Madam Justice Rosalie Abella tossed out the search warrant and the convictions, stating that the FLIR technology constituted an unreasonable intrusion into Tessling's privacy for two reasons.

First, she said, the camera revealed information about activities that are carried on in the privacy of the home. Second, she ruled that the FLIR technology discloses more information about what goes on inside a house than is detectable by normal observation or surveillance.

According to the Ontario Court of Appeal, most members of the public have a reasonable expectation of privacy that would prohibit the government from using infrared aerial cameras to measure the heat coming from activities inside private homes as a way of trying to figure out what is going on inside.

In the United States, the Fourth Amendment to the Constitution provides citizens the right "to be secure in their persons, houses, papers and effects against unreasonable searches and seizures."

In 1991, U.S. federal agents used infrared technology to scan the house of Danny Kyllo in Florence, Oregon. Based partly on the thermal images, the agents obtained a search warrant and soon found a marijuana growing operation with more than 100 plants.

Ten years later, the case finally wound up in the Supreme Court of the United States. In a 5-4 decision, the court found that the use of FLIR technology without a search warrant was an unreasonable search without a warrant. It struck out the evidence obtained by the thermal images and the subsequent search warrant.

As many as 500 Canadian cases now before the courts could be affected by the Tessling decision. The federal Crown attorney is seeking leave to appeal the case to the Supreme Court of Canada. Personally, I hope the Ottawa Supremes will reach the same conclusion as their counterparts in Washington and in the Ontario Court of Appeal.

What do you think?

Should the Supreme Court of Canada come down on the side of personal privacy, or are the police justified in using thermal imaging cameras, directional microphones and other technology to infringe on the privacy of a home without a warrant?

E-mail your letters to newhomes@thestar.ca or fax them to 416-869-4410.

Bob Aaron is a Toronto real estate lawyer. Send questions to Bob Aaron, 10 King Street East, #1400, Toronto, Ontario M5C 1C3, or by e-mail to bob@aron.ca, phone 416-364-9366, or fax 416-364-3818.

Bob Aaron is a Toronto real estate lawyer. www.aron.ca ©Aaron & Aaron. All Rights Reserved.