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## **PULLING THE IVY OUT OF THE WINDOWS: PRESUMPTIONS OF PRIVACY IN THE HOME AND *R v. GOMBOC***

Tipper McEwan\*

### **INTRODUCTION**

Ivy is a beautiful plant. Its green leaves brighten up the side of a house and picturesquely connect buildings to landscapes. Ivy is also a useful plant: the leaves naturally act as a first line of defence against the elements, and in the spring and fall they absorb the punishment of the wind and rain. They help keep a house cool in the summer and warm in the winter. But ivy can also harm the house that it should adorn and protect. From a single seed, it grows quickly and aggressively. If the mortar or bricks of the wall are too soft, ivy will slowly dig into the wall and undermine it. If any wood is exposed, ivy will put roots into it, and slowly split into the grain of the wood. If left unchecked, it will overwhelm the house beneath a multiplicity of spreading tendrils.

The law of search and seizure is like ivy growing on Canadians' homes. It should both connect the home to the greater landscape, by providing a means of balancing the rights of individuals against the concerns of the state, and protect the rights of Canadians to enjoy privacy in their own homes. More than any other place, the home is where Canadians can be themselves. Section 8 of the *Charter* reads: "Everyone has the right to be secure against unreasonable search or seizure."<sup>1</sup> However, the jurisprudential ivy that has sprung from this seed has worked its way into the wood and walls of Canadian homes. Judicial analysis under s. 8 has grown more complex, and Canadians' expectations that they will enjoy privacy in their own homes have been

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1 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being *Schedule B of the Canada Act 1982 (U.K.)*, 1982, c.11, s. 8 [*Charter*].

buried under a thicket of vines and leaves. Some pruning is in order.

From the origins of the common law, the home has been a presumptively private place. Sir Edward Coke famously held that “the house of everyone is to him as his castle and fortress, as well for his defence against injury and violence as for his repose.”<sup>2</sup> This passage was quoted in *R. v. Tessling*, but ultimately it was not enough to sway the result of that case.<sup>3</sup>

Today in Canada the law of search and seizure presumes that nothing is automatically within the protection of s. 8. The power of the state to search the home is limited only by the existence of a reasonable expectation of privacy (“REP”). Where there is a REP, neither the government nor the police can search for either physical evidence or information without a warrant or some other form of prior judicial authorization.<sup>4</sup> In other words, the law does not recognize that a search has taken place unless there was a REP. However, if there is a REP in a place or in certain information, then whatever was done by the state to gain the information was a search. A search without a warrant is presumptively unreasonable.<sup>5</sup>

From the seed of the REP has grown a tangled mass of factors and sub-factors for evaluating the reasonableness of expectations of privacy. A REP is determined by an analysis of all the circumstances. The subjective expectation of the person whose home is searched is only one factor in the analysis.<sup>6</sup> However, the Supreme Court of Canada (“SCC”) has repeatedly held that it can be presumed that Canadians subjectively expect what goes on in their homes to be private.<sup>7</sup> What Canadians actually expect to be private – their homes – and what the REP analysis says they can expect to be private are two very different things. The REP analysis as it stands gives Canadians less privacy than the jurisprudence says they expect. The ivy has come through the windows, but why?

Various scholars argue that the REP analysis erodes Canadians’ privacy through circular reasoning, by protecting privacy in a *post-facto*, case-by-case fashion, and by taking too narrow an approach to the kinds of information that should be kept private. In *R. v. Gomboc*, a majority of the Alberta Court of Appeal held that the data gathered by placing a digital recording ammeter (“DRA”) on the accused’s power line was subject to a REP, with O’Brien J.A. dissenting.<sup>8</sup> The Crown appealed to the SCC as of right, and

2 *Semayne’s Case*, 77 Eng. Rep. 194, at 195, 5 Co. Rep. 91a, at 91b (K.B. 1604).

3 *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432, at para. 22, 3 C.R. (6th) 207 [*Tessling*].

4 *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at 159-160, 162, 14 C.C.C. (3d) 97 [*Hunter*].

5 *Ibid.* at 161.

6 *R. v. Edwards*, [1996] 1 S.C.R. 128 at para. 45, 45 C.R. (4th) 307 [*Edwards*], *Tessling*, *supra* note 3 at para. 32.

7 *R. v. Patrick*, 2009 SCC 17, [2009] 1 S.C.R. 579, at para. 37, 64 C.R. (6th) 1 [*Patrick*]; *Tessling*, *ibid.* at para. 41.

8 *R. v. Gomboc*, 2009 ABCA 276, at paras. 26-27, 33 and 95, 2009 CarswellAlta 1250, [*Gomboc*].

the appeal will tentatively be heard on May 19, 2010.<sup>9</sup>

The majority of the Court of the Appeal implicitly presumed that there is a REP in the home. This presumption should be adopted as part of the law of search and seizure, because it answers each of the scholarly critiques and, more importantly, *because it closes the gap between the privacy Canadians expect and the privacy the law gives them.*

## I. REASONABLE EXPECTATION OF PRIVACY: THE CASES

The REP jurisprudence started off simple enough. However, as the number of factors for assessing the REP multiplied, the test became increasingly objective. Courts continued to recognize that Canadians subjectively expected a high level of privacy in their own homes, and that the home was a place worthy of s. 8 protection. However, these axioms proved insufficient to establish an REP; they were simply overwhelmed as the objective factors in the analysis multiplied. Eventually, the expectation of privacy in the home ostensibly held by everyone disappeared beneath the leaves and branches of objectivity.

*Hunter v. Southam Inc.*, the start of the REP jurisprudence, established four core principles relevant to determining the extent of a privacy interest in the home. One, s. 8 only protects a REP; if there is no REP, there is no search and thus s. 8 does not apply. Two, s. 8 protects people, not places. Three, s. 8 may protect more interests than privacy, but it goes “at least that far.” Four, a warrantless search is *prima facie* unreasonable where obtaining a warrant would be feasible.<sup>10</sup>

The second principle – that s. 8 protects people and not places – appears on its face to preclude the creation of a presumption of a REP in the home because the home is a place. There are two responses to this critique. First, the purpose of this principle was originally to extend the law of search and seizure beyond its ancient limits in the common law of trespass and to broaden the scope of s. 8 protection to protect more than the right to enjoy property.<sup>11</sup> It would be perverse if the expansion of s. 8 protection beyond property rights to “guarantee a broad and general right to be secure from search and seizure” prevented s. 8 jurisprudence from creating a presumption that would protect a person’s home.<sup>12</sup> Second, a home is by definition a place where a person resides. In *R. v. A.M.*,<sup>13</sup> discussed below, Justice Binnie’s minority judgment recognized that a person’s association with a particular object or space is enough to support a REP

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9 Supreme Court of Canada, Bulletin of Proceedings, September 25, 2009, at 1245. For the tentative date see: <http://www.scc-csc.gc.ca/case-dossier/cms-sgd/hear-aud-eng.aspx?ya=2010&ses=03&sr=Search>

10 *Hunter*, *supra* note 4 at 158-159, 160-1.

11 *Ibid.* at 157-159.

12 *Ibid.* at 158.

13 *R. v. A.M.*, [2008] 1 S.C.R. 569, 2008 SCC 19, at para. 48, 55 C.R. (6th) 314 [A.M.].

even when that person is elsewhere.<sup>14</sup>

In *R. v. Plant*,<sup>15</sup> a majority of the SCC held that electricity consumption records accessed by a police computer network were not covered by a REP. The majority reasoned as follows:

In fostering the underlying values of dignity, integrity and autonomy, it is fitting that s. 8 of the Charter should seek to protect a biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state. This would include information which tends to reveal intimate details of the lifestyle and personal choices of the individual.<sup>16</sup>

The majority held that electricity consumption records did not contain the information concerning the accused's biographical core, and therefore that there was no REP in the information.<sup>17</sup> The concept of a biographical core continues to bedevil s. 8 jurisprudence. However, one would hope that the protection of s. 8 would extend beyond the biographical core. A person may keep core biographical information written in a diary, but that does not mean that a REP would be violated if the police entered his or her home and thumbed through the copies of *Maclean's* magazine on the kitchen table. The flowers of dignity, integrity and autonomy can only bloom if they are given a place to grow. In Canada, the home is the place where these values bloom. If the home is not a private place, then how much autonomy can a person really have?

The totality of the circumstances test was laid out by the Court in *Edwards*. The factors identified by the Court were:

- (i) presence at the time of the search;
- (ii) possession or control of the property or place searched;
- (iii) ownership of the property or place;
- (iv) historical use of the property or item;
- (v) the ability to regulate access, including the right to admit or exclude others from the place;
- (vi) the existence of a subjective expectation of privacy; and
- (vii) the objective reasonableness of the expectation.<sup>18</sup>

Although only factor (vi) could truly be labeled "subjective," this test at least superficially placed subjective expectations and objective reasonableness on the same level of importance.

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14 *Ibid.* at para. 48.

15 *R v. Plant*, [1993] 3 S.C.R. 281, 84 C.C.C. (3d) 203 [*Plant*].

16 *Ibid.* at 293.

17 *Ibid.* at 295-6.

18 *Edwards*, *supra* note 6 at para. 45.

In *Tessling* the Court held that there was no REP in the heat emanations from the accused's home. Police flew by the house with an infrared camera, called a FLIR.<sup>19</sup> While the Court was careful to point out that *Plant* did not limit the scope of a REP to the "biographical core," it ultimately held that the FLIR did not intrude into a "biographical core" or reveal "intimate details of [the accused's] lifestyle."<sup>20</sup> The tension between these two positions plays out in the subsequent case law, with some cases finding no REP because the information did not touch on the biographical core and others struggling to move beyond this conceptual framework.

The Court also distinguished between three types of privacy: personal, territorial, and informational. The privacy interest at stake in *Tessling* was "essentially informational" but with a territorial implication.<sup>21</sup> The Court also adapted the totality of the circumstances test as follows:

1. What was the subject matter of the FLIR image?
2. Did the respondent have a direct interest in the subject matter of the FLIR image?
3. Did the respondent have a subjective expectation of privacy in the subject matter of the FLIR image?
4. If so, was the expectation objectively reasonable? In this respect, regard must be had to:
  - a. the place where the alleged "search" occurred;
  - b. whether the subject matter was in public view;
  - c. whether the subject matter had been abandoned;
  - d. whether the information was already in the hands of third parties, and if so, whether it was subject to an obligation of confidentiality;
  - e. whether the police technique was intrusive in relation to the privacy interest;
  - f. whether the use of surveillance technology was itself objectively unreasonable;
  - g. whether the FLIR heat profile exposed any intimate details of the respondent's lifestyle, or information of a biographical nature.<sup>22</sup>

The factors in this test show an increased focus on whether or not a subjective expectation was objectively reasonable. A full seven points of inquiry on the objective side of the analysis are now weighed against a single question on the subjective side of the analysis. However, the Court held that it can be presumed that a person has a subjective expectation of privacy in information regarding what goes on inside the

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19 *Tessling*, *supra* note 3 at paras. 1-3.

20 *Ibid.* at paras. 25-26, 62.

21 *Ibid.* at paras. 20, 24.

22 *Ibid.* at paras. 31-32.

home.<sup>23</sup> This presumption was repeated in *Patrick*.<sup>24</sup> The Court in *Tessling* also noted that the territorial privacy interest in one's home was most worthy of protection because it is "the place where our most intimate and private activities are most likely to take place."<sup>25</sup> This point recognizes that Canadians expect that their homes will be uniquely private spaces.

The universal expectation of privacy in the home and the high level of protection awarded to this expectation are not enough to create a REP. The Court in *Tessling* emphasized that the s. 8 analysis must balance individual privacy interests against the public interest in security.<sup>26</sup> The SCC treated the search in *Tessling* as a search for information about the home, and not as a search of the home itself. Accordingly, the Court centered its objective analysis on the nature and the quality of the information at stake, since the information revealed by the FLIR was, by itself, meaningless.<sup>27</sup> Therefore the information did not trench on a REP largely because it did not reveal any part of the accused's biographical core.<sup>28</sup>

On the other hand, the Court took pains to declare that the subjective expectation of privacy was a normative standard, and that an expectation of privacy was not lost simply because a person subjectively feared that they might be under surveillance.<sup>29</sup> A reduced subjective expectation of privacy is insufficient to lower the level of constitutional protection afforded to a particular privacy interest. One would expect that there would logically be a fair bit of weight given to the subjective expectation of privacy as well, at least where the subjective expectation is presumed as it is in cases touching the home. Otherwise, the standard of privacy which the Court presumes all Canadians are subjectively entitled to expect as a basic social norm would be unreasonable. It would be odd if a basic social norm was unreasonable. However, the juxtaposition of the subjective expectation with a plethora of factors for determining the objective reasonableness of this expectation suggests that subjective expectations of privacy are inherently unreasonable and need to be carefully, and objectively, qualified.

In essence, *Tessling* suggests that the weaker the inference about what is going on in the home, the less the *Charter* will regulate the information-gathering activity. However, there is no corresponding decline in the subjective expectations of the accused. Consequently, the reasonableness analysis outweighs the expectation, and s. 8 no longer protects information which the Court recognizes that Canadians should expect to be private.

This discrepancy is all the more jarring given the minority judgment in *A.M.*, where

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23 *Ibid.* at para. 38.

24 *Patrick*, *supra* note 7 at para. 37.

25 *Tessling*, *supra* note 3 at para. 22.

26 *Ibid.* at para. 17.

27 *Ibid.* at paras. 35-36.

28 *Ibid.* at paras. 36, 62-3.

29 *Ibid.* at paras. 41-42.

Binnie J., McLachlin C.J.C concurring, held that information regarding the contents of a backpack could be the subject of a REP because the contents were intended to be private.<sup>30</sup> Surely if information in a backpack can have an REP because it is intended to be private, then the home, too, can be subject to a presumed REP, since Canadians similarly intend that it will be a private space.

The judgment of Binnie J. in *A.M.* points toward reform of the REP test, at least in the circumstances of that case. On the one hand, his Lordships reasons firmly focused on the intention of A.M. to keep the contents of his backpack private, rather than on the fact that the backpack was left in plain view and was unattended at the time of the search.<sup>31</sup> Furthermore, Binnie J. offered an important qualification to the axiom that s. 8 protects people and not places: "My home is no less private when I am out than when I am there. When students left their backpacks in the gymnasium, they did not thereby lose their privacy interest in the concealed contents, in my view."<sup>32</sup> This qualification makes room for a presumption of a REP in the home under the rubric of s. 8. Finally, Binnie J. held the following regarding the use of the concept of the biographical core in the previous cases:

[The concept] was used as a useful analytical tool, not a classification intended to be conclusive of the analysis of information privacy. Not all information that fails to meet the "biographical core of personal information" test is thereby open to the police. Wiretaps target electrical signals that emanate from a home; yet it has been held that such communications are private whether or not they disclose core "biographical" information [...]. The privacy of such communications is accepted because they are reasonably intended by their maker to be private.<sup>33</sup>

Despite this qualification, the concept of the biographical core continues to raise its head, as we shall see in the dissent in *Gomboc*.

Binnie J. in *A.M.* sought to balance the need for the police to conduct searches with the need for individual privacy rights. In the result, his Lordship suggested striking the balance by adoption of the standard of reasonable suspicion, without prior judicial authorization, to govern sniff searches.<sup>34</sup> Countering the intention of the person searched to keep information private, were: first, the minimally intrusive nature of the sniff search; second, the fact that the sniffer dog only gave a positive or negative indication instead of revealing personal information; and third, the evidence that the particular dog in *A.M.* was extremely accurate.<sup>35</sup>

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30 *A.M.*, *supra* note 13 at paras. 67-68.

31 *Ibid.* at para. 49.

32 *Ibid.* at para. 48.

33 *Ibid.* at para. 68 (citations omitted).

34 *Ibid.* at paras. 5, 12-13.

35 *Ibid.* at paras. 81, 83, 84.



Binnie J. also pointed out that the “all or nothing” approach to s. 8 jurisprudence leaves both the police and the accused in difficult positions. On the one hand, if there is a REP, then the full wall of prior judicial authorization is required before a search can be taken. If there is no REP, the police action is completely unregulated.<sup>36</sup> Thus Binnie J.’s solution was to adopt the standard of reasonable suspicion: absent a reasonable suspicion, the sniff search would violate s. 8. However, a sniff search on the basis of reasonable suspicion would not require any prior judicial authorization.<sup>37</sup> Binnie J. pointed out that sniffer dogs could only be used when they were not needed to detect illicit drugs, if warrants were required for their use, since the police would have already gathered the information indicating the presence of drugs.<sup>38</sup>

This reasoning suggests that s. 8 judicial analyses would be clarified by an increased focus on the intention of the party being searched at the REP stage, and by adopting a more flexible framework for determining whether or not minimally intrusive searches are reasonable. This approach extends the privacy interests protected by s. 8 on the front end and decreases the requirements for prior authorization on the back end, if the context renders prior judicial authorization impractical.

Only one pre-*Gomboc* appellate decision squarely addressed the issue of a REP in the data produced by a DRA. In *R. v. Cheung*, the Saskatchewan Court of Appeal held there was no REP in electrical consumption data gathered by a DRA.<sup>39</sup> Chronologically, *Cheung* followed *Tessling* but preceded *A.M.*

In *Cheung*, a confidential source tipped off the police about the location of a potential grow-op. The source – a former police officer – had seen individuals unloading gardening equipment and extension cords into a house.<sup>40</sup> The source said the two individuals looked nervous.<sup>41</sup> The utility records examined by the police showed that electrical consumption at the house was normal.<sup>42</sup> However, at the request of the police, the utility attached a DRA to the power line for a two week period. The DRA showed that power consumption was much higher than normal and that the consumption was elevated over a ten hour period and a separate two hour period each day. A search warrant was granted using this data on the basis that it was consistent with presence of a marijuana grow-op.<sup>43</sup>

At the Saskatchewan Court of Queen’s Bench, Smith J.A. held that there was a REP in the data gathered by the DRA. In so holding, she emphasized that the DRA information was more probative of the existence of a grow-op in the case at bar than the FLIR

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36 *Ibid.* at paras. 51-53.

37 *Ibid.* at paras. 12-13.

38 *Ibid.* at para. 9.

39 *R. v. Cheung*, 2007 SKCA 51, 2007 at para. 23, 219 C.C.C. (3d) 414 [*Cheung CA*].

40 *R v. Cheung*, 2005 SKQB 283 at para. 11, 199 C.C.C. (3d) 260 [*Cheung QB*].

41 *Cheung CA*, *supra* note 39, at para. 4.

42 *Cheung QB*, *supra* note 40 at para. 13.

43 *Ibid.* at paras. 2, 6.

information was in *Tessling*.<sup>44</sup>

Smith J.A. applied the totality of the circumstances test at paragraph 62 of her judgment, a brief summary of which is as follows: first, the subject matter of the search was the power flowing into the house, and that subject matter was capable of supporting an inference that there was a grow-op in the house. Second, there was a direct interest in the subject matter of the DRA data because it related to the accused's home. Third, the accused had a subjective expectation of privacy both in the DRA data itself and in the grow-op activities which the data revealed.

Smith J.A. held that the expectation of privacy was objectively reasonable for the following reasons: first, the fact that the place subject to the DRA surveillance was the accused's home was a factor, but more importantly, the information revealed by the DRA was "considerably more valuable to the police" than the FLIR image in *Tessling*. Second, the data was not on public view. Third, the data had not been abandoned. Fourth, the data was not already in the hands of third parties; rather the DRA was installed solely at the request of the police. Fifth, the DRA intruded on the accused's privacy interest in his home and the grow-op because it permitted inferences to be drawn about what was going on inside the home. Finally, it was held that the DRA data did not reveal any part of the accused's biographical core.<sup>45</sup>

The Court of Appeal overturned Smith J.A. on the basis that she had erred by construing the "quality of the information" analysis in *Tessling* as meaning "usefulness to the police." It was held that the nature and the quality of the DRA information was not covered by a REP because it did not reveal any information that formed part of the accused's biographical core.<sup>46</sup> Furthermore, it was held that the DRA was no more intrusive than the searches in *Plant* and *Tessling*. Specifically, it was noted that placing a box on a power line is no more intrusive than searching a database or flying over a house.<sup>47</sup> The Court made only one reference to the accused's subjective expectation of privacy, agreeing that there was a subjective expectation of privacy in the data. However the case was decided on the basis that the expectation was not objectively reasonable.<sup>48</sup>

The jurisprudence governing the law of search and seizure has increasingly focused on the objective reasonableness of any expectation of privacy. It has wound itself up the walls, over the roof and through the windows. Underneath this tangle of precedent and circumstance lies a single constant: courts recognize that Canadians should be entitled to privacy in their own homes. The factors in the REP analysis have eroded this expectation.

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44 *Ibid.* at paras. 61-63. Madame Justice Smith was appointed to the Saskatchewan Court of Appeal after hearing of the case but before her written decision was rendered. The decision is signed by "Gene Anne Smith, J.A.".

45 *Ibid.* at para. 62.

46 *Cheung CA.*, *supra* note 39 at para. 20.

47 *Ibid.* at para. 21.

48 *Ibid.* at para. 19.

## II. REASONABLE EXPECTATION OF PRIVACY: THE CRITIQUES

The REP analysis has been criticized for having a circular methodology and for too narrowly considering both the privacy interests at stake and the effects of any given case on the privacy rights of all Canadians. These critiques explain how the objective factors in the REP analysis have overwhelmed the subjective expectations of Canadians.

### 1. Circularity

The REP analysis has been criticized as a circular test both for allowing end runs around s. 8 and for defining privacy tautologically.

Luther criticizes *Tessling* and *Cheung CA* on the basis that they permit the police to gather information at will for the purposes of getting a warrant as long as the information gathered is not probative of illegal activity. In particular, Luther critiques the return to the biographical core analysis in *Cheung CA* and the Court of Appeal's conclusion that the use of the DRA was non-intrusive because it was placed on the power company's property, on the basis that this analysis:

is really all about allowing the police to snoop at will, without authorization or indeed any regulation at all, to allow them to obtain grounds to then get a warrant. Any information gleaned from any of these methods that ends up in a warrant application has the effect of breaching privacy and doing an end run around section 8's Charter requirements.<sup>49</sup>

Pomerance criticizes the REP analysis on the grounds that it "tell[s] us that s. 8 will only protect the privacy interest in information if the information is inherently private."<sup>50</sup> In essence, her view is that the "biographical core" is merely a synonym for the word "private." Pomerance then argues that what is inherently private ultimately lies "in the subjective apprehension of the decision-maker."<sup>51</sup> This critique rings true even if the minority judgment of Binnie J. in *A.M.* signals the beginning of the end for the biographical core as a foundational concept of the REP analysis in informational privacy. However, if Binnie J.'s judgment in *A.M.* does indicate that the REP analysis is moving to a more subjective focus on the intention of the person searched to keep information or places private, then this critique loses some of its force.

MacKinnon argues that the case-by-case approach to s. 8 and the lack of clear guiding principles breach Canadian's privacy because this approach fails to prospectively

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49 Glen Luther, "Consent Search and Reasonable Expectation of Privacy: Twin Barriers to the Reasonable Protection of Privacy in Canada" (2008) 41 U.B.C. L. Rev. 1 at para. 36.

50 Renee M. Pomerance, "Shedding Light on the Nature of Heat: Defining Privacy in the wake of *R. v. Tessling*", (2004) 23 C.R. (6th) 229 at 233 [Pomerance].

51 *Ibid.* at 233.

guide the use of police power.<sup>52</sup> On this account, breaches are inevitable because subsequent litigation is the only way to determine whether or not the state has committed a search in violation of a person's constitutional right.

## 2. Narrowness

The narrowness critique of the REP analysis has two parts: one consequential and one analytical.

On the consequential side of the analysis, Bailey argues that the jurisprudence takes too narrow a view of informational privacy interests, because it ignores the fact that many small pieces of information can be pieced together to create a more revealing data set.<sup>53</sup> Pomerance also makes this critique, and points to the example of "data-mining" which uses complex computer programs to gather all bits of information available on a single individual and assembles them to create a detailed picture of the individual involved. As she describes the phenomenon,

Zero plus zero does not always equal zero and, like a jigsaw puzzle, a very clear picture can emerge when otherwise unintelligible pieces are fit together. This process can strike very poignantly at what we call the biographical core. Yet, any one item of information may not meet the threshold for constitutional protection set out in *Plant* and affirmed in *Tessling*.<sup>54</sup>

In other words, the consequences of not finding a REP in any particular case should be considered in light of the possibility that innocuous pieces of information can become part of a revealing whole.

Turning to the issue of analytical narrowness, Burkell points out that empirical psychological studies suggest that violations of privacy are perceived as less intrusive when an objective, third person perspective is used to evaluate the search, and as more intrusive when a subjective, first person perspective is used. She argues that the REP analysis should focus more on the perspective of how an average citizen would feel if the search happened to them, rather than on whether what was done to someone else was reasonable. Burkell also points out that psychological studies suggest that searches are perceived to be less intrusive when the outcome (such as the discovery of a grow-op) is known. Accordingly, it is also necessary to ignore the evidence produced by a search at the s. 8 stage in order to prevent the reasonableness of any expectation of privacy

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52 William MacKinnon "Tessling, Brown, and A.M.: Towards and Principled Approach to Section 8" (2007), 45 Alta. L. Rev 79 at 115 [MacKinnon].

53 Jane Bailey, "Framed by Section 8: Constitutional Protection of Privacy in Canada" (2008) 50 Can J. Crimin & Crim. Jus. 279 at 302 [Bailey].

54 Pomerance, *supra* note 46 at 234-35.

from being reduced.<sup>55</sup> Crucially, Burkell does not advocate for a purely subjective test; she argues only that the first person be used to address objective reasonableness (i.e. “would this intrude on *our* or *my* privacy” rather than “did this intrude on *their* or *his* privacy”) because what is at stake in every case is the boundary of privacy available to all Canadians.<sup>56</sup>

The presumption of a REP in the home implicitly created in *Gomboc* answers each of these critiques, and closes the gap between the expectations of privacy that Canadians have and that which the REP permits them to have. It pulls the ivy out of the windows.

### III. *R. v. GOMBOC*: THE FACTS

In *Gomboc*, the Alberta Court of Appeal overturned the convictions of Mr. Gomboc for producing marihuana and possession for the purposes of trafficking. While investigating an unrelated matter, a police officer noticed that Mr. Gomboc’s house exhibited signs consistent with the presence of a grow-op. Two officers from the drug unit were assigned to investigate, and after observing the home they concluded that Mr. Gomboc’s house probably contained a grow-op.<sup>57</sup> So, the officers asked Mr. Gomboc’s electrical utility, Enmax, to place a DRA on his power line. Enmax complied. For five days the DRA gathered information on Mr. Gomboc’s power consumption. Enmax gave the information to the police, who concluded it was consistent with the presence of a grow-op. They obtained a search warrant, found a grow-op, and charged Mr. Gomboc.<sup>58</sup>

By a 2-1 majority the Court of Appeal overturned the accused’s conviction and ordered a new trial. For the majority, Martin J.A. held there was a REP in the information gathered by the DRA and that in the absence of prior judicial authorization, the gathering and release of the information to the police was an unreasonable search.<sup>59</sup> In dissent, O’Brien J.A. held there was no REP in the DRA information.<sup>60</sup> In so doing he stuck closely to the existing jurisprudence and to the concept of the core biographical information in particular.

There are three key sources of divergence between the majority and the dissent: first, whether the information collected by the DRA could fall within the accused’s biographical core; second, whether Enmax acted as an agent of the state in using the DRA at the police’s request; and third, whether the law and contract governing the relationship be-

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55 Jacquelyn Burkell, “Deciding for Ourselves: Some Thoughts on the Psychology of Assessing Reasonable Expectations of Privacy” (2008), 50 Can J. Crimin & Crim. Jus. 308 at 313, 323 and 322 [Burkell].

56 *Ibid.* at 317.

57 *Gomboc*, *supra* note 8 at paras. 3-4.

58 *Ibid.* at para. 5.

59 *Ibid.* at para. 8.

60 *Ibid.* at para. 95.

tween Enmax and the accused could prevent the accused from claiming an objectively reasonable expectation of privacy in the information. The reasoning of the dissent on these issues exhibits the problems of consequential and analytical narrowness which emerged from the earlier jurisprudence. In each case the majority's implicit presumption of a REP in the home solves the problems that have plagued the REP analysis.

#### **IV. R. v. GOMBOC: AN ANALYSIS**

##### **1. The Biographical Core**

Despite the cases cautioning against limiting the REP analysis to the biographical core, the concept raised its head in both the majority and the dissenting reasons in *Gomboc*. Comparing the application of the concept in the two judgments reveals the majority's implicit creation of a presumption of a REP in the home.

In his dissent, O'Brien J.A. held that he was bound by the SCC's holding in *Plant* that there was no REP in electricity records.<sup>61</sup> Although he did note that the law has long recognized the sanctity of the home, he noted that the mere fact that the home was involved did not relieve the Court from the need to balance the interests of the state against those of the citizen.<sup>62</sup>

O'Brien J.A. then referred to the expert evidence of Sergeant Morrison, who testified that he could not determine from the DRA records how many people lived at the house, when they were home, or anything about their "lifestyle, personal habits or beliefs."<sup>63</sup> O'Brien J.A. agreed with the Saskatchewan Court of Appeal in *Cheung* that the DRA "data did not disclose any intimate details of the accused's lifestyle or core biographical data, as it was essentially similar in nature to the electrical consumption records in *Plant*."<sup>64</sup>

After noting that Binnie J.'s judgment in *A.M.* opened the possibility that the REP analysis could extend beyond the biographical core, O'Brien J.A. went on to examine some "further factors." However, it appears that these other two factors examined are plucked straight from *Tessling*. The first factor appears to be a restatement of the biographical core. Specifically, O'Brien J.A. agreed with the Court of Appeal in *Cheung* that the nature and quality of the information was insufficient to support a conclusive inference that there was a grow-op in the house.<sup>65</sup> However, the passage which he quotes from that case specifically relies on the concept of the biographical core, the very concept which the "further factors" should be moving beyond. O'Brien J.A. con-

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61 *Ibid.* at paras. 68, 70.

62 *Ibid.* at para. 62.

63 *Ibid.* at para. 69.

64 *Ibid.* at para. 71-72.

65 *Ibid.* at paras. 75-76.

cluded the following:

I see little difference in the privacy interests possessed by residents between the patterns of heat distribution generated from within and emanating from their residences as externally measured, and the patterns of electrical utility usage within the residences as externally measured. Like the FLIR image, the disclosure of the DRA graph scarcely affects the “dignity, integrity and autonomy of the person whose house is subject of” the graph (*Tessling*, para. 63).<sup>66</sup>

In this passage, it appears that the focus on the intent of the person affected by the search in Binnie J.’s judgment in *A.M.* collapsed back into the concept of the biographical core which it sought to leave behind. That point aside, this passage seems to say that the information is not private, because it is not private.

O’Brien J.A. went on to examine the intrusiveness of the search. This analysis was not undertaken with regard to the perspective of the person being searched. Rather, it focuses on the desirability of catching criminals:

Nor, in my view, does the police technique in obtaining the graph undermine privacy to a greater extent than having an airplane overfly [sic] the residence to take a “heat” picture [...] Such investigative measures may properly be used by the authorities to detect criminal activity, which otherwise may not be discernable, without encroachment on the constitutional rights of citizens to be free of unreasonable searches.<sup>67</sup>

Burkell’s critiques are aptly applicable to this passage. The intrusiveness of the investigation is measured relative to the detection of crime, rather than to whether or not it actually invades the privacy of all Canadians. Whether or not crime is detected should be subsidiary to the question of “would it be an invasion of my privacy if the police could use my power company to monitor my power consumption whenever they wanted?”

For O’Brien J.A., the subjective expectation of privacy is overwhelmed by an objective analysis of the nature and quality of the information obtained and the technique used to gather it. While this analysis follows the framework laid down by the jurisprudence, it does, as Pomerance argues, amount to saying that information is private when it is private.<sup>68</sup> Furthermore, as Luther points out, it amounts to saying that any information that is not particularly probative of criminal activity is not protected by s. 8.<sup>69</sup>

In *Patrick*, Binnie J. reaffirmed that individuals are presumed to have a subjective ex-

66 *Ibid.* at para. 77.

67 *Ibid.* at para. 78.

68 Pomerance, *supra* note 50 at 233.

69 Luther, *supra* note 49 at para. 35.

pectation of privacy in information relating to activity within their homes.<sup>70</sup> After referring to this presumption, Martin J.A. began his analysis of the DRA information and whether it fell within a biographical core. He distinguished *Tessling* on the basis that a DRA was more revealing and intrusive than a FLIR.<sup>71</sup> Martin J.A. reasoned that:

Notwithstanding the evidence of the police expert, Sgt. Morrison, DRA information must, as a matter of common sense, also disclose biographical or private information; for example, the approximate number of occupants, when they are present in the home, and when they are awake or asleep.<sup>72</sup>

In so holding, he cites the judgment of Abella J.A., as she then was, in *Tessling*, and the dissenting judgment of McLachlin J., as she then was, in *Plant*.<sup>73</sup> The former judgment was overruled by the SCC while the latter was a dissent. Not only does this holding swim against the flow of precedent, it also drives against the current of the evidence in the case, as Martin J.A. concedes.

Martin J.A. went on to hold that the information gathered by the DRA did disclose core biographical information, but he also held in the alternative that there would be a REP in the information even if it did not relate to a biographical core of information because, as in *A.M.*, it was “reasonably intended to remain private.”<sup>74</sup>

Martin J.A.’s reasoning on this point is illuminated by his opening remarks:

It has been famously said that “the state has no business in the bedrooms of the nation.” The actual prohibition is much broader: in our society, absent exigent circumstances, the state has no business in the homes of the nation without invitation or judicial authorization.

This expectation of privacy in one’s home is encompassed within the constitutional protection to be free from unreasonable search and seizure. Indeed, it ranks among the primary objectives of s. 8 of the Charter of Rights and Freedoms.<sup>75</sup>

This statement by itself it does not address the analysis set down in legal framework, namely, whether in all the circumstances, there should be a REP in the information generated by a DRA.<sup>76</sup> *Instead, it presumes a REP in the home.* For Martin J.A. the subjective expectation of privacy in the home, and, by extension, in information relating to the home, is a fundamental part of Canadian society, and is presumptively worthy

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70 *Patrick*, *supra* note 7 at para. 37.

71 *Gomboc*, *supra* note 8 at para. 16.

72 *Ibid.* at para. 17.

73 *R. v. Tessling* (2003), 63 O.R. (3d) 1 (Ont. C.A.) at para. 69; *Plant*, *supra* note 14 at 302-303.

74 *Gomboc*, *supra* note 8 at paras. 17-18.

75 *Ibid.* at paras. 9-10.

76 *Tessling*, *supra* note 3 at paras. 31-32.



of legal protection. In retrospect, these comments explain Martin J.A.'s reasoning on the biographical core. It could be argued that this approach is no less circular than the old biographical core approach, since the point where his Lordship starts has a lot to do with where he ends. However, at the very least, this presumption provides the analysis with a clear starting premise, which is a preferable option to the imprecision of the concept of the biographical core. More importantly, this premise closes the gap between privacy that the courts say Canadians expect, and the privacy that a REP analysis permits.

## 2. Enmax as a State Agent

Martin J.A.'s analysis on this point remains squarely focused on the home as the place under surveillance. In so doing, he expands the subjective presumption of privacy in the home into the objective part of the test. After examining the portion of *Patrick* (paragraph 40) in which Binnie J. noted that most of the factors in that case pointed towards a REP, since the information gathered dealt with what was happening in a private home, Martin J.A. held as follows: "the point remains that the police wanted the DRA information to find out what was happening in the appellant's home -- a place where the appellant's expectation of privacy was high and objectively reasonable."<sup>77</sup> This analysis departs from *Tessling* by focusing on where the information was gathered. Again, Martin J.A. presumes a REP in information related to the home.

In the following paragraph, Martin J.A. goes even further in creating the presumption of a REP in the home, holding as follows:

In my opinion, the expectation of privacy extends beyond simply the information as to the timing and the amount of electricity used. It is also objectively reasonable to expect that the utility would not be co-opted by the police to gather additional information of interest only to the police, without judicial authorization. Indeed, I expect that the reasonable, informed citizen would be gravely concerned, and would object to the state being allowed to use a utility to spy on a homeowner in this way.<sup>78</sup>

Martin J.A. went on to say,

In my opinion, the Regulations must be strictly construed, and not interpreted to imply the homeowner's consent in allowing the utility to gather, at the behest of the state, information that is not useful to his or her relationship with the utility. The Regulations cannot mean that the utility can be used, without judicial authorization, as an investigative arm of the police to gather evidence about what is happening inside the home, unless the consumer has forbidden it.[...]If it were otherwise, the police could

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<sup>77</sup> *Gomboc*, *supra* note 8 at paras. 19, 20.

<sup>78</sup> *Ibid.* at para. 21.

recruit any agency with limited access to a home to exploit that access to gather information for them. For example, the mailman to look into the windows while at the house delivering mail and report his observations; or the cable TV provider to report the viewing habits and preferences of the subscriber. Such unauthorized state surveillance of its citizens is offensive to the basic tenets of our society and would render the protection of a reasonable expectation of privacy over one's home, illusory.<sup>79</sup>

The presumption of a REP in the home which informs the above passages also expands the focus of the s. 8 analysis beyond the facts of the case at bar. The judgment of Martin J.A. recognizes that what is at stake in the case practically extends far beyond the relationship between the accused and Enmax. This expansion answers the consequential narrowness critiques of Bailey and Pomerance. Furthermore, his reasons on this point also avoid the analytical narrowness which Burkell warns against. The adoption of the presumption of a REP in the home broadens the perspective of Martin J.A.'s analysis so that he considers not only the privacy interest of Mr. Gomboc, but also the privacy interest of all Canadians.

By contrast, O'Brien J.A. held that Enmax was not acting as a state agent, because it had a "legitimate self interest in discovering and deterring the criminal activity of the accused. Enmax was not instructed by the police, but rather its employees voluntarily cooperated."<sup>80</sup>

The line between being instructed to do something by the police and voluntarily complying with a police request is a very thin one.<sup>81</sup> Furthermore, the test for whether or not a third party performing a search is a state agent is whether or not the search would have occurred "but for the involvement of the police."<sup>82</sup> Whatever self interest Enmax may have had in detecting Mr. Gomboc's grow-op, it would have not used the DRA absent the police request. On this basis, Enmax clearly is a state agent. Moreover, underlying O'Brien J.A.'s analysis are the inherent dangers in a case-by-case, after-the-fact test for the protection of privacy. As MacKinnon points out, the information is already in the hands of the state.<sup>83</sup> The police have done their job without prior knowledge of whether or not they needed a warrant, and Enmax helped them along. We want the police to do their job and we want society to help them. In this situation, it is impossible for the REP analysis as it stands to either bend in favour of the police and against privacy, or to result in a public outcry by letting the bad guys go free. Furthermore, framing the analysis as "the detection of crime" rather than the "determination of privacy" may result in a lowering of the perceived reasonableness of the expectation of privacy.<sup>84</sup> This potential consequence is troubling, given that the limits

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79 *Ibid.* at paras. 24, 25.

80 *Ibid.* at para. 101.

81 *R. v. Therens*, [1985] 1 S.C.R. 61 at 644, 45 C.R. (3d) 97.

82 *R. v. M. (M.R.)*, [1998] 3 S.C.R. 393, at para. 29, 20 C.R. (5th) 197 [M. (M.R.)].

83 MacKinnon, *supra* note 52 at 115.

84 Burkell, *supra* note 49 at 313.

of the privacy of all Canadians are at stake.

Martin J.A.'s implicit presumption would escape this dilemma in future cases. A presumption of a REP in the home would let the police know where they stand: when gathering information that can be used to draw inferences about what is inside the home, police had best seek a warrant. Furthermore, this presumption would place the onus on the state to justify the breach. This onus would act as barrier to the adjudicator considering the result of the state action when evaluating its impact on Canadians' privacy. If what the state did was presumptively wrong, then the outcome is of less weight than it would be if the state action was unobjectionable until an individual proved otherwise.

The presumption of a REP in the home, which Martin J.A. implicitly creates, also draws on a deeper fount of s. 8 wisdom by looking back to *Hunter*. The REP analysis is meant to be the threshold test which determines whether or not conduct is a search for the purposes of s. 8. The second part of the analysis is whether or not the search was conducted in a reasonable manner, at which point the presumption against warrantless searches is relevant.<sup>85</sup> Martin J.A. reaches across the divide between REP and the reasonableness of the search and uses the presumption from *Hunter* – that a warrantless search is unreasonable – to inform his s. 8 analysis. In essence, his reasoning seems to be as follows: how can a person not have an objectively reasonable expectation of privacy in their activities in their own home, when the law states that an unauthorized search is *prima facie* unreasonable? This reasoning ignores the need to define a search, which is of course the whole purpose of the REP analysis. It simply says, "if you want to gather information about my home, get a warrant." However, it also avoids all the difficulties that accompany a *post-facto* case-by-case analysis for all privacy interests related to the home.

### 3. The Objective Reasonableness of the Expectation of Privacy

The third fundamental point of contention between Martin J.A. and O'Brien J.A. is whether the *Regulations* and the *Tariff* governing the relationship between the accused and Enmax ended Mr. Gomboc's REP in any data gathered or held by Enmax. The *Regulations* provided, in part:

10 (3) Customer information may be disclosed without the customer's consent to the following specified persons or for any of the following purposes:

(e) for the purpose of complying with a subpoena, warrant or order issued or made by a court, person or body having jurisdiction to require or compel the production of information or with a rule of court that relates to the production of information;

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85 *R. v. Collins*, [1987] 1 S.C.R. 265 at 278, 56 C.R. (3d) 193. See also *Hunter*, *supra* note 4 at 156-61.

(f) to a peace officer for the purpose of investigating an offence if the disclosure is not contrary to the express request of the customer.<sup>86</sup>

The Enmax Distribution Tariff contained the contractual terms governing the accused's relationship with Enmax. Part 17.1 provided, *inter alia*: "Information may be transferred without consent in the case of legal, regulatory or law enforcement requirements (e.g., transfer of electricity information for drug investigations)."<sup>87</sup>

O'Brien J.A. held that the *Regulations* and the *Tariff* prevented a REP from arising in the data gathered by the DRA, because both documents expressly contemplated the disclosure of information to the police for investigative purposes.<sup>88</sup> He reasoned that there could be no REP where a law (the *Regulations*) provided for disclosure without consent unless the customer requested that the information not be disclosed. Since Mr. Gomboc did not request that his electrical consumption data remain confidential, he could not have a REP.<sup>89</sup>

In his analysis of the *Tariff*, O'Brien J.A. held that the word "requirements" could not mean compulsion, because there were other provisions stating that information would be disclosed if it was sought under a subpoena or a warrant. He also placed great weight on the fact that the *Tariff* specifically stated that information would be disclosed to assist the police with drug investigations.<sup>90</sup> O'Brien J.A. did not address whether the word "information" included "requests to generate information," which was the situation in *Gomboc*.

O'Brien J.A.'s interpretation can be criticized for both consequential and analytical narrowness. He fails to consider the broad consequences of interpreting the *Regulations* to permit the police to use the utility to not only release information, but also to gather it at the behest of the police. As Bailey and Pomerance argue, there is nothing to stop the police from gathering DRA data at will and combining it with other non-protected pieces of information to create a fuller picture of the life of the person under surveillance.<sup>91</sup>

Analytically, O'Brien J.A. remains focused on whether what was done to detect Mr. Gomboc's "criminal activity" was acceptable.<sup>92</sup> This phrase suggests that he falls into the two analytical quagmires identified by Burkell. First, he frames the issue as whether the privacy of someone else is at stake, rather than the privacy of all Canadians. Second, he undertakes this analysis without ignoring the result of the surveillance, and allows his analysis to be influenced subtly by the fact that Mr. Gomboc was violating the law.<sup>93</sup>

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86 *Code of Conduct Regulations*, Alta. Reg. 160/2003, [*Regulations*].

87 *Re ENMAX Power Corp.*, 2003 CarswellAlta 2143 (Alta. E.U.B.), Appendix B, Part 17.1 [*Tariff*].

88 *Gomboc*, *supra* note 8 at para. 95.

89 *Ibid.* at para. 86.

90 *Ibid.* at para. 93.

91 Bailey, *supra* note 53 at 302; Pomerance, *supra* note 46 at 234-35.

92 *Gomboc*, *supra* note 8 at para. 101.

93 Burkell, *supra* note 55 at 309 and 321.

As noted above, Martin J.A. began his reasoning by implicitly holding that there was a REP in the home. He then went on to hold that it was “objectively reasonable to expect that the utility would not be co-opted by the police to gather additional information of interest only to the police, without judicial authorization.”<sup>94</sup> This holding shows that he adopts a broader perspective in his REP analysis by considering the interests of all Canadians, and he has ignored the results of the search. It seems that Martin J.A.’s initial presumption of a REP in the home provided him with the guidance necessary to avoid the analytical pitfalls that can pepper a s. 8 analysis.

Martin J.A. held, following *obiter* from the judgment of Binnie J. in *Patrick*, that the licence granted to Enmax to come onto the accused’s property could not be extended to permit Enmax to assist in a police investigation.<sup>95</sup> He distinguished *Plant* on the basis that the police asked Enmax to generate new information, rather than to release information that the customer would expect the utility to have.<sup>96</sup> Martin J.A. went on to hold that the *Regulations* only permitted Enmax to share existing information:

The *Regulations* cannot mean that the utility can be used, without judicial authorization, as an investigative arm of the police to gather evidence about what is happening inside the home, unless the consumer has forbidden it. Trespassing on a homeowner’s property is conduct the police themselves are not permitted to engage in (see *Kokesch, Evans*), and I do not understand that the *Regulations* were intended, nor constitutionally able, to empower police agents to do what they themselves can not legally do.<sup>97</sup>

What is objectionable is not the gathering of the information *per se*, but the gathering of the information *about what is going on inside the home*. Implicitly, Martin J.A. assumes that information related to what goes on in the home is subject to a REP, and this presumption guides him in restrictively interpreting the *Regulations*.

#### **4. Gomboc: A Summary**

O’Brien J.A. keeps close to the analytical framework laid down in the jurisprudence. He follows the twists and turns of precedent, straight into the home. By contrast, Martin J.A.’s analysis is underpinned by a presumption of a REP in the home. This presumption covers both what goes on within the four walls of a home and the gathering of information outside the home which can be used to draw inferences about what is going on inside the home. There is a solid foundation for this presumption, namely the presumption of a subjective expectation of privacy found in the earlier case law. However, the presumption of Martin J.A. also significantly alters the totality of the circumstances test. It cuts away some of the branches.

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94 *Gomboc*, *supra* note 8 at para. 21.

95 *Ibid.* at para. 22.

96 *Ibid.* at paras. 23, 24.

97 *Ibid.* at para. 24.

Rather than requiring an individual to prove that his or her expectation of privacy was reasonable, the presumption of a REP in the home places the burden on the Crown to prove that an expectation of privacy in the home was unreasonable. The presumption also gives greater weight to the expectations of the person searched. However the perspective of the person searched is no longer purely subjective; rather, it is the perspective of every Canadian. The *obiter* in *Tessling*, that the subjective expectation of privacy is derived from social norms and not individual caprice, is a precursor to this change in perspective. Not only does this shift in perspective reduce the risks of consequential and analytical narrowness, it also reconnects the s. 8 analysis with the basic values of individual autonomy, integrity and dignity by giving substantive force to the presumption of a subjective expectation of privacy in the home which has thus far had little impact on the jurisprudence. Essentially, the presumption of a REP in the home creates a legal space where Canadians can assume that they will be free to be themselves.

The big question is whether this pruning will reshape the landscape or whether the prior jurisprudence will grow back.

## V. POST-GOMBOC CASES

To date, only four cases have considered the judgment in *Gomboc*. Three have treated the decision favourably, while one has not. The cases deal with *Gomboc* both in the context of s. 8 and in the context of the exclusion of evidence in s. 24(2) applications under the Charter. The s. 24(2) cases are likely less significant than the s. 8 cases, since the s. 24(2) cases deal superficially with the importance of the privacy interest in the home, and not the legal force of the presumption created in *Gomboc*. The favourable cases will be considered first.

### 1. *R. v. Ngai*

In *R. v. Ngai*, the Alberta Court of Appeal heard a case which the Crown conceded was not distinguishable from *Gomboc*.<sup>98</sup> The Court confirmed *Gomboc* and overruled the trial judge's decision that the use of a DRA without a warrant did not violate s. 8.<sup>99</sup> The Court ultimately ruled that the evidence should not be excluded under s. 24(2). It was held that the breach of the accused's *Charter* right was not flagrant or abusive because the state of the law regarding DRAs was unsettled at the time of the DRA search.<sup>100</sup> The decision in *Ngai* probably would have been different had the DRA search been made after the decision in *Gomboc*, since such a search would have shown considerably less regard for the accused's *Charter* rights.

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98 *R. v. Ngai*, 2010 ABCA 10, at para. 25, 2010 CarswellAlta 170 [*Ngai*].

99 *Ibid.* at para. 30.

100 *Ibid.* at para. 40.

In assessing the impact of the breach on the *Charter* right of the accused, the Court found that the breach did not seriously entrench upon it. Two reasons supported this finding. First, the house was not the accused's residence; in fact, it was not inhabited at all. This fact suggests that the question of whether or not a house is a home may become the central issue in future grow-op cases if the SCC affirms *Gomboc*. Second, the Court noted that the information did not relate to the accused's "biographical core."<sup>101</sup> This reasoning is troubling, because it is not clear whether the Court was returning to a *Tessling*-style analysis, focusing on the nature of the DRA information itself at the s. 24(2) stage, or if it merely was using *Tessling's* terminology to say that the information did not relate to the home, and therefore was less worthy of protection. Furthermore, one wonders how far a presumption of a REP in the home would go towards protecting Canadians' privacy if the concept of the biographical core was transplanted to the s. 24(2) analysis.

## **2. R. v. LaFontaine**

In *R. v. Lafontaine*, the police found marihuana while searching for the accused's brother in their parents' home.<sup>102</sup> The Court held that the marihuana should be excluded under s. 24(2).<sup>103</sup> In considering the impact of the breach on the *Charter* rights of the accused, the Court noted: "Here, what amounted to a warrantless search took place in a private dwelling where it is admitted the Applicant Matthew Lafontaine had a reasonable expectation of privacy."<sup>104</sup> The Court then cited paragraphs 9 and 10 of *Gomboc*, and held, "I accept that the protection of one's expectation of privacy in one's home is an important Charter objective. Citizens are to be left in peace by the state unless there is sufficient justification to intrude."<sup>105</sup>

This decision endorses the presumption of an REP in the home. However, it may be an endorsement of limited effect, given that the REP issue was conceded on the facts of that case.

## **3. R v. Cuttell**

In *R. v. Cuttell*, the police sought information about the accused's name and address from his internet service provider during a child pornography investigation.<sup>106</sup> Ultimately, the Court held that there was a breach of s. 8 but that the evidence should not be excluded under s. 24(2).<sup>107</sup>

In finding a breach of s. 8, the Court cited paragraphs 24 and 25 of Martin J.A.'s judg-

101 *Ibid.* at para. 43.

102 *R. v. Lafontaine*, 2009 CarswellOnt 8444 at paras. 3, 6, 9-10, (December 3, 2009), 08-0645 (Ont. S. Ct. J.) [*Lafontaine*].

103 *Ibid.* at para. 29.

104 *Ibid.* at para 25.

105 *Ibid.* at para. 26.

106 *R. v. Cuttell*, 2009 ONCJ 471 at para. 1, 247 C.C.C. (3d) 424 [*Cuttell*].

107 *Ibid.* at para. 3.

ment in *Gomboc* before noting:

Although the privacy concerns in *Gomboc* are admittedly much stronger than in this case because they relate to active creation of electronic records that invade the privacy of the home, I believe the clear caution to police about using a third party to act as an unauthorized state agent is nonetheless valid.<sup>108</sup>

This passage endorses *Gomboc*'s presumption of a REP in the home.

#### **4. R. v. Luong**

*R. v. Luong* closely parallels *Gomboc* on its facts, but adopts the reasoning of O'Brien J.A.'s dissent in the result. A DRA was installed at the request of the police while they investigated a suspected grow-op, and the information which the DRA generated was used to obtain a warrant.<sup>109</sup> The Court concluded:

As in [*Tessling*], in the case at bar, DRA technology did not affect an individual's dignity, integrity or autonomy and could not reasonably be considered to touch at the biographical core of the accused persons or reveal intimate details of their lifestyle, individually or together. I am in agreement with the dissenting opinion of Justice O'Brien in *Gomboc*.<sup>110</sup>

The result in *Luong* illustrates the methodological break between the majority and the dissent in *Gomboc*. O'Brien J.A.'s reasoning follows the existing jurisprudence closely and is compelling if the key factor in the REP analysis is the biographical core. On the other hand, Martin J.A.'s approach is only compelling if the underlying presumption takes hold. The Court in *Luong* clearly did not accept this premise; indeed, it made no reference to the level of privacy that could be expected in a home. However, this rejection may not be as harsh as it seems, since there was some evidence before the Court that could lead to the conclusion that the house was not being used as a home.<sup>111</sup>

## **CONCLUSION**

On the one hand, the jurisprudence says that it is presumptively reasonable for Canadians to expect privacy in their own homes. Privacy is a normative standard, and privacy in the home is something which Canadians are presumed to expect. Unless Canadians are unreasonable, then the expectation of privacy in the home is reasonable. On the other hand, the totality of the circumstances test often overrides this expecta-

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108 *Ibid.* at para. 54.

109 *R. v. Luong & Phung*, 2010 ONSC 84 at paras. 5 and 10, 2010 CarswellOnt 86 [*Luong*].

110 *Ibid.* at paras. 27-28.

111 *Ibid.* at para. 17.



tion, and in the process analyzes privacy circularly, narrowly, and after breaches of privacy have occurred. The concept of the biographical core, if it remains a part of law, also draws attention away from the reality that people need their own space if they are to pursue self-fulfillment. The legal ivy has grown into the house. Presuming a REP in the home, and in information related to the home, as Martin J.A. did in *Gomboc*, would address each of these critiques. Most importantly, it would make the law as a whole consistent with the privacy expectations which, according to the courts, Canadians already have: would that not be reasonable?

When the Supreme Court of Canada renders its decision in *Gomboc*, it may affirm the established s. 8 analysis, adopt the approach of Martin J.A., or create a new approach. I have spent my ink analyzing the ways in which the current approach to s. 8 has been used to reduce the privacy which Canadians expect in their homes. If this presumption takes hold, the next question is how it would affect the state's power to legitimately investigate matters connected to a home.

A presumption of a REP in the home is not necessarily incompatible with the need of the state to detect crime. Perhaps the appropriate response would be to permit warrants to be issued on a lower standard than reasonable and probable grounds, but to retain the requirement for prior authorization. Warrants for information relating to the home could be issued on the basis of reasonable suspicion, the standard adopted by Binnie J. in *A.M.* for sniff searches. Although, given that investigations of the home are not made in situations where the "the police are generally required to take quick action guided by on-the-spot observations," it seems difficult to justify dropping the requirement for prior authorization.<sup>112</sup> The police would still have access to their investigative tools, but the use of these tools would be subject to judicial oversight before any search occurred.

However, I leave a precise examination of how to structure the law of search and seizure in response to the creation of a presumption of a REP in the home for another time, or another author.

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112 *A.M.*, *supra* note 13 at para 90.