Section 8 of the *Charter*

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Canadian Association of Provincial Court Judges Conference

September 22, 2022 | Halifax

Everyone has the right to be secure against unreasonable search or seizure.

Overview

1. State action
2. What is a “search or seizure”?
3. What is an “unreasonable” search or seizure?

32. (1) This Charter applies

(*a*) to the Parliament and government of Canada in respect of all matters within the authority of Parliament … and

(*b*) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

Government officials

Private citizens

… would the exchange … have taken place, in the form and manner in which it did take place, but for the intervention of the state …?

R. v. Broyles,
[1991] 3 S.C.R. 595

Delegation of statutory power?

Charter applies

- *R v Lerke*, 1986 ABCA 15 at paras 35-39
- *R v Jones*, [2004] NBJ No 510 at paras 18-25 (PC), aff'd 2005 NBQB 14
- *Giguère c R*, 2017 QCCS 3959 at paras 37-41

Charter does not apply

- *R v Skeir*, 2005 NSCA 86 at paras 10-21, leave application dismissed, 2005 CanLII 44366 (SCC)
- *R v NS*, 2004 CanLII 59977 (ON CA)

Overview

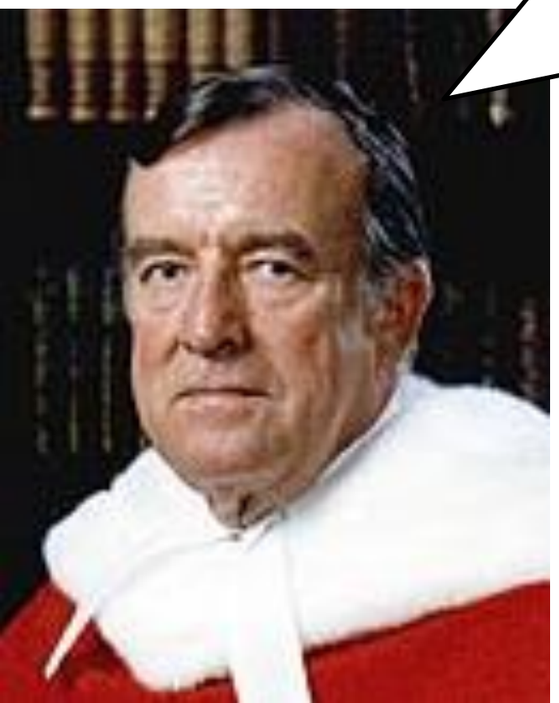
1. State action
2. What is a “search or seizure”?
3. What is an “unreasonable” search or seizure?


I guess I should have known a public telephone booth wasn't "private".
stus.com

The Fourth Amendment protects people, not places.

"Oh, look . . . they're reading '1984' in Ms. Smith's English class."

… security from unreasonable search and seizure only protects a reasonable expectation.



Hunter et al v Southam Inc., [1984] 2 SCR 145

….[A]n assessment must be made as to whether … the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement.


RFP

[redacted]

[redacted]


Search or
seizure

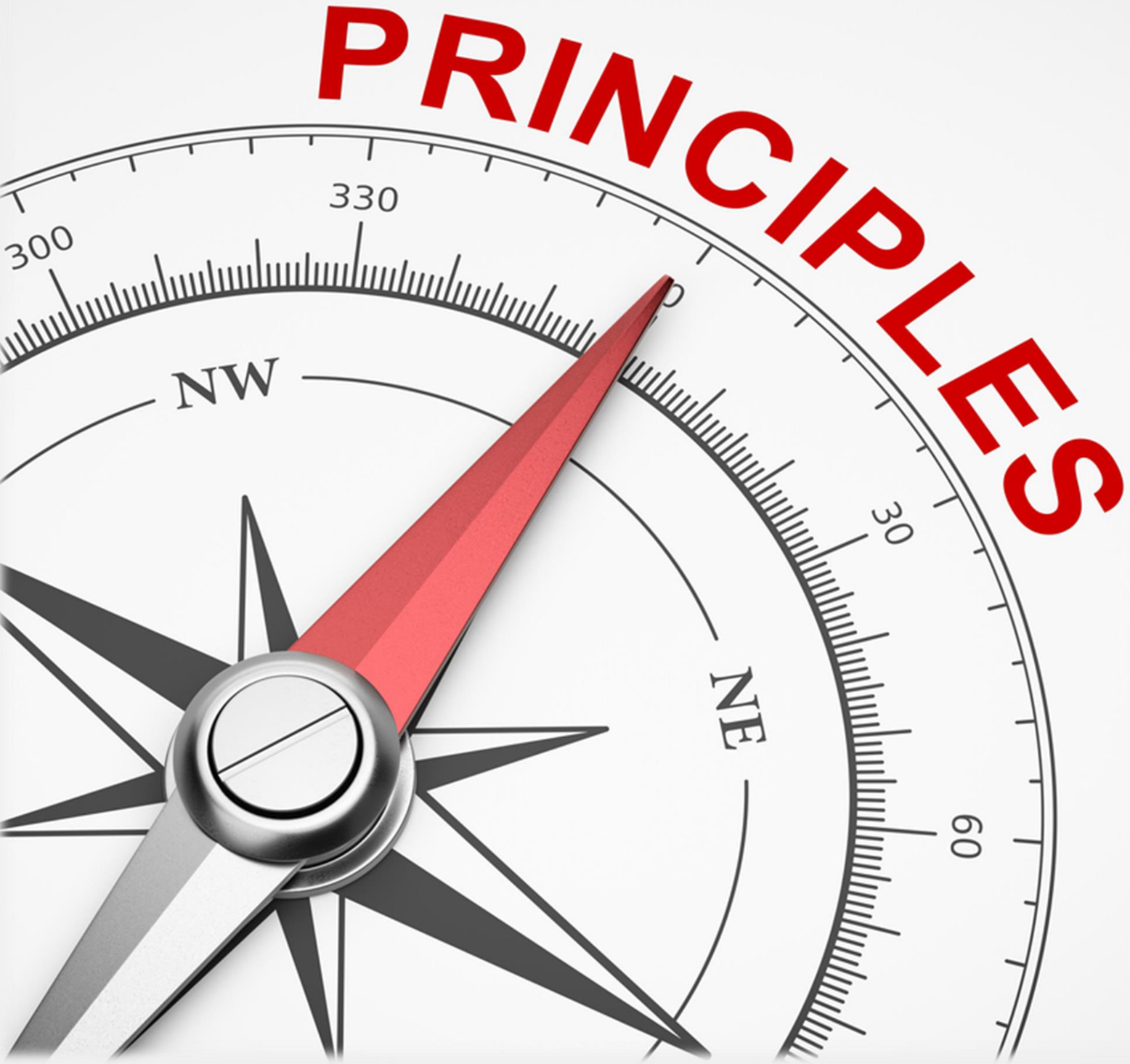
1. What is the subject matter of the alleged search?

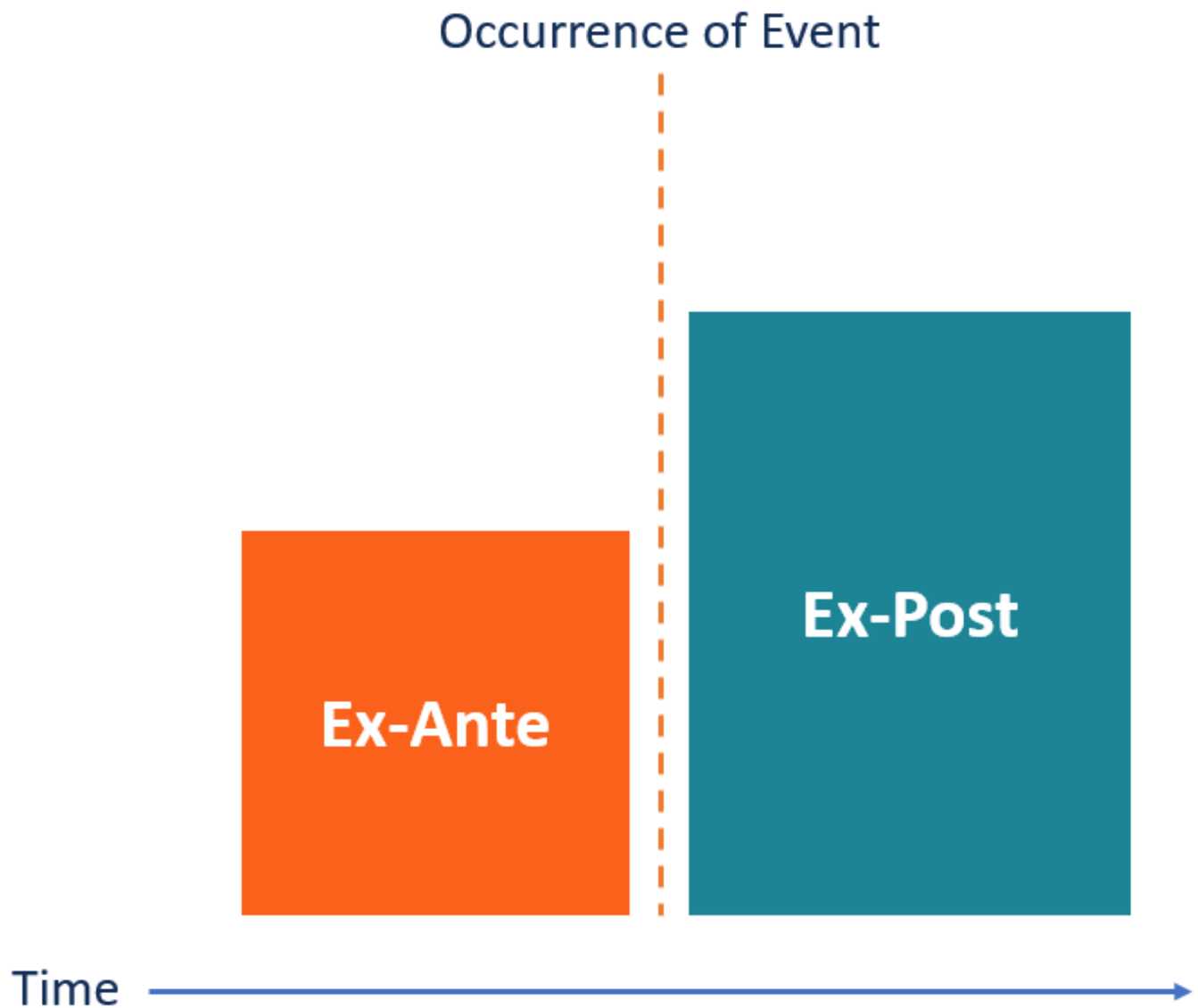
2. Did the claimant have a direct interest in the subject matter?

3. Did the claimant have a subjective expectation of privacy in the subject matter?

4. Was this subjective expectation of privacy objectively reasonable, having regard to the totality of the circumstances?

KEEP
CALM
AND
CONSIDER
EVERYTHING


PRINCIPLES
330
300
30
60
NW
NE


Occurrence of Event
Ex-Ante
Ex-Post
Time

… it would be an error to suppose that the question that must be asked in these circumstances is whether persons who engage in illegal activity behind the locked door of a hotel room have a reasonable expectation of privacy.

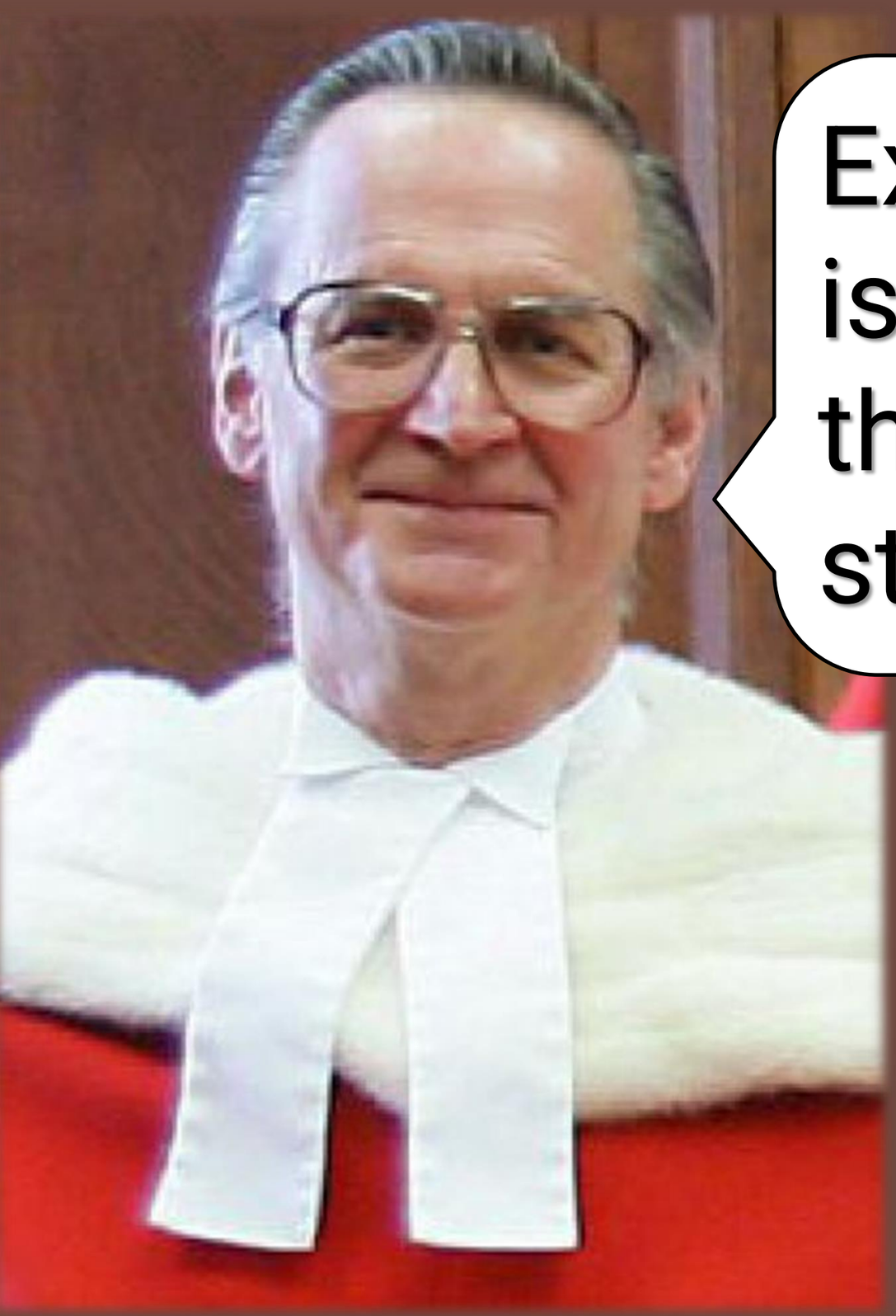
R v Wong,
[1990] 3 SCR 36

… it would be an error to suppose that the question that must be asked in these circumstances is whether persons who engage in illegal activity behind the locked door of a hotel room have a reasonable expectation of privacy.

R v Wong,
[1990] 3 SCR 36

Rather, the question must be framed in broad and neutral terms so as to become whether in a society such as ours persons who retire to a hotel room and close the door behind them have a reasonable expectation of privacy.

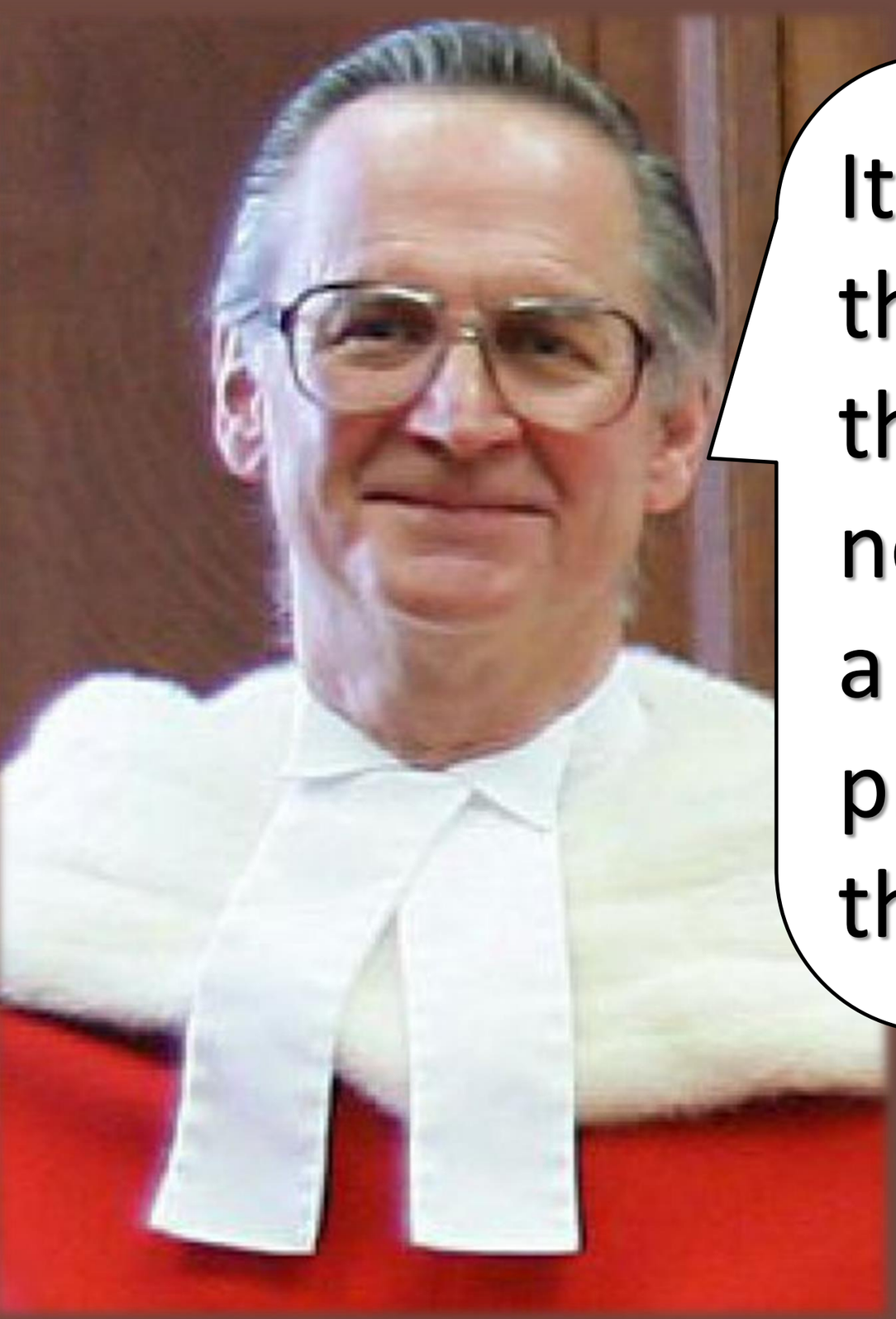
R v Wong,
[1990] 3 SCR 36



Expectation of privacy is a normative rather than a descriptive standard.

R v Tessling,
[2004] 3 SCR 432

BIG BROTHER IS WATCHING YOU



It is quite another to say
that someone who fears
their telephone is bugged
no longer has
a subjective expectation of
privacy and thereby forfeits
the protection of s. 8.

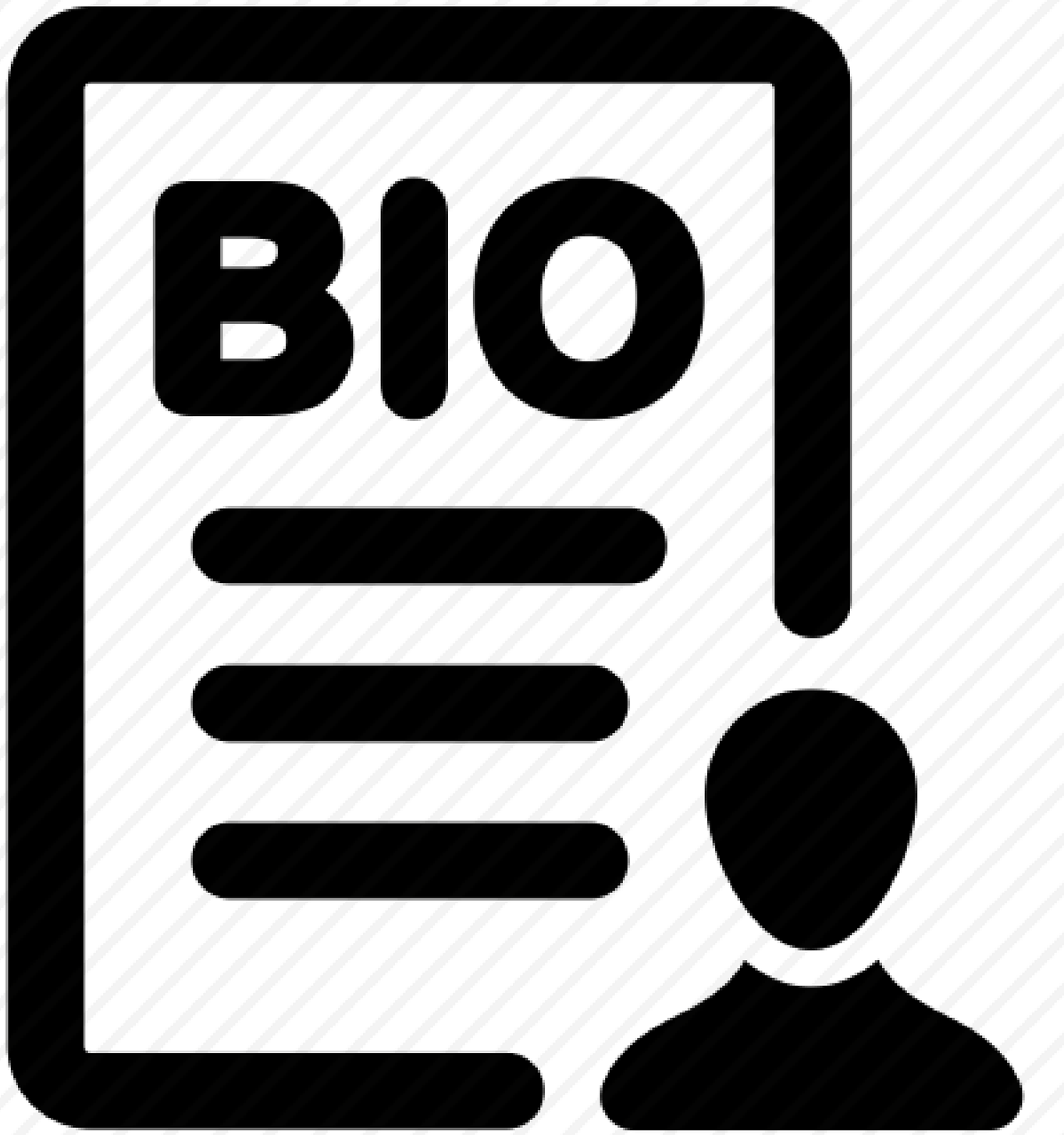
R v Tessling,
[2004] 3 SCR 432

No 3d party rights

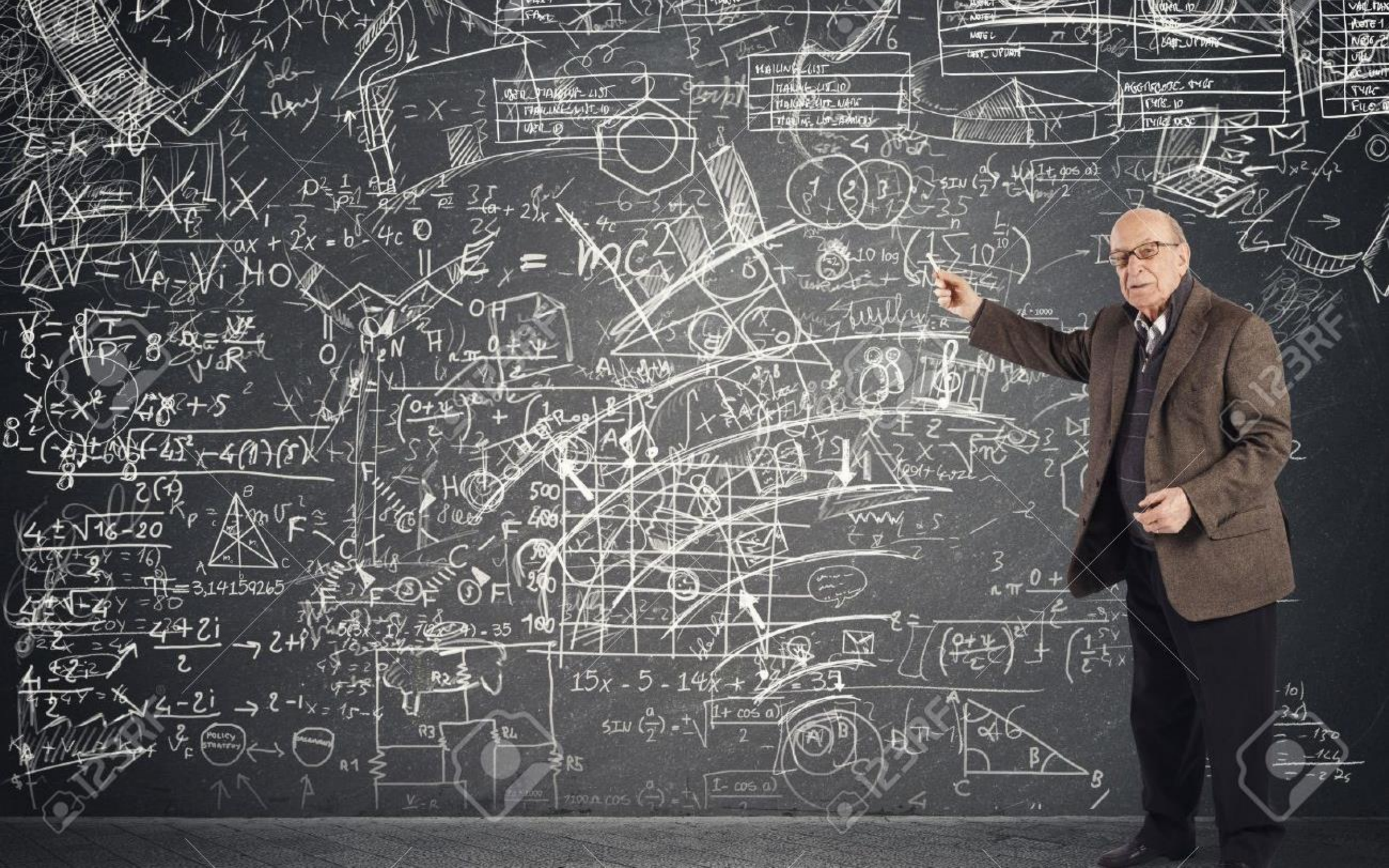
R v Edwards, [1996] 1 SCR 128

- Ownership
- Presence
- Possession or control
- Historical use, *etc.*

Biographical core

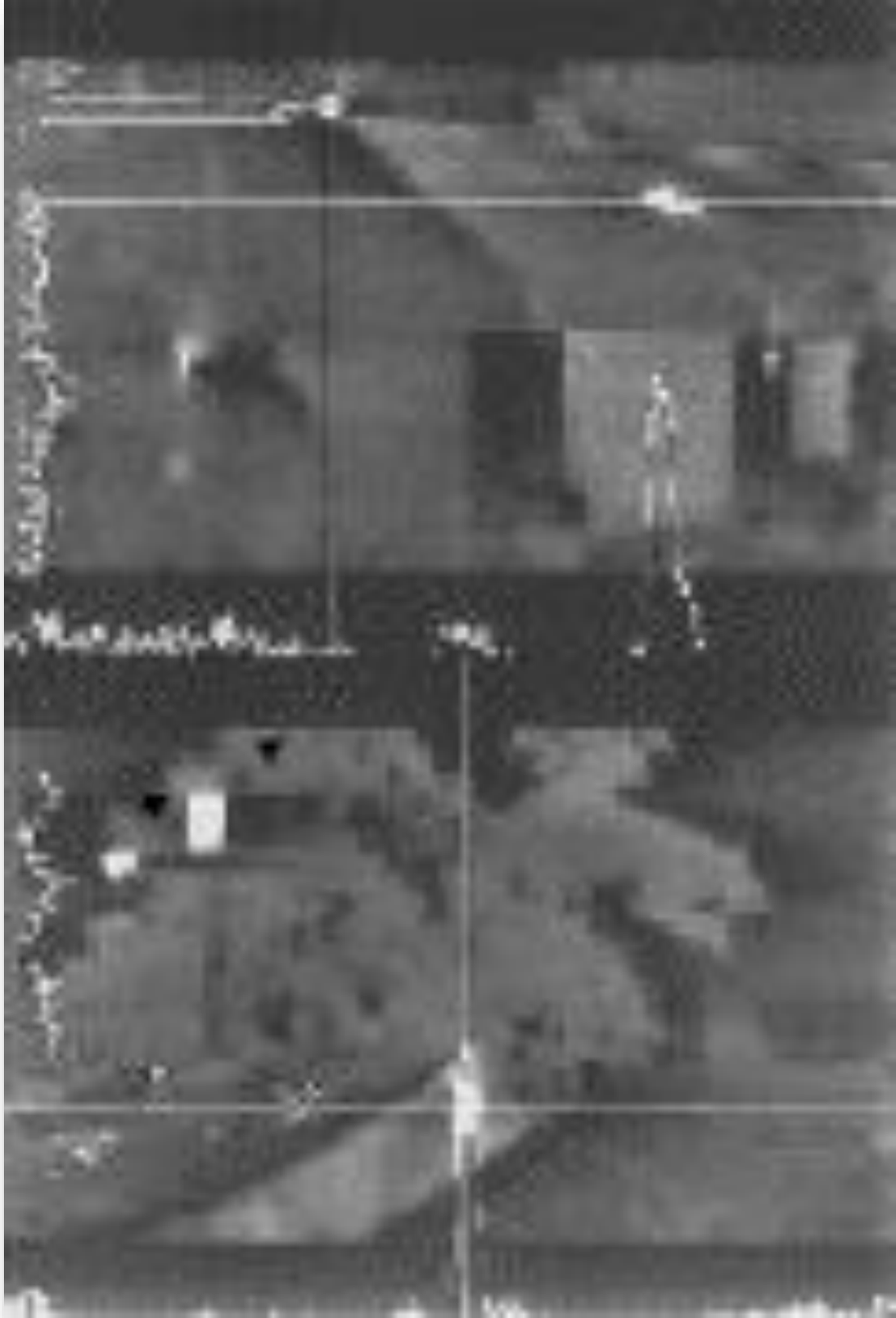


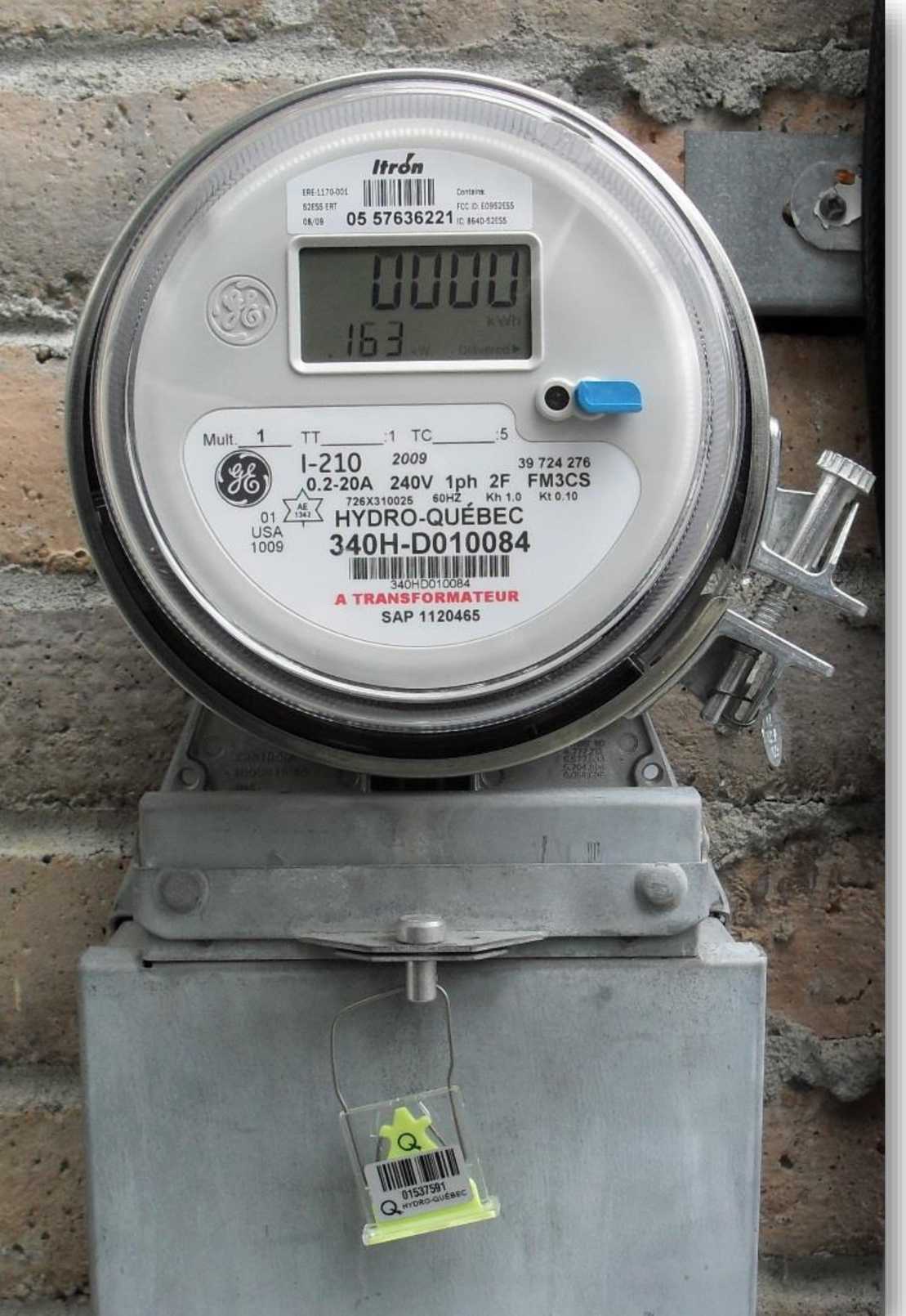

72% 1:42 pm
61°
Manhattan
Updated 20/02 1:23 pm
Phone
69% 1:42 pm
57°
Manhattan
Updated 20/02 12:51 pm
Say "Ok Google"
Phone
Messages
Internet
Play Store
Camera



Fuzzy inferences

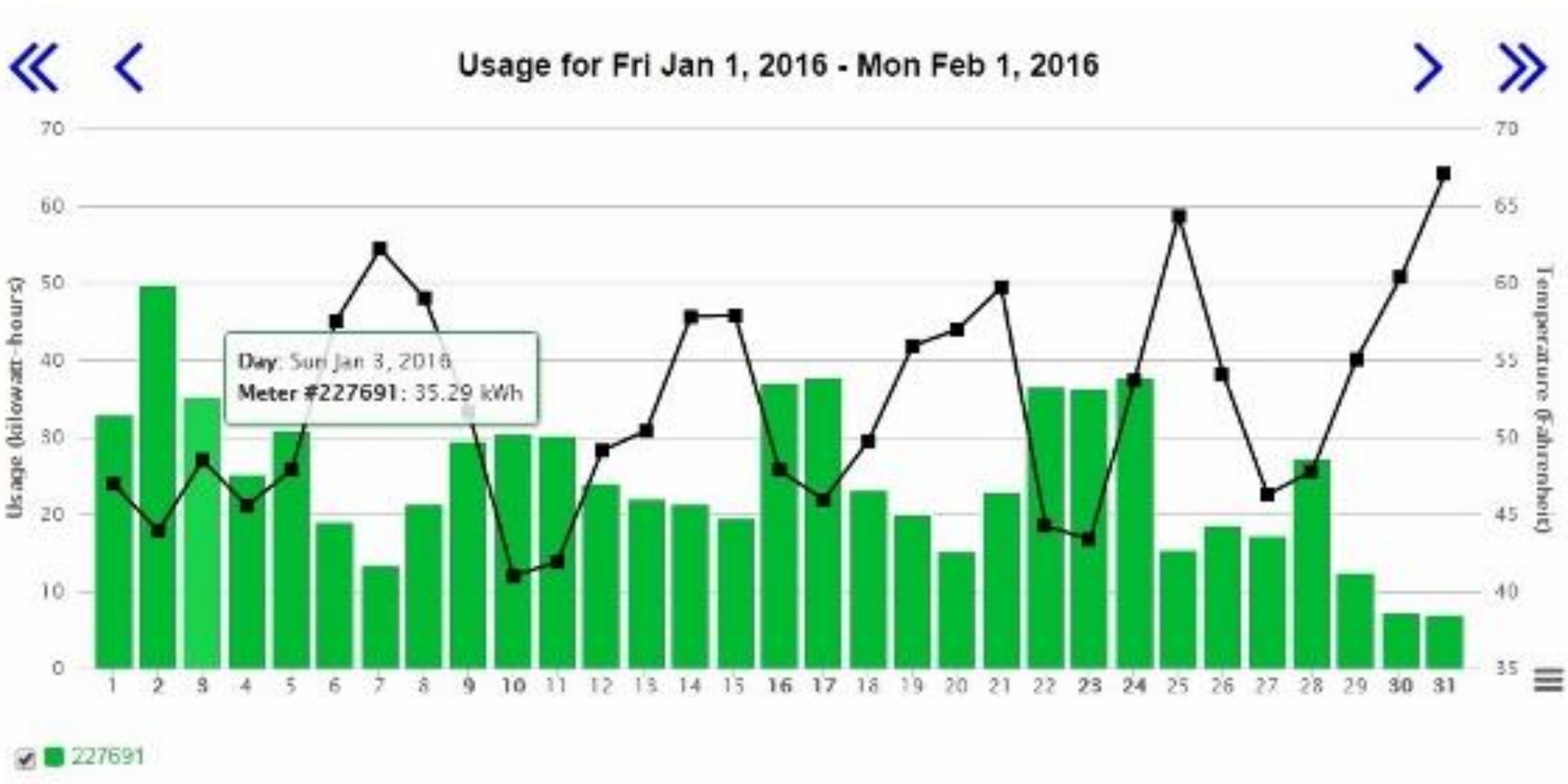
R v Tessling,
[2004] 3 SCR 432





R v Plant,
[1993] 3 SCR 281

R v Gomboc,
[2010] 3 SCR 211


Usage for Fri Jan 1, 2016 - Mon Feb 1, 2016
Day: Sun Jan 3, 2016
Meter #227691: 35.29 kWh
Usage (kilowatt-hours)
Temperature (Fahrenheit)
70
60
50
40
30
20
10
0
65
55
45
35
1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31
227691

R v Patrick, [2009] 1 SCR 579


BIOGRAPHICAL
CORE

ABANDONED!

However

PSSST...!

R v Duarte, [1990] 1 SCR 30

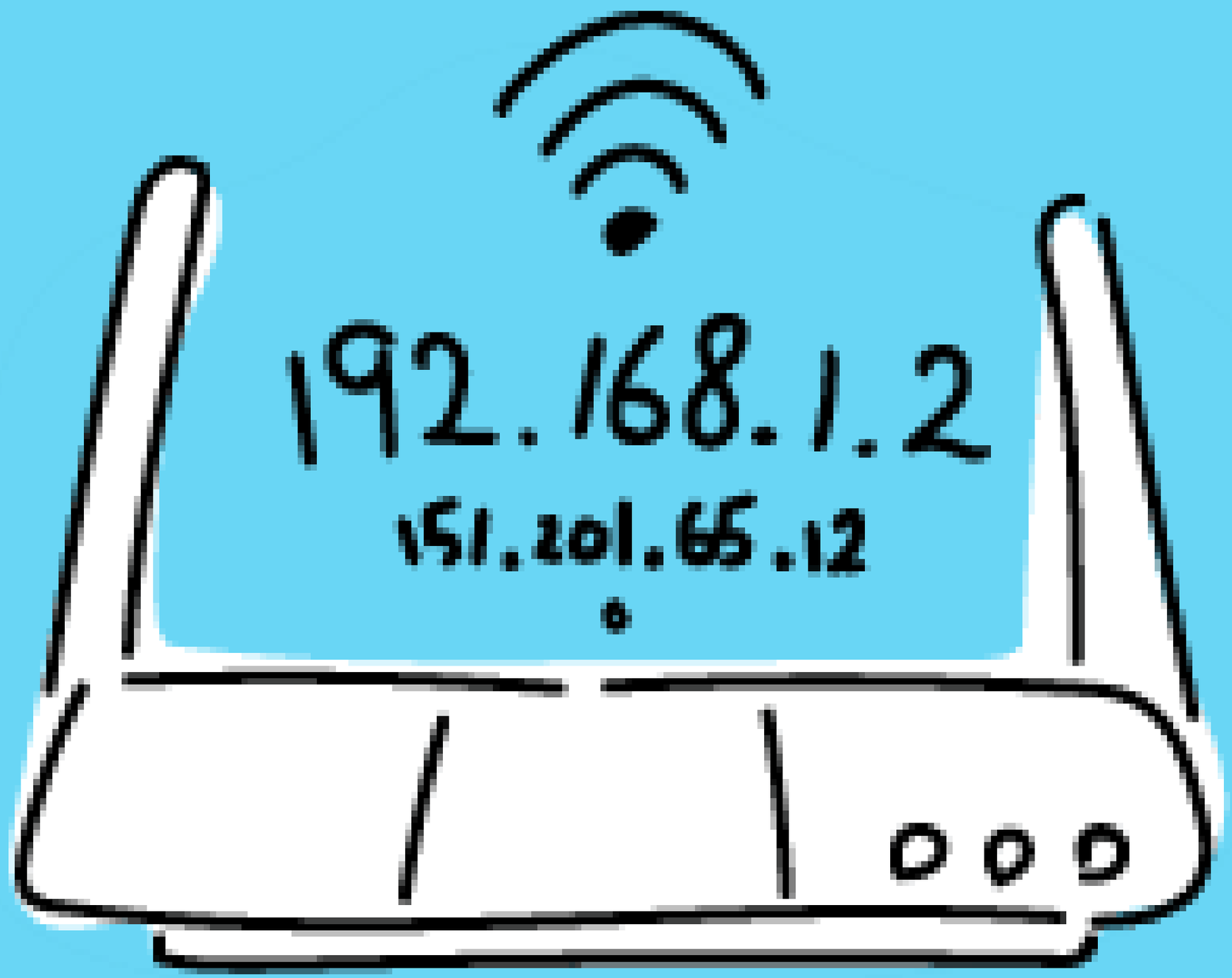
R v Wong, [1990] 3 SCR 36

R v Cole, [2012] 3 SCR 34

R v Marakah, [2017] 2 SCR 608

R v Buhay, [2003] 1 SCR 631

R v Spencer,
2014 SCC 43



Consent searches

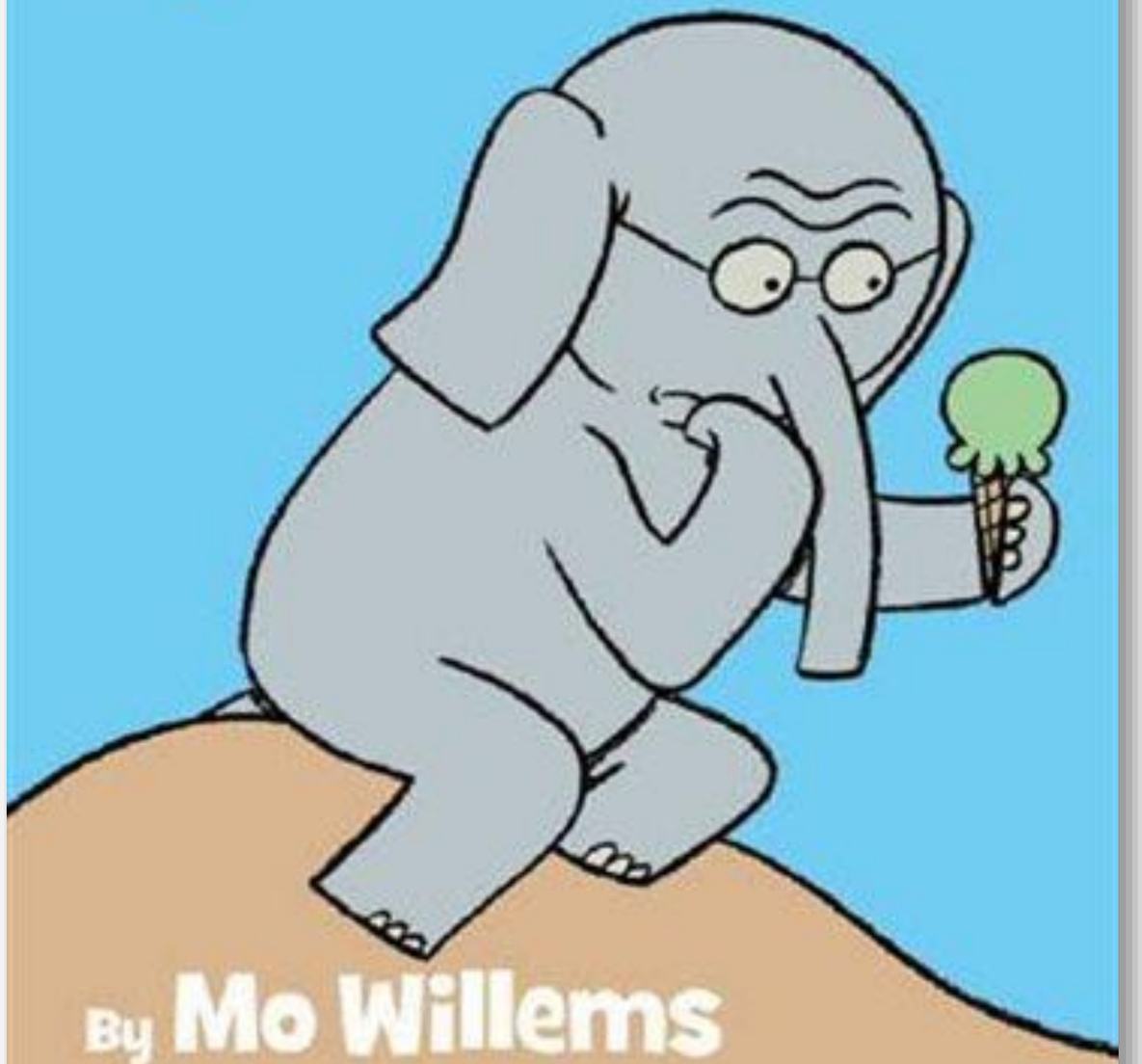

RFP

Authority to consent

3P

An ELEPHANT & PIGGIE Book

Should I Share My Ice Cream?



By Mo Willems

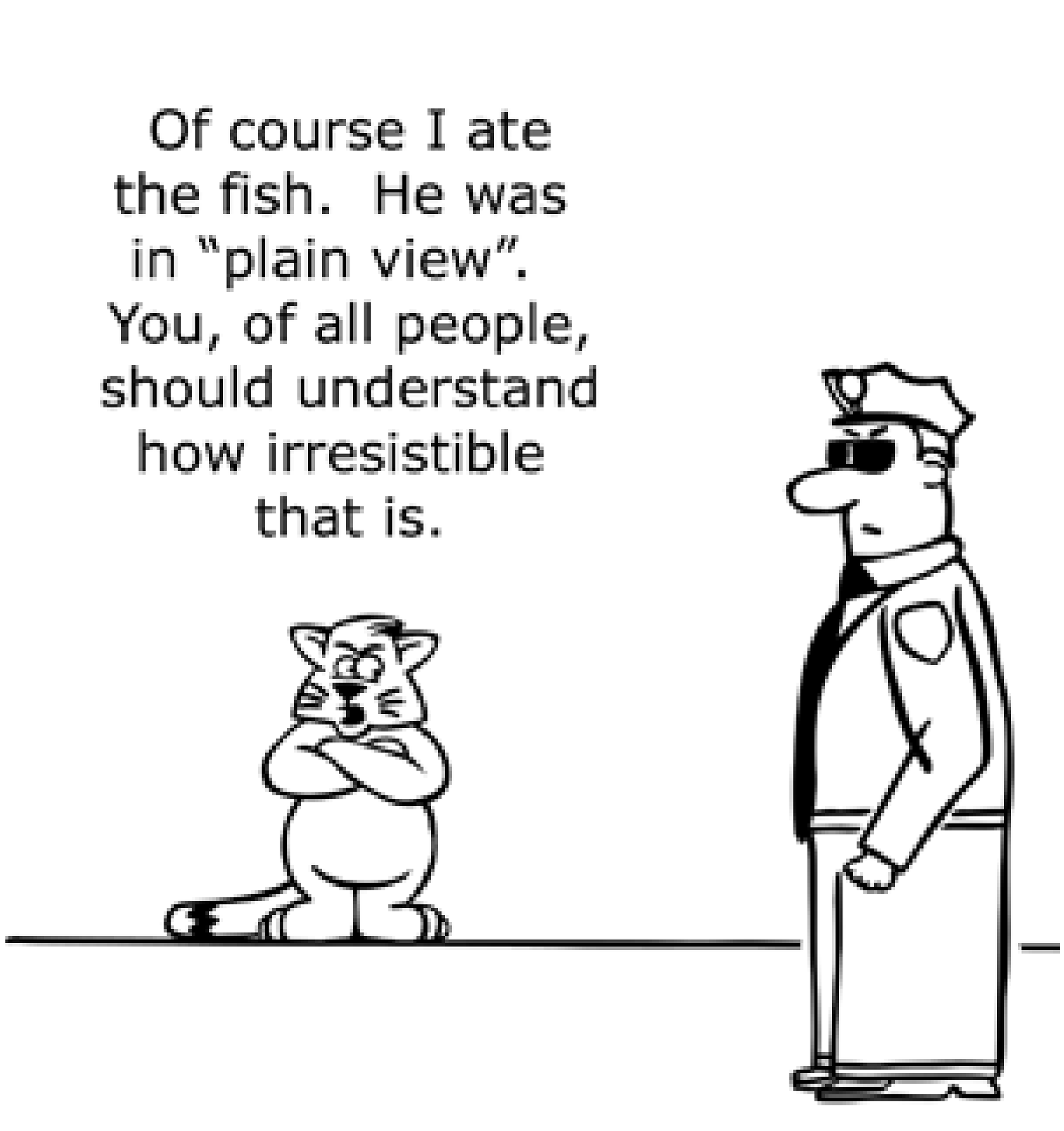
I cannot accept that, by choosing to share our computers with friends and family, we are required to give up our Charter protection from state interference in our private lives. We are not required to accept that our friends and family can unilaterally authorize police to take things that we share.

R v Reeves, 2018 SCC 56 at para 44

Voluntary


CONFESS!
CONFESS!

Informed



Plain view seizures

Lawful presence

Inadvertent

Evidentiary significance

BART

BRETT

CHARLES

EVA

BILL

FANNIE

Overview

1. State action
2. What is a “search or seizure”?
3. What is an “unreasonable” search or seizure?

Types of unreasonableness

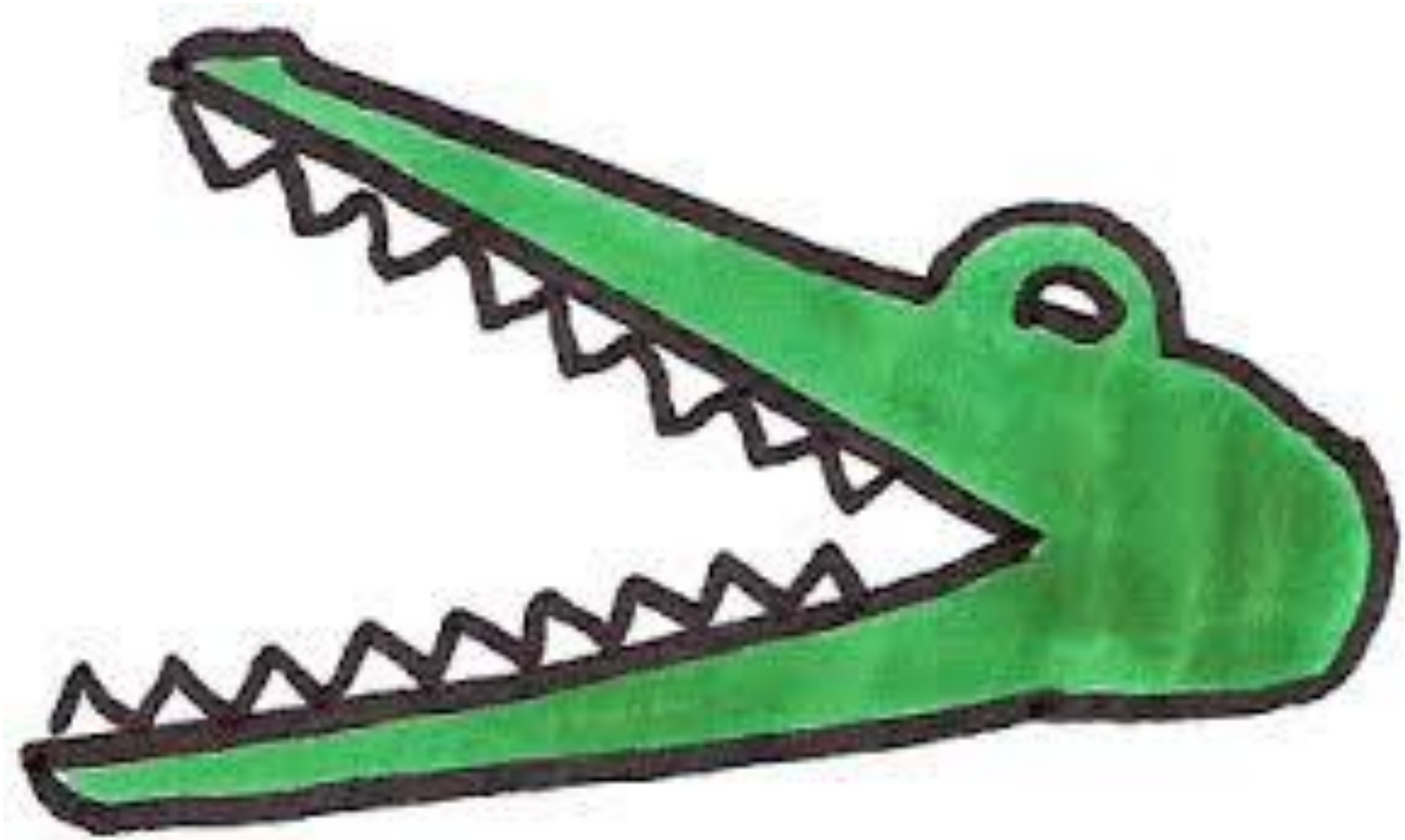
1. Not authorized by law (*eg Wong*)
2. Law is unreasonable (*eg Hunter*)
3. Applied unreasonably (*eg* police lacked required grounds)


caps lock
A
S
Z
X
default
control
alt
option

Warrant

Probable grounds

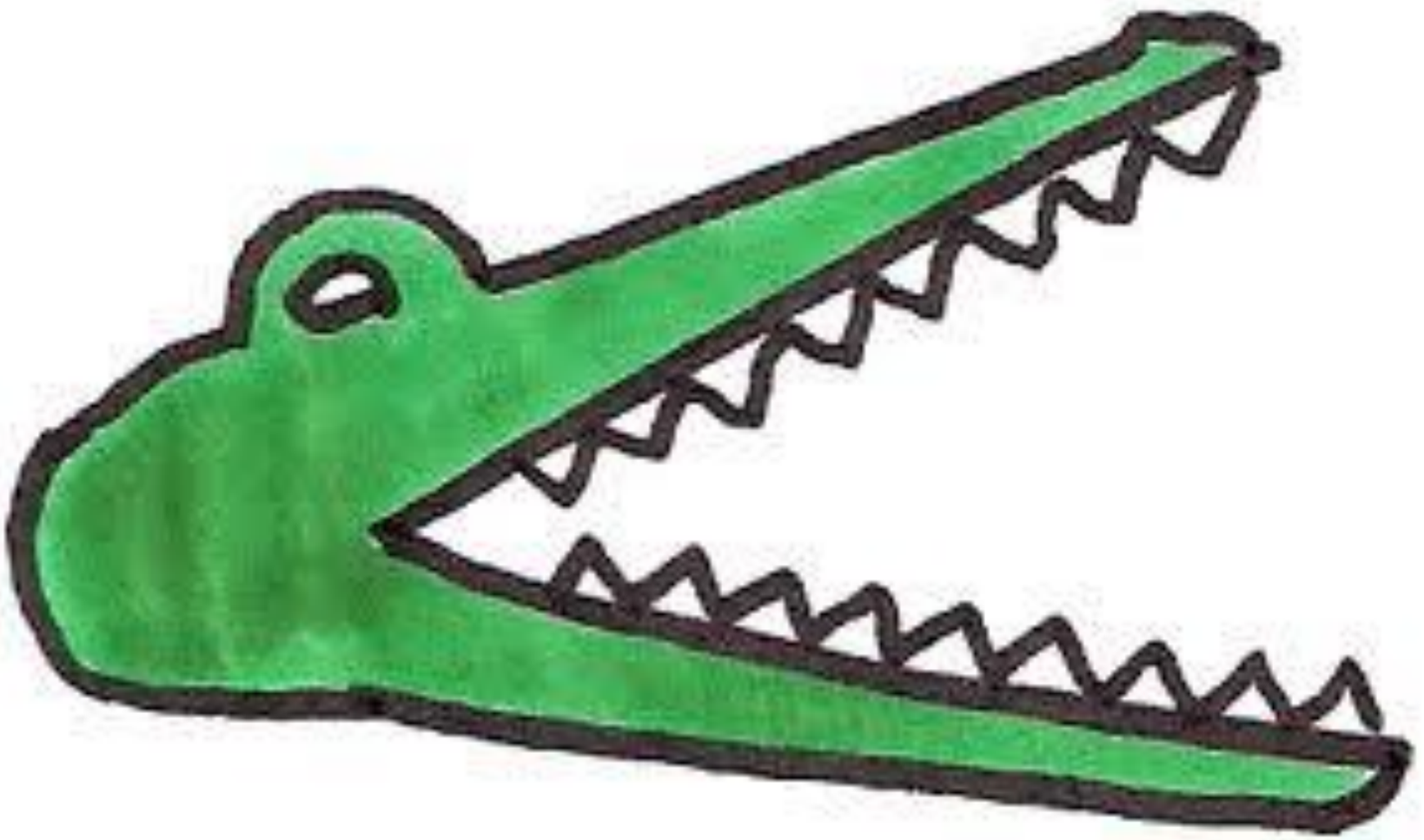
Greater than *Hunter*




Confidential Document
Attorney-Client Privilege


TERMS & CONDITIONS

Less than *Hunter*



Diminished REP

Compelling state interest

I don’t *need* a warrant!

1. Reasonable & probable grounds

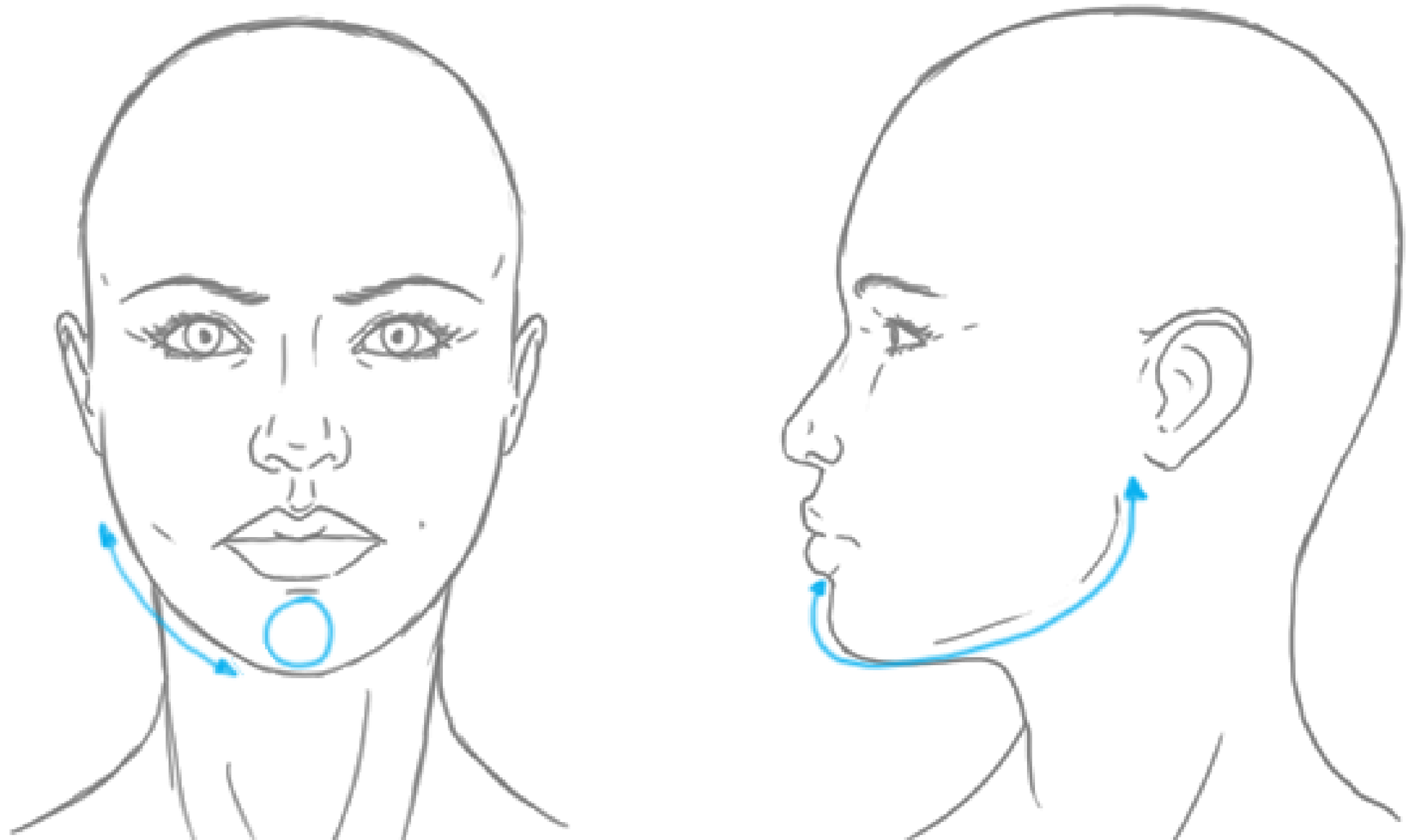
2. Reasonable suspicion

3. No suspicion

	Warrant	No warrant
Probable grounds	n/a [*Hunter* standards]	• Exigency (evidence) • Safety search • Breathalyzer
Reasonable suspicion	Transmission data warrants	• Exigency (safety) • Canine sniff
No suspicion	n/a	• SIA • ASD • Regulatory

Warrant review

Facial validity



Warrant

- Offence
- Location to be searched
- Items to be seized
- Any special terms

ITO

- Evidentiary value?
- Currency & sourcing of grounds

C Credible

C Compelling

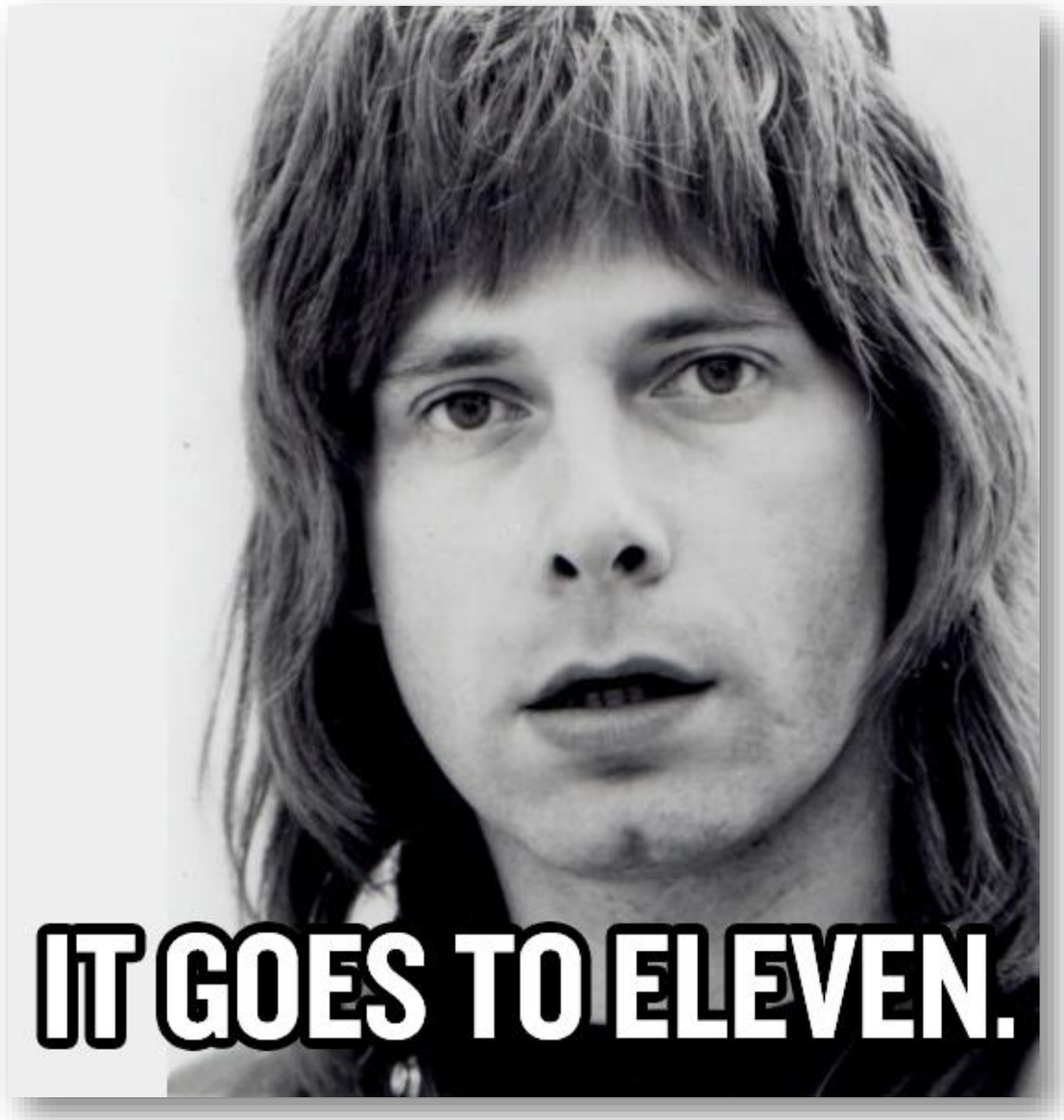
C Corroborated

Sub-facial validity

- Cross-examination?
- Undermine validity?
  - Errors
  - Failure to disclose
  - False or misleading assertions

Excision

Amplification




FRAUD ALERT
FRAUD ALERT
FRAUD ALERT

THANK YOU