# MR. STILLMAN, DNA AND DISCARDED EVIDENCE IN CRIMINAL CASES

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> A seller on eBay tried to auction off a cough drop that Gov. Arnold Schwarzenegger allegedly used, then tossed into a trash can – listing the item under the heading *Schwarzenegger's DNA* ... The original listing was accompanied by two photos of a half-consumed cough drop and the words, "Own a piece of DNA from the man himself."
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> - USA Today, May 24, 2004

## I. INTRODUCTION

In recent years 'genetic trophy hunters' have begun to actively collect items discarded from famous individuals such as Jessica Simpson, Britney Spears and Kelly Clarkson and posting them for sale on Internet sites such as eBay. Similarly the police have begun collecting discarded items from more infamous people, suitable for DNA analysis, and comparison to biological material collected at crime scenes.

Such techniques are often used when there is a viable suspect, but insufficient information to positively identify them for the purposes of obtaining a DNA warrant. In such cases, "cast-off" or discarded DNA samples can be a useful tool in providing the police with sufficient information to obtain a DNA warrant. Where is the line to be drawn, however, between effective law enforcement and the invasion of one's privacy?

In this article I will discuss a number of different methods in which police officers may collect discarded items for use as evidence. As these items are often abandoned, a challenge under s. 8 of the Charter is rarely successfully because the

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collection of such evidence is not a generally not considered a seizure. In addition, there is generally no reasonable expectation of privacy in a person's garbage, especially where it is set out in a location that is accessible to animals, snoopers, collectors and other members of the public.

Furthermore, as noted by a majority of the Supreme Court in *Hunter v. Southam*, section 8 of the Charter does not protect against every search or seizure, but requires a balance between a citizen's reasonable expectations in maintaining privacy over their personal activities with the need of police officers to effectively investigate criminal activity. [1]

A question that is sometimes raised, however, is whether or not there should be controls on the government or the private sector that prevent them from collecting and cataloguing DNA profiles developed from such discarded or abandoned items. While human rights and privacy legislation may prevent the use of this information in a discriminatory or prejudicial manner, there is nothing to prevent its wholesale collection and retrieval in criminal matters. Nevertheless, in an effort to foster the underlying values of dignity, integrity and autonomy, should the *Charter* seek to protect an individual's genetic profile as the "*biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to* the state"? [2]

If one's DNA profile is considered to be core biographical information, which individuals in a free and democratic society would wish to maintain and control from dissemination to the state, would not the use and development of such a profile, even from a discarded or abandoned sample, be a violation of one's s. 7 right to the integrity and sanctity of their body? If so, should the collection and data banking of discarded bodily tissue be statutorily prevented? This was certainly the concern of the B.C. Civil Liberties Association:

> The collection of discarded bodily tissue by police raises a number of difficult issues. We recognize that police should be permitted to collect such information, where it is relevant, if it is found as the result of the execution of a regular search. But it is our view that the police should be prevented from compiling data banks of DNA information on persons drawn from discarded body tissue.
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> It is our position that DNA information should be banked only for those convicted of indictable offences. Banking information on a wider range of persons, and possibly drawing on discarded tissue for this purpose, will bring the administration of justice into disrepute by extending the level of police surveillance of law abiding citizens to too high a level and by putting too many innocent people under the net of police suspicion. As well, such practices will undoubtedly encourage police to operate on the principle that everyone tangentially related to an investigation is a suspect until proven innocent. We want our law enforcement officials to operate on a different principle, namely, that people should be

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1 *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at pp. 159-160.

2 See *R. v. Plant*, [1993] 3 S.C.R. 281 at para. 20.

> treated as though they are innocent by law enforcement authorities at least until there is some good reason to bring them under suspicion.
> The BCCLA recommends that the police should be statutorily prevented from generally collecting discarded bodily tissue for the purposes of banking DNA information. The exception to this is where such tissue is found at a crime scene and police have some reason to think that it belongs to the perpetrator of the crime. [3]

A similar conclusion was recently reached by the Australian Law Reform Commission when they proposed a new criminal offence for the unauthorized, non-consensual genetic testing of biological material, characterizing it as a breach of information privacy – an intrusion on basic human dignity and autonomy:

> Testing can reveal information about the present and future health of an individual, and individual's identity, or his or her parentage or kinship ... The possible uses of the information derived from non-consensual testing may also give rise to harm, including harm caused by ... the use of genetic information ... for discriminatory purposes ... [to determine] physical and behavioural characteristics ... by police in criminal proceedings ...[4]

While it is true that the results of genetic testing can contain a great deal of information about a person, from eye and skin colour to information about a person's behaviours and predispositions to diseases, [5] law enforcement officials are not interested in predicting what disease an individual may or may not acquire during their life when analyzing discarded DNA. Nevertheless, none of the loci used for standard identification in forensic DNA analysis have been found to contain predictive medical information. [6]

While the new DNAWitness™ Retinome™ assay being marketed to the police by DNAPrint in Ontario can provide investigators with the ability to construct a physical portrait of a suspect, from ancestry to eye colour (and they are working on hair colour, skin pigmentation and other physical characteristics that can be identified through genetic markers),[7] they do not use the same loci as the forensic DNA technology currently being used by policing services.

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3 British Columbia Civil Liberties Association, *DNA Matching for Criminal Identification Purposes*, on-line:British Columbia Civil Liberties Association Newsflash <http://www.bccla.org/positions/privacy/94dna.html>

4 Ausl., Commonwealth, Law Reform Commission, *Essentially Yours: The Protection of Human Genetic Information in Australia* (Report No. 96) (Canberra: Government of Australia, 2003) at 359-374.

5 Brian Edy, *Privacy Handbook for Canadians: Your Rights and Remedies* (Calgary: Alberta Civil Liberties Research Centre, 2002) at 311-12.

6 D.H. Kaye, *Science Fiction and Shed DNA*: Draft publication (Centre for the Study of Law, Science and Technology, Arizona State University, 2006). Also see John M. Butler, *Forensic DNA Typing: Biology, Technology and Genetics of STR Markers*, 2d ed. (London: Academic Press, 2005), and D.H. Kaye, "Two Fallacies About DNA Databanks for Law Enforcement", (2001) 67 Brooklyn L.R. 179 at 187-188.

7 See *DNAPrint Genomics* home page, on-line: <http://www.dnaprint.com/welcome/home/>

In fact, an actual forensic DNA profile is meaningless to almost 100 percent of the population, whether it is expressed as a chain of amino acids (i.e. G-A-T-T-A-C-A), its numerical value (i.e. 8,9; 11,13; 27,28; 12,14), or the x-ray ("autorad"), dot blots or gel plates on which it was developed. Even then, the information is innocuous and has no meaning without something with which to compare it, or some kind of database or directory in which to look it up, - something to which the general public and the police simply do not have access.

While leaving DNA in a public place is often unavoidable (unlike the ways in which a person can shred his or her personal papers or burn garbage), so long as the police find DNA at a crime scene and have some "good reason to bring [the suspect] under suspicion", the collection of his/her abandoned DNA poses little problem for law enforcement or the courts. So long as the State only looks at those markers suitable for comparison to crime scene DNA, and not the genetic information as to their medical or psychological make-up, or for some discriminatory or prejudicial purpose, abandoned or discarded DNA should be treated no differently than household garbage.

## II. R. v. STILLMAN

*R. v. Stillman*[8] is the leading case from the Supreme Court regarding the use of discarded items by a suspect for DNA analysis. Although this case dealt with discarded items while suspects in police custody, the general statements made by the Court with respect to abandoned property are helpful in determining what police can do when suspects are not in custody.

### A. Background

On the evening of April 12, 1991, a group of teenagers gathered attended a party in the woods near Oromocto, New Brunswick, where they drank beer and wine and shared some drugs. At dusk, 17-year-old William Stillman and 14-year-old Pamela Bischoff, left the party. Bischoff was never seen alive again. When Stillman arrived home later that night he was cold, shaking, and wet from the upper thighs down. He was cut above one eye, and had mud and grass on his pants.

Six days later Bischoff's body was found in the Oromocto River a few hundred metres from where she was last been seen by her friends. The time of death was determined to be the evening of April 12, 1991, shortly after she left the party with Stillman. Witnesses subsequently reported seeing Bischoff near where she was found with a male companion and Stillman was positively identified walking away from the area with mud on his pants shortly thereafter.

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8 *R. v. Stillman* [1997], 1 S.C.R. 607.

An autopsy revealed that Bischoff died as a result of a wound or wounds to the head. Semen was found in her vagina and a human bite mark had been left on her abdomen.

Stillman was arrested on April 19, 1991, and was requested to provide bodily samples, including hair and teeth impressions for comparison to the semen and bite marks found at the scene. Stillman refused to provide any samples or to give any statements. However, once his lawyers had left the police station, officers took, under threat of force, scalp and pubic hair samples and plasticine teeth impressions. In addition, the police seized a tissue he had used to blow his nose and which he threw in the wastebasket at the police station. The tissue was subsequently used for DNA testing.

Stillman was released after questioning but was arrested again several months later after DNA analysis confirmed he had raped and killed Bischoff.

At trial the Crown relied heavily on the DNA and dental evidence. While the trial judge found that the hair samples and teeth impressions were collected in a manner that infringed his Charter rights, he found that it was real evidence that existed independent of the Charter violation and admitted the evidence. In addition he also held that the police had the right to seize the samples as incident to a lawful arrest. Furthermore, the judge held that the seizure of the tissue from the wastebasket was not a search as Stillman had abandoned it and thus ceased to have a reasonable expectation of privacy in it.

## B. Compelled Samples Excluded

Stillman was subsequently convicted by a jury of first-degree murder and sentenced to life imprisonment with no eligibility for parole for eight years. A majority of the New Brunswick Court of Appeal upheld the conviction. However, on appeal to the Supreme Court of Canada, it was held that the common law power of search incidental to arrest was not so broad as to encompass the seizure of bodily samples. As such Stillman's right to be free from unreasonable search and seizure pursuant to s. 8 of the *Charter* was seriously violated and the evidence was excluded:

> It has, for a great many years, been considered unfair and indeed unjust to seek to convict on the basis of a compelled statement or confession ... Similarly, to compel an accused to use his body or to provide bodily substances in order to incriminate himself would generally render the trial unfair. This is so because the compelled production of bodily parts or substances is just as great an invasion of the essence of a person as is a compelled conscripted statement. The unauthorized use of a person's body or bodily substances is just as much compelled 'testimony' that could render the trial unfair as is a compelled statement.[9]

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[9] *Ibid.* at para. 86.

Furthermore, the majority held that the taking of the bodily samples also contravened s. 7 of the *Charter* since it violated the right to security of the person in a manner not consistent with the principles of fundamental justice. The taking of these bodily samples was the ultimate invasion of privacy as it breached the sanctity of the body - something that is essential to the maintenance of human dignity:

> Canadians think of their bodies as the outward manifestation of themselves. It is considered to be uniquely important and uniquely theirs. Any invasion of the body is an invasion of the particular person. Indeed, it is the ultimate invasion of personal dignity and privacy
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> It is repugnant to fair-minded men and women to think that police can without consent or statutory authority take or require an accused to provide parts of their body or bodily substances in order to incriminate themselves. The recognition of the right to bodily integrity and sanctity is embodied in s. 7 of the Charter which confirms the right to life, liberty and the security of the person and guarantees the equally important reciprocal right not to be deprived of security of the person except in accordance with the principles of fundamental justice. This right requires that any interference with or intrusion upon the human body can only be undertaken in accordance with principles of fundamental justice.[10]

## C. Discarded Tissue Admitted

With respect to the mucous filled tissue that had been discarded in the wastebasket at the police station, the majority concluded that the seizure was also a violation of Stillman's right to privacy. Nevertheless they admitted the evidence, as it was not conscriptive, that is, the police did not force, or even request, a mucous sample from Stillman. Although the police acted surreptitiously and in disregard of his explicit refusal to provide them with a sample, the violation of his rights with respect to the tissue was not serious. The seizure did not interfere with his bodily integrity, nor did it cause him any loss of dignity. It was discoverable and the administration of justice would not be brought into disrepute if the evidence obtained from the tissue were admitted:

> In contrast to the hair samples, teeth impressions and buccal swabs, the police did not force, or even request, a mucous sample from the appellant. He blew his nose of his own accord. The police acted surreptitiously in disregard for the appellant's explicit refusal to provide them with bodily samples. However, the violation of the appellant's Charter rights with respect to the tissue was not serious. The seizure did not interfere with the appellant's bodily integrity, nor cause him any loss of dignity. In any event, the police could and would have obtained the discarded tissue. They would have had reasonable and probable grounds to believe that the tissue would provide evidence in their investigation and therefore would have sealed the garbage container and obtained a search warrant in order to recover its contents. Quite simply, it was discoverable. In my view, the administration of justice would

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10 *Ibid.* at paras. 87-89.

> not be brought into disrepute if the evidence obtained from the mucous sample were to be admitted.[11]

Although the majority of the Court (5 judges) found that there was a *Charter* violation, they supported the admission of the evidence from the tissue, as the violation was not one that would bring the administration of justice into disrepute. The remaining four judges did not believe there was a *Charter* violation at all, as Stillman had voluntarily and intentionally discarded the tissue into the washroom wastebasket in full view of the officers. By doing so, they concluded, he had abandoned the tissue and lost any expectation of privacy he may have had in regard to it:

> In my view, the police action in taking the tissue did not violate s. 8 of the Charter. The tissue was not obtained as a result of a search of the appellant. Nor was it seized from him; he had discarded it. To put it another way, the appellant had abandoned any privacy interest in the tissue that he may have had. The police may find and use a gun thrown away by a killer as evidence against the killer. In my view, so may they find and use a tissue that he has discarded. The purpose of s. 8 is to protect the person and property of the individual from unreasonable search and seizure. This purpose is not engaged in the case of property which the accused has discarded.[12]

As a result of these findings the Supreme Court ordered a new trial in which the hair samples and dental impressions were to be excluded, while the mucous sample from the tissue was to be admitted. Ultimately, at the re-trial, Stillman was still convicted of murdering Bischoff.

As noted above, there were really three issues in *Stillman*. The first was the right of the police to seize bodily samples incident to a lawful arrest. The second was the sanctity of the body and the maintenance of human dignity. The issue third was the use of abandoned bodily samples. While I will briefly touch on the first two issues, I submit that it is the use of discarded or abandoned bodily samples that will has the greatest impact on our privacy and the maintenance of human dignity in the future.

## III. CUSTODIAL SEIZURES

### A. Gum Trick #1

As noted above, *Stillman* is probably the leading case from the Supreme Court regarding the use of discarded items by a suspect for DNA analysis. Although this case dealt with discarded items while in police custody, the general statement made by the Court with respect to abandoned property is helpful in determining what police can do in the public arena. According to the Court:

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[11] *Ibid.* at para. 128.

[12] *Ibid.* at pp. 223.

> Where an accused who is not in custody discards an item offering potentially valuable DNA evidence, the police may ordinarily collect and test the item without any concern about consent, since, in the circumstances, the accused abandoned the item and ceased to have a reasonable expectation of privacy in it.[13]

While the Court stated the situation would be different for a person who was in custody, the issue of whether they had abandoned an item and relinquished any privacy interest in it would have to be determined on a case by case basis.

In *R. v. Nguyen*, the Ontario Court of Appeal was confronted with just such an issue when they had to determine if the use of trickery by the police to obtain a DNA sample from a suspect who was in custody was lawful.

In *Nguyen*, the accused also refused to provide his DNA. The police, however, contrived a plan to obtain a sample by having two female officers share a piece of gum and then offer a stick to the accused. Nguyen was free to decline, but if he did take the gum he was also free to dispose of it any way he saw fit (ie: swallow it or throw it in the garbage).

He took the gum and eventually threw it in the garbage where the police retrieved it. The question was, was the trick of offering gum to an accused in the expectation that it will be discarded, objectionable as an act of elicitation by the State causing subversion of a constitutional right. The Court ruled that it was not, holding that the trick was entirely passive and by offering gum, police created opportunity but nothing more.

While the Court found that there had been a Charter violation, they unanimously supported the admission of the evidence from the gum as it was "non-conscriptive". As such, it would not bring the administration of justice into disrepute. The Court subsequently affirmed the trial judge's ruling that:

> The ploy is not objectionable. The trick was entirely passive. The passive element was analogous to placing an undercover officer in a cell with an accused for no purpose but to listen, thereby opportunity for the accused to speak to someone is provided. By offering gum, police created opportunity. Whether anything resulted depended on the accused. His actions following acceptance were entirely of his own volition. The choice to accept, chew and discard the gum closely parallel McLachlin J.'s (as she then was) statement in *Hebert* at page 42:
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> If the suspect speaks, it is by his or her own choice, and he or she must be taken to have accepted the risk that the recipient may inform police.
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> Police resort to this trick is not disqualified as a dirty trick, one "that shocks the community." DNA evidence has a potential for impactive trial consequences relating to identification. It would be more probable that public consciousness would be shocked if upon a charge of first degree murder no further investigative attempt was made to marshal such significant evidence.[14]

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[13] *Ibid.* See also para. 55.

[14] *R. v. Nguyen*, [2002] O.J. No. 3 (C.A.), at pp. 19. Also see *R. c. Macryllos*, [2007] J.Q. no. 11429 (Q.S.C.).

## B. Cigarette Butts from the Interview Room

A similar situation arose in *R. v. Fash*, a case from the Alberta Court of Appeal regarding the use of discarded cigarette butts for DNA analysis by a suspect while detained, but who was subsequently released from police custody. As was the case in *Stillman* and *Nguyen*, the accused had refused to provide DNA samples. However, unlike those cases, the Court did not find any Charter violation because the accused was not in custody, and was free to leave the police station after his interview. As such, the accused *"could have prevented the police from taking possession of [the cigarette butts] by putting them in his pocket and taking them with him or refraining from smoking ... the accused discarded the cigarette butts and had no reasonable expectation of privacy in them."*[15]

In *Commonwealth v. Bly*,[16] in the Massachusetts Supreme Judicial Court determined that the defendant lacked an expectation of privacy in the cigarette butts and a water bottle that he had abandoned in a detention centre interview room. The court held that the police did not act improperly in collecting DNA evidence from those items after questioning the defendant on unrelated offences. The items had been collected by the police pursuant to a ruse where they had placed cigarettes and a water bottle in the interview room, in the hope, unbeknownst to the defendant (who had declined to provide a blood sample), of collecting DNA evidence.

In response to the defendant's argument "that the method used by the Commonwealth in obtaining his known DNA sample constituted a non-consensual seizure", the Supreme Judicial Court held that the defendant's failure to retrieve the cigarette butts when leaving the interview room (or request to go back and collect them) constituted a "wholesale failure to manifest any expectation of privacy in the items whatsoever".[17]

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15 *R. v. Fash* (sub nom *R. v. D.F.M.*), (1999) 244 A.R. 146 (C.A.), leave to appeal SCC dismissed March 29, 2001, 281 A.R. 272 (note). Also see *R. v. Arp*, [1998] 3 S.C.R. 339, aff'ing (1997) B.C.A.C. 286, aff'ing [1995] B.C.J. No. 882, where cigarette butts were also collected from a police interview room for DNA analysis. The Supreme Court noted the practice at paras. 17, 18 & 19 without adverse comment (although the defence had conceded the issue in the Court below).

16 *Commonwealth v. Bly* (2007), 448 Mass. 473 (Mass. S.J.C.).

17 *Ibid.* Also see *State v. Christian* (2006), Docket No. 6-518/04-0900; 723 N.W.2d 453, in which a unanimous Iowa State Court of Appeals upheld the warrantless seizure of a water bottle and fork used by the suspect during his interview with the Iowa City Police. The Court held that *"by leaving the water bottle and the fork [but taking his other property with him], Christian demonstrated he was not interested in keeping either ... he abandoned [them] ... and therefore had no reasonable expectation of privacy in either ... In the absence of any definitive authority to the contrary, we are unable to say Christian had a subjective or objective expectation of privacy in the DNA shed on the items seized".*

## C. Cigarette Butts and Pop Cans from the Courthouse

In *R. v. Johnson*, Justice Bryk was asked to rule on the admissibility of DNA evidence obtained from the seizure of Johnson's cigar. The issue was that while in police custody, the accused was taken to the Dauphin Courthouse to arrange for his release. As a result of some minor difficulty, the surety had to leave and while waiting for her return, the accused decided to have a cigar and went outside with his lawyer (Semchuk) and the police officer (Kirouac). He stood on the vestibule just outside the courthouse door while he smoked. There are ashtrays attached to the courthouse building on either side of the entrance doors. When the surety returned, the accused placed the cigarillo on the ashtray but did not extinguish it. He re-entered the building. While he was at the counter completing the paperwork, the police officer obtained an envelope from the sheriff's office, returned to the ashtray and took the cigar that had been left by the accused.

In admitting the evidence, Justice Bryk stated that:

> The police are entitled to collect an abandoned item and use it in evidence. This does not violate any Charter rights. However, when an accused is custody, the issue of abandonment must be decided considering all of the circumstances of the abandonment.
> Here, the Applicant was technically in custody in that the documentation to secure his release from custody was not yet completed. However, his freedom was not restricted except for the fact that he could not leave without the documentation being completed. He was free to step outside the courthouse to have a cigar. The evidence clearly establishes that he did that and was followed by both Semchuk and Kirouac. There was no attempt by Kirouac to restrict his movement or his activity. The smoking of the cigar was a voluntary act on his part as was its placement on the ashtray. The Applicant was not told by Kirouac to step back inside the building or to stop smoking the cigar. This also was voluntary on the part of the Applicant. There was no indication from the Applicant that he intended to return to finishing smoking the cigar. Finally, there was no evidence that he returned to the ashtray or that he made any attempts to have the unfinished cigar returned to him.
> On the evidence before me, I cannot conclude that the seizure violated the Applicant's s. 8 Charters Rights. I find that the Applicant abandoned the cigar when he placed it in the ashtray and re-entered the building to complete his business. There is no evidence that he knew how long the unfinished business inside would take nor is there any evidence as to his actions following completion of that business. The mere fact of his not having butted or extinguished his cigar is inconclusive to establish his intentions with respect to retaining possession of that item. I therefore dismiss the Application.[18]

More recently, in *R. v. Marini*, [19] Justice Clark of the Ontario Superior Court found no Charter breach in admitting DNA evidence derived from two ginger ale cans discarded by the accused during pre-trial motions at the courthouse.

The accused, who was on charge for manslaughter in relation to a jewelry store robbery, left behind several hairs in the duct work and ventilation shafts

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[18] *R. v. Johnson* (sub nom *R. v. Grywacheski*), [2004] M.J. No. 108; (2004) 117 C.R.R. (2d) 249 (Man. QB), at paras. 17-19.

[19] R. v. Marini, [2005] O.J. No. 6197.

above the ceiling in the jewelry store where he had been hiding, waiting for the jeweler to arrive. A DNA profile was extracted from one of the hairs and during a scheduled court appearance the police surreptitiously seized two pop cans he discarded in the courthouse. It was subsequently determined that the DNA profile derived from the hair matched the profile from cans. In holding that there was no s. 8 breach, Justice Clark stated:

> I am not convinced ... that the average person would be likely to have any greater subjective expectation of privacy in the general environs of a courthouse than that person would have in the public areas of any other building to which the general public has access. Thus, even if there were evidence from which it could be inferred that this accused had a subjective expectation of greater privacy within the courthouse than in other public places, I am not persuaded that such expectation would be a reasonable one.
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> While it may be reasonable to expect that the applicant would consume food or drink during the court day, I am not persuaded that the parallel that [the defence] seeks to draw between the custodial situation in Stillman and the situation in the case at bar is valid. This is not a case like Stillman where the genetic material came into existence by what Cory J. referred to as the "inevitable consequence of the normal functioning of the human body." Indeed, it is quite the contrary; there was nothing, in my view, inevitable about the way in which the items seized were generated.
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> To my mind, there is more to be discerned respecting one's continuing privacy interest, or expectation of privacy, from the manner in which the article is discarded as opposed to the nature of the container. For example, if a person were to shred documents before putting them in the trash, and the police were later to seize the shredded documents and reconstruct them, although the cases on point seem to hold the contrary, it strikes me that one could make a reasonable argument that since the person made a concerted effort to prevent others from learning the content of the documents the court ought to recognize a residual privacy interest not in the documents as physical artifacts, but in the information they contained. To compare that to the situation at bar, if there were some evidence that the applicant had, before discarding them, made an effort to render the cans unsuitable for DNA analysis, for example, by something as simple as taking the time to rinse the cans with water, one could perhaps then sensibly argue that was some evidence that the applicant, while content to relinquish his privacy interest in the cans, was anxious to maintain his privacy interest in the genetic information contained in or on the cans by rendering that information unavailable to others. There is no such evidence in the case at bar.
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> In short, there is nothing, in my view, from which to reasonably infer that he had an expectation of privacy that survived his discarding the cans. Accordingly, it being his onus of proof, I am not satisfied that the applicant had a subjective expectation of privacy in what he had just discarded.

## D. Prison Searches

While a person confined in a jail or prison retains most of their civil rights, there is a substantially reduced level of privacy in such institutions as most inmates, and even their visitors, expect to be exposed and observed. As noted by La Forest, J. in *Weatherall v. Canada* for a unanimous court:

> Imprisonment necessarily entails surveillance, searching and scrutiny. A prison cell is expected to be exposed and to require observation. The frisk search, the count and the 'wind' [i.e. random, unannounced surveillance patrols] are all practices necessary in a penitentiary for the security of the institution, the public and indeed the prisoners themselves. A substantially reduced level of privacy is present in this setting and a prisoner thus cannot hold a reasonable expectation of privacy with respect to these practices. This conclusion is unaffected by the fact that the practices at times may be conducted by female guards.[20]

In the United States a prisoner also retains limited rights under the Fourth Amendment against an investigative search of his prison cell and belongings.

In *Commonwealth v. Rice*, the Supreme Court of Massachusetts upheld the seizure of the accused's bed sheets, inmate uniform and T-shirt, for DNA analysis in a homicide case, while incarcerated on an unrelated matter. The court found that the accused did not establish that the items were seized during a search and further that he failed to show that he had a subjective expectation of privacy in the items seized:

> The judge found, with record support, that the items in question were obtained in the ordinary course of collecting standard issue bed sheets and inmate uniforms for periodic laundering. The T-shirt was obtained in the ordinary course of exchanging new T-shirts and underwear for worn out items. In each instance, the items were obtained after the defendant passed them through a space in his cell door created for such purposes, as is done by all inmates at the South Bay facility. The defendant's items were segregated from those of other inmates and turned over to State police. DNA samples obtained from these items were tested and matched the DNA of the sperm found in the victim's vagina.[21]

However in *R. v. Dorfer* the British Columbia Court of Appeal held that dental residue containing blood and saliva was not abandoned when it was retained by a prison dentist for DNA analysis at the request of the police. While it had been collected during the course of a regularly scheduled dental procedure, the accused still maintained an expectation of privacy with respect to the dental residue. Nevertheless the admission of the evidence was not found to bring the administration of justice into disrepute.

The Court found that the intrusion on the accused was minor, in that the dental procedures were at his request and performed normally. The police proceeded in good faith, in that they thought that getting a warrant to recover the residue from the dentist's office afterwards would be sufficient. The offence involved was a very serious one and the balance favoured the admissibility of the DNA evidence.[22]

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20 Weatherall v. Canada (Attorney General), [1993] 2 S.C.R. 872.

21 *Commonwealth v. Rice* (2004), Docket No. SJC-08304 (Mass. S.J.C.).

22 *R. v. Dorfer* (1996), 34 C.R.R. (2d) 173, leave to appeal SCC refused (1997), 41 C.R.R. (2d) 376 (note). Leave to appeal in this case was refused while the decision in *R. v. Stillman* was on reserve by the Supreme Court.

# IV. PUBLIC SEIZURES

## A. Gum Trick #2

On September 13, 1992, Denny MacDonald was found stabbed to death in his Richmond B.C. home. Evidence suitable for DNA analysis was found in the home and police subsequently identified Jason Good as a viable suspect. As the investigation occurred prior to the enactment of the DNA warrant legislation, the police set up a bogus test booth in a shopping centre - a consumer products testing station. The station was staffed by two officers who obtained material suitable for DNA analysis from Mr. Good by having him chew gum and then discard it into a cup. The information obtained was subsequently used in an Affidavit to obtain a DNA warrant when the legislation came into affect in 1995. A subsequent attack on the validity of the warrant was dismissed by Justice Hall who found that it had it had been lawfully issued.[23]

This trick was used again more recently in *R. v. Delaa.*[24] In this case the accused was a suspect in two sexual assaults that were perpetrated using a similar ruse to gain entry to the victim's homes. DNA evidence was obtained from each victim and while the police had reason to believe that the accused was a suspect, they did not wish to alert him to their suspicion and they engaged in a series of undercover operations to obtain DNA wilfully discarded by the accused. The evidence was ultimately obtained when undercover officers asked the accused to participate in a chewing gum survey and he complied. DNA from the gum was analyzed and matched the DNA obtained from each of the victims. A subsequent blood sample testing confirmed the match.

The accused submitted that the undercover operation constituted an unreasonable search and seizure that violated his rights. Justice Park found that the degree of trickery involved in the police operation did not violate the accused's rights, and that the retrieval of the gum discarded by the accused did not constitute unreasonable search and seizure. The accused had no reasonable expectation of privacy in relation to gum discarded as garbage following his voluntary participation in a gum survey conducted in a public location. The accused was neither in police custody, nor was he the subject of coercion. Also,

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[23] *R. v. Good* (1995) B.C. S.C., Docket No. CC950145, unreported decision dated 1995-10-13.

[24] *R. v. Delaa* [2006] A.J. No. 948. Also see *The People v. LaGuerre* (2006), 815 N.Y.S. 2d 211, leave denied (2006), 822 N.Y.S. 2d 489, in which a unanimous New York State Court of Appeals upheld the warrantless seizure of a piece of gum obtained by the police during the course of a contrived Pepsi taste test challenge. The Court found that the accused voluntarily and freely discarded and abandoned the gum inside the cup when he handed it to a police detective during the supposed taste test.

the gum was not disposed of in a secure manner. Therefore, the DNA samples derived from the discarded gum were admitted as evidence.

## B. Perimeter Searches

In *R. v. Kokesch*[25] and *R. v. Evans*[26] the Supreme Court of Canada has held that the police cannot seize items from the accused's yard without a warrant. In both these cases the Court held that the law recognizes a person's yard as a "place" and that a warrantless perimeter search or approach to a dwelling to secure evidence (i.e. such as smells emanating from the house) exceeded the terms of the implied invitation to approach, was a trespass and therefore, unlawful.

However, in *Evans*, only a bare majority of the court (4:3) found that the police approach to the house was a trespass. Even then the majority, upholding the search under s. 24(2) of the Charter, felt that other *lawful investigatory techniques* could have been used by the police to obtain the necessary information for a search warrant - including "*searches through the appellant's garbage [and] overhead infra red photography*".[27]

## C. Garbage Searches

In *California v. Greenwood*,[28] the United States Supreme Court ruled on exactly this issue, holding that since the defendant voluntarily left his trash for collection in an area particularly suited for public inspection, his claimed expectation of privacy in the items they discarded was not objectively reasonable:

> It is common knowledge that plastic garbage bags left along a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public. Moreover, respondents placed their refuse at the curb for the express purpose of conveying it to a third party, the trash collector, who might himself have sorted through it or permitted others, such as the police, to do so. The police cannot reasonably be expected to avert their eyes from evidence of criminal activity that could have been observed by any member of the public.[29]

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25 *R. v. Kokesch* [1990] 3 S.C.R. 3.

26 *R. v. Evans* [1996] 1 S.C.R. 8.

27 *Ibid.*, per Sopkina J, Cory and Iaccobucci JJ concurring, at para. 29. The dissenting justices, Major & Gonthier JJ,at para. 41, all felt that there had been no trespass.

28 *California v. Greenwood*, 486 U.S. 35 (1988). It should be noted until the United States Supreme Court heard this case only the states of California and Hawaii had refused to admit evidence seized by the police from trash put out for collection. The majority of all other States had previously admitted this type of evidence.

29 Ibid.

More recently, in *R. v. Tessling*, the Supreme Court of Canada affirmed that "a person can have no expectation of privacy in what he or she knowingly exposes to the public; or to a section of the public, or abandons in a public place".[30]

While *Tessling* dealt with the detection of heat radiating from a residence using a Forward Looking Infra-Red camera ("FLIR"), it was one of the *lawful investigatory techniques* (besides garbage searches) that the majority of the Court in *Evans* had identified.[31] Furthermore, in both *R. v. Krist* [32] and *R. v. Kennedy*[33], the B.C. and Ontario Court of Appeals (respectively) have held that garbage put out for collection at the front of a dwelling or apartment block is seizable without warrant as abandoned property. The Court in *Krist*, specifically relying on the decision of the United States Supreme Court in *California v. Greenwood*, stated that:

> Putting material in the garbage signifies that the material is no longer something of value or importance to the person disposing of it, and that there is no reason or need to retain it. In my opinion, when trash is abandoned, there is no longer a reasonable expectation of privacy in respect of it.[34]

Notwithstanding the ruling in *Kyllo v. United States*,[35] in which the United States Supreme Court found that the warrantless seizure of thermal images using the FLIR technique was unreasonable, American courts are still upholding the warrantless seizure of garbage put out for collection as reasonable. For example, in the most recent pronouncement on the issue, the Supreme Court of Montana held that:

> Even if we assume for the sake of argument that [the defendant] had an actual expectation of privacy in the garbage he placed for collection, we must still determine whether society would be willing to recognize that expectation as objectively reasonable. In analyzing this inquiry, we logically look to society's experience with respect to garbage placed in an alley for the trash collector.
>
> While garbage bags oftentimes remain intact until their contents are collected by a designated hauler, it is also common to see homeless people, stray pets and wildlife, curious children, and scavengers rummaging through trash set out for collection, in hopes of finding food, salvageable scrap, or deserted treasure. The wind and the elements are also factors, particularly in Montana. Routinely, cans are knocked over, bags are exposed to the predations of dogs and raccoons, and garbage is found strewn across streets and alleyways. In short, society's experience with trash left at the alley or curb for collection is anything but consistent with an objective expectation of privacy.

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30 *R. v. Tessling*, [2004] 3 S.C.R. 432 at para. 40. Also see *R. v. Boersma*, [1994] 2 S.C.R. 488.

31 *Supra*, note 26.

32 *R. v. Krist* (1995), 100 C.CC. (3d) 58 (B.C.C.A.), leave to appeal SCC denied without reasons.

33 *R. v. Kennedy* (1996), [1996] O.J. No. 4401(C.A.), aff'ing [1992] O.J. No. 1163.

34 *R. v. Krist*, *supra*, note 32 at para. 28.

35 *Kyllo v. United States* (2001), 533 U.S. 27. The Supreme Court of Canada rejected *Kyllo* in their decision in *R. v. Tessling*, supra, note 30.

> We conclude that when [the defendant] placed his garbage at the alley's edge for collection, he abandoned his garbage; as a result, he had no expectation of privacy in it that society would be willing to accept as reasonable. Absent such a reasonable expectation of privacy, there is neither a "search" or "seizure".[36]

However, the Montana Supreme Court did impose the following two constraints on future garbage searches:

> The garbage must be quickly retrieved by officers in substantially the same manner as the trash collector would take it. In other words, officers cannot openly rummage through a person's garbage at the curb or in the alley, to the embarrassment or indignity of the owner.
>
> So as to prevent wholesale or random searches, officers must have an articulable individualized suspicion that a crime is being committed, essentially the same as is required for a "Terry stop" of an automobile, in order to justify the garbage seizure.[37]

The Court held that these constraints were reasonable and justified as they balanced the State's interest in conducting a legitimate investigatory search against the public's expectation that, if they place their garbage for collection as the law requires, curbside chaos will not ensue.

More recently in Canada, Judge Wilkins of the Alberta Provincial Court in *R. v. Patrick*,[38] upheld a search warrant based on six warrantless searches of the accused's garbage that had been placed in an opening of the fence at the rear of his residence, adjacent to the alley. The details of the warrantless garbage searches and what was obtained from the garbage (including in some instances laboratory analysis of the items seized) were detailed in the "Information to Obtain" a search warrant by the police for his residence.

Judge Wilkins upheld the validity of the warrantless searches based on the "totality of the circumstances", which included the following factors or "markers":

> Place where the alleged search occurred
> Intrusiveness of police technique in relation to the privacy interest
> Whether or not the use of the technique is objectively unreasonable
> Whether or not the subject matter is in public view
> Whether or not the subject matter has been abandoned
> Whether or not the information is already in the possession of 3rd parties?

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36 *State of Montana v. 1993 Chevrolet Pickup*, 2005 MT 180 (S.C.), at paras. 16-17. A similar ruling was also upheld by the Indiana Supreme Court in *Litchfield v. State* (2005), 824 N.E. 2d 356 (Ind. S.C.).

37 *Ibid.* at para. 19. Having prior "reasonable suspicion" before conducting garbage searches would also be consistent with the plurality of the Supreme Court in *R. v. Kang-Brown*, 2008 SCC 18, per McLachlin C.J. and Binnie, Deschamps and Rothstein, and Bastarache JJ.

38 *R. v. Patrick*, 2005 ABPC 242. Also see *R. v. Tam*, [1993] B.C.J. No. 781 (B.C.S.C.); *R. v. Taylor*, [1984] B.C.J. No. 176 (B.C.S.C.); and *R. c. Allard*, 2006 QCCQ 3080 (C.Q.)

> Whether or not seizure of the garbage from the accused's property reveals intimate details of the accused's lifestyle or core biographical data[39]

With respect to the last four points, Judge Wilkins found that the accused had clearly abandoned the bags of garbage and waived any privacy interest in their contents, questioning "why would he place that garbage in an indentation in his own fence constructed for the obvious and sole purpose of storing garbage for pick-up and disposal?"[40] He further continued:

> If the Accused did have a presumed subjective expectation of privacy in the garbage, at some point he has clearly waived that expectation by placing the garbage where he did and abandoning it. To conclude otherwise would be unreasonable and totally unsupported by the facts.[41]

While it could not be said that the contents was already in the possession of third parties, it soon would have been when the garbage truck collected it. As such the accused must have been fully aware of this fact because that was the sole reason he placed the garbage in that location - to have it removed. Furthermore, if the accused was trying to protect intimate details of his lifestyle and control it "from dissemination to the state", he would not have abandoned the information in garbage bags accessible to the public. By doing so, he clearly indicated that the material was no longer something of value or importance to him.

The decision in *Patrick* was affirmed on appeal on October 18, 2007. A majority of the Court agreed with Justice Wilkins' assessment that there was no reasonable expectation of privacy in garbage put out for collection:

> Patrick enjoyed little or no control over the garbage at the time of the purported search. While technically still within the boundaries of his property, Patrick relinquished control over his garbage, in a practical sense, by placing it into the garbage receptacle to be picked up by the garbage collectors. Anyone living in a major metropolitan area knows that once garbage is left for pickup, it may be subject to disturbance by bottle collectors and others looking for discarded treasures, as well birds, dogs, and vermin. Anyone placing garbage in an open receptacle enjoys virtually no control over it.
>
> ...
>
> In other cases, much of the household garbage generated by an entire city is transported to disposal sites across great distances. Citizens could hardly expect that the trucks transporting garbage would never be involved in collisions compromising the load, or never lose a single item from their loads during a trip of literally hundreds of kilometres. One need only follow a garbage truck a short distance to realize that not all of its contents remain in the truck. Persons to whom garbage is entrusted have neither the obligation nor the means to protect the privacy of its donor.[42]

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39 *Ibid.* at paras. 30-49.

40 *Ibid.* at para. 39.

41 *Ibid.* at para 39.

42 *R. v. Patrick*, [2007] A.J. No. 1130 (C.A.), at paras. 16 and 25. Notice of appeal filed (As of Right) November 16, 2007, [2007] S.C.C.A. No. 543.

However, in a lengthy dissent, Justice Conrad would have excluded the evidence, holding that Patrick "had a reasonable expectation of privacy with respect to his dwelling house and its perimeter, and when the police intruded on that privacy without a warrant, and searched for, and seized, his garbage, they breached his section 8 rights."[43]

Interestingly, while Justice Conrad relied, in part on the Supreme Court's decision in Evans,[44] he made no reference to the majority's comments in that case about "searches through the appellant's garbage" being a lawful investigatory technique.

While it is true that the majority's comments in *Evans* were *obiter*, considering the dissenting justices found no breach of the accused's Charter rights in that case, *Patrick* has set an interesting stage for the Supreme Court considering their pronouncement in *Tessling* in which the FLIR was held to be a lawful investigatory technique - implicitly recognizing it from the list of lawful investigatory techniques mentioned in *Evans*.[45]

## D. Spitting on the Sidewalk

In *Commonwealth v. Cabral*[46] the defendant was suspected of raping and impregnating a mentally challenged girl while working as a tradesman in the parent's home. Based on the timing of the pregnancy, the defendant was asked to provide a DNA sample to police. He refused. As there were insufficient grounds to obtain a warrant, the family hired a private investigator, on leave from the New Bedford Police Department, to survey Cabral and covertly attempt to obtain a DNA sample.

Working independently of the police department, the investigator devised a plan wherein his assistant would contact the defendant to arrange for plumbing work at his house. Cabral performed the requested plumbing work, during which time he spat on the sidewalk outside the investigators home. The spittle was collected in a napkin and sent to a forensic laboratory for genetic testing. The results implicated Cabral, were passed on to the police and a DNA warrant confirmed his parentage.

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43 *Ibid.* at para. 58.

44 *Ibid.* at paras. 78 and 89.

45 *R. v. Evans*, *supra* note 26 at para. 8. While the Ontario Court of Appeal, per Abella, explicitly recognized the FLIR as being in the majority's list of other lawful techniques from *Evans*, that Court of Appeal found that it actually violated a person's reasonable expectation of privacy. The Supreme Court unanimously (9:0) overruled the Court of Appeal without further reference to *Evans* on this point.

46 *Commonwealth v. Cabral* (2007), Docket No. 06-P-987 (Mass. C.A.).

At trial the admission of the DNA evidence was upheld as the defendant had no expectation of privacy in his saliva when he abandoned it on a public sidewalk. On appeal, Cabral argued that the trial judge erred because the DNA sample was obtained in a ruse devised by a State actor, and that his State and Federal constitutional rights were violated.

The Massachusetts Court of Appeal disagreed, holding that the defendeant lacked any expectation of privacy in the spittle that he had abandoned, and that the police did not act improperly in collecting it.

> [Although] the defendant had a reasonable expectation of privacy in his saliva (and other bodily fluids), when he expectorated [spit] on to a public street and did not retrieve the fluid, he voluntarily abandoned that protection; he assumed the risk of the public witnessing his action and thereafter taking possession of his bodily fluids....Thus, where the defendant here voluntarily abandoned his saliva onto a public street, the investigator (whether deemed to be functioning in a private capacity or as a State actor) did not infringe on any reasonable expectation of privacy when he recovered the spittle from the street.[47]

Although not a consideration by the Court, most jurisdictions make it an offence to spit in a public place. Such laws were passed at the turn of the last century to prevent the spread of diseases such as Tuberculosis. In 1907, for example, the City of Winnipeg passed an anti-spitting by-law. That by-law remains in force today as part of the Anti-Litter By-law, which makes it an offence to spit in a public other than in a litter receptacle.[48] The by-law further defines a "public place" as being "any and all streets, sidewalks, boulevards, alleys or other public ways and any and all public parks, squares, spaces, grounds and buildings which are owned by or under the control and jurisdiction of the City".[49]

As such the police would be lawfully entitled to collect spit (or cigarette butts, paper cups, straws, etc), not only as abandoned or discarded, but also as part of their duty to investigate offences.[50]

## E. A Lick and a Promise

Other police agencies have turned to more creative approaches, such as that used by the Seattle Police Department (SPD) to solve the murder of 13-year old Kristen Sumstad in 1982. The victim was found stuffed in a cardboard box in an alley and semen was found in her vagina and on her leg. An autopsy also revealed microscopic hemorrhaging or bruising to her anus, bruising and contusions on

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47 Ibid.

48 Section 3.4, Anti-Litter By-law, City of Winnipeg #1075/75.

49 *Ibid.* at section 2.1.

50 Section 217(1) of the *Manitoba Highway Traffic Act*, C.C.S.M. c.H60, also makes it an offence to "drop, throw, or deposit on a highway any glass bottles, cans ... tobacco ashes, lighted cigar or cigarette ... or any ashes, garbage, or other refuse, trash, or litter".

her face, neck, and legs, and a possible abrasion on her labia,. All signs indicated a forced sexual assault.

John Athan became a suspect early in the case because he had been seen carrying a similar box earlier in the day, however police were unable to lay charges due to insufficient evidence. In 2002 the case was re-opened and a DNA profile obtained from the crime scene. Athan now lived in New Jersey, and had family in Greece. The SPD considered him a serious flight risk if he were to learn of the re-investigation, and the police had to wait for the results of a DNA warrant before they could charge him. As a result, the police invented a ruse to obtain his DNA without making him aware they had resumed investigating the murder.

Writing on the stationery of a fictitious law firm, the SPD sent a letter to Athan that asked him to join a class action lawsuit to recover overcharged traffic fines. The letterhead contained the names of the "attorneys," all of whom were employed by the SPD. Believing the ruse to be true, Athan signed, dated, and returned the enclosed class action authorization form and attached a hand-written note stating, "if I am billed for any of your services disregard my signature and my participation completely." Athan's reply was forwarded it to the crime lab where a DNA profile was obtained from saliva located on the flap. The DNA profile from the envelope matched the DNA profile from the semen found on Sumstad's body and Athan was arrested.

At trial *neither* side disputed that "...one's cells sloughed in public in the normal course of daily living are not entitled to constitutional protection." However Athan argued that the police had violated his rights 'not to be disturbed in his private affairs, or his home invaded, without authority of law' under both the Federal Constitution and the Washington State Constitution, which provides greater privacy rights than does the Fourth Amendment of the Federal Constitution. The trial court rejected these claims. A review by the Court of Appeal was rejected as was a further review by the Washington State Supreme Court on May 10, 2007.[51]

At the Supreme Court, Athan argued that his "private affairs" under Washington law included one's body and bodily functions, communications with a person he believed was an attorney, and sealed correspondence intended for that attorney.

While the Court agreed that a person has a privacy interest in his body and bodily functions which he should be able to hold safe from government trespass, Athan voluntarily relinquished his DNA when he licked the envelope and mailed it to a third party:

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[51] *State v. Athan* (2007), No. 75312-1 (Wash. S.C.).

> The facts of this situation are analogous to a person spitting on the sidewalk or leaving a cigarette butt in an ashtray. We hold under these circumstances, any privacy interest is lost. The envelope, and any saliva contained on it, becomes the property of the recipient.
> ...
> DNA has the potential to reveal a vast amount of personal information, including medical conditions and familial relations; therefore DNA should constitute a privacy interest. While this may be true in some circumstances, the State's use of Athan's DNA here was narrowly limited to identification purposes. What was done with the letter, including DNA testing for the limited purpose of identification, was not within the sender's control.[52]

The Court also agreed that while Washington law provides a strong protection of communications between attorney's (or purported attorney's) and their clients, the issue to be decided was if the saliva on the envelope flap was a "communication" subject to protection by the attorney-client privilege. The Court held that it was not:

> [S]aliva is not a communication in this case .... We note this case is not about police intercepting mail addressed to someone else. The envelope, its contents, and the saliva contained on it, were addressed to and received by the SPD detectives, albeit through the use of a ruse.
> Communication may be defined as "[t]he expression or exchange of information by speech, writing, or gestures." Under the facts of this case, Athan's saliva was merely a means by which he could seal the envelope. There was no intent or expectation on Athan's part that his saliva would be an expression or exchange of information. Although the State was ultimately able to gain information from the saliva, it does not mean the saliva was a "communication" as it is ordinarily defined.[53]

Although Athan contended that the police were unlawfully practicing law by posing as attorneys, the Court found that there is "no absolute prohibition of police ruses involving detectives posing as attorneys in the state of Washington".[54] The ruse was not designed to intercept attorney-client communications; the ruse was only to induce him to mail an envelope. The fact that Athan "was not aware that the recipient was a police detective does not vitiate [his] consent [to the receipt of his saliva]".[55]

The final argument, that State law protected his rights to "sealed messages, letters, and telegrams from being opened or read by someone other than the intended recipient"[56] was also rejected by the Court because the detective who actually received the letter was listed on the "law firm's" letterhead and thus, under the state privacy act, had authority to open or cause to be opened, the letter. Since the intended addressee received the letter, though not an attorney as Athan believed, there was no statutory violation.

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52 *Ibid.* at paras. 18-19.

53 *Ibid.* at paras. 22-23.

54 *Ibid.* at para. 26.

55 *Ibid.* at para. 27.

56 *Ibid.* at para. 29.

## F. Conclusion

In all of the above-mentioned cases, courts found that the values, which the Charter sought to protect, could not reasonably be extended to include that which had been discarded from the home and put out for collection as garbage. From the deliberate discarding or abandonment of trash, it is logical to conclude that the person no longer had a subjective expectation of privacy in relation to information that may be obtained from trash that has been abandoned by a householder to the municipal garbage disposal system.

Generally, courts have held that an accused has no expectation of privacy in evidence he abandons in a public place. The accused will, however, have an expectation of privacy in items s/he has on his/her property and inside his/her home but not in the household trash s/he has placed at the curb for collection. Furthermore, an accused will not have an expectation of privacy in evidence s/he voluntarily leaves behind at a police station once s/he is released, but may have an expectation of privacy in items s/he has discarded while in custody if there is some evidence that s/he has made an effort to render the items unsuitable for DNA analysis.

# V. PRIVATE PROPERTY

## A. Undercover Officers

In *R. v. Love*[57] the Alberta Court of Appeal considered the removal of a mucous filled tissue for DNA analysis from inside the accused's hotel room by an undercover officer. In this case, the Court found that a police agent or undercover officer cannot routinely seize evidence from inside the accused's residence for analysis without warrant, even though the agent may have been inside the premise with the owner's consent. While the Court found that the tissue had been discarded or abandoned by the accused, there was still a general expectation of privacy while that item was still inside the hotel room.

Furthermore, in *State v. Reed*, the North Carolina Court of Appeals excluded DNA evidence obtained from the accused's cigarette butt where it had been discarded on his own property, but kicked by an officer into a grassy common area. The Court held that the accused had a reasonable expectation of privacy in his yard:

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[57] *R. v. Love* (1995), 102 C.C.C. (3d) 393 (Alta. C.A.), leave to appeal refused [1995] S.C.C.A. No. 555. The police were successful in obtaining some hair from the accused which they pulled from his head under the guise of helping him correct his cowlick. They also obtained hair from a new brush one of the officers had allowed the accused to use.

> The fact that the cigarette butt was removed from the curtilage when one of the detectives kicked the butt off of the patio fails to defeat defendant's reasonable expectation of privacy. Additionally, the furtive nature of the seizure raises a suspicion that the detective was aware that defendant would not consent to his taking the butt and that the detective knew that a seizure of the butt would be illegal so long as it was on the patio. It is possible that had defendant placed the cigarette butt in the common area, he may have lost his reasonable expectation of privacy; the police may not, however, by removing evidence from the curtilage, proceed as if the evidence had been left open to the public by defendant.[58]

The Court in *Reed* was clear to distinguish between garbage put out for collection where there was a clear intention to abandon it, verses garbage within the cartilage of a dwelling where no such intention was obvious.

## B. Vacated Apartments/Hotel Rooms

In *R. v. Brooks*[59] and *R. v. Wells*,[60] the Ontario Court of Appeal admitted bloody clothing that the accused left behind in his hotel room. In the case of *Wells*, the police "rented" the room after Wells left without paying his bill and collected the evidence he left behind without warrant. In finding the evidence admissible, the Court of Appeal stated:

> In my view, the evidence reasonably supported the conclusion that, in his haste to leave the jurisdiction, the appellant abandoned the items left in his hotel room. Furthermore, the appellant was delinquent in his rental payments and he probably was not maintaining any further lawful possession interest in his personal belongings in the hotel room.
> The police lawfully rented the room from the manager of the hotel, packed up the appellant's belongings in boxes, stored the boxes and then obtained a search warrant before opening the boxes and subjecting the contents to forensic examination.[61]

In *R. v. LeBlanc*,[62] the New Brunswick Court of Appeal upheld the seizure of blood from the front seat of the accused's car after it was in an accident. In this case, a police officer collected enough blood off the seat of the vehicle to determine the blood alcohol level of the accused at the time of the accident, and charged him with impaired driving. The Court ruled that blood found on front seat of the vehicle was considered abandoned and that the accused ceased to have

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58 *State v. Reed* (2007), Docket No. COA06-4006 (N.C. C.A.), pg. 7-8.

59 *R. v. Brooks* (1998), 129 C.C.C. (3d) 227, rev'd [2000] 1 S.C.R. 237, but not on this point.

60 *R. v. Wells*, [2001] O.J. No. 81, leave to appeal refused [2001] S.C.C.A. No. 347 (S.C.C. Nov 15, 2001).

61 *Ibid.* at paras. 67-68. It should be noted that while the officers originally seized the clothing without warrant, they later obtained a search warrant to seize the items from their own storage facility. Also see *U.S. v. Abel* (1960), 362 U.S. 217: The United States Supreme Court upheld the warrantless seizure of items from a hotel wastepaper basket after the accused had checked out. The items were deemed to be abandoned by the suspect.

62 *R. v. LeBlanc* (1981), 64 C.C.C. (2d) 31 (N.B.C.A.).

any expectation of privacy in it. Although this is a pre-Charter case, it was cited with approval by the Supreme Court of Canada in *R. v. Dyment.*[63]

## C. Abandoned Vehicles and other Property

In *R. v. Pruim*[64] the Manitoba Court of Appeal held that a suspect who flees from the police effectively abandons his/her vehicle and it may be searched without warrant as discarded. In this case the accused fled from the scene of a break and enter in a truck, pursed by the police. The vehicle was subsequently found abandoned and searched by the police without warrant. Tools forensically linking the accused to the crime were recovered inside the vehicle. While the trial judge found that the search of the vehicle was justified as being lawfully incident to arrest, the Court of Appeal, in upholding the warrantless search, unanimously stated that they would have been "more comfortable in deciding this issue ... on the basis that there could be no reasonable expectation of privacy [in a truck which had been abandoned during the flight from the break-in]."[65]

A similar decision was reached by the Quebec Court of Appeal in *R. v. Goodleaf.*[66] In that case, the accused was speeding and refused to stop for the police. After a short chase the suspect stopped his vehicle and fled on foot, making good his escape. The officer returned to the accused's vehicle and searched it, finding 314 bottles of illegally imported alcohol. At trial, the evidence was excluded as being the product of an illegal search. However the Court of Appeal reversed that decision, holding that "by abandoning the vehicle, the accused lowered her own expectation of privacy, and it was not reasonable for her to believe that the privacy of her vehicle was protected or was as secure in that location as it [would on her own property]. As a result of her abandonment, she could not invoke a violation of her right to be secure against unreasonable search and seizure."[67]

However, in *R. v. Law,*[68] the Supreme Court of Canada held that the search of a stolen safe that had been recovered by police was unlawful where police photocopied documents contained therein, forwarding them to Revenue Canada. Although the safe had been abandoned (by the thief), the victim had not

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63 *R. v. Dyment,* [1988] 2 S.C.R. 417.

64 *R. v. Pruim and McClelland* (1993), 92 Man. R. (2d) 35 (C.A.), aff'ing (1991) 77 Man. R. (2d) 300 (Q.B.)

65 *Ibid.* at para. 11.

66 *R. v. Goodleaf,* [1997] A.Q. no. 2665 (C.A.)

67 Ibid.

68 *R. v. Law,* [2002] 1 S.C.R. 227.

abandoned it, and as such maintained a reasonable expectation of privacy in its contents. As noted by the Court:

> Where an individual abandons his property, he effectively abandons his privacy interest in it. However, the mere fact that police recover lost or stolen property is insufficient to support an inference that the owner voluntarily relinquished his expectation of privacy in the item. In this case, the accused retained a residual, but limited, reasonable expectation of privacy in the contents of their stolen safe. The existence of a residual privacy interest does not undermine the police's obligation to investigate the theft of a stolen item, or to carry out whatever law enforcement responsibility is reasonably associated with its taking. The police's taking of the accused's safe was restricted to the investigation of the theft and did not extend to the pursuit of totally unrelated hunches.[69]

Nevertheless, in *U.S. v. Procopio*,[70] the 1st Circuit Court of Appeals upheld the warrantless search of documents found in a stolen safe, finding that the accused had abandoned his privacy interest in them when he stored them in a third party's safe, which was subsequently stolen and abandoned in a public park.

## D. Private Individuals

Generally, the Charter was not intended to cover activities by non-governmental entities. The wording of s. 32(1) of the Charter indicates that it is confined to government action. It is essentially and instrument for checking the powers of government over the individual. The exclusion of private activity from Charter protection was deliberate. To open up all private and public action to judicial review could strangle the operation of society and impose an impossible burden on the courts. Only government need be constitutionally shackled to preserve the rights of the individual. Private activity, while it might offend individual rights, can either be regulated by government or made subject to human rights commissions and other bodies created to protect these rights.[71]

As such, biological material seized illegally by non-state agents, can be obtained and used for law enforcement purposes. Such was the case in *R. v. S.J.S.*,[72] where private investigators (acting on their own and not at the behest of the police) illegally entered a car driven by the suspect and obtained a sample of material from a tube of chapstick. The sample was subsequently analyzed, compared and matched to semen found on the victim. In holding the DNA evidence admissible at trial, the Saskatchewan Court of Appeal held that:

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69 Ibid.

70 *U.S. v. Procopio*, 88 F.3d 21, 23 (1st Cir), cert. denied, 117 S.Ct. 620 (1996).

71 McKinney v. University of Guelph, [1990] 3 S.C.R. 229.

72 *R. v. S.J.S.* (2000), 199 Sask. R. 198 (C.A.). Also see *Commonwealth v. Cabral*, *supra*, note 46.

> We are of the view the private investigators cannot be said to have been agents of the state so as to render their actions in gathering the sample of material, including the sample gathered from the tube of chapstick, a violation of the appellant's constitutional rights.[73]

In this case the family had retained private investigators after the police had failed to identify the accused as the suspect. Although police had originally obtained DNA samples from the suspect (a doctor) on two occasions, it turned out that he had been inserting a tube of blood belonging to someone else underneath his skin.

## VI. OTHER FAMILY MEMBERS

As every person's DNA is a combination of their parent's DNA (50% is contributed by each parent), investigators should also consider them as sources of DNA (discarded or otherwise) that can identify or eliminate your suspect. Other useful combinations would include a child and one parent to identify or eliminate the other parent.

The first time "familial" DNA was used to identify a possible suspect was in 2002 when it linked Joe Kappen to the murder and rape of three girls who were killed in South Wales in 1973. Although Kappen had since died, the police exhumed his body and obtained a full DNA profile to compare to that found at the crime scene.

More recently "familial DNA searching" was used in 2004 to identify and convict Craig Harman of Surrey, England, for manslaughter after he was linked to the crime scene by a close relative's DNA profile.

Harman threw a brick from a bridge over a motorway which crashed through the windscreen of Michael Little's trick in March 2003. As the brick hit his chest, 53-year-old Little suffered a heart attack, though he still managed to steer his vehicle out of harm's way before dying.

According to an article in the *New Scientist*, police obtained a DNA profile of the assailant from blood on the brick but could not match it to anything on the UK's national DNA database because Harman had no criminal convictions. However the UK's Forensic Science Service used familial searching to uncover a close relative of Harman's, who had a criminal conviction and was on the DNA database. The relative's profile matched the DNA on the brick by 16 out of 20 points. This lead police to Harman, who's DNA gave a perfect match, and he eventually confessed to the drunken act of violence.

Familial searching comprises of two tests. The first matches parents to children. Standard DNA profiles examine 10 markers in the DNA. Each marker has two sequences - one inherited from the mother, and one from the father. The

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[73] *Ibid.* at para. 12.

database can be trawled to match potential parents which gives the police "a manageable list" to investigate. Potential siblings can also be matched via the database by comparing markers. On average, two people would probably have six or seven DNA markers in common out of 20, simply by chance ... but with over 12 bands in common, you very, very rarely see unrelated people with that degree of similarity.[74]

On April 25, 2008, Jerry Brown, Attorney General for California, announced that California had become the first state to adopt familial or "partial match" searching as a matter of policy. According to an article in the Los Angeles Times, the state's crime lab will perform calculations and tests to determine the likelihood of a biological relationship between the person found in the state's database and the unknown offender believed to have left DNA at the crime scene. The article continued that "once a relative has been identified, police can interview him or construct a family tree based on existing records. If a suspect is identified, police can obtain a warrant for his DNA, or even gather it surreptiously from an abandoned drink or cigarette butt".[75]

## VII. CONCLUSION

Accused persons have no expectation of privacy in evidence they abandon in a public place. They will, however, have an expectation of privacy in items they have on their property and inside their home. This will not, however, generally include household trash placed at the curb for collection (especially if the constraints suggested in *State of Montana v. 1993 Chevrolet Pickup* [76] are followed).

An accused will also generally not have an expectation of privacy in evidence voluntarily left behind at the police station upon release. However s/he may have an expectation of privacy if s/he is detained and has no choice but to discard the evidence into the State's garbage can. In these situations, however, a search warrant may be obtained for the evidence or a General Warrant used to collect a sample using a simple ruse such as was employed in *R. v. Nguyen*.[77]

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74 Shaoni Bhattacharya, "*Killer convicted thanks to relative's DNA*" (April 20, 2004). On-line at <http://www.newscientist.com/article.ns?id=dn4908>. Also see Andrew Barrow, "*Sex Attacker Caught by Family DNA*" (Sept 19, 2005). Familial DNA was used to identify and convict serial sex offender James Davies in 2005 for a number of offences that occurred in Wales between 1998 and 2000. On-line at <http://icwales.icnetwork.co.uk>.

75 Maura Dolan and Jason Felch, "State offers police extra DNA tool; California will use partial matches from relatives in its genetic database to track down criminals" (April 26, 2008). On-line at <http://www.innovations.harvard.edu/news/95761.html>.

76 *Supra*, note 36. Also see *R. v. Kang-Brown* supra, note 37.

77 *Supra*, note 14.

Nevertheless, collecting items discarded directly by the accused in a public place is a legal and safe way of obtaining a DNA sample. All other methods have their drawbacks, including the seizure of garbage from the curb, as one has no idea to whom any of the items actually belong, and one may have to trespass onto private property in order to obtain it, whereas if you actually see the accused abandon his/her cigarette butt, juice bottle, mucous, spittle, etc., you can state that the sample obtained was from the suspect in question.

It has been suggested that a special 'exception' should be made for discarded or abandoned DNA evidence because one does not always intend to leave genetic material behind.[78] However, as rightly noted by Crown Attorney Michael Fairburn:

> [P]erpetrators do not intentionally leave their genetic fingerprint behind. How would one develop a constitutional exception in relation to DNA that would allow a warrantless seizure from a crime scene, but not from a McDonald's cup?[79]

However, a compelling case could be made for protecting and possibly criminalizing the misuse and abuse of genetic information surreptitiously collected by employers, insurers and others for discriminatory purposes. A similar case can be made where ones right to privacy is violated by 'trophy hunters' selling genetic information, or in other case where the collection and analysis of genetic information is not in the public interest.

## VIII. EXAMPLES OF ABANDONED / DISCARDED ITEMS WHERE DNA HAS BEEN OBTAINED

Gum
Pop cans / bottle rims
Used Straws
Saliva
Comb
Toothbrush
Used pens / pencils
Cigarette butts
Used tissue
Unfinished food (half-eaten foods, apple cores, etc.)
Cutlery
Cup or drinking glass rims

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78 See Elizabeth Joh, "Reclaiming 'Abandoned' DNA: The Fourth Amendment and Genetic Privacy" (2006) 100 Nw. U.L. Rev. 857.

79 Michael Fairburn, "From Washing Your Hands to Blowing Your Nose: The Constitutionality of New Search Techniques" (2005) Section 4.1, National Criminal Law Program handout.

Shirts/Jackets (collars, cuffs, etc)
Gloves
Balaclavas
Reading glasses (nose bridge)
Rings
Watchstraps
Fingerprints