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## Search heats up home privacy concerns

The Supreme Court of Canada's decision in the Walter Tessling case is a blow to the right of personal privacy for Canadians.

It's also in stark contrast to a decision of the United States Supreme Court, which produced the opposite result on a virtually identical set of facts.

Last month, the Supreme Court of Canada ruled an infrared image of a house taken from an airplane without a search warrant does not intrude on a homeowner's privacy rights.

Reversing a ruling of the Ontario Court of Appeal, our nation's highest court ruled the photography did not violate the Charter right to be free from unreasonable search and seizure.

In 1999, the RCMP received a tip that Walter Tessling was involved in the growing and trafficking of marijuana in his Windsor home. They used an airplane with an infrared camera to fly over Tessling's house.

The camera takes an image of the thermal energy or heat radiating from the outside of a building. It can detect heat sources inside a home, but can't identify the exact nature of the source or see inside the building.

The heat could be from a sauna, hot tub, overheated toaster or a halide lamp used to grow marijuana. The camera can't tell the difference.

Based on the thermal images and sketchy information from two informants, the RCMP were able to obtain a search warrant for the house and raided it. They found marijuana worth at least \$15,000, along with scales, and several guns.

Tessling's conviction at trial was overturned by the Ontario Court of Appeal on the basis the camera technology discloses more information about what goes on inside a house than is detectable by normal observation. In my opinion, Justice Abella was correct when she wrote that members of the public have a reasonable expectation of privacy that prohibits the government from using cameras to determine what is going on inside the house.

That reasoning was reversed in Ottawa. Writing for the Supreme Court, Justice Ian Binnie wrote that the heat profile did not expose any intimate details of Tessling's lifestyle or part of his "core biographical data." It only showed that some activities in the house generate heat.

Given the "totality of the circumstances," the court ruled, the technology did not intrude on the reasonable sphere of privacy of the homeowner.

The Supreme Court acknowledged its decision differed from that of the United States Supreme Court in a 1991 case.

Both section 8 of the Canadian Charter of Rights and Freedoms, and the Fourth Amendment to the U.S. Constitution, guarantee citizens the right to be secure from unreasonable searches and seizures.

But the U.S. ruled the infrared camera search was unconstitutional, based on the "sanctity of the home."

The Canadian court declined to follow the reasoning of the U.S. judges.

The one saving grace to last month's decision was that the court left open the possibility that in future it might revisit the issue as technology develops.

"Few things are as important to our way of life," Justice Binnie wrote, "as the amount of power allowed the police to invade the homes, privacy and even the bodily integrity of members of Canadian society without judicial authorization."

The court added that gathering of the heat distribution information by the police did not offer an insight into Tessling's private life, and its disclosure scarcely affected his "dignity, integrity and autonomy."

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