

CANADA / JUDGMENT

R. v. Wise

[1992] 1 SCR 527

COURT

Supreme Court of Canada

DECIDED

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R. v. Wise

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Report

[1992] 1 SCR 527

Case number

22050

Judges

Lamer, Antonio; La Forest, Gérard V.; Sopinka, John; Gonthier, Charles Doherty; Cory, Peter deCarteret; Stevenson, William; Iacobucci, Frank

On appeal from

Ontario

Subjects

Constitutional law

Criminal law

Notes

SCC Case Information: 22050

Decision Content

R. v. Wise, [1992] 1 S.C.R. 527

James Henry Wise Appellant

v.

Her Majesty The Queen Respondent

Indexed as: R. v. Wise

File No.: 22050.

1991: June 25; 1992: February 27.

Present: Lamer C.J. and La Forest, Sopinka, Gonthier, Cory, Stevenson and Iacobucci JJ.

on appeal from the court of appeal for ontario

Constitutional law -- Charter of Rights -- Unreasonable search and seizure -- Electronic surveillance -- Tracking devices -- Police installing unauthorized electronic tracking device in accused's car to monitor his whereabouts -- Whether use of device infringed accused's right to be secure against unreasonable search and seizure -- Canadian Charter of Rights and Freedoms, s. 8 .

Constitutional law -- Charter of Rights -- Admissibility of evidence -- Bringing administration of justice into disrepute -- Police installing unauthorized electronic tracking device in accused's car to monitor his whereabouts -- Accused's right to be secure against unreasonable search and seizure infringed -- Whether admission of evidence so obtained would bring administration of justice into disrepute -- Canadian Charter of Rights and Freedoms, s. 24(2) .

Criminal law -- Electronic surveillance -- Tracking devices -- Police installing unauthorized electronic tracking device in accused's car to monitor his whereabouts -- Whether use of device infringed guarantee against unreasonable search and seizure in s. 8 of Canadian Charter of Rights and Freedoms -- If so, whether admission of evidence so obtained would bring administration of justice into disrepute under s. 24(2) of Charter .

Appellant was charged with mischief to property. The Crown sought to introduce evidence of his whereabouts obtained through the use of an electronic tracking device (a "beeper") installed in his car. The police had had appellant under surveillance for some time since they suspected him of involvement in a recent murder believed to be linked to a series of similar killings. On July 14, 1987, they had obtained a warrant to search his home and vehicle, but had found nothing to link him to any of the homicides. The police had towed the car to the police station to carry out the search. While it was there, but after the warrant had expired, they installed the beeper. On August 15, the day of the alleged offence, the police had been able to trace the location of appellant's car using the beeper and established surveillance on a vehicle resembling his parked in a driveway. About two hours later, the police heard a loud crashing sound, caused by the felling of a communications tower. Soon after, they observed another vehicle, which was in fact appellant's, pull out of a laneway in a nearby field. On August 26 the police obtained a warrant to search appellant's vehicle. When the car was vacuumed, melted pieces of metal, consistent with

the metal guy wires of the communications tower, were found. The constant electronic surveillance was maintained until mid-November, when appellant was arrested on the mischief charge. The trial judge excluded all evidence obtained through the use of the beeper, on the ground that it had been obtained in violation of appellant's right to be secure against unreasonable search and seizure under s. 8 of the Canadian Charter of Rights and Freedoms . He acquitted appellant. The Court of Appeal set aside the acquittal and ordered a new trial.

Held (La Forest, Sopinka and Iacobucci JJ. dissenting): The appeal should be dismissed.

Per Lamer C.J. and Gonthier, Cory and Stevenson JJ.: The installation of the beeper inside the appellant's vehicle constituted an unreasonable search in violation of s. 8 of the Charter . Since the subsequent monitoring of the vehicle invaded a reasonable expectation of privacy, it also constituted a search, and, in the absence of prior authorization, violated s. 8 . The search was only minimally intrusive, however. The expectation of privacy in a motor vehicle is much less than in one's home or office. As well, the device used was unsophisticated and inaccurate. It was a very rudimentary extension of physical surveillance, and was attached to the appellant's vehicle, not to the appellant. The police also had a bona fide belief that they were protecting the public when the device was installed, in view of the series of homicides in the rural area in which the appellant lived.

The admission of the evidence in this case would not bring the administration of justice into disrepute. The evidence as to the location of the car would not affect the fairness of the trial. This evidence was real, not conscriptive. There was no police compulsion or enticement which required appellant to enter or drive his car. The beeper merely helped the police to gather evidence which, to a great extent, they had obtained by visually observing the vehicle. The police also acted in good faith in this case. They had reasonable and probable grounds for searching appellant's vehicle when they installed the beeper. While the prolonged electronic monitoring after the metal filings were discovered is difficult to justify, the police obtained the evidence as to the location of the vehicle within a 30-day period, and this was not an unreasonable length of time to maintain surveillance, particularly in light of their obligation to protect the community from the suspected serial killer. There was clearly a pervasive threat of violence and a sense of urgency here. Moreover, the offence in this case is a serious one. The evidence pertaining to the metal pieces should also be admitted, for the same reasons.

Per Sopinka and Iacobucci JJ. (dissenting): The installation of the tracking device in appellant's automobile constituted an unreasonable search in violation of s. 8 of the Charter . It is not necessary to consider whether the surveillance itself would violate s. 8 . The admission of the evidence would bring the administration of justice into disrepute. The police knowingly committed an illegal trespass. While they suspected appellant of a serious offence, mere suspicion cannot be used to redeem Charter violations. There is no appreciable distinction between this case and *R. v. Kokesch*, [1990] 3 S.C.R. 3.

Per La Forest J. (dissenting): The installation of the tracking device in appellant's car constituted an unlawful trespass and violates his privacy rights under s. 8 of the Charter . The use of the device to monitor his movements also violated s. 8 . An individual has a reasonable expectation of privacy not only in the communications he makes, but in his movements as well, even when travelling on a public road. This is not a case where the police are monitoring the roads for the purpose of regulating or observing what goes on there. It is a case of tracking the movements of an individual. There is an important difference between courting the risk that our activities may be observed by other persons and the risk that agents of the state, in the absence of prior authorization, will track our every move. It is constitutionally unacceptable that the state should be allowed to rest a justification for the unauthorized electronic surveillance of a given person on the mere fact that that person had been in a situation where he could be the object of scrutiny on the part of private individuals. Whether a person whose movements were surreptitiously tracked had a reasonable expectation of privacy in given circumstances must not be made to depend on the degree to which that person took measures to shield his or her activities from the scrutiny of other persons.

The grave threat to individual privacy posed by surreptitious electronic tracking of one's movement is such as to require prior judicial authorization. The issuance of a search warrant will ordinarily call for an objective showing of reasonable and probable cause, and this should generally be required of those seeking to employ electronic tracking devices in the pursuit of an individual. Since this means of surveillance, if properly controlled, is somewhat less intrusive than electronic audio or video surveillance, it may be possible to establish that judicial officers should be empowered in certain circumstances to accept a somewhat lower standard, such as a "solid ground" for suspicion, if it can be established that such a power is necessary for the control of certain types of dangerous or pernicious crimes.

The evidence obtained through the use of the tracking device should be excluded under s. 24(2) of the Charter . Such evidence would not have existed without the device because visual contact had been lost. Since the violation in this case was intrusive and long-lasting, it was serious. The electronic surveillance continued day and night over many months. The violation was not mitigated by good faith on the part of the police. The police certainly knew they needed a warrant to search the car, and that the warrant they had obtained did not permit what they did, and in fact had expired. The police did not have reasonable and probable cause, but were acting on mere suspicion. The long-term consequences of admitting evidence obtained in such circumstances on the integrity of our justice system outweigh the harm done by this accused being acquitted.

Cases Cited

By Cory J.

Distinguished: R. v. Kokesch, [1990] 3 S.C.R. 3; referred to: United States v. Knotts, 460 U.S. 276 (1983); R. v. Greffe, [1990] 1 S.C.R. 755; R. v. Collins, [1987] 1 S.C.R. 265; R. v. Jacoy, [1988] 2 S.C.R. 548; R. v. Debot, [1989] 2 S.C.R. 1140; R. v. Black, [1989] 2 S.C.R. 138; R. v. Pohoretsky, [1987] 1

S.C.R. 945; R. v. Manninen, [1987] 1 S.C.R. 1233; R. v. Ross, [1989] 1 S.C.R. 3; Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission), [1990] 1 S.C.R. 425; R. v. Therens, [1985] 1 S.C.R. 613; R. v. Genest, [1989] 1 S.C.R. 59; R. v. Duarte, [1990] 1 S.C.R. 30; R. v. Simmons, [1988] 2 S.C.R. 495.

By Sopinka J. (dissenting)

R. v. Kokesch, [1990] 3 S.C.R. 3.

By La Forest J. (dissenting)

R. v. Collins, [1987] 1 S.C.R. 265; R. v. Kokesch, [1990] 3 S.C.R. 3; Hunter v. Southam Inc., [1984] 2 S.C.R. 145; R. v. Moran (1987), 36 C.C.C. (3d) 225; R. v. Wong, [1990] 3 S.C.R. 36; R. v. Thompson, [1990] 2 S.C.R. 1111; Cardwell v. Lewis, 417 U.S. 583 (1974); R. v. Duarte, [1990] 1 S.C.R. 30; United States v. Knotts, 460 U.S. 276 (1983); R. v. Simmons, [1988] 2 S.C.R. 495; R. v. Jacoy, [1988] 2 S.C.R. 548; Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission), [1990] 1 S.C.R. 425; R. v. Black, [1989] 2 S.C.R. 138; R. v. Ross, [1989] 1 S.C.R. 3; R. v. Greffe, [1990] 1 S.C.R. 755; Olmstead v. United States, 277 U.S. 438 (1928); R. v. Dymont, [1988] 2 S.C.R. 417.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 8 , 10 (b), 24(2) .

Criminal Code, R.S.C. 1970, c. C-34, s. 387(3).

Criminal Code, R.S.C., 1985, c. C-46, s. 430(4) .

United States Constitution, Fourth Amendment.

Authors Cited

Guterman, Malvin. "A Formulation of the Value and Means Models of the Fourth Amendment in the Age of Technologically Enhanced Surveillance" (1988), 39 Syracuse L. Rev. 647.

Hentoff, Nat. "Profiles: The Constitutionalist", The New Yorker, March 12, 1990. p. 45.

APPEAL from a judgment of the Ontario Court of Appeal (1990), 40 O.A.C. 103, 49 C.R.R. 163, allowing the Crown's appeal of appellant's acquittal by Smith Dist. Ct. J. on a charge of mischief to property. Appeal dismissed, La Forest, Sopinka and Iacobucci JJ. dissenting.

J. Bruce Carr-Harris and Carole J. Brown, for the appellant.

Susan Chapman, for the respondent.

//Cory J.//

The judgment of Lamer C.J. and Gonthier, Cory and Stevenson JJ. was delivered by

Cory J. -- I have read with great interest the compelling reasons of my colleague Justice La Forest but, with respect, I must differ from the conclusions that he has reached.

Issues

The Crown respondent conceded that the installation of the beeper was an unreasonable search in violation of s. 8 of the Canadian Charter of Rights and Freedoms . Accepting this concession, the main issue is whether the evidence obtained as a result of the unreasonable search should be excluded under s. 24(2) of the Charter . However, the evidence in question stems not only from the installation of the beeper but also from the monitoring by the beeper. Prior to the s. 24(2) analysis, the following preliminary issue arises:

Did the use of the beeper constitute an unreasonable search in violation of s. 8 of the Charter ?

Analysis

1. Did the Beeper Monitoring of the Vehicle Constitute an Unreasonable Search for the Purposes of s. 8 ?

(a) Introduction

It is clear that s. 8 of the Charter guarantees a broad and general right to be secure from unreasonable search where the person who is the object of the search has a reasonable expectation of privacy. In determining whether the beeper monitoring constitutes a search, the initial question is whether there is a reasonable expectation of privacy in respect of the monitored activity. If the police activity invades a reasonable expectation of privacy, then the activity is a search.

(b) The Lesser Expectation of Privacy in a Motor Vehicle

The expectation of privacy in a vehicle cannot be as great as that contended by my colleague. For the safety and well-being of society, motor vehicles and their drivers are subject to a great many statutory requirements, conditions and regulations. Almost every aspect of the use of a motor vehicle is controlled. The side of the road on which a car may be driven; the speed at which it may proceed; when it may overtake and where it may overtake another vehicle; where and when it must stop; the mechanical condition of the vehicle; the installation of certain accessories, be they required or prohibited; the places where a vehicle may park: all these and many more are circumscribed by various Acts and regulations.

For the safety of all, it is essential that drivers be tested before receiving their licence; that RIDE programs be instituted to discourage the drinking driver; that the speed of vehicles be supervised and that the mechanical fitness of vehicles be inspected. These inspections and tests and this supervision do not constitute unreasonable breaches of basic civil liberties. Rather, they are common sense rules that exist for the protection of society as a whole. Reasonable surveillance

and supervision of vehicles and their drivers are essential. Without them, motor vehicles inevitably become instruments of crippling injury, death and destruction.

Society then requires and expects protection from drunken drivers, speeding drivers and dangerous drivers. A reasonable level of surveillance of each and every motor vehicle is readily accepted, indeed demanded, by society to obtain this protection. All this is set out to emphasize that, although there remains an expectation of privacy in automobile travel, it is markedly decreased relative to the expectation of privacy in one's home or office.

(c) The Nature of the Device Utilized in this Case and its Minimal Intrusion

It must be remembered that the tracking device used in this case was unsophisticated and indeed simplistic. It did not provide a visual record of the movement or position of the vehicle. Nor was it able to pick up and record conversations in the vehicle. Rather, it was capable of giving only a very rough idea of the vehicle's location. Certainly, it could not be said that the device was capable of tracking the location of a vehicle at all times.

The device consisted of a low power radio transmitter. From the strength of the signal, it was possible to determine the general location of the object to which the beeper had been fixed. By moving in the direction of the transmitter and adjusting the "RF gain control", the location could be more precisely determined. The device used in this case was not capable of indicating if the object being tracked was to the right, left, front or back of the receiver of the signal.

The evidence in this case was that the device was used intermittently as a back-up for visual surveillance of the appellant's car beginning on July 17, 1987, particularly to attempt to locate the vehicle when visual surveillance failed. Since the device was not capable of pinpointing the vehicle with any degree of precision, physical surveillance was always required to fix its proximate position.

Indeed, on the night the tower was destroyed, the device was not capable of successfully tracking the appellant's vehicle. That night, the police lost visual contact with the appellant's vehicle and attempted to trace its location using the beeper. With the "help" of the beeper, the police established surveillance on a car resembling the appellant's. While they were busy observing this vehicle that was not, in fact, the appellant's, they heard the crashing of the Bell tower and then visually observed the appellant's actual vehicle leave a nearby field. This incident illustrates the unsophisticated and inaccurate nature of the beeper.

It has been seen that there is a reduced expectation of privacy by those using a motor vehicle. In addition, the intrusion on any remaining expectation of privacy as a result of the device used in this case is minimal. This particular beeper was a very rudimentary extension of physical surveillance. It must be remembered as well that the device was attached to the appellant's vehicle, not to the appellant. How very different a device such as this is, in its operation and in its effect on the individual, from a hidden video camera or an electronic monitor that surreptitiously intercepts private communications.

Before considering what the position with regard to vehicle tracking devices should be in Canada, it may be of interest to see what approach the Supreme Court of the United States has taken. This should not be considered an indication that American decisions should be slavishly followed. Rather, they should be considered for the sake of their learning and to see if they might be helpful to our consideration.

(d)The American Approach

In the United States, it has been held that beeper monitoring of a vehicle on a public roadway is neither a "search" nor a "seizure" for the purposes of the Fourth Amendment because it does not violate any legitimate expectation of privacy. In *United States v. Knotts*, 460 U.S. 276 (1983), the Supreme Court held (at pp. 281-82):

A person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another. When [the courier] traveled over the public streets he voluntarily conveyed to anyone who wanted to look the fact that he was traveling over particular roads in a particular direction, the fact of whatever stops he made, and the fact of his final destination when he exited from public roads onto private property.

...

Visual surveillance from public places along [the courier's] route or adjoining [the accused's] premises would have sufficed to reveal all of these facts to the police. The fact that the officers in this case relied not only on visual surveillance, but also on the use of the beeper to signal the presence of [the courier's] automobile to the police receiver, does not alter the situation.

It is true there has been some criticism of this decision: first, on the ground that it assumes an equivalence between visual surveillance and scientific enhancement of surveillance; and second, that it fails to recognize the existence of the privacy interest in automobile travel. Nonetheless, the decision is a strong indication that there must be, at the very least, a markedly lesser expectation of privacy by the users of motor vehicles.

(e)The Protection of the Public

The factual background to this case is of importance. It establishes that the police had a bona fide belief that they were protecting the public when the beeper was installed. There had been a series of homicides in the rural area in which the appellant lived. He was a suspect in these events. The homicides were as follows:

- 1)Sept. 24, 1975 -Lillian Rouson died in a farmhouse fire near Morrisburg,
- 2)Jan. 8, 1981 -Kenneth Murphy died in a farmhouse fire in Finch Township,
- 3)Nov. 18, 1983 -Archie Collision died in a fire in his log cabin near Kempenfeldt,
- 4)Nov. 25, 1983 -Harold Davidson was shot to death in his farmhouse kitchen near Brinston,

5) May 16 or 17, 1987 - Keith Johnston was killed by a shot from a high powered rifle in a farmhouse near Monkland,

6) July 14, 1987 - John King was apparently shot to death before his home was set on fire in Moorewood.

It can be seen that the four most recent murders took place over a four-year period, the last two occurring within two months of each other. In addition to the homicides, the police had received a tape of an anonymous telephone call threatening more killings. They believed that the call came from the appellant. The appellant was the prime suspect in the killings of Keith Johnston and John King.

The police were able to satisfy a justice of the peace that there were reasonable and probable grounds to obtain a warrant to search the appellant's home, the outbuildings surrounding his home and his vehicle. Between 5:30 p.m. on July 14 and 7:30 a.m. on July 15, 1987, the warrant relating to the murder investigation was executed. The appellant's vehicle was towed to the Winchester Provincial Police Detachment, so that it could be examined by the identification unit. The vehicle remained at this detachment until July 16. During this time, arrangements were made to have the tracking device installed in the back seat. In light of this background, the police had every reason to believe that in installing the device they were not only investigating two murder cases, but also were acting to protect the residents of this rural community.

(f) The Nature of the Search in this Case

In this case, it has been fairly conceded that the installation of the beeper in the interior of the motor vehicle constituted a search which breached the provisions of s. 8 of the Charter. Since the beeper monitoring of the appellant's vehicle invaded a reasonable expectation of privacy, this police activity also constituted a search. Absent prior authorization, such a search will be *prima facie* unreasonable and therefore in violation of s. 8. As there was no prior authorization for the installation and use of the beeper device, the monitoring violated the appellant's s. 8 right to be free from unreasonable search. At the same time, however, the lessened privacy interest combined with the use of an unsophisticated device establish that the search was only minimally intrusive. This minimal intrusion and the urgent need to protect the community provide the context in which the s. 24(2) analysis should be made.

Furthermore, it seems artificial to distinguish between the installation of the beeper and the subsequent monitoring. The monitoring is the extension of the installation. It is the aim and object of the installation and cannot be divided from the latter. The installation of the device and its subsequent use to monitor the vehicle, together, constituted the unreasonable search. It is therefore necessary, in the context of the unreasonable search as a whole, to determine whether the evidence obtained should nonetheless be admitted.

2. Should the Evidence be Admitted?

Section 24(2) of the Charter reads as follows:

24. . . .

- (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

It must be remembered that this Court has a limited role in reviewing the decisions of provincial appellate courts in respect to s. 24(2) of the Charter. In *R. v. Greffe*, [1990] 1 S.C.R. 755, Lamer J. (as he then was), at p. 783, wrote:

I note that it is not the proper function of this Court, absent some apparent error as to the applicable principles or rules of law, or absent a finding that is unreasonable, to review findings of courts below in respect of s. 24(2) of the Charter and substitute its opinion for that arrived at by the Court of Appeal. . . .

Thus, it is only if the Court of Appeal made an unreasonable finding or applied the wrong principles that it would be appropriate to undertake a review.

What then are the principles that should be considered? They are set out in *R. v. Collins*, [1987] 1 S.C.R. 265. There, Lamer J., as he then was, divided the factors that should be taken into account when considering the admissibility of evidence under s. 24(2) into three groups:

- (1) the effect of admission on the fairness of the trial process;
- (2) the seriousness of the violation; and
- (3) the effect of exclusion on the reputation of the administration of justice.

It was emphasized that the object of s. 24(2) was not to remedy police misconduct, but rather to prevent the administration of justice being brought into further disrepute through the admission of improperly obtained evidence. These factors will have to be applied to two aspects of the evidence, namely, the location of the appellant's car and the metal pieces found in the vehicle which were similar to the metal guy wires of the destroyed tower.

Evidence Obtained as to the Movement of the Car

I. Factors Affecting the Fairness of the Trial

The fairness of the trial process has been described as a critical factor. In determining fairness, the nature of the evidence obtained must be considered. The admission of real evidence obtained as a result of a Charter violation will rarely result in a finding of unfairness. However, the admission of evidence obtained by conscripting the accused against himself, such as a confession, will generally render the trial unfair. In *Collins*, supra, Lamer J. at pp. 284-85 wrote:

It is clear to me that the factors relevant to this determination will include the nature of the evidence obtained as a result of the violation and the nature of the right violated and not so much the manner in which the right was violated. Real evidence that was obtained in a manner that violated the Charter will rarely operate unfairly for that reason alone. The real evidence existed irrespective of the violation of the Charter and its use does not render the trial unfair. However, the situation is very different with respect to cases where, after a violation of the Charter, the accused is conscripted against himself through a confession or other evidence emanating from him. The use of such evidence would render the trial unfair, for it did not exist prior to the violation and it strikes at one of the fundamental tenets of a fair trial, the right against self-incrimination. Such evidence will generally arise in the context of an infringement of the right to counsel. Our decisions in *Therens*, *supra*, and *Clarkson v. The Queen*, [1986] 1 S.C.R. 383, are illustrative of this. The use of self-incriminating evidence obtained following a denial of the right of counsel will generally go to the very fairness of the trial and should generally be excluded.

The Nature of the Evidence: Is it Real or Conscriptive?

How should the evidence as to the location of the appellant's vehicle be considered? Evidence has been found to be "real" when it referred to tangible items. For example narcotics were held to be real evidence in *R. v. Jacoy*, [1988] 2 S.C.R. 548, and in *R. v. Debot*, [1989] 2 S.C.R. 1140. Weapons were held to be real evidence in *R. v. Black*, [1989] 2 S.C.R. 138. In all of these cases, the real or tangible evidence was admitted even though it had been obtained as a result of an unreasonable search.

On the other hand, "conscriptive" evidence usually refers to evidence which emanates from the accused following a violation of s. 10 (b) of the Charter. Samples of blood taken from the accused were found to be conscriptive evidence in *R. v. Pohoretsky*, [1987] 1 S.C.R. 945. Statements made by the accused were found to be conscriptive in *R. v. Manninen*, [1987] 1 S.C.R. 1233. The compulsory appearance in a police line-up was held to constitute conscriptive evidence in *R. v. Ross*, [1989] 1 S.C.R. 3. There at p. 16 it was said:

... the use of any evidence that could not have been obtained but for the participation of the accused in the construction of the evidence for the purposes of the trial would tend to render the trial process unfair.

In this case, I agree with the Court of Appeal that the movements of the car constituted real evidence. There was no police compulsion or enticement which required the appellant to enter or drive his car. Rather he exercised his own free will. It was the accused who determined that he would drive his car, the routes he would follow and the manner in which he drove. The movement of an object may be transitory but it is real. The movement of a terrestrial body can be and often is plotted. That movement is transitory but real. The migratory route of the caribou herds is transitory but it is vital and real to those who depend upon that movement for food and clothing. So too is the movement of a motor vehicle real. This evidence could be considered conscriptive if the actions of the police forced or perhaps enticed the accused to utilize his vehicle and to follow prefixed routes in arriving at destinations selected by them.

It has been conceded that visual surveillance of motor vehicles by the police is permissible. Further, there is agreement that visual surveillance may properly be augmented by the use of binoculars. The use of this particular beeper, similarly, simply augments visual surveillance. The installation and use of the beeper did not affect in any way the movement of the car. It simply enhanced the ability of the police to observe its movements.

In *Thomson Newspapers Ltd. v. Canada* (Director of Investigation and Research, Restrictive Trade Practices Commission), [1990] 1 S.C.R. 425, La Forest J. found there was a clear distinction between evidence which an accused was forced to create, which should not be admissible, and existing evidence, which the accused had merely been forced to locate or identify, which should be admitted. He put forth his position at pp. 552-553:

I would first of all note that I do not believe that in drawing this distinction, Lamer J. intended to draw a hard and fast line between real evidence obtained in breach of the Charter and all other types of evidence that could be so obtained. . . . I think this clearly indicates that what Lamer J. had in mind was the much broader distinction between evidence which the accused has been forced to create, and evidence which he or she has been forced to merely locate or identify. . . .

A breach of the Charter that forces the eventual accused to create evidence necessarily has the effect of providing the Crown with evidence it would not otherwise have had. It follows that the strength of its case against the accused is necessarily enhanced as a result of the breach. This is the very kind of prejudice that the right against self-incrimination, as well as rights such as that to counsel, are intended to prevent. In contrast, where the effect of a breach of the Charter is merely to locate or identify already existing evidence, the case of the ultimate strength of the Crown's case is not necessarily strengthened in this way. The fact that the evidence already existed means that it could have been discovered anyway. Where this is the case, the accused is not forced to confront any evidence at trial that he would not have been forced to confront if his Charter rights had been respected. In such circumstances, it would be the exclusion rather than the admission of evidence that would bring the administration of justice into disrepute.

and at p. 555:

The one qualification that must be made to the above has to do with the difference between independently existing evidence that could have been found without compelled testimony, and independently existing evidence that would have been found without compelled testimony. As I have acknowledged at several points in these reasons, there will be situations where derivative evidence is so concealed or inaccessible as to be virtually undiscoverable without the assistance of the wrongdoer. For practical purposes, the subsequent use of such evidence would be indistinguishable from the subsequent use of the pre-trial compelled testimony. [Emphasis in original.]

There my colleague indicated that "created" evidence would affect the fairness of the trial and should not be admitted while "located" evidence would only affect the fairness of the trial if the evidence were virtually undiscoverable without the assistance of the accused.

In this case, the use of the beeper merely assisted the police to gather evidence which, to a great extent, they had obtained by visually observing the vehicle. It is difficult to determine from the transcript what evidence was obtained from the beeper and what was obtained from observation. In light of the unsophisticated nature of the beeper, it seems that the essential evidence was obtained by direct observation. In any event, evidence as to movement of the vehicle was certainly not "undiscoverable". It follows that the admission of the evidence as to the location of the car could not be said to affect the fairness of the trial.

II. The Factors Affecting the Seriousness of the Violation

In this case, I have concluded that the admission of the evidence would not affect the fairness of the trial. How then should the violation be assessed? Lamer J. in *Collins*, supra, at p. 285 quoted the following passage from Le Dain J.'s reasons in *R. v. Therens*, [1985] 1 S.C.R. 613, at p. 652:

The relative seriousness of the constitutional violation has been assessed in the light of whether it was committed in good faith, or was inadvertent or of a merely technical nature, or whether it was deliberate, wilful or flagrant. Another relevant consideration is whether the action which constituted the constitutional violation was motivated by urgency or necessity to prevent the loss or destruction of the evidence.

Were the police actions in this case undertaken in bad faith or were they wilful and flagrant violations of Charter rights?

(a) Good Faith

Bad faith has been found in situations where there has been a blatant disregard for the Charter rights of an accused or where more than one Charter right has been violated (see *R. v. Greffe*, supra, and *R. v. Genest*, [1989] 1 S.C.R. 59). Good faith has been established in situations where the violation stemmed from police reliance upon a statute or from the following of a procedure which was later found to infringe the Charter (see *R. v. Duarte*, [1990] 1 S.C.R. 30, and *R. v. Simmons*, [1988] 2 S.C.R. 495).

The Court of Appeal found that the police acted in good faith. I agree with that conclusion. The police had been successful in obtaining a warrant to search the appellant's home, outbuildings and car. It can therefore be assumed that they had reasonable and probable grounds for searching the vehicle of the appellant. These reasonable and probable grounds do not disappear simply because the police were not able to find evidence within a short period of time.

The police did retain the car and install the beeper after the warrant had expired. The officer who installed the device testified that he did not realize the warrant had expired the day before the installation. Although this evidence indicates carelessness on the part of the police, it does not demonstrate bad faith. Of greater concern is the length of time of the surveillance assisted by the beeper. Although the communications tower was destroyed on August 15 and the metal fillings were discovered on August 27, the constant electronic surveillance was maintained until mid-November when the accused was arrested on the charge of mischief. There can be no doubt that

the police had a responsibility to the community to carefully investigate the murders. Yet the prolonged electronic monitoring after August 27 is difficult to justify. Nonetheless, the police did obtain the evidence as to the location of the vehicle within a 30-day period from the beginning of the electronic monitoring, a time when the police had established grounds for the search. This was not, in the circumstances, an unreasonable length of time to maintain surveillance, particularly in light of the obligation of the police to protect the small community from the suspected serial killer.

(b) The Threat of Violence and Urgency

In the case at bar there clearly existed a pervasive threat of violence and a sense of urgency. The relatively small rural community in which the accused resided had experienced a series of unsolved homicides. The accused had been a suspect in these crimes and indeed a prime suspect in at least two of the homicides. Evidence existed which linked the appellant to the murders. There had been an anonymous phone call threatening more killings. The police suspected this call came from the appellant. The accused had a significant criminal record including convictions for robbery, break and enter, theft and possession of offensive weapons. These factors must have motivated the police in undertaking and continuing the surveillance of the accused. It was the duty of the police to investigate the crimes and to protect the community.

In the circumstances, the police would have been remiss in their duties if they had not observed the movements of the appellant. It is easy to imagine the sense of outrage and the criticism that would flow from the community if there had not been police surveillance of the appellant.

The question then becomes: how was that surveillance to be accomplished? All agree that it was quite proper for the police to physically observe the appellant and his car at all hours of the day and night. It is further agreed that these physical observations could be enhanced by the use of binoculars. Yet, it is said that the installation of this rudimentary tracking device the day after the search warrant expired and the subsequent monitoring goes too far and prohibits the admission of the evidence pursuant to s. 24(2). This I find to be a somewhat anomalous position.

In my view the actions of the police in this case were not such that they could be termed "actions taken in bad faith". There was no physical violence, force, coercion or threat employed. The carelessness, with regard to the expiry date of the warrant and the lengthy continuation of the surveillance, do not, in the circumstances of this case, justify the exclusion of the evidence.

Nor do I think that this conclusion conflicts with principles laid down in *R. v. Kokesch*, [1990] 3 S.C.R. 3. In that case, the police searched the yard surrounding the accused's home without a warrant and without the existence of any reasonable and probable grounds upon which they could have obtained a search warrant. There it was held that the narcotics found during the subsequent valid search of the house should be excluded. It was determined that where the police have nothing but suspicion and no legal way to obtain other evidence they should leave the suspect alone.

Here the situation was very different. It must be remembered that the police did have reasonable and probable grounds to search the appellant's vehicle when they installed the beeper. Moreover, there was a real threat of urgency flowing from the two most recent homicides in the community coupled with the telephone threat of further murders which motivated police action. More importantly, the invasion of privacy was not of a home or office but of a motor vehicle.

III. The Effect of Exclusion

In *Collins*, *supra*, Lamer J. observed that if evidence is excluded because of a trivial violation, particularly where the charge is very serious, the administration of justice may suffer greater disrepute than if the evidence were admitted. He went on to observe that if the admission of evidence renders the trial unfair, then, no matter how serious the offence, the evidence must be excluded.

The charge in this case does not appear to be extremely grave. But when it is recalled that the destruction of the tower caused damage in excess of one million dollars, it can be seen that the offence is very serious. The s. 8 violation in respect of the accused's car, although not trivial, was certainly less severe than would be a violation of the s. 10 (b) right to counsel or a search of a person, home or office. Taking into account the nature of the charge and the nature of the Charter breach, I am of the view that the admission of the evidence would not bring the administration of justice into disrepute.

Metal Pieces

The surveillance of the vehicle of the appellant, both electronically and visually by the police, provided them with the necessary grounds to obtain a second warrant to search the appellant's car. As a result of that search, the police discovered the metal pieces that were similar to those found on the guy wires of the tower. The information obtained from that search emanated from information obtained as a result of the initial Charter violation which occurred when the beeper was installed. As a result, the evidence obtained from the second search is linked to the original Charter breach. Its admissibility will be determined by a review of the same factors and principles that were considered in determining the admissibility of the evidence as to the movements of the vehicle. It follows that this evidence too is admissible. If anything, the metal filings can be said to be more "real" than the movements of the vehicle. Once again the admission of the evidence would not affect the fairness of the trial procedure. Nor is the violation so serious that it, in itself, would warrant the exclusion of the evidence. In all the circumstances, the evidence pertaining to the metal pieces should be admitted as should the evidence pertaining to the movements of the appellant's vehicle.

Summary

In summary, the installation of the electronic tracking device inside the vehicle after the expiry of the warrant and the subsequent monitoring of the movements of that vehicle constituted an unreasonable search in violation of s. 8 of the Charter . However, the evidence as to the location of the appellant's motor vehicle and the evidence of the metal pieces found in his car are admissible pursuant to s. 24(2) of the Charter .

Future Legislation

I agree with my colleague that it would be preferable if the installation of tracking devices and the subsequent monitoring of vehicles were controlled by legislation. I would also agree that this is a less intrusive means of surveillance than electronic audio or video surveillance. Accordingly, a lower standard such as a "solid ground" for suspicion would be a basis for obtaining an authorization from an independent authority, such as a justice of the peace, to install a device and monitor the movements of a vehicle.

Disposition

In the result, I would dismiss the appeal.

The following are the reasons delivered by

//La Forest J.//

La Forest J. (dissenting) -- This appeal raises the general question of whether, and in what circumstances, the installation by the police without authorization of an electronic tracking device in a private citizen's automobile and its use as a means of surreptitious electronic surveillance to monitor the whereabouts of the citizen violate s. 8 of the Canadian Charter of Rights and Freedoms , which protects the individual against unreasonable searches and seizures. It also raises the question whether evidence so obtained should be rejected under s. 24(2) of the Charter because it could bring the administration of justice into disrepute.

Facts

The appellant was charged with mischief to property contrary to s. 387(3) (now s. 430(3)) of the Criminal Code, R.S.C. 1970, c. C-34. In attempting to establish this offence, the Crown sought to introduce evidence of the whereabouts of the appellant obtained through the use of an electronic tracking device (a "beeper") installed in his car. A beeper may be described as a radio transmitter, usually battery operated, which emits periodic signals that can be picked up by a radio receiver. The background and manner of installation may briefly be summarized as follows.

The appellant had for some time been under surveillance by the Ontario Provincial Police (the O.P.P.) who suspected him of involvement in a recent murder in Morewood, Ontario which they believed to be linked to a series of similar killings in the area. In the course of its homicide investigation, the O.P.P. on July 14, 1987 applied for a warrant to search the appellant's home and

vehicle on the following grounds: that the police had spotted the appellant driving his automobile towards his home shortly after the murder; that they had observed, in the back seat of his car, a pair of binoculars, a pair of work gloves, and a plastic rain coat, which appeared used; that they had observed under the car soil and vegetation (Timothy, a plant common to the area) similar to that found on the victim's property; that the appellant's voice sounded similar to that on a tape of someone who purported to be the murderer, though the voice appeared disguised and could not be positively identified; that the appellant had been a suspect in certain of the previous homicides; and that he had an extensive criminal record for break and enter, robbery, theft, and offences relating to offensive weapons. The police obtained the warrant and conducted the search but found nothing in either the accused's home or vehicle to link him to any of the homicides.

Pursuant to the terms of the warrant, the police had towed the appellant's automobile to the police station to carry out the search. Some time later, more than thirty hours after the expiration of the warrant, they installed an electronic tracking device in the interior of the appellant's vehicle. The "beeper" was surreptitiously hidden in the foam in the back seat of the appellant's car, causing minor damage to the seat. This, the trial judge held, was done on the basis of "mere suspicion" and it was, of course, done without judicial authorization. The car was then returned to the appellant.

The beeper emitted a radio frequency transmission which could be detected by a police scanner for a distance of up to three kilometres. Though the device was rather unsophisticated, and the person who installed it thought it was capable of giving only its general location, he had not counted on the ingenuity of the police who by listening to the tone and using an antenna held outside the window of a police vehicle could be led in a specific direction. Along with constant visual surveillance, the device enabled the police to track the appellant's whereabouts at all times of the day or night. The trial judge found that the police used the device on a constant basis for a period extending over many months, and pertinently, over a month prior to the commission of the offence alleged in the present case, both to track the vehicle in motion and to pinpoint its location when stationary.

On August 15, 1987, the day of the alleged offence, the police had lost visual contact with the appellant's vehicle but were able to trace its location using the beeper. Upon moving to that location, the police established surveillance on a vehicle resembling the appellant's that was parked in a driveway. Approximately two hours later, the police surveillance team heard a loud noise which sounded like metal crashing. The crashing sound was caused by the felling of a Bell Canada communications tower, the value of which was in excess of \$2 million. Soon after, the police observed another vehicle, which was in fact the appellant's and appeared to be identical to the one they were watching, pull out of a laneway in a nearby field from which the crashing sound had emanated. The second vehicle was later located at the appellant's residence.

On August 26, 1987, the O.P.P. observed the appellant sitting in his car in a field, where he had parked in an attempt to avoid the heavy police surveillance. At this time, the police conducted a warrantless search of the appellant's vehicle and person. Nothing was found. Later that evening, the police obtained a warrant to search the appellant's vehicle. When the car was vacuumed,

melted pieces of metal, consistent with the metal guy wires of the Bell communications tower, were discovered. On November 13, 1987, the appellant was charged with mischief to property over \$1,000 with respect to the Bell tower.

The appellant brought a pre-trial motion for exclusion of the evidence relating to his whereabouts on August 15, 1987 on the ground that such evidence had been obtained in violation of his rights under s. 8 of the Charter . The trial judge granted the appellant's motion and refused to admit any of the evidence obtained directly or indirectly as a result of the use of the electronic tracking device. As a result, he acquitted the appellant. The Ontario Court of Appeal allowed the Crown's appeal, set aside the acquittal and ordered a new trial.

Judicial History

District Court of Ontario, September 26, 1988

The trial judge, Smith Dist. Ct. J., made three separate rulings. The first concerned the issue of whether the installation and use of an electronic tracking device constitutes a "search" for the purposes of s. 8 of the Charter . He held that it does, rejecting the Crown's arguments that a person, by travelling upon a public highway, extends an open invitation to be observed, and that the tracking device in this case was generally used only to facilitate and assist visual surveillance. He stated:

There is then, from time to time at least, a reasonable expectation of privacy in the use made of one's private automobile and when that expectation of privacy is intruded upon by the police as it was here, then the police effectively made a search of that vehicle not only by installing the device, but by tracking it over the one month period between the time of its installation and the alleged commission of the offence by the accused.

The trial judge next considered the reasonableness of the search. In finding that the police had no reasonable and probable grounds for employing the monitoring device, the trial judge held that the police's suspicion of the appellant in relation to the homicides was never elevated to the point of their having any reason to believe he was the killer. Rather, he held, the police proceeded on the basis of mere suspicion. The trial judge interpreted the police's motives in planting the tracking device in the appellant's car as an attempt "to keep track of his whereabouts and see if he was going to attempt any similar action". He held that the Charter prevents the police from invading a person's privacy to see if they are going to do something illegal.

The trial judge found the search represented by the installation and use of the monitoring device to be an on-going and continuous one. He disagreed with the Crown's contention that the device was used simply as an aid to visual surveillance. Rather, he held, it was used as a tracking device and constituted "an on-going search conducted by the police for which they had no reasonable and probable ground because they had nothing more than a suspicion of Wise as a criminal". For these reasons, he found the installation and use of the tracking device to be an unreasonable search and thus a violation of the appellant's rights under s. 8 of the Charter .

The trial judge then considered whether the evidence obtained through use of the monitoring device should be excluded under s. 24(2) of the Charter . In finding that admission of the evidence would bring the administration of justice into disrepute, he emphasized the serious and on-going nature of the Charter violation. The unreasonable search, he observed, took place twenty-four hours a day for over a month prior to the commission of the alleged offence. He found the violation to be deliberate and planned, and not to have been committed in circumstances of urgency. He also observed that because the impugned evidence did not exist before the Charter violation, the accused had been compelled to produce evidence against himself.

In such circumstances, the trial judge concluded, admission of the evidence would bring the administration of justice into disrepute since it would deprive the accused of a fair trial and would constitute judicial condonation of unacceptable police conduct. In reaching this conclusion, the trial judge emphasized that the relevant standard is that of the reasonable person, dispassionate and fully apprised of the circumstances, in a community where the current mood is reasonable. Such a person, he found, would hold the administration of justice in disrepute if the impugned evidence were admitted.

Accordingly, the trial judge held that all evidence obtained directly or indirectly as a result of the use of the electronic tracking device was to be excluded. As a result, he acquitted the appellant.

Ontario Court of Appeal (1990), 49 C.R.R. 163

On appeal, the Crown conceded that the installation of the electronic monitoring device constituted a breach of the appellant's s. 8 right. Given this concession, the Court of Appeal confined its reasons to the s. 24(2) issue. In considering the test of admissibility as set out by this Court in *R. v. Collins*, [1987] 1 S.C.R. 265, the Court of Appeal stated, at pp. 165-66:

The evidence obtained may or may not be conclusive but there is no question that without it there is no case against the accused. We believe that while the action of the police was deliberate, they proceeded in good faith having found other investigatory techniques unproductive. The populace in the area was understandably very concerned about the rash of murders committed and it was reasonable both for the investigation and the prevention of crime to track the movements of the respondent in his car. The device proved necessary to maintain contact with that car. We do not find the evidence obtained to be conscriptive of the accused as referred to in the *Collins* case. Everything he did, everywhere he went, was of his own volition. Also, the evidence obtained must be classified as real, which as stated in *Collins* is an important factor leading to admissibility.

For these reasons, the court refused to find that admission of the evidence would bring the administration of justice into disrepute. Accordingly, it allowed the appeal, set aside the acquittal and ordered a new trial.

Notice of appeal to this Court was then filed on behalf of the appellant.

Analysis

Application of s. 8 to the Installation

I should at the outset note that the Crown has conceded that the installation of the tracking device in the appellant's car in the circumstances of this case constituted a violation of s. 8 . In my view, the Crown was right in making this concession. The violation resulted from a combination of facts: the device was installed in the interior of the car; minor damage (the displacement of some of the foam in the seat cushion) was caused; and the installation was not performed pursuant to a search warrant. This installation constituted an unlawful trespass. In engaging in this activity, the police were carrying on an unreasonable search. The information obtained was a product of the illegal search; it came into the state's possession by the exploitation of its wrong.

All of this is fully supported by the recent decision of this Court in *R. v. Kokesch*, [1990] 3 S.C.R. 3. There police officers in the course of a narcotics investigation conducted a perimeter search of a house without warrant and by observing, listening and smelling were able to surmise what was going on in the house. The Court unanimously held that the police had no right to trespass on the land adjoining the house and that they were engaged in an unreasonable search. A majority rejected evidence flowing from this search under s. 24(2) of the Charter . The case, of course, dealt with the home, the principal bulwark against the invasion of an individual's privacy, but other locations closely related to one's life or affairs are also protected under s. 8 ; see, for example, *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *R. v. Moran* (1987), 36 C.C.C. (3d) 225; *R. v. Wong*, [1990] 3 S.C.R. 36. While I am prepared to acknowledge that, as compared to the home, the individual has a diminished expectation of privacy in respect of his or her automobile, nonetheless an automobile is so central to one's daily life that the interior of the vehicle immediately jumps to mind as being an area meriting protection against state intrusion; see in this context *Cardwell v. Lewis*, 417 U.S. 583 (1974), at p. 591. In the present case, there were no exigent circumstances, and the activities of the police were not authorized. The search warrant had expired and, for that matter, it did not authorize that kind of search.

Application of s. 8 to the Monitoring

Given its concession that the manner in which the tracking device was installed constituted an unreasonable search, the Crown argued that it becomes unnecessary to consider the extent to which the use of electronic tracking devices generally violates s. 8 , and that the Court should not address the issue. I do not agree. The use of these types of tracking devices on automobiles poses important questions that will ultimately have to be resolved in some form by Parliament, and it would, I think, be helpful if this Court could provide some indication of the constitutionality of the use of electronic tracking devices. This is particularly important given the absence of any applicable legislation. Besides, the Crown's concession masks the fact that two different methods of invading privacy are involved, the trespass to the interior of the appellant's car and the electronic surveillance of his movements, both of which may have implications for the assessment of whether the evidence obtained should be rejected under s. 24(2) ; for a comparable

situation, see *R. v. Thompson*, [1990] 2 S.C.R. 1111, at pp. 1150-52 and at pp. 1182-83. I would also note that this was the manner in which the appellant's case was framed, and the issue has been fully addressed by both parties. I turn then to that issue.

I think it is clear, given this Court's holdings in *R. v. Duarte*, [1990] 1 S.C.R. 30, and *Wong*, *supra*, that the use of an electronic tracking device is a search within the meaning of the Charter . In *Wong*, the majority stated, at pp. 43-44, that it would be superfluous to undertake a lengthy analysis into whether surreptitious video surveillance by the state constitutes a search and seizure under s. 8 , and added:

In *Duarte*, this Court held that unauthorized electronic audio surveillance violates s. 8 of the Charter . It would be wrong to limit the implications of that decision to that particular technology. Rather what the Court said in *Duarte* must be held to embrace all existing means by which the agencies of the state can electronically intrude on the privacy of the individual, and any means which technology places at the disposal of law enforcement authorities in the future. [Emphasis added in third sentence.]

That reasoning applies here. It is true that, unlike the audio and video surveillance methods employed in *Duarte* and *Wong*, the tracking device reveals only the whereabouts of an individual, and does not extend to the interception and recording of private communications. It would be surprising, however, if the ambit of the Charter 's protection did not extend to this area. An individual has a reasonable expectation of privacy not only in the communications he makes, but in his movements as well. Indeed, this proposition was clearly enunciated in *Wong*, *supra*, at p. 47, in the following passage:

George Orwell in his classic dystopian novel *1984* paints a grim picture of a society whose citizens had every reason to expect that their every movement was subject to electronic video surveillance. The contrast with the expectations of privacy in a free society such as our own could not be more striking. [Emphasis added.]

The underlying rationale for this approach has been well stated by Professor Melvin Gutterman in his article "A Formulation of the Value and Means Models of the Fourth Amendment in the Age of Technologically Enhanced Surveillance" (1988), 39 *Syracuse L. Rev.* 647, in the following passage, at p. 706:

In a variety of public contexts, we may expect to be casually observed, but may justifiably be outraged by intensive scrutiny. In these public acts we do not expect to be personally identified and subject to extensive surveillance, but seek to merge into the "situational landscape." The ability to move about freely without constant supervision by the government is an important source of individual liberty that must be addressed. A fear of systematic observation, even in public places, destroys this sense of freedom. Justice Douglas recognized the importance of this privacy value in a democratic society, commenting that free movement is as dangerous to a tyrant as free expression of ideas or the right of assembly and is, therefore, controlled in most countries.

I must confess to finding it absolutely outrageous that in a free society the police or other agents of the state should have it within their power, at their sole discretion and on the basis of mere suspicion, to attach a beeper on a person's car that permits them to follow his or her movements night and day for extended periods.

As I noted in *Duarte*, supra, at p. 44, I realize the necessity of police surveillance when they suspect someone, and I also realize that it is vital for them to have access, where reasonable, to electronic devices in the performance of their difficult task of enforcing the law and detecting crime. However, the Court is not faced with the unpalatable choice of prohibiting the use of beepers altogether but simply of imposing judicial control. What I quarrel with is that the police or other agents of the state should have the power to use electronic equipment permitting them, at their whim, to know where any particular individual may be at any time without the authorization of the judiciary or some other independent third party. This Court first asserted this position in *Hunter v. Southam Inc.*, supra, and has consistently reasserted it since, in particular in relation to devices for electronic surveillance; see *Duarte* and *Wong*. The Court thus stated the rationale for this position in *Duarte*, at p. 44:

The reason for this protection is the realization that if the state were free, at its sole discretion, to make permanent electronic recordings of our private communications, there would be no meaningful residuum to our right to live our lives free from surveillance. The very efficacy of electronic surveillance is such that it has the potential, if left unregulated, to annihilate any expectation that our communications will remain private.

This equally applies to monitoring our every movement. The fact that in a particular case the police may be able *ex post facto* to justify their action is of no moment. The problem is that society would have no way of knowing how many situations are not justifiable. To control the police, and more generally state power, in this context, prior independent third party scrutiny is required, though as Dickson J. observed in *Hunter v. Southam Inc.*, this need not necessarily be done by a member of the judiciary.

I am fully aware that, in the absence of laws, such as exist in the Criminal Code respecting audio surveillance, the police may be deprived of the use of these modern methods of crime detection. But it is not the task of the Court to devise means to assist the police to make use of these electronic media. This too is made clear in *Wong*, where at p. 57, it is stated:

This is wholly consistent with my earlier observations in *R. v. Landry*, [1986] 1 S.C.R. 145, at p. 187, and *R. v. Bernard*, [1988] 2 S.C.R. 833, at p. 891, as to what I perceive to be the respective roles of the courts and Parliament when Charter rights and freedoms are at issue. As I stated there, it does not sit well for the courts, as the protectors of our fundamental rights, to widen the possibility of encroachments on these personal liberties. It falls to Parliament to make incursions on fundamental rights if it is of the view that they are needed for the protection of the public in a properly balanced system of criminal justice.

The Court was there speaking of video surveillance, but the same principle applies to the present case. Later, on p. 57, it added:

It is for Parliament, and Parliament alone, to set out the conditions under which law enforcement agencies may employ video surveillance technology in their fight against crime. Moreover, the same holds true for any other technology which the progress of science places at the disposal of the state in the years to come. Until such time as Parliament, in its wisdom, specifically provides for a code of conduct for a particular invasive technology, the courts should forebear from crafting procedures authorizing the deployment of the technology in question.

See also *R. v. Kokesch*, *supra*, at p. 28.

I should note at this point that I am not impressed by the fact that the beeper in this case was a rather unsophisticated device. As we saw, the police with admirable ingenuity were able to track the location of the appellant at all times. But quite apart from this, in this era of explosive technology, can it be long before a device is developed that will be able to track our every movement for indefinite periods even without visual surveillance? We owe our statutory protection against wiretapping to the fact that the courts of the United States, from which our provisions largely derive, had the wisdom to strike down that form of electronic surveillance at an early stage of its development. This is the time to begin regulating the use of electronic tracking devices while they are still in their infancy and before the law enforcement authorities begin routinely using them as part of their work habits.

The Issue of Public Roads

Perhaps the most interesting argument presented in this appeal is the Crown's contention that the appellant did not have a reasonable expectation of privacy that was violated in this case because the tracking device was only used to locate his whereabouts on public roads. Before going on, I should perhaps observe that this case is not, of course, one where the police are engaged in monitoring the roads or other public place by electronic means or otherwise in the course of regulating or observing what goes on there. What we are dealing with, we saw, is an effort to track the movements of an individual through a device attached to his car, an entirely different matter.

The Crown thus put forth its position on this aspect of the case in its *factum*:

There is no evidence that the Appellant's vehicle was ever tracked, by means of the beeper, onto private property invisible from the street or onto property where the Appellant was not a trespasser. Furthermore, no permanent electronic recording was made of either the words or activities of the Appellant. It is respectfully submitted that when the Appellant travelled over the public streets he voluntarily conveyed to anyone who wanted to look, the fact that he was travelling over particular roads in a particular direction, and the fact of his final destination when he exited from public roads onto private property. [Emphasis added.]

The Crown supports this position by reference to the decision of the Supreme Court of the United States in *United States v. Knotts*, 460 U.S. 276 (1983). The *Knotts* case concerned a charge of conspiracy to manufacture controlled substances. Visual surveillance had revealed where the suspects obtained chemicals required to manufacture these substances. An electronic tracking device, similar to the one in the instant case, was placed inside a five gallon drum of chloroform that was eventually purchased by an associate of the accused. The tracking device was used to track the movements of the drum which a co-accused transported in his car to its ultimate location near a cabin in the woods. The police apparently did not rely upon the device from that point on, but set up a three-day visual surveillance of the cabin that ultimately led to the accused's arrest. The court held that using an electronic device to trace an individual's movements on a public road and to his ultimate destination did not violate the Fourth Amendment.

The surveillance in that case was far more limited than in the present case. It consisted simply of following a co-accused on public highways while he was in possession of a specific article, the drum, in respect of which they had reason to suspect an offence was about to be committed. It invaded less than the present case on the personal freedom of the individual. Here the beeper was installed in the appellant's personal automobile and his every move was thereby monitored at all times for months, whatever activity he might be engaging in. Even in *Knotts*, at pp. 283-84, the court left to a later day the situation where the result would be "twenty-four hour surveillance of any citizen . . . without judicial knowledge or supervision". Nonetheless, the court did take the view that there is no expectation of privacy when one ventures onto a public street. At pages 281-82, it stated:

A person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another. When Petschen traveled over the public streets he voluntarily conveyed to anyone who wanted to look the fact that he was traveling over particular roads in a particular direction, the fact of whatever stops he made, and the fact of his final destination when he exited from public roads onto private property.

While the views of that court are undoubtedly entitled to great respect, I make no apology for taking a more rigorous approach to the right of the state to interfere with the citizen's freedom of movement, and as I see it the path proposed by the *Knotts* decision is wholly inconsistent with the principles enunciated in previous pronouncements of this Court. In both *Duarte* and *Wong*, it was made clear that the Court rejected the "risk analysis" approach, i.e., the argument that the risk that an agent of the state will electronically record one's words or actions is but a variant of the risk of having that person disclose the words or actions to another. I have no doubt that the police, like other people, may observe our comings and goings when we place ourselves in open view, and I would also think that they may enhance their visual observations by the use of such instruments as binoculars. This type of observation does not pose grave or overriding threats to individual privacy. But *Duarte* and *Wong* both underlined the potential of uncontrolled electronic surveillance to annihilate privacy, and its consequent danger to individual autonomy and the organization of a free society. They emphasized that these sorts of threats to privacy "are of a

different order of magnitude" and "involve different risks to the individual and the body politic"; see Duarte, at p. 48. The crucial point is that there is a qualitative difference between the risk one takes that one's movements in a car will be observed by others, including the authorities, and the risk that one's vehicle will be monitored by a device that will follow its every movement. This is the proposition that lies at the heart of the Wong decision. It is as if one had an agent of the state in the car constantly reporting one's location. The question that must be asked is "whether, by the standards of privacy that persons can expect to enjoy in a free and democratic society, the agents of the state were bound to conform to the requirements of the Charter when effecting the intrusion in question"; see Wong, at pp. 45-46. I think that in this case that question must be answered in the affirmative.

The decisions in Wong and Duarte are predicated on the notion that there exists a crucial distinction between exposing ourselves to the risk that others will see us or overhear our words, and the much more pernicious risk that they will be electronically monitored at the sole discretion of the state. Transposing to the technology in question here, it must follow that there is an important difference between courting the risk that our activities may be observed by other persons and the risk that agents of the state, in the absence of prior authorization, will track our every move. In both instances, it is constitutionally unacceptable that the state should be allowed to rest a justification for the unauthorized electronic surveillance of a given person on the mere fact that that person had been in a situation where he could be the object of scrutiny on the part of private individuals. To sanction state intrusions on this basis is to blind oneself to the fact that the threat to privacy inherent in courting the ordinary observations of other members of society pales by comparison with the threat to privacy posed by allowing the state to electronically monitor our every movement. Section 8 of the Charter exists to protect privacy and not solitude.

As I view the matter, the answer to the question whether a person whose movements were surreptitiously tracked had a reasonable expectation of privacy in given circumstances must not be made to depend on the degree to which that person took measures to shield his or her activities from the scrutiny of other persons. Were that to be the case, the consequences in the crowded conditions of modern life would be unacceptable. We would effectively be shorn of our right to be secure against electronic surveillance the moment we left our dwellings, for a moment's reflection will confirm that as we go about our daily business many, if not the majority, of our activities are inevitably carried out in the plain view of other persons. The prospect that the agents of the state should be free, on account of this fact alone, to make it their business to electronically track all our comings and goings is simply an unthinkable prospect in a free and open society such as ours.

Professor Gutterman has aptly summarized the position in the article cited, *supra*, at pp. 706-7:

Privacy includes control over disclosure of our movements, or else it compels us to live the life of a hermit. Living in society, of necessity, requires the revealing of private information for select purposes without sacrificing the privacy of our daily activities. To limit this freedom a stronger justification than a mechanical incantation of "public exposure" is required. The Court must be reminded of the powerfully eloquent dissent of Justice Brennan that electronic aids add a whole

new dimension to surveillance; "[t]hey make it more penetrating, more indiscriminate, more truly obnoxious to a free society. Electronic surveillance, in fact, makes the police omniscient, and police omniscience is one of the most effective tools of tyranny."

As indicated earlier, the grave threat to individual privacy posed by surreptitious electronic tracking of one's movement is such as to require prior judicial authorization. And as *Hunter v. Southam*, supra, instructs us, the issuance of a warrant to conduct a search will ordinarily call for an objective showing of reasonable and probable cause by those seeking the warrant. I see no reason why this should not, at least generally, be the case when one seeks to employ electronic tracking devices in the pursuit of an individual. Given the somewhat less intrusive nature of this means of surveillance, if properly controlled, than electronic audio or video surveillance, a case might be made for empowering a judicial officer in certain circumstances to accept a somewhat lower standard, such as the "solid ground" for suspicion which the peace officers claimed here, if it can be established that such a power is necessary for the control of certain types of dangerous or pernicious crimes. A passage in *Hunter v. Southam*, cited *infra*, contemplates the possibility of varying the standard in certain circumstances, and a lowering of the standard was approved for entry into the country even without judicial authorization in *R. v. Simmons*, [1988] 2 S.C.R. 495. Still this should not be permissible in the absence of cogent reasons.

There is another aspect of this case that should be noted. It would appear that the police were as much concerned with the protection of the public against an individual they thought was dangerous, as with detecting the source of earlier crimes. *Hunter v. Southam*, supra, instructs us that there may be occasions where danger to some person may constitute a ground for lowering the standard. At pages 167-68 of that case, the former Chief Justice, then Dickson J., observed:

History has confirmed the appropriateness of this requirement as the threshold for subordinating the expectation of privacy to the needs of law enforcement. Where the state's interest is not simply law enforcement as, for instance, where state security is involved, or where the individual's interest is not simply his expectation of privacy as, for instance, when the search threatens his bodily integrity, the relevant standard might well be a different one.

Dickson J. was there speaking of the objective standard employed by a judicial officer. The police also have power to act without warrant where this is required for the protection of an individual or property. But I do not think this affords the police a licence to engage in searches, including electronic tracking of a suspect, because they believe that a particular individual may be dangerous, and that he may therefore somewhere, sometime cause harm, even serious harm, to another.

It may at times be difficult to accept that an individual -- even a dangerous individual -- should be allowed to escape the clutches of the law because law enforcement bodies must be kept within constitutional norms. But that is the price of freedom. Nor must we mislead ourselves that we are dealing here with mere technicalities. The great American jurist, Brennan J., with characteristic vigour, thus responded to this misconception in a radio interview in 1987:

"Honestly," Brennan said, raising his voice, "you in the media ought to be ashamed of yourselves to call the provisions and the guarantees of the Bill of Rights 'technicalities.' They're not. They're very basic to our very existence as the kind of society we are. We are what we are because we have those guarantees, and this Court exists to see that those guarantees are faithfully enforced. They are not technicalities! And no matter how awful may be the one who is the beneficiary time and time again, guarantees have to be sustained, even though the immediate result is to help out some very unpleasant person. They're there to protect all of us."

See "Profiles: The Constitutionalist", *The New Yorker*, March 12, 1990, p. 45, at p. 65.

This sets the stage for the discussion of whether the evidence should be rejected under s. 24(2) .

Application of s. 24(2) of the Charter

General Considerations

In *R. v. Collins*, supra, at pp. 283-84, the present Chief Justice, Lamer J., set forth a number of criteria to be examined in determining whether the admission of evidence obtained in violation of a Charter right should be rejected as tending to bring the administration of justice into disrepute, namely:

- what kind of evidence was obtained?
- what Charter right was infringed?
- was the Charter violation serious or was it of a merely technical nature?
- was it deliberate, wilful or flagrant, or was it inadvertent or committed in good faith?
- did it occur in circumstances of urgency or necessity?
- were there other investigatory techniques available?
- would the evidence have been obtained in any event?
- is the offence serious?
- is the evidence essential to substantiate the charge?
- are other remedies available?

Lamer J. then grouped these factors into three general categories: (1) those affecting the fairness of the trial; (2) those relating to the seriousness of the violation; and finally (3) those relating to the effect on the reputation of the administration of justice. He added that the impact of the evidence on the fairness of the trial was the most important consideration under s. 24(2) . See also *R. v. Jacoy*, [1988] 2 S.C.R. 548, at pp. 558-59.

The trial judge and the Court of Appeal differed in their application of the above factors to the case at bar. The Court of Appeal emphasized that while the action of the police was deliberate, it was undertaken in good faith, and only after other investigatory techniques had proved futile.

Considering that the police were investigating a possible serial killer, it thought the technique employed was reasonable for both the investigation and prevention of crime. The court was of the opinion that the evidence was not "conscriptive" of the accused in that he was not compelled by the police to do anything, but rather went everywhere in his automobile of his own accord.

The trial judge, on the other hand, stressed that the police action was a planned and on-going invasion of the appellant's rights that continued twenty-four hours a day for a period of at least one month. In his opinion, the police were not operating on reasonable and probable cause, but on mere suspicion. He also found that the evidence was conscriptive of the accused in that the appellant produced the evidence by effectively operating the device by driving it around in his car.

Before going on, I should again draw attention to the fact that the breach of the s. 8 right in this case has two different aspects. The manner in which the police installed the beeper involved entering into and damaging (albeit in a minor manner) the interior of the car at a time when they had no warrant to be there. This constituted an illegal trespass, and one moreover that took place in an area where the appellant had a reasonable expectation of privacy. It was this aspect of the breach on which the Court of Appeal focussed. As we saw, however, s. 8 was also violated by the use of the beeper to monitor the appellant's every movement. It was this aspect on which the trial judge focussed. In my view, both aspects deserve to be considered. I turn now to a discussion of the various factors grouped in the manner suggested in Collins.

Trial Fairness - The Kind of Evidence

In discussing the factors affecting the fairness of the trial, Lamer J. emphasized the importance of distinguishing between real and conscriptive evidence. While this distinction is undoubtedly useful in many contexts, it would pose serious problems for the fairness of a trial if it were to be adopted as a hard and fast rule, and I do not think this is what Lamer J. had in mind. I had occasion to deal with this question in dealing with the problems relating to derivative evidence in *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425, at pp. 548-63. At page 552, I had this to say:

I would first of all note that I do not believe that in drawing this distinction, Lamer J. intended to draw a hard and fast line between real evidence obtained in breach of the Charter and all other types of evidence that could be so obtained. He did not merely say that the admission of real evidence would generally not affect the fairness of the trial of the accused; he said, at p. 284, that it would not generally affect the fairness of the trial because it "existed irrespective of the violation of the Charter " (emphasis added). Similarly, in reference to confessions "or other evidence emanating" from the accused, he noted that "it did not exist prior to the violation" (emphasis added). I think this clearly indicates that what Lamer J. had in mind was the much broader distinction between evidence which the accused has been forced to create, and evidence which he or she has been forced to merely locate or identify. In other words, he had in mind the kind of distinction which I have attempted to draw between compelled testimony and evidence derived from compelled testimony. [Emphasis in original.]

The fact that evidence already existed means that it could have been discovered in any event. That is not so where the evidence would not have existed but for the Charter breach. At page 553 of *Thomson Newspapers*, I added:

A breach of the Charter that forces the eventual accused to create evidence necessarily has the effect of providing the Crown with evidence it would not otherwise have had. It follows that the strength of its case against the accused is necessarily enhanced as a result of the breach.

I then added that this is the very kind of prejudice the right against self-incrimination and the right to counsel were intended to protect, and referred to several cases, notably *R. v. Black*, [1989] 2 S.C.R. 138, and *R. v. Ross*, [1989] 1 S.C.R. 3, supporting this method of approach to s. 24(2) in other contexts.

In the present case, the distinction between real and conscriptive evidence does not appear all that useful and, indeed, is not easy to make. The evidence is not really conscriptive in the sense that the accused was never induced by the police to create evidence against himself. However, as the trial judge notes, as a result of the employment of the tracking device, the appellant was potentially creating evidence against himself every single time he went out in his car. Such evidence would not have existed were it not for the tracking device because visual contact with the accused had been lost. In short, a large part of the evidence against the accused is that he was tracked by unconstitutional means to the area where the crime occurred. It seems to me, therefore, that this factor weighs in favour of the appellant.

The Seriousness of the Violation

I turn, then, to the second category of factors, those relating to the seriousness of the violation. There can be little doubt that the violation in this case was serious. Although the police ostensibly acted in good faith, the violation was of such an intrusive and long-lasting nature that I believe that no other conclusion is possible. It might be noted that the search in this case appears to have been part of a larger pattern of disregard for the appellant's rights. The police actually held a press conference where they all but identified the appellant as a suspect (the press identified him the next day) even though they admitted that they did not have enough evidence at that time to arrest him. The appellant was, not surprisingly, "hounded" by the media from that point forward.

The intrusion into the interior of the appellant's automobile, in complete disregard of his rights, even after a search warrant had failed to provide evidence, is, by itself, of a serious nature. The words of Sopinka J. in *Kokesch*, *supra*, are equally apt here. He stated, at p. 29:

From the point of view of individual privacy, which is the essential value protected by s. 8 of the Charter, this illegal intrusion onto private property must be seen as far from trivial or minimal. Even before the enactment of the Charter, individuals were entitled to expect that their environs would be free of prowling government officials unless and until the conditions for the exercise of legal authority are met: see *Eccles v. Bourque*, [1975] 2 S.C.R. 739; and *Colet v. The Queen*, [1981] 1 S.C.R. 2. The elevation of that protection to the constitutional level signifies its deep roots in our legal culture.

If the intrusion on even the environs of a house is objectionable, the same can surely be said of intrusions into the interior of an individual's automobile.

I turn then to whether the police acted in good faith, or flagrantly. I referred a moment ago to the "ostensible good faith" of the police officers. I understand that the police were faced with a difficult situation. Over a period of several years there had been a number of killings in the area of which the accused had been suspected. Some time between May 17 and when the warrant was obtained some two months later, an anonymous phone call was made to a news information office claiming responsibility for the latest killing and stating that "there's going to be a lot more". The police had some circumstantial evidence that could be seen as linking the accused to several of the previous murders and were concerned with preventing a further crime. But as Sopinka J. observed in *Kokesch*, at p. 30, in determining whether a s. 8 violation was committed in "good faith" or was "flagrant", it must be remembered that these words are terms of art in s. 24(2) cases. In performing the task, one of the first questions to ask is whether the police had reasonable and probable cause. That is underlined in *Kokesch* and also figures large in *R. v. Greffe*, [1990] 1 S.C.R. 755, at pp. 795, 796 and 799. In the present case the trial judge held the police had no reasonable and probable grounds, and they themselves admitted it. What they claimed to have, and this is precisely what the police claimed in *Kokesch*, at p. 31, where the evidence was rejected, was that they had "solid grounds".

Kokesch, at p. 28, and the cases there cited are also authority for the view that "the unavailability of other, constitutionally permissible, investigative techniques is neither an excuse nor a justification for constitutionally impermissible investigative techniques". The police might well be excused for believing that they had the right to use an electronic tracking device, though the fact that the Criminal Code prohibits the use of more established electronic devices without authorization, and then only for a limited time, should have given them pause. But the police have no excuse concerning the manner in which they installed the device. I would have thought it elementary that everyone knows or should know they have no right to enter into a person's automobile and do damage. The police here certainly knew they needed a warrant to search the car, and that the warrant they had obtained did not permit what they did, and indeed had expired. To repeat the words of Sopinka J. in *Kokesch*, *supra*, at p. 32:

Either the police knew they were trespassing, or they ought to have known. Whichever is the case, they cannot be said to have proceeded in "good faith", as that term is understood in s. 24(2) jurisprudence.

I conclude, then, that the Charter violation was very serious and not mitigated by good faith on the part of the police officers.

Disrepute

Finally, I must consider the factors relating to whether the admission of the evidence would bring the administration of justice into disrepute, and the fact that the accused cannot be convicted on the basis of the remaining evidence. The seriousness of the offence investigated certainly

militates in favour of inclusion given that the police were also concerned with the real possibility of preventing a future crime, and not just with obtaining evidence. However, the seriousness of the crime and the proclivities of the accused must not be viewed as ensuring admissibility. In both Greffe, *supra*, and Kokesch, there is every reason to think the accused there were, in the Court's view, certainly guilty of a serious crime and would, if the opportunity presented itself, continue in their unlawful activities. At all events, one must not forget that the proper limits placed on police authority apply at all stages of law enforcement. As Dickson J. put it in *Hunter v. Southam*, *supra*, at p. 167:

The state's interest in detecting and preventing crime begins to prevail. . . where credibly-based probability replaces suspicion. [Emphasis added.]

In a free society the police cannot be permitted to conduct the sort of intrusive search carried on in this case based on mere suspicion, even strong suspicion. That is clearly unacceptable in a free society, and in my opinion would bring the administration of justice into disrepute.

Here the police did not have reasonable and probable cause; they, themselves, did not think they did, a conclusion confirmed by the trial judge's finding. They might at one stage have had reasonable and probable cause sufficient to support a warrant to search the appellant's house and vehicle, and indeed, they were able to obtain such a warrant. However, when these searches turned up nothing to identify the appellant with the crime, this negated some of the grounds upon which the police had relied. For example, the police had hypothesized that a pair of work gloves contained in the back seat had been used in the commission of the crime and that they might contain red paint chips from forcing open the freshly painted side door to the garage of the King house. No paint chips were found. It seems to me that proceeding further, after the search turned up nothing, amounted to acting on mere suspicion. (It is true that some of the analytical tests had not yet been completed on the evidence obtained from the accused's home when the tracking device was implanted; however, even after these tests turned out to be negative the tracking continued.) Under these circumstances, the police were free to keep the appellant under surveillance, but absent something more, there was no adequate ground for installing the tracking device in the appellant's car.

In particular, the police should not have invaded the interior of the appellant's automobile, and so his privacy, to obtain evidence. As I noted earlier, this was only one aspect of their total disregard of the elementary duty and prudence that should be employed in conducting police investigations. I noted that they went to the length of virtually informing the public that the appellant was the likely perpetrator of multiple homicides, even though they lacked reasonable and probable cause. As Sopinka J. noted in *Kokesch*, *supra*, at p. 35:

This Court must not be seen to condone deliberate unlawful conduct designed to subvert both the legal and constitutional limits of police power to intrude on individual privacy. As Dickson C.J. stated in *Genest*, supra, at p. 92: "the breach was not merely technical or minor". The violation of s. 8 of the Charter that occurred in this case must be regarded as flagrant, and the disrepute to the justice system that would necessarily result from the admission of the impugned evidence cannot be counterbalanced by speculation about the disrepute that might flow from its exclusion.

This Court has frequently expounded the importance for the protection of the individual and the state, and indeed the law enforcement authorities themselves, to stay within the bounds of the constitutional and legal rules governing law enforcement, which be it noted allow for some leeway for exigent circumstances, circumstances that did not exist in this case. Looking at the whole of the matter, I cannot help but think the police officers here conducted themselves with the excessive zeal against which Brandeis J. long ago warned us. "The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding"; see *Olmstead v. United States*, 277 U.S. 438 (1928), at p. 479, cited in *R. v. Dyment*, [1988] 2 S.C.R. 417, at pp. 436-37.

I conclude, then, that the long-term consequences of admitting evidence obtained in circumstances like this on the integrity of our system of justice outweigh the harm done by this accused being acquitted. The end does not justify the means. We must respect our constitutional values and not barter them away for short-term gains. I refer again to the remarks of Brennan J., cited earlier, for the proposition that, though we must pay a price, the rigorous enforcement of our constitutional values enures to the benefit of all of us.

Disposition

For these reasons, I would allow the appeal and restore the acquittal.

//Sopinka J.//

The reasons of Sopinka and Iacobucci JJ. were delivered by

Sopinka J. (dissenting) -- I have read the reasons for judgment proposed by my colleagues, Justices La Forest and Cory, and find that I am in agreement with the result reached by La Forest J. I would dispose of the appeal on more limited grounds leaving for another occasion the broader issue as to whether surreptitious electronic tracking of the kind involved in this case can only be carried out pursuant to prior judicial authorization prescribed by statute.

As my colleagues both point out, the Crown has quite properly conceded that the installation of the tracking device in the appellant's automobile constitutes an unreasonable search or seizure so as to violate s. 8 of the Canadian Charter of Rights and Freedoms . The facts are so similar to those in *R. v. Kokesch*, [1990] 3 S.C.R. 3, that it would be difficult, if not impossible, to come to a different result with respect to violation of s. 8 . In both cases, a trespass by the police which the police knew or ought to have known was unlawful, enabled them to engage in surveillance of the activities of a suspect which eventually led to the discovery of incriminating evidence. In both

cases, the nexus between the trespass, the surveillance and the discovery of the evidence is sufficient to conclude that the evidence was obtained in a manner that violates the Charter . It is not necessary here, as it was not in Kokesch, to consider whether the surveillance itself, in the absence of trespass, would violate s. 8 . While I agree with my colleague La Forest J. that legislation is desirable in this area, I would refrain from expressing an opinion as to the form that it should take. I am not prepared to say in advance whether prior judicial authorization will be necessary or whether statutory authority simpliciter will suffice.

I agree with my colleague, La Forest J., that the admission of the evidence would bring the administration of justice into disrepute and, in conformity with s. 24(2) of the Charter , the evidence should be rejected. In my opinion, we would attribute to the arbiter of this question too high a degree of subtlety if we tried to distinguish this case from Kokesch. I do not think that there is a sufficient distinction between entering onto private premises (not the dwelling itself) and unlawfully damaging the seat of an automobile to warrant a different result. The significant fact for Charter purposes is the illegal trespass knowingly committed by the police. Nor do I view the fact that in this case the police suspected the appellant of a more serious offence as a significant distinction. Mere suspicion remains just suspicion and it cannot be used to redeem Charter violations on the basis of the nature of the offence suspected.

I would dispose of the appeal as proposed by La Forest J.

Appeal dismissed, La Forest, Sopinka and Iacobucci JJ. dissenting.

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