

1999

# Reasonable Expectations of Privacy and Open Fields: Taking The American 'Risk Analysis' Head On

James Stribopoulos

*Osgoode Hall Law School of York University*

Follow this and additional works at: [http://digitalcommons.osgoode.yorku.ca/scholarly\\_works](http://digitalcommons.osgoode.yorku.ca/scholarly_works)

 Part of the [Criminal Law Commons](#)



This work is licensed under a [Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License](#).

## Recommended Citation

Stribopoulos, James. "Reasonable Expectations of Privacy and Open Fields: Taking The American 'Risk Analysis' Head On." *Criminal Reports*. 25 (1999): 351-361.

This Article is brought to you for free and open access by the Faculty Scholarship at Osgoode Digital Commons. It has been accepted for inclusion in Articles & Book Chapters by an authorized administrator of Osgoode Digital Commons.

**Reasonable Expectations of Privacy & “Open Fields” —  
Taking the American “Risk Analysis” Head On**

**James Stribopoulos\***

In the United States, the Fourth Amendment has been held inapplicable where the authorities enter upon private property and search an area beyond the “curtilage” of a home. The United States Supreme Court has concluded that there is no reasonable expectation of privacy in “open fields”. In arriving at this conclusion, America’s highest court reasoned that it is not uncommon for members of the public to venture onto private property despite the presence of fences or “no trespassing” signs. This possibility, according to the Court, renders any expectation of privacy in such areas objectively unreasonable. As a result, the Fourth Amendment has no application to searches which target private property beyond the immediate perimeter of a home.<sup>1</sup>

In *R. v. Lauda*, reported *ante* at p. 320, the Court of Appeal for Ontario refused to incorporate the American “open fields” doctrine into s. 8 of the *Charter*. This holding is directly at odds with *R. v. Patriquen*<sup>2</sup>. In *Patriquen*, a majority of the Nova Scotia Court of Appeal endorsed the “open fields” doctrine in concluding that entry onto a privately owned woodland, in the absence of a warrant, did not violate s. 8 of the *Charter*.

These conflicting provincial appeal court decisions suggest that it will not be long before the “open fields” doctrine finds its way before the Supreme Court of Canada. In deciding whether to endorse the “open fields” doctrine in Canada, the Supreme Court should remember the theoretical divide that distinguishes its jurisprudence under s. 8 of the *Charter* from the decisions of its American counterpart under the Fourth Amendment to the United States Bill of Rights. This article argues that the “open fields” doctrine

---

\*Of the Ontario Bar.

<sup>1</sup>See *Hester v. United States* (1924), 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898 (U.S. S.C.); *Oliver v. United States* (1984), 466 U.S. 170, 104 S. Ct. 1735, 80 L.Ed. 2d 214 (U.S. Ky.).  
<sup>2</sup>(1994), 36 C.R. (4th) 363, 136 N.S.R. (2d) 218, 388 A.P.R. 218, 27 C.R.R. (2d) 135 (N.S. C.A.). The status of the “open fields” doctrine went unresolved when the Supreme Court dismissed a further appeal based on s. 24(2) of the *Charter* alone, see 43 C.R. (4th) 134, 188 N.R. 232, 146 N.S.R. (2d) 74, 422 A.P.R. 74, [1995] 4 S.C.R. 42 (S.C.C.).

should not be adopted in Canada as it is premised upon the perilous American "risk analysis" which the Supreme Court has previously rejected.

### The Rejection of the American "Risk Analysis" in Canada

In 1984 the Supreme Court of Canada was afforded its first opportunity to pass upon the meaning to be given to s. 8 of the *Charter*. In *Hunter v. Southam*, in deciding upon the purpose of s. 8, the Supreme Court of Canada looked to the seminal decision of the United States Supreme Court under the Fourth Amendment, *Katz v. United States*. In *Hunter* the Supreme Court held that, like the Fourth Amendment, the purpose of s. 8 was to protect people and not places. Towards this end the Court recognized that s. 8 of the *Charter* protects an individual's "reasonable expectation of privacy."<sup>3</sup> In time, the Supreme Court indicated that this is the starting point for *Charter* scrutiny under s. 8. A court confronted with a privacy claim must

... inquire into the purposes of s. 8 in determining whether or not a particular form of police conduct constitutes a "search" for constitutional purposes. ... Clearly, it is only where a person's reasonable expectations of privacy are somehow diminished by an investigatory technique that s. 8 of the *Charter* comes into play. As a result, not every form of examination conducted by the government will constitute a "search" for constitutional purposes. On the contrary, only where those state examinations constitute an intrusion upon some reasonable privacy interest of individuals does the government action in question constitute a "search" within the meaning of s. 8.<sup>4</sup>

The similarity between American and Canadian jurisprudence, under the respective constitutional guarantees, ends with a recognition that the protection of reasonable expectations of privacy is the purpose underlying both constitutional safeguards. Although the Supreme Court of Canada shares the view of the United States Supreme Court under the Fourth Amendment

<sup>3</sup>*Canada (Director of Investigation & Research, Combines Investigation Branch) v. Southam Inc.*, 33 Alta. L.R. (2d) 193, 27 B.L.R. 297, 41 C.R. (3d) 97, 84 D.T.C. 6467, (sub nom. *Hunter v. Southam Inc.*) 14 C.C.C. (3d) 97, [1984] 2 S.C.R. 145, 11 D.L.R. (4th) 641, 55 N.R. 241, 55 A.R. 291, 2 C.P.R. (3d) 1, 9 C.R.R. 355, (sub nom. *Director of Investigations & Research Combines Investigation Branch v. Southam Inc.*) [1984] 6 W.W.R. 577 (S.C.C.) at 108 (C.C.C.). After citing Stewart J.'s view that this was the purpose of the Fourth Amendment, see *Katz v. United States* (1967), 389 U.S. 347, 19 L.Ed. 2d 576, 88 S. Ct. 507 (U.S. Cal.) at 351 (U.S.): Dickson J. indicated "I believe this approach equally appropriate in construing the protections in s. 8."

<sup>4</sup>*R. v. Evans*, 104 C.C.C. (3d) 23, 45 C.R. (4th) 210, 191 N.R. 327, 131 D.L.R. (4th) 654, 33 C.R.R. (2d) 248, 69 B.C.A.C. 81, 113 W.A.C. 81, [1996] 1 S.C.R. 8 (S.C.C.) at 29 (C.C.C.).

that privacy is the pivotal concern underlying s. 8 of the *Charter*, the Court has usually taken a much broader view of what constitutes an intrusion upon constitutionally protected privacy interests.<sup>5</sup>

Ever since the Warren Court delivered the *Katz* decision, shifting the focus of Fourth Amendment jurisprudence from property law concepts to privacy issues, the Burger and Rehnquist Courts have systematically narrowed the scope of Fourth Amendment protection by taking an increasingly narrow view of privacy expectations.<sup>6</sup> The Supreme Court of Canada has rejected this narrow approach because it seems "largely motivated by the social costs attendant upon the application of the strict exclusionary rule in the United States."<sup>7</sup> There are no parallel concerns in Canada given the balancing approach to the exclusion of evidence under s. 24(2) of the *Charter*.<sup>8</sup>

In *Katz*<sup>9</sup> the United States Supreme Court had held that a reasonable exception exists if two requirements are met, first that a person exhibited an actual or subjective expectation of privacy and, second, that the expectation

<sup>5</sup>See R. Harvie & H. Foster, "Different Drummers, Different Drums: The Supreme Court Of Canada, American Jurisprudence And The Continuing Revision Of Criminal Law Under The Charter" (1992), 24 Ottawa L. Rev. 39 at 101.

<sup>6</sup>See B.J. Serr, "Great Expectations Of Privacy: A New Model For Fourth Amendment Protection" (1989), 73 Minn. L. Rev. 583; L.A. Berner, "The Supreme Court and the Fall of the Fourth Amendment" (1991), 25 Val. U. L. Rev. 383 (1991); W.S. McCanish, "Unreasonable Expectations: The Supreme Court and the Fourth Amendment" (1991), 20 Stetson L. Rev. 435.

<sup>7</sup>*R. v. Edwards*, 104 C.C.C. (3d) 136, 45 C.R. (4th) 307, 192 N.R. 81, 26 O.R. (3d) 736 (note), 132 D.L.R. (4th) 31, 33 C.R.R. (2d) 226, 88 O.A.C. 321, [1996] 1 S.C.R. 128 (S.C.C.) at 159 (C.C.C.), LaForest J., concurring in the result. Also see *R. v. Silveira*, 97 C.C.C. (3d) 450, 38 C.R. (4th) 330, 23 O.R. (3d) 256 (note), 124 D.L.R. (4th) 193, 181 N.R. 161, 28 C.R.R. (2d) 189, 81 O.A.C. 161, [1995] 2 S.C.R. 297 (S.C.C.) at 467-68 (C.C.C.), LaForest J., dissenting. For a discussion of the deleterious impact of the automatic exclusionary rule on Fourth Amendment jurisprudence, see J. Dawe, "Standing to Challenge Searches and Seizures Under the Charter: The Lesson of the American Experience and Their Application to Canadian Law" (1993), 52 U.T. Fac. L. Rev. 39 at 49-55.

<sup>8</sup>The factors relevant to the exclusion of evidence under s. 24(2) of the *Charter* are fully discussed in *R. v. Collins*, 33 C.C.C. (3d) 1, [1987] 3 W.W.R. 699, [1987] 1 S.C.R. 265, (sub nom. *Collins v. R.*) 38 D.L.R. (4th) 508, 74 N.R. 276, 13 B.C.L.R. (2d) 1, 56 C.R. (3d) 193, 28 C.R.R. 122 (S.C.C.) and *R. v. Stillman*, 113 C.C.C. (3d) 321, 144 D.L.R. (4th) 193, 5 C.R. (5th) 1, [1997] 1 S.C.R. 607, 209 N.R. 81, 185 N.B.R. (2d) 1, 472 A.P.R. 1, 42 C.R.R. (2d) 189 (S.C.C.).

<sup>9</sup>*Supra*, note 3.

be one that society is prepared to recognize as reasonable.<sup>10</sup> Despite this relatively clear exposition, the Burger and Rehnquist Courts instead focused on the words of Stewart J. who explained the privacy focus of the Fourth Amendment by indicating that “what a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.”<sup>11</sup> These words have been seized upon to conclude that whenever an individual assumes a risk of exposing otherwise private conduct to the public, the Fourth Amendment’s protections will not apply.

The Supreme Court of Canada has categorically rejected the “risk analysis” which taints recent Fourth Amendment jurisprudence.<sup>12</sup> According to the Court, these American decisions improperly focus upon the risk that those guilty of wrongdoing have assumed, without considering the larger societal concerns at work. The ultimate question is not whether criminals should bear the risk, but whether that risk should be imposed on all members of Canadian society.<sup>13</sup> The question must always be framed in broad and neutral terms otherwise “all of us must bear the risk of such surveillance”.<sup>14</sup> In deciding if a particular governmental intrusion should be tolerated by the citizenry under s. 8 of the *Charter*, courts must consider whether the “particular form of unauthorized surveillance in question would see the amount of privacy and freedom remaining to citizens diminished to a compass inconsistent with the aims of a free and open society.”<sup>15</sup>

In Canada, the normative approach employed in defining reasonable expectations of privacy has insured greater constitutional scrutiny of state investi-

<sup>10</sup>*Ibid.* Harlan J., concurring. The Supreme Court of Canada recently seized upon this aspect of the *Katz* holding in articulating the requirements that must be met before an individual can have standing to assert a territorial or spatial claim of privacy in relation to a particular place, see *R. v. Edwards*, *supra*, note 7 at 150-151 (C.C.C.). Also see *R. v. Belnavis*, 118 C.C.C. (3d) 405, 29 M.V.R. (3d) 1, 216 N.R. 161, 34 O.R. (3d) 806 (headnote only), 151 D.L.R. (4th) 443, 103 O.A.C. 81, 10 C.R. (5th) 65, [1997] 3 S.C.R. 341, 46 C.R.R. (2d) 272 (S.C.C.).

<sup>11</sup>*Katz*, *ibid.* at 351. per Stewart J.

<sup>12</sup>See *R. v. Sanelli*, 103 N.R. 86, 37 O.A.C. 322, 74 C.R. (3d) 281, (sub nom. *R. v. Duarte*) 53 C.C.C. (3d) 1, [1990] 1 S.C.R. 30, 65 D.L.R. (4th) 240, 45 C.R.R. 278, 71 O.R. (2d) 575 (S.C.C.) at 13-14 (C.C.C.); *R. v. Wong*, 60 C.C.C. (3d) 460, 1 C.R. (4th) 1, 120 N.R. 34, [1990] 3 S.C.R. 36, 2 C.R.R. (2d) 277, 45 O.A.C. 250 (S.C.C.) at 477-78, 482 (C.C.C.); *R. v. Wise*, 70 C.C.C. (3d) 193, 11 C.R. (4th) 253, 8 C.R.R. (2d) 53, 51 O.A.C. 351, 133 N.R. 161, [1992] 1 S.C.R. 527 (S.C.C.) at 206-207 (C.C.C.), LaForest J., dissenting in the result.

<sup>13</sup>*Duarte*, *ibid.* at 17.

<sup>14</sup>*Wong*, *supra* note 12, at 481.

<sup>15</sup>*Ibid.* at 478.

gative techniques. A number of examples quickly serve to illustrate this important point.

In the United States, a government agent is free to surreptitiously record a conversation with an individual. The Fourth Amendment does not apply because everyone assumes the risk that a conversation could be repeated accurately in court, whether through memory or mechanical recording.<sup>16</sup> The Supreme Court of Canada, however, has distinguished between the risk posed by speaking to a tattle-tale and the prospect that government agents may be listening to and recording our conversations every time we speak. “They involve different risks to the individual and the body politic. In other words, the law recognizes that we inherently have to bear the risk of the ‘tattle-tale’ but draws the line at concluding that we must also bear, as the price of choosing to speak to another human being, the risk of a having a permanent recording made of our words.”<sup>17</sup>

The same reasoning has been applied to video surveillance. In Canada, an individual’s reasonable expectation of privacy is not spent the moment they invite an individual into a private place like a hotel room. According to the Supreme Court,

... there is an important difference between 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 permanently record those activities on video tape ... To fail to recognize the distinction is to blind oneself to the fact that the threat to privacy inherent in subjecting ourselves to the ordinary observations of others pales by comparison with the threat to privacy posed by allowing the state to make permanent electronic records of our words or activities.<sup>18</sup>

In contrast, such measures would appear acceptable in the United States under the “risk analysis”. If one assumes the risk by exposing a private place to public view then reasonable expectations of privacy are lost, government deception is irrelevant to the constitutional equation.<sup>19</sup>

<sup>16</sup>See *United States v. White* (1970), 401 U.S. 745; *On Lee v. United States* (1952), 343 U.S. 747 (which had focused on the absence of a physical intrusion into a private place, emphasizing old trespass approach to privacy).

<sup>17</sup>*Duarte*, *supra* note 12, at 14. The court preferred the approach of American state courts, interpreting privacy guarantees under their state constitutions, over the approach of the United States Supreme Court in *White*, *ibid.*

<sup>18</sup>*Wong*, *supra* note 12, at 478.

<sup>19</sup>See *Hoffa v. United States* (1966), 385 U.S. 293 (use of secret informers, acting at the behest of government, does not intrude on reasonable privacy expectations); *Lewis v. United States* (1966), 385 U.S. 206 (it is permissible for government agents to misrepresent their identity or purpose in order to obtain access to private places).

In the United States, police are free to affix an electronic transmitting device to a vehicle in order to monitor an individual's whereabouts. The Fourth Amendment is inapplicable, as the police could theoretically monitor the vehicle without such a device, therefore no reasonable expectation of privacy is encroached upon.<sup>20</sup> But when confronted with the same issue, the Supreme Court of Canada again rejected the all-or-nothing approach to privacy expectations that plagues Fourth Amendment jurisprudence. The Court conceded that police could theoretically monitor a citizen's movements while in their vehicle through ordinary surveillance and the use of sensory enhancing devices like binoculars. But the Supreme Court of Canada recognized a profound difference between "the threat to privacy inherent in courting the ordinary observations of other members of society ... [and] ... the threat to privacy posed by allowing the state to electronically monitor our every movement."<sup>21</sup> State activity in the latter category intrudes upon a reasonable expectation of privacy and is subject to scrutiny under s. 8 of the *Charter*.

This brief comparison with American Fourth Amendment jurisprudence reveals just how expansive an approach the Supreme Court of Canada has taken in defining Canadians' reasonable privacy expectations. In the United States, the "risk analysis" approach has been favoured when deciding whether an investigative technique intrudes upon a constitutionally protected privacy interest. In Canada, in contrast, the Supreme Court has endorsed a more normative approach in deciding whether a particular measure intrudes upon a legitimate privacy expectation. The Court has been careful not to automatically import American jurisprudence, developed in a different constitutional context, into its analysis under s. 8 of the *Charter*. This difference in approaches must always be remembered when Canadian courts are asked to adopt developments under the Fourth Amendment, like the "open fields" doctrine.

### The American "Open Fields" Doctrine

The "open fields" exception to the Fourth Amendment is undoubtedly bot-tomed on the "risk analysis". It is premised on an assumption that those who own or occupy private property assume the risk of a passer-by wander-ing onto their open field and discovering their criminal conduct. That risk is then equated with a law enforcement official entering onto private property

<sup>20</sup>*United States v. Knotts* (1983), 460 U.S. 276 (U.S. Minn.).

<sup>21</sup>*Wise, supra* note 12, at 207.

in search of criminal evidence. This analysis ignores that the risk involved in each form of intrusion is considerably different. In the words of Justice LaForest, each possibility involves "different risks to the individual and the body politic".<sup>22</sup>

No doubt Canadians accept the possibility that members of the public may periodically walk across their property uninvited; the example of a neigh-bour's child retrieving a baseball that has gone astray immediately comes to mind. That possibility is considerably different, however, from the prospect of law enforcement officials entering onto private property to collect evi-dence implicating an occupant in a crime. In this latter situation, Canadians would undoubtedly expect that the police would first obtain a search war-rant. This type of distinction is not foreign to the Supreme Court of Canada.

In *R. v. Evans*<sup>23</sup>, the police had received an anonymous tip that the occu-pant of a home was growing marijuana inside. They were unable to corrob-orate the tip based on a check of criminal records, electricity consumption and a visual perimeter search. Eventually the police entered onto the prop-erty and approached the front door. When the appellant opened the front door the police detected the odour of marijuana and arrested him. The premises were then secured and a search warrant was obtained. The warrant obtained on the basis of the "knock and sniff" was challenged by the appel-lant under s. 8 of the *Charter*.

In *Evans* a majority of the Supreme Court recognized that at common law there is an implied licence for all members of the public, including police, to approach the door of a residence and knock. The Court also recognized, however, that the implied invitation extends no further than is required to permit convenient communication with the occupant of the home, and only those activities that are reasonably associated with this purpose are author-ized by the implied licence. A police officer who approaches a dwelling for the purpose of securing evidence against the occupant exceeds the implied invitation and conducts a "search" of the home which must comport with s. 8 standards.<sup>24</sup>

<sup>22</sup>*Duarte, supra* note 12, at 14.

<sup>23</sup>104 C.C.C. (3d) 23, 45 C.R. (4th) 210, 191 N.R. 327, 131 D.L.R. (4th) 654, 33 C.R.R. (2d) 248, 69 B.C.A.C. 81, 113 W.A.C. 81, [1996] 1 S.C.R. 8 (S.C.C.) at 29 (C.C.C.).

<sup>24</sup>*Ibid.*, at 33. But contrast this position with *State v. Petty*, 740 P.2d 879 (Wash. App. 1987), where the court held that no reasonable expectation of privacy was intruded upon when police approached a residence, knocked on the door and sniffed for the odour of marijuana when the resident opened.

In *Evans*, once again, the Supreme Court of Canada rejected the American risk analysis, albeit implicitly. The fact that a member of the public, pursuant to the implied licence to approach and knock, might attend upon a residence and smell marijuana when the door is opened, was considered of no moment. No doubt Canadians accept such a risk as part of the normal intercourse of daily life. There is a marked difference, however, between that risk and the prospect of a police officer approaching a home to secure evidence of criminality against an occupant, in the absence of probable cause or a warrant. This same distinction is even more compelling in the context of “open fields”.

Although an occupier of a dwelling is deemed to grant the public permission to approach the door and knock, that licence clearly does not extend any further than the approach to a home. For instance, it would not include an invitation to enter onto vacant lands adjacent to a home, such as a backyard. In fact, pursuant to provincial statutes and at common law, any such entry onto private property would constitute an unlawful trespass. The risk that members of the public might disregard the law and enter onto private property should be of no significance. No matter how frequently this might occur, the fact of the matter is that such conduct remains unlawful.

The need for consistency would seem to dictate that if the issue ever presents itself, the Supreme Court should be compelled to reject the “open fields” doctrine, given that it finds its genesis in the “risk analysis”. A contrary holding would be difficult to reconcile with *Evans* and the Supreme Court’s earlier decisions that dealt with unauthorized perimeter searches. In the context of “perimeter” searches, the Supreme Court has consistently characterized any entry upon property surrounding a residence to be a “search” meriting s. 8 *Charter* scrutiny, drawing no distinction between the “curtilage” of a home and “open fields”.<sup>25</sup>

<sup>25</sup>See *R. v. Kokesch*, 61 C.C.C. (3d) 207, [1990] 3 S.C.R. 3, [1991] 1 W.W.R. 193, 121 N.R. 161, 51 B.C.L.R. (2d) 157, 1 C.R. (4th) 62, 50 C.R.R. 285 (S.C.C.); *R. v. Plant*, 84 C.C.C. (3d) 203, [1993] 8 W.W.R. 287, 145 A.R. 104, 55 W.A.C. 104, 17 C.R.R. (2d) 297, 12 Alta. L.R. (3d) 305, [1993] 3 S.C.R. 281, 24 C.R. (4th) 47, 157 N.R. 321 (S.C.C.); *R. v. Wiley*, 84 C.C.C. (3d) 161, 24 C.R. (4th) 34, 17 C.R.R. (2d) 314, 158 N.R. 321, [1993] 3 S.C.R. 263, 34 B.C.A.C. 135, 56 W.A.C. 135 (S.C.C.). Also see J. Atrens, “A Comparison Of Canadian And American Constitutional Law Relating To Search And Seizure” (1994), 1 Sw. J.L. & Trade Am. 29 at 36.

### The Reasoning in *Patriquen*

Given the above, one is left to wonder why a majority of the Nova Scotia Court of Appeal would choose to endorse the “open fields” doctrine under s. 8 of the *Charter*. *Patriquen* involved the police entering onto “a secluded plot of land surrounded by woods in a rural area”. The land was privately owned and legally occupied by the appellants. In concluding that the appellants did not have a reasonable expectation of privacy in the land that was searched, the Nova Scotia Court of Appeal placed a great deal of reliance on the Supreme Court of Canada’s decision in *R. v. Boersma*.<sup>26</sup>

On closer analysis, the decision in *Boersma* was only superficially analogous. There the police searched an “open field” which consisted of a parcel of Crown land which the Supreme Court was careful to point out “was accessible to everyone.” The marijuana which was being cultivated on public lands could be seen from an adjacent roadway. Under these circumstances, it is quite understandable that the Supreme Court would conclude that the appellants had no reasonable expectation of privacy in the area searched. In *Patriquen*, the Nova Scotia Court of Appeal relied upon *Boersma* to conclude that:

...the expectation of privacy on privately held woodland is not substantially different from that of Crown land. ... woodlands in rural areas are in some respects “subject to inspection by members of the public at large”. See for example the provisions of the *Angling Act*, R.S.N.S. 1989, c. 14 which allow any resident to cross on foot any uncultivated land in order to access a lake, stream or river for the purpose of fishing.<sup>27</sup>

The judgment in *Patriquen* does not suggest that there was any waterway in proximity to the parcel of land that was searched. Instead, the court appears to use this possibility to trigger an American style risk analysis. Under this analysis the risk that a passer-by might traverse the land is sufficient to vitiate the existence of any privacy expectation. Unfortunately, the decision ignores that this approach has been repeatedly disapproved of by the Supreme Court. In fairness to the Nova Scotia Court of Appeal, however, it is important to note that it did not have the benefit of the Supreme Court’s decision in *Evans*. As indicated, *Evans* would appear to make the applicability of the “open fields” doctrine in Canada extremely unlikely. It is for these reasons that the decision of the Court of Appeal for Ontario in *Lauda*, reported *ante* p. 320, should be preferred.

<sup>26</sup>[1994] 2 S.C.R. 488, 168 N.R. 196, 31 C.R. (4th) 386, 45 B.C.A.C. 3, 72 W.A.C. 3 (S.C.C.).

<sup>27</sup>*Patriquen*, *supra* note 2, at 372.

### Dangers of the American “Risk Analysis”

The judgment of the Court of Appeal for Ontario in *Lauda* is in keeping with the Supreme Court’s prior pronouncements repudiating the American “risk analysis”. In contrast, the Nova Scotia Court of Appeal’s judgment in *Patriquen* is premised on an uncritical acceptance of the American “risk analysis”. If taken to extremes, the American “risk analysis” can have devastating consequences for personal privacy.

The most chilling example that reveals the dangers inherent in the recent American approach comes in the context of aerial surveillance. According to the United States Supreme Court, low altitude air surveillance of an individual’s residence from a helicopter or airplane is not a “search” because individuals assume the risk of such intrusions by commercial air traffic passing overhead.<sup>28</sup> This conclusion ignores, however, that in both the cases that gave rise to these exceptions, the police made their observations from altitudes substantially lower than that at which commercial air traffic travels. In the one case, for instance, the police made their observations from an airplane at 1,000 feet. In the other case, the observations were made from a helicopter hovering above a greenhouse below, at an altitude of 400 feet.

In concluding that observations from the air did not encroach upon constitutionally protected privacy interests, the United States Supreme Court employed a “risk analysis”. This analysis completely ignores the cost of such air surveillance to innocent individuals. It is difficult to envision anything more Orwellian than the prospect of state officials making observations of our residences from helicopters hovering at low altitudes above our homes!<sup>29</sup>

<sup>28</sup>See *California v. Ciraolo* (1986), 476 U.S. 207, 106 S. Ct. 1809, 90 L.Ed. 2d 210, 54 U.S.L.W. 4471 (U.S. Cal.); *Florida v. Riley* (1989), 488 U.S. 445, 109 S. Ct. 693, 102 L.Ed. 2d 835, 57 U.S.L.W. 4126 (U.S. Fla.).

<sup>29</sup>In *Lauda*, in a footnote to the judgment, the Court of Appeal for Ontario indicated that “For the purposes of this appeal, it is unnecessary to explore the constitutional limits of aerial surveillance.” See *Lauda, supra*, footnote 5. The British Columbia Court of Appeal has already dealt with this issue, concluding that such surveillance does not intrude upon reasonable expectations of privacy under s. 8, see: *R. v. Hutchings* (1996), 111 C.C.C. (3d) 215, 83 B.C.A.C. 25, 136 W.A.C. 25, 39 C.R.R. (2d) 309 (B.C. C.A.). In contrast, the New Brunswick Court of Appeal recently held that aerial surveillance of an individual’s garden, situated behind their home, from a height of 30 metres, intruded upon a reasonable expectation of privacy, see *R. v. Kelly* (1999), 132 C.C.C. (3d) 122, 169 D.L.R. (4th) 720, 22 C.R. (5th) 248 (N.B. C.A.). Also see *R. v. Cook* (May 4, 1999), Doc. St. Paul 9814-0048-C6, Edmonton 9903-0904-C1 (Alta. Q.B.), following *Hutchings* for aerial surveillance from

In rejecting the “risk analysis”, in favour of a more normative approach to the definition of reasonable privacy expectations, the Supreme Court of Canada was undoubtedly aware of the dangers inherent in the American approach. In this regard, the Supreme Court paid close attention to the warnings of leading American Fourth Amendment scholars, such as Professor Anthony G. Amsterdam. Amsterdam cautioned against using a risk assumption approach because, given advancements in law enforcement techniques, there is a danger that the individual will be forced to withdraw from society, “retiring to the cellar, cloaking all the windows with thick caulking, turning off the lights and remaining absolutely quiet”<sup>30</sup> in order to ward off the spectre of state intrusion. This eventuality has been deemed unacceptable by the Supreme Court of Canada which has insisted that “[s]ection 8 of the *Charter* exists to protect privacy and not solitude”.<sup>31</sup>

### Conclusion

The “open fields” doctrine is one of many examples of the American “risk analysis” at work. This risk reasoning is dangerous. It is capable of being taken to unfathomable extremes. As the aerial surveillance cases demonstrate, it is easy to envision risks to individual privacy that can be employed as a rationale for doing away with the constitutional safeguard entirely.

It is for this reason that the American “risk analysis”, and the blanket exceptions to the Fourth Amendment which it has spawned, like the “open fields” doctrine, should find no sanctuary in Canadian jurisprudence. Canadians deserve more. They deserve meaningful protections from state intrusions on their privacy. Protections that are not fleeting. Protections that are not extinguished the moment the state is able to conjure up some theoretical risk to their personal privacy.

1,000 feet but Kelly for aerial surveillance from 50 feet! The Supreme Court has not yet addressed the constitutional status of this form of surveillance in Canada.

<sup>30</sup>A. G. Amsterdam, “Perspectives On The Fourth Amendment” (1974), 58 *Minnesota L. Rev.* 349 at 402. Cited with approval in *Wong, supra* note 12, at 477.

<sup>31</sup>*Wise, supra* note 12, at 207, LaForest J., dissenting in the result only.