



The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference

Volume 54 (2011)

Article 12

Normative Foundations for Reasonable Expectations of Privacy

Hamish Stewart

Follow this and additional works at: <http://digitalcommons.osgoode.yorku.ca/sclr>



This work is licensed under a [Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License](http://creativecommons.org/licenses/by-nc-nd/4.0/).

Citation Information

Stewart, Hamish. "Normative Foundations for Reasonable Expectations of Privacy." *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 54. (2011).

<http://digitalcommons.osgoode.yorku.ca/sclr/vol54/iss1/12>

This Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference by an authorized editor of Osgoode Digital Commons.

Normative Foundations for Reasonable Expectations of Privacy

Hamish Stewart*

I. INTRODUCTION

Section 8 of the *Canadian Charter of Rights and Freedoms*¹ provides that “Everyone has the right to be secure against unreasonable search or seizure.” It is now well established that section 8 protects a person’s reasonable expectation of privacy, but no more than that: state action engages the section 8 right against unreasonable search and seizure if, but only if, it affects a person’s reasonable expectation of privacy.² State action that does not affect a person’s reasonable expectation of privacy, even if called a “search” or a “seizure” in ordinary language and in reasons for judgment, does not engage section 8. Put another way, if state action affects a person’s reasonable expectation of privacy, it must be “reasonable” as that term is understood in section 8 jurisprudence: the search must be authorized by law, the law authorizing the search must be reasonable (*i.e.*, constitutionally valid), and the manner in which the search is conducted must be reasonable.³ A search that fails to meet any one of these three criteria is unreasonable and violates section 8. But if state action does not affect a person’s reasonable expectation of privacy, it does not have to comply with section 8 and therefore does not have to be shown to be reasonable. In particular, it does not have to be authorized

* Faculty of Law, University of Toronto. I am very grateful to Lisa Austin and Jamie Cameron for their comments on a draft of this paper.

¹ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter “Charter”].

² Some early cases leave room for the possibility that s. 8 might protect more than a reasonable expectation of privacy: see, for instance, *Canada (Combiner Investigation Act, Director of Investigation and Research) v. Southam Inc.*, [1984] S.C.J. No. 36, [1984] 2 S.C.R. 145, at 159 (S.C.C.) [hereinafter “*Southam*”]. This possibility has largely been disregarded in the more recent cases on point.

³ *R. v. Collins*, [1987] S.C.J. No. 15, [1987] 1 S.C.R. 265, at 278 (S.C.C.) [hereinafter “*Collins*”].

by law.⁴ So the stakes in the determination of a reasonable expectation of privacy are high.

What is a “reasonable expectation of privacy”? The Supreme Court of Canada’s methodology for determining this question appears on the surface to be well settled because the list of factors to be considered has been clearly stated and restated in the leading cases. But it is not at all clear how the relevant factors are supposed to contribute to a finding concerning a reasonable expectation of privacy because there are (at least) two distinct normative strands of argument at work in the cases. I will call these strands “the risk approach” and “the surveillance approach”. Both approaches involve an assessment of the vulnerability of the Charter applicant’s privacy to intrusion by others, but they emphasize different aspects of this vulnerability. Under the risk approach, the most important factors typically relate to the empirical ability of others, whether they are state agents or not and whether they act lawfully or not, to obtain access to the evidence or information. Questions of the ease or difficulty of physical access and of whether the accused should be deemed to have waived or abandoned his privacy therefore dominate the analysis. Under the surveillance approach, the central question is whether the investigative technique at issue intrudes on privacy in a manner that raises constitutional concerns about its unfettered use. The most important factors typically relate to the impact of the technique on the values protected by the privacy interest. But the Court has not clearly committed itself to either approach, so even where the facts are essentially undisputed, it is difficult to anticipate whether the Court will find a reasonable expectation of privacy because the different normative strands may suggest different outcomes.

In this paper, I outline the two approaches and argue that the surveillance approach better reflects the values underlying section 8 of the Charter because it highlights the central normative question: in light of the reasons for recognizing a constitutionally protected privacy interest, does our conception of the proper relationship between the state and the individual permit the use of the investigative technique in question without specific legal authorization? I then discuss two cases from 2010 in which the Supreme Court of Canada had to decide whether an accused had a reasonable expectation of privacy: *R. v. Nolet*⁵ and *R. v. Gomboc*.⁶

⁴ *R. v. Evans*, [1996] S.C.J. No. 1, [1996] 1 S.C.R. 8, at para. 11 (S.C.C.) [hereinafter “*Evans*”].

⁵ [2010] S.C.J. No. 24, [2010] 1 S.C.R. 851 (S.C.C.) [hereinafter “*Nolet*”].

⁶ [2010] S.C.J. No. 55, [2010] 3 S.C.R. 211 (S.C.C.) [hereinafter “*Gomboc*”].

In *Nolet*, the Court was unanimous in recognizing a reasonable expectation of privacy in the living area of a tractor-trailer. Though the main issue in the case was the legality of the search, the Court's holding concerning the reasonable expectation of privacy is consistent with the surveillance approach. But in *Gomboc*, the Court was seriously divided as to whether the accused had a reasonable expectation of privacy in information concerning the pattern of electricity usage in a residence. The division of opinion illustrates both the striking differences between the two approaches and the dangers to the value of privacy posed by the risk approach.

II. A REASONABLE EXPECTATION OF PRIVACY

1. The Court's Methodology

The standard methodology for determining whether a Charter applicant, typically an accused person,⁷ has a reasonable expectation of privacy is as follows.⁸ A judge should consider the following questions:

- Does the accused have a subjective expectation of privacy? While this is a fact-specific question, the existence of a subjective expectation is readily inferred in many situations, *e.g.*, where the place intruded upon is the accused's home⁹ or body.
- If the accused does have a subjective expectation of privacy, is that expectation objectively reasonable? In deciding that question, a judge should consider the totality of the circumstances, including factors such as:¹⁰

⁷ A person does not have to be accused of an offence to claim a violation of his or her s. 8 rights. See, for instance, *Ruby v. Canada (Solicitor General)*, [2002] S.C.J. No. 73, [2002] 4 S.C.R. 3 (S.C.C.). However, I will generally refer to the Charter claimant as "the accused" because that is the context in which the s. 8 right has developed. But a narrow construction of the right in the criminal context will reduce the possibility of a successful Charter claim in other contexts. If a particular form of electronic surveillance is held not to affect a person's reasonable expectation of privacy, then the state can use it to observe people for any reason, without engaging (much less infringing) s. 8.

⁸ See also the overview of this topic in James A. Fontana & David Keeshan, *The Law of Search and Seizure in Canada*, 7th ed. (Markham, ON: LexisNexis Canada, 2007), at 5-29.

⁹ *R. v. Tessling*, [2004] S.C.J. No. 63, [2004] 3 S.C.R. 432, at para. 37 (S.C.C.) [hereinafter "Tessling"]; *Gomboc*, *supra*, note 6, at para. 25, *per* Deschamps J.

¹⁰ *Gomboc*, *id.*, at para. 108, *per* McLachlin C.J.C. and Fish J., dissenting; *Tessling*, *id.*, at para. 19; *R. v. Edwards*, [1996] S.C.J. No. 11, [1996] 1 S.C.R. 128, at para. 45 (S.C.C.) [hereinafter "Edwards"].

- the subject matter of the search;
- the place searched;
- whether the subject matter was in public view;
- whether the subject matter was abandoned;
- whether the subject matter was in the hands of third parties and subject to a duty of confidentiality;
- the degree of intrusiveness of the search; in cases of informational privacy, this factor refers especially to the question whether the technique revealed “any intimate details of the [accused’s] lifestyle, or information of a biographical nature”;¹¹ and
- the legal framework for the search.

Moreover, the Court has identified three distinct but potentially overlapping types of privacy interests:

- personal privacy, *i.e.*, an individual’s interest in the privacy of his or her body;
- territorial privacy, *i.e.*, a person’s interest in a particular physical location, such as his or her home or office;
- informational privacy, *i.e.*, a person’s interest in records (such as medical charts, banking statements, academic transcripts and patterns of computer usage) that reveal information about him or her.¹²

The factors relevant to the determination of a reasonable expectation of privacy may play out differently depending on which kind of privacy interest is at stake. For example, the question of abandonment would rarely be relevant in connection with personal privacy, but is frequently a point of contention in connection with informational privacy.

2. Two Approaches

The Supreme Court of Canada’s decisions reveal at least two, potentially incompatible, ways of orienting the factors in deciding whether a particular accused has a reasonable expectation of privacy in a particular situation. I will call these the “risk approach” and the “surveillance approach”.¹³ Under the risk approach, the focus of the inquiry is on the

¹¹ *Tessling, id.*, at para. 32; compare *R. v. Plant*, [1993] S.C.J. No. 97, [1993] 3 S.C.R. 281, at para. 20 (S.C.C.) [hereinafter “*Plant*”].

¹² *Gomboc, supra*, note 6, at para. 19; *Tessling, supra*, note 9, at paras. 21-24.

¹³ Lisa Austin has used the terms “descriptive” and “normative” for these two positions; she has also called the first the “what did you expect” approach: Lisa M. Austin, “Information Sharing and the ‘Reasonable Ambiguities’ of Section 8 of the Charter” (2007) 57 U.T.L.J. 499, at 506-10.

security of the place searched (or information obtained) from intrusion by the world at large. If the place searched is not in fact secure against the world in general, then it is not secure against agents of the state in particular, and so any expectation that the state will not intrude is not reasonable. The accused, by failing to adequately secure his or her interests against intrusions from the world at large, is deemed to have accepted the potential intrusion on his or her privacy interests and so cannot complain if the person who intrudes happens to be an agent of the state.

The risk approach is well-illustrated by the reasoning and the outcome in *Edwards*¹⁴ and *Patrick*.¹⁵ In *Edwards*, the police obtained evidence against the accused in the course of a police search of his girlfriend's apartment. The Supreme Court of Canada held that the accused had no standing to argue for exclusion of the evidence because he had no reasonable expectation of privacy. He could not control access to the apartment; he was, on the factual findings of the courts below, "no more than an especially privileged guest" in the apartment.¹⁶ Why do these facts matter? The Court does not explain that very clearly, but the underlying idea seems to be that because he "could not be free from intrusion or interference in [his girlfriend's] apartment" by the world at large, he could not object to intrusion or interference by the police. The accused could not prevent his girlfriend, or a stranger, from discovering evidence against him in the apartment and turning it over to the police; he took the risk that the evidence would be discovered, so he could not complain if the intruder was a police officer, even if the officer's search of the girlfriend's apartment was blatantly unlawful.¹⁷ Similarly, in *Patrick*, the accused was found to have no reasonable expectation of privacy in bags of garbage left on his property, near the property line, for pick-up. Although the garbage amounted to "bag[s] of 'information'" that could reveal a great deal about the accused's activities within his home,¹⁸ and although there was a municipal by-law that prohibited anyone other than the garbage collectors from taking it,¹⁹ the accused

¹⁴ *Supra*, note 10.

¹⁵ *R. v. Patrick*, [2009] S.C.J. No. 17, [2009] 1 S.C.R. 579 (S.C.C.) [hereinafter "*Patrick*"].

¹⁶ *Edwards*, *supra*, note 10, at para. 47.

¹⁷ *Id.*, at para. 51. The majority does not decide whether the search was unlawful; they hold that the accused could not object to it under s. 8 even if it was unlawful. Justice La Forest, concurring in the result, thought that the search was best described as a "constructive break-in" (at para. 69).

¹⁸ *Patrick*, *supra*, note 15, at para. 30.

¹⁹ *Id.*, at para. 68.

was deemed to have abandoned any expectation of privacy he might otherwise have had in the bag. Anyone could have picked it up, lawfully or not:

The bags were unprotected and within easy reach of anyone walking by in a public alleyway, including street people, bottle pickers, urban foragers, nosy neighbours and mischievous children, not to mention dogs and assorted wildlife, as well as the garbage collectors and the police.²⁰

That the garbage was picked up by the police, not a homeless person or a raccoon (neither of whom would be likely to turn it over to the state), was just a risk that the accused ran.

Under the surveillance approach, the focus of the inquiry is on the question whether a reasonable person would anticipate that an agent of the state would be able to intrude on the accused's privacy interests with no specific legal authority to do so. That a private party, or even a state agent, might in fact have the ability to intrude is not determinative; that the accused has accepted possible intrusions by non-state actors is not determinative. The central concern is the impact of the state's investigative technique on the accused's privacy.

The classic exemplars of the surveillance approach are the Supreme Court of Canada's cases on electronic surveillance from the early 1990s. Consider, for example, *R. v. Duarte*.²¹ The police installed audio-visual recording equipment in an informer's apartment. A conversation among the accused, the informer, an undercover officer, and others was captured by this equipment. The making of the recording was not unlawful because the informer consented to the recording pursuant to what is now s. 184(2)(a) of the *Criminal Code*;²² moreover, both the informer and the undercover officer could have testified at trial to the content of their conversations with the accused, pursuant to the hearsay exception for party admissions.²³ Nonetheless, a strong majority of the Supreme Court of Canada held that the accused had a reasonable expectation that his conversations would not be recorded without judicial authorization. The Court was concerned that if such an expectation was not recognized, the

²⁰ *Id.*, at para. 55.

²¹ [1990] S.C.J. No. 2, [1990] 1 S.C.R. 30 (S.C.C.) [hereinafter "*Duarte*"].

²² R.S.C. 1985, c. C-46; formerly s. 178.11(2)(a) of the *Criminal Code*, R.S.C. 1970, c. C-34.

²³ Compare *R. v. Sanelli*, [1987] O.J. No. 821, 61 O.R. (2d) 385, 38 C.C.C. (3d) 1 (Ont. C.A.), rev'd *Duarte*, *supra*, note 21; see also *R. v. Fliss*, [2002] S.C.J. No. 15, [2002] 1 S.C.R. 535 (S.C.C.), where an undercover officer's testimony about his conversation with the accused was admissible even though a recording of the conversation was excluded on Charter grounds.

state would have an unfettered power “to make permanent electronic recordings of our private communications”. The risk approach was expressly considered and rejected. The flaw in the argument “that a man has no one but himself to blame if he is confounded by his own words”²⁴ was that it provided no effective check on the power of state agents to conduct electronic surveillance of anyone, criminal or otherwise:

To countenance this practice would not strike only at the expectations of privacy of criminals and those concerned with wrongdoing. Rather, it would undermine the expectations of privacy of all those who set store on the right to live in reasonable security and freedom from surveillance, be it electronic or otherwise.²⁵

The risk of having one’s words reported by an informant or undercover officer was “of a different order of magnitude” than the risk of having one’s private conversations electronically recorded.

In some cases, the factors relevant to the reasonable expectation of privacy may point in the same direction regardless of the approach chosen. In *R. v. Kang-Brown*,²⁶ for example, the Court was unanimously of the view that a passenger in a bus depot had a reasonable expectation of privacy in his luggage, and indeed a reasonable expectation of privacy in any odours that, though undetectable by humans, were detectable by sniffer dogs.²⁷ The Court assumes rather than analyzing this expectation of privacy, but it is supportable on either approach. The risk that non-humans will detect odours from our luggage is not one that we take when we put our suitcases in the belly of a bus. And the unsupervised use of the technique would significantly compromise privacy interests in luggage (who knows what other substances, lawful or unlawful, a dog can be trained to detect?). But some cases are strongly affected by the choice of approach. In *Duarte*, where the majority found a reasonable expectation of privacy, the risk analysis supports the opposite conclusion that the accused had no reasonable expectation of privacy in his conversation with the informant.²⁸ In *Edwards*, where the majority found no reasonable expectation of privacy, the surveillance approach might support the opposite conclusion; a reasonable person would assume that

²⁴ *Duarte, id.*, at para. 38.

²⁵ *Id.*, at para. 41.

²⁶ [2008] S.C.J. No. 18, [2008] 1 S.C.R. 456 (S.C.C.) [hereinafter “*Kang-Brown*”].

²⁷ Though unanimous on this point, the Court was badly divided on the question whether the police were authorized at common law to intrude on this expectation of privacy by using a sniffer dog without a warrant.

²⁸ *Duarte, supra*, note 21, at para. 58, *per* Lamer J. concurring in the result.

the police would conduct themselves lawfully and so would not anticipate an unlawful search of his friend's apartment. So there might be a reasonable expectation of privacy against unlawful searches in general, lest the state in its sole discretion could decide to violate the rights of third parties for investigative purposes.²⁹

3. Normative Foundations

Strikingly, none of the factors invoked in the standard methodology for determining a reasonable expectation of privacy is explicitly normative; all of them are facts about the relationship between the accused and the place searched or thing seized. But whether there is a reasonable expectation of privacy is not a purely factual question because it is a question of what ought to be the case. What ought to be done in any given situation never depends solely on the facts, but always on the facts in conjunction with the applicable norms. Thus, while normative conclusions are typically dependent on the facts,³⁰ a normative conclusion cannot be derived *solely* from the facts.³¹ So in deciding whether a Charter applicant has a reasonable expectation of privacy, a judge must not only consider the presence or absence of the factors identified by the Supreme Court of Canada, but also why and how those factors are important in defining the right to a reasonable expectation of privacy. Put another way, the ultimate normative question is whether, in light of the impact of an investigative technique on privacy interests, it is right that the state should be able to use that technique without any legal authorization or judicial supervision. Does our conception of the proper relationship between the investigative branches of the state and the individual permit this technique without specific legal authorization? The facts of the case are highly relevant to this normative question but do not by themselves determine it.

²⁹ *Edwards, supra*, note 10, at paras. 59 and 69, *per* La Forest J. concurring in the result.

³⁰ As emphasized by A.K. Sen, "The Nature and Classes of Prescriptive Judgments" (1967) 17 *Philosophical Quarterly* 46.

³¹ As famously suggested in 1740, by David Hume, *A Treatise on Human Nature*, L.A. Selby-Bigge, ed. (Oxford: Clarendon Press, 1978), at 469-70; see, more recently, Scott J. Shapiro, *Legality* (Cambridge, MA.: Harvard University Press, 2011), at 45-49. The long tradition that questions the fact/value distinction typically does not claim that normative conclusions can be drawn from facts alone, and so does not directly contradict Hume's Law; instead, the key move is to emphasize the common elements in reasoning about facts and in reasoning about norms: see, for instance, Cheryl Misak, *Truth, Politics, Morality* (London: Routledge, 2000).

The Supreme Court of Canada has clearly recognized the normative nature of the concept of a reasonable expectation of privacy. As Binnie J. put it in *Tessling*, “Expectation of privacy is a normative rather than a descriptive standard.”³² Moreover, some of the specific factors mentioned in *Tessling* and *Edwards*, such as the intrusiveness of the search in relation to the asserted privacy interest, seem intended to focus the judge’s attention on the desirability of permitting the unauthorized use of the technique. And the choice between the risk approach and the surveillance approach, or any other approach to determining the existence of a reasonable expectation of privacy, ultimately depends on those foundations, that is, an assessment of which approach better reflects the values supporting the section 8 protection for the reasonable expectation of privacy.

Nevertheless, the Court has not been entirely clear about these normative foundations. The Court has, on a number of occasions, referred to the individual interest in being left alone³³ and to the values of autonomy, freedom, dignity and integrity,³⁴ but has not said a great deal about exactly how these interests and values are protected by a reasonable expectation of privacy. There are several ways to make that connection, and indeed to relate the section 8 privacy interest to the fundamental rights guaranteed in section 2 of the Charter. As Thomas Nagel, Lisa Austin and others have argued, everyone needs a sphere that is private in the sense of not being readily accessible to others; everyone needs “respite from the public gaze” in order to be human.³⁵ And there are at least three reasons for this need. First, everyone expresses thoughts and emotions, has experiences, and engages in activities that are for various reasons not fit for public observation. The public presentation of oneself involves restraint in the expression of emotions and attitudes; but sometimes we need to dispense with restraint; “we need privacy to be allowed to conduct ourselves in extremis in a way that serves purely individual demands, the demands of strong personal emotion.”³⁶ Many activities, though perfectly ordinary and in no way inherently wrongful or shameful — sleeping, using the toilet, cleaning oneself, dressing and undressing — are considered embarrassing or humiliating if viewed by

³² *Tessling*, *supra*, note 9, at para. 42; see also *Gomboc*, *supra*, note 6, at para. 34.

³³ *Southam*, *supra*, note 2, at 159 S.C.R.; *Duarte*, *supra*, note 21, at 49 S.C.R.

³⁴ *Plant*, *supra*, note 11, at para. 17; *R. v. Golden*, [2001] S.C.J. No. 81, [2001] 3 S.C.R. 679, at paras. 89-90 and 98 (S.C.C.).

³⁵ Lisa M. Austin, “Privacy and the Question of Technology” (2003) 22 *Law & Philosophy* 119, at 147 [hereinafter “Austin, ‘Privacy’”].

³⁶ Thomas Nagel, “Concealment and Exposure” (1998) 27 *Philosophy & Public Affairs* 3, at 19 [hereinafter “Nagel”].

others.³⁷ That is why surreptitious observation or recording of some of these activities is a criminal offence.³⁸ Some activities may be undertaken for pleasure or relaxation — sitting around in one's underwear, playing "air guitar", singing really badly, reading comic books — yet public observation or knowledge of them may be embarrassing or inhibiting. And some pursuits may be exploratory or preparatory to a public presentation, yet undertaken in private to prevent others from drawing improper inferences from them. Practising the piano is often preparation for a public performance; but the pianist typically does not want the public to hear the slow, laborious and error-ridden process of learning, repeating and experimenting that precedes the performance. Similarly, the project of reading all the politically important books of the 20th century requires no legal justification, but publication of one's reading list might invite unwarranted speculation about why one is reading *How to be a Good Communist*,³⁹ and knowledge that one's reading lists would routinely be made available to state agents might affect one's reading choices.

Second, privacy enables intimate activities, that is, activities involving small numbers of individuals who wish to interact with each other, but only with each other. Sexual activity is the most obvious example: though it is neither wrongful nor intrinsically shameful, most people require privacy to engage in it.⁴⁰ But there are many other examples. Musical ensembles rehearse in private, for the same reasons as soloists. Most people need a private space to engage in casual conversations in which opinions may be stated in ways inappropriate for a public forum, perhaps because they are stated too strongly or too absolutely or in ways that are prone to be misunderstood, or because they are not fully considered.

Thus, privacy "protects two aspects of individuality: our ability to be distinct individuals and our ability to have an authentic inner life and intimate relationships".⁴¹ And, in protecting these two aspects of individuality, privacy has a third function: it makes possible the construction of a public persona through which the individual can participate in those

³⁷ *Id.*, at 18. I take no position on whether the reasons that these activities are embarrassing are merely conventional or derive from more basic psychological or biological needs.

³⁸ *Criminal Code*, R.S.C. 1985, c. C-46, s. 162(1). The offence is commonly known as "voyeurism".

³⁹ Liu Shao-Chi, *How to be a Good Communist* (Peking: Foreign Languages Press, 1951).

⁴⁰ Nagel, *supra*, note 36, at 20; J. David Velleman, "The Genesis of Shame" (2001) 30 *Philosophy & Public Affairs* 27 [hereinafter "Velleman"]. Compare, again, s. 162(1) of the *Criminal Code*.

⁴¹ Austin, "Privacy", *supra*, note 35, at 147.

institutions and conventions that make social and political life possible. If there was no private space, the distinction between the individual and his or her self-presentation would be obliterated, leaving no room for the possibility of distinguishing one's considered public behaviour, positions and attitudes from one's private activity. Moreover, the possibility of surreptitious surveillance deprives the individual of control over how he or she presents himself or herself to the rest of the world. Thus, privacy enables not only activities typically thought of as private, but also those typically thought of as public.⁴²

All three of these functions of privacy would be seriously inhibited if individuals were routinely exposed to the gaze of others. Yet all of them are necessary to being human. And many of them are closely connected with the right to freedom of conscience, religion, thought, belief and opinion protected by section 2(a) and (b) of the Charter. To be free to think and to form beliefs and opinions requires not just public spaces for expression and debate but also private spaces for thought and contemplation, for reading controversial and uncontroversial material alike, for exploring with friends and colleagues ideas that may later be qualified or rejected.⁴³

We can now see why the surveillance approach is preferable to the risk approach. The risk approach tends to underrate the interests protected by privacy because it focuses principally on the vulnerability of one's private space rather than on the value of that space. In contrast, the surveillance approach takes the factors relevant to the reasonable expectation of privacy and considers them in light of the interest in maintaining a private space with (at least) these three functions of enabling individuality, intimacy and self-presentation. The risk approach often takes the fact that intrusion is empirically possible as decisively eliminating any reasonable expectation of privacy; the surveillance approach asks instead whether any given intrusion should be permitted without legal authorization, in light of the inhibiting effects of the intrusion on the activities protected by privacy.

Consider *Duarte* again. On the risk approach, the accused had no reasonable expectation of privacy in the recordings of his conversations with the informant because there was nothing to stop the informant from disclosing the conversations to the police. Justice La Forest rejected the

⁴² Velleman, *supra*, note 40, at 35-37; Lisa M. Austin, "Privacy and Private Law: The Dilemma of Justification" (2010) 55 McGill L.J. 165, at 202-204.

⁴³ Austin, "Privacy", *supra*, note 35, at 146.

argument that this risk destroyed the accused's expectation of privacy because he was concerned about the invasiveness on the private sphere of unrestricted recording of private conversations. "No set of laws," he said, can protect us from the risk "that their interlocutors will divulge communications that are meant to be private."⁴⁴ But electronic surveillance presented "the much more insidious danger inherent in allowing the state, in its unfettered discretion, to record and transmit our words":

... if the state were free, at its sole discretion, to make permanent electronic recordings of our private communications, there would be no meaningful residuum to our right to live our lives free from surveillance. The very efficacy of electronic surveillance is such that it has the potential, if left unregulated, to annihilate any expectation that our communications will remain private. A society which exposed us, at the whim of the state, to the risk of having a permanent electronic recording made of our words every time we opened our mouths might be superbly equipped to fight crime, but would be one in which privacy no longer had any meaning.⁴⁵

Indeed, for the reasons La Forest J. gives, the logic behind the risk approach could undermine long-standing and well-recognized protections for privacy in other areas. Suppose that the accused's interlocutor in *Duarte* had not been a police informant, but had gone to the police with his concerns after the fact. From the accused's point of view, the risk in this hypothetical is the same as the risk in *Duarte*. But no-one seemed to think that in the hypothetical a warrant would not be required to intercept the conversation; while the *Criminal Code* clearly required one, if there was no reasonable expectation of privacy, section 8 of the Charter would not.⁴⁶ Similarly, if Joe writes Bill a letter, there is nothing to stop Bill from showing the letter to the police. But that does not mean Joe has no reasonable expectation of privacy in his mail. A warrant is undoubtedly required to open it.⁴⁷ And the risk (indeed, the likelihood) that a passer-by might overhear me practising a Chopin nocturne is not at all the same as the risk that the state might surreptitiously record all of my practice sessions. The first is an unavoidable consequence of the impossibility of

⁴⁴ *Duarte*, *supra*, note 21, at para. 21.

⁴⁵ *Id.*, at para. 22.

⁴⁶ The interception would be unlawful under the Code, but would not violate s. 8 of the Charter because it would not intrude on a reasonable expectation of privacy. A search has to be lawful to be reasonable, but if the police conduct is not a search, the reasonableness — and therefore the lawfulness — requirement does not apply.

⁴⁷ See, for instance, *R. v. Fry*, [1999] N.J. No. 352, 142 C.C.C. (3d) 166 (Nfld. C.A.).

perfect sound-proofing, while the prospect of the second would seriously inhibit my preparation.

Now, the privacy interests protected by section 8, as I have described them, may seem weak in the typical search and seizure case where the accused is growing marijuana in his basement or making Ecstasy in his garage. These activities have little in common with those protected by the interests in authenticity, intimacy and self-presentation that I described above. But the Supreme Court of Canada has consistently maintained that the legality or illegality of the activity conducted in a place does not affect the determination of a reasonable expectation of privacy in that place; or, put another way, that the expectation of privacy does not depend on the activity being conducted. Everyone has a reasonable expectation of privacy in his or her bedroom, whether that bedroom is used for sleeping, sex, reading, playing air guitar, practising the violin, growing marijuana, storing firearms or plotting a murder. The reason is not to protect criminal activity; it is to protect lawful activity from uncontrolled surveillance. Thus, the Court has consistently recognized that in order to protect the expectation of privacy in a place such as the bedroom, the particular activity that occurs there is not relevant.⁴⁸

Moreover, no place (except, perhaps, the individual's mind) is immune from search and seizure. The existence of a reasonable expectation of privacy in a place does not prevent that place from being searched; rather, it requires some lawful authority for the search. So a person carrying on an illegal activity in his home might well anticipate a search of his home, not because that activity is illegal, but because it is likely to generate publicly observable bits of evidence (the odour of marijuana, the papered-over windows) giving rise to reasonable grounds on which to obtain a search warrant.

Against this background, I turn to two 2010 cases where the Supreme Court of Canada had to determine whether the accused had a reasonable expectation of privacy.

⁴⁸ *R. v. Wong*, [1990] S.C.J. No. 118, [1990] 3 S.C.R. 36, at paras. 18-21 (S.C.C.); *Patrick*, *supra*, note 15, at para. 32. See also *R. v. Silveira*, [1995] S.C.J. No. 38, [1995] 2 S.C.R. 297 (S.C.C.), where only one of seven judges thought that the illegality of the accused's activity had any effect on his reasonable expectation of privacy.

III. *R. v. NOLET*

In *Nolet*,⁴⁹ the two accused and another were driving in Saskatchewan in an apparently empty tractor-trailer. They were pulled over by an RCMP officer for a regulatory spot-check. The spot-check developed into a search of both the tractor and the trailer. After examining some documents, the police officer picked up a duffle bag that he found “behind the driver’s seat in the sleeping compartment” of the tractor. The bag contained \$115,000 in cash in small-denomination bills; on that basis, the officer arrested the accused for possession of proceeds of crime.⁵⁰ A further warrantless search of the trailer, conducted some time later, revealed a substantial quantity of marijuana in a hidden compartment. The two accused were charged with possession of marijuana for the purpose of trafficking and other offences.

If the accused had no reasonable expectation of privacy in the cabin, the police taking of the duffle bag would not have been a “search” for section 8 purposes, and therefore would not have required any law to authorize it. But the Court found that the accused had a reasonable expectation of privacy in the sleeping area of the tractor “because living quarters, however rudimentary, should not be classified as a *Charter*-free zone”; though the expectation was “necessarily low” because the tractor was “vulnerable to frequent random checks in relation to highway transport matters”.⁵¹ This reasoning is brief but suggestive. The reference to the possibility of frequent regulatory search may suggest a risk analysis, but the Court’s reasoning is, for two reasons, better understood as an instance of the surveillance approach. First, the fact that truck drivers live in their cabs, albeit for short periods, gives them a privacy interest in their cabs that is analogous to, if less strong, than the privacy interest in the home, and so supports a requirement that the police have some legal authority before searching a cab, notwithstanding the vulnerability of the cabin to regulatory scrutiny. Second, the “vulnerability” to

⁴⁹ *Supra*, note 5.

⁵⁰ *Id.*, at para. 9.

⁵¹ *Id.*, at para. 31. The phrase “*Charter*-free zone” neatly summarizes the concerns underlying the surveillance approach because a zone where the accused has no reasonable expectation of privacy is one where he has no s. 8 rights. Since the accused did have a reasonable expectation of privacy, however low, the taking of the duffle bag was a search for s. 8 purposes and had to be authorized by law; similarly for the search of the trailer. The Court held that the taking of the bag was authorized by the officer’s power to search without a warrant in relation to provincial regulatory offences and that the rest of the search was for the most part a valid incident of the arrest. (An assessment of the Court’s reasoning on these points is beyond the scope of this paper.) The accused had been acquitted at trial; a new trial was ordered.

which the Court refers is not empirical vulnerability to the world at large; rather, it is a vulnerability that arises as a matter of law because the operation of a tractor-trailer is subject to a detailed regulatory scheme that is itself justified on highway safety grounds. Indeed, the accused had a much stronger expectation of privacy *vis-à-vis* the world in general than *vis-à-vis* the RCMP officer who stopped them. An ordinary driver of a private vehicle would have had no authority to stop them in the first place; and if their vehicle was parked somewhere, a private individual who broke into the trailer or the tractor would likely commit a number of quite serious offences. But because the accused were engaged in a regulated activity, the police had significant powers to stop and make inquiries that substantially diminished their expectations of privacy. And regulatory search powers must themselves be constitutionally valid; they must satisfy the *Hunter* criteria⁵² or be based on considerations that provide an adequate substitute for those criteria. The approach in *Nolet* is encouraging precisely because it focuses on the legal setting of the interaction with the police rather than on the accused's empirical vulnerability to the world at large. The main issue in the case is the legality of the police conduct, and that is as it should be; but that issue arises only because the Court recognized the accused's reasonable expectation of privacy in the first place.

IV. *R. v. GOMBOC*

Nolet is mainly about search powers rather than about expectations of privacy. *Gomboc*,⁵³ in contrast, is a major decision on the reasonable expectation of privacy. The significant differences of opinion in the Court flow not from disagreement about the facts — which were not really in issue — but from competing normative visions of the concept of a reasonable expectation of privacy. While elements of the risk approach and the surveillance approach can be discerned in all three sets of reasons for judgment, the influence of the risk approach is strongest in the plurality reasons of Deschamps J., while the influence of the surveillance approach is strongest in the dissenting reasons of McLachlin C.J.C. and Fish J.

The accused was charged with production of marijuana and other offences. The Calgary police and the RCMP had made observations and had gathered other information strongly suggesting the presence of a

⁵² *Supra*, note 2.

⁵³ *Supra*, note 6.

marijuana “grow-op” in a residence owned by the accused.⁵⁴ The final investigative step was to ask the accused’s electricity provider (the utility) to attach a digital recording ammeter (“DRA”) to the power line. A DRA measures the flow of current into a residence in one-amp increments over time.⁵⁵ The DRA remained in place for five days. The data it gathered indicated a pattern of electricity use typical of a marijuana grow-op. These data, together with the other observations made and information gathered by the police, supported the issuance of a search warrant for the residence. When the warrant was executed, the police seized a substantial quantity of marijuana and evidence of a grow-op.

The accused argued that the warrantless use of the DRA violated his section 8 right “to be secure against unreasonable search or seizure”. He therefore had to demonstrate that the use of the DRA intruded upon his reasonable expectation of privacy; if so, its use would be a presumptively unreasonable warrantless search, and, if the Crown could not demonstrate a lawful basis for it, would violate his section 8 right. The trial judge found that the DRA did not intrude on the accused’s reasonable expectation of privacy, admitted the evidence from the search, and convicted the accused. The accused’s appeal to the Alberta Court of Appeal was allowed on the basis that he did have a reasonable expectation of privacy in the information obtained from the DRA and that its warrantless use was unlawful and so violated his section 8 right.⁵⁶

The Crown’s appeal to the Supreme Court of Canada was allowed and the conviction was restored. A 7-2 majority held that the accused did not have a reasonable expectation of privacy in the data obtained from the DRA; however, the seven judges in the majority divided 4-3 as to why that was so. It is therefore possible that on slightly different facts the Court would divide 5-4 in favour of recognizing a reasonable expectation of privacy.

Of the many factors relevant to determining the existence of a reasonable expectation of privacy, three were particularly important in *Gomboc*. First, what does the DRA indicate about what is happening in a home? There was no dispute that the DRA showed no more than, but also

⁵⁴ The Crown conceded at trial that this information did not amount to reasonable grounds for the issuance of a warrant. The wisdom of this concession has been questioned (*Gomboc, id.*, at para. 12), but it certainly had the effect of making the effect of the DRA on the accused’s privacy the critical issue in the case.

⁵⁵ *Id.*, at para. 61.

⁵⁶ The Court remitted the matter to the trial court for a determination of whether the evidence should be excluded under s. 24(2) of the Charter.

no less than, the pattern of electricity consumption in the house over time, and that the pattern would fairly reliably indicate whether or not the house was being used for a marijuana grow-op.⁵⁷ Second, what was the place searched? The DRA was installed in a transformer box near, but not on, the accused's property; but it revealed information about what was happening inside the house.⁵⁸ Third, what was the legal setting for the use of the DRA? There was no dispute about the terms and conditions governing the accused's contract with his electricity supplier: the contract, in conjunction with the relevant Alberta regulation, permitted the utility to share "customer information" with the police as long as "the disclosure is not contrary to the express request of the customer." The accused Gomboc had made no such request.⁵⁹

The way these factors are dealt with in the judgments indicates the relative importance of the risk approach and the surveillance approach to each group of judges. Justice Deschamps, for the four-judge plurality (Charron, Rothstein, and Cromwell JJ. concurred), emphasized the limited amount of information obtained from the DRA and therefore characterized it as a relatively unintrusive technique.⁶⁰ While the information obtained was information about activity in the accused's home, where the privacy interest is high, she commented that this fact "should be not allowed to inflate the actual impact of the search",⁶¹ information about what is happening in a home is not automatically entitled to a reasonable expectation of privacy.⁶² Finally, she held that the utility could, on its own initiative, have installed a DRA and turned the results over to the police; thus, the accused could not reasonably consider these data to be "confidential or private".⁶³ It made no difference that the request to install the DRA came from the police.⁶⁴

Justice Deschamps's reasons draw on both the risk analysis and the surveillance approach, but the risk approach dominates. Given his failure to request non-disclosure under the regulation, the accused was, empirically speaking, vulnerable to the risk that the utility would gather and disclose information to the police; that the police, rather than the utility, put this process in motion made no difference. This reasoning is characteristic of the

⁵⁷ *Gomboc, id.*, at paras. 7-9.

⁵⁸ *Id.*, at para. 4.

⁵⁹ *Id.*, at para. 31; see also *Code of Conduct Regulation*, Alta. Reg. 160/2003, s. 10(3)(f).

⁶⁰ *Gomboc, id.*, at para. 36.

⁶¹ *Id.*, at para. 50.

⁶² Compare *Tessling, supra*, note 9; *Plant, supra*, note 11; and *Patrick, supra*, note 15.

⁶³ *Gomboc, supra*, note 6, at para. 41.

⁶⁴ *Id.*, at para. 42.

risk approach; it is very similar to the “risk analysis” considered and rejected in *Duarte*. But at the same time, the technique is characterized as relatively unintrusive, so the need to constrain its unfettered use is correspondingly diminished. In a case where an accused ran exactly the same risk, but the information disclosed was plausibly characterized as being at the biographical core that informational privacy protects, the risk analysis and the surveillance approach would pull in different directions.

And that was, more or less, how the three concurring judges saw it. Justice Abella (Binnie and LeBel JJ. concurring) found the DRA to be quite intrusive as it permitted the drawing of a “strong and reliable inference” about what was going on “*inside the home*”.⁶⁵ And because of “the overriding significance of protecting the privacy interests in one’s home”, there was reason to be concerned about allowing the police to use this investigative technique with no judicial oversight.⁶⁶ Thus, most of the factors pushed in the direction of recognizing a reasonable expectation of privacy. However, Abella J. refrained from expressly stating this conclusion because even if it was correct there was, in her view, a factor that weighed decisively against recognizing a reasonable expectation of privacy. Because the accused had not requested confidentiality under the regulation, any expectation of privacy that he might have had was not objectively reasonable.⁶⁷

Justice Abella’s analysis of the relevant factors is much closer to surveillance approach than the plurality’s. She sees the DRA as a device for determining what is going on inside the home, and therefore as properly subject to legal regulation. This reasoning is typical of the surveillance approach; it is not the accused’s empirical vulnerability to intrusion but the effect on privacy of permitting the intrusion without any legal authority that matters. Justice Deschamps treated the accused’s failure to request confidentiality as merely one factor in assessing his reasonable expectation of privacy; thus, even if he had so requested, she might have been prepared to find no expectation of privacy. In contrast, Abella J. treats the failure to request confidentiality as nearly decisive, indicating that she would likely have found a reasonable expectation of privacy if the accused had so requested. To put this point another way, suppose the accused had requested confidentiality but the utility had, on its own

⁶⁵ *Id.*, at paras. 81 and 80 (emphasis in the original).

⁶⁶ *Id.*, at para. 82.

⁶⁷ *Id.*, at paras. 82-95.

initiative and contrary to the regulation, gathered the information and then disclosed it to the police. Would the accused's section 8 rights have been infringed? Justice Deschamps suggests that they would not, because the DRA did not record "household activities of an intimate or private nature that form part of the inhabitants' biographical core data",⁶⁸ so the accused would have had no reasonable expectation of privacy in the DRA information. Justice Abella in contrast, suggests not only that the DRA did gather such core information, but also that for the police to obtain it in defiance of the customer's express wishes would be an unlawful search: "A request by a customer to prohibit disclosure of customer information revokes the legislative authority for its disclosure."⁶⁹ Moreover, she left open the possibility of challenging the regulation as an unreasonable law under section 8 of the Charter,⁷⁰ a challenge which would be pointless if the regulation was not in essence a law authorizing search and seizure of information that would otherwise be protected by a reasonable expectation of privacy.

Chief Justice McLachlin and Fish J. dissented. They agreed with much of Abella J.'s analysis, but went further and held that the DRA disclosed information that was subject to a reasonable expectation of privacy.⁷¹ But, unlike Abella J., they held that the regulation did not defeat that expectation. In contrast to *Nolet*, where the reasonable trucker would be aware of the regulatory scheme governing trucking, "[t]he average consumer signing up for electricity cannot be expected to be aware of the details of a complex regulatory scheme ... especially where a presumption of awareness operates to, in effect, narrow the consumer's constitutional rights."⁷² Thus, the accused had a reasonable expectation of privacy in the information obtained from the DRA. The use of the DRA was a search for section 8 purposes.⁷³

⁶⁸ *Id.*, at para. 36.

⁶⁹ *Id.*, at para. 85. Justice Binnie concurred with Abella J. here, but contrast his reasons in *Patrick*, *supra*, note 15, where he held that the police's failure to respect a by-law prohibiting garbage-picking had no effect on the accused's expectation of privacy in his garbage.

⁷⁰ *Gomboc*, *id.*, at paras. 86-91.

⁷¹ *Id.*, at paras. 105 and 124.

⁷² *Id.*, at para. 139. Justice Abella suggests that this consideration would subjectivize the analysis of a reasonable expectation of privacy: at para. 93. Yet the dissenters are clearly concerned not with Gomboc's knowledge, but with the reasonable person's likely awareness, of the regulation: *id.*, at para. 142.

⁷³ The dissenters went on to hold that there was no lawful authority for the search; consequently, the accused's s. 8 rights were violated. The dissenters would have remitted the case for further argument on the question whether the evidence obtained from the DRA (and from the physical search that followed) should have been excluded under s. 24(2) of the Charter.

The dissenters are strongly motivated by the normative concerns that underlie the surveillance approach. The DRA enables the person analyzing the data it generates to make an informed prediction as to “whether anyone is home, the approximate time at which the occupants go to bed and wake up, and ... [the] particular appliances being used” as well as whether plants are being grown.⁷⁴ If there is no reasonable expectation of privacy in that information, if the police can ask the utility to disclose it without reasonable grounds to believe that an offence has occurred and that the information will disclose evidence of the offence, could not the police also, without reasonable grounds, ask a cable company to gather information on what programs a person is watching, or a plumber to gather information about the contents of a person’s bathroom while in a person’s home for the stated purpose of repairing a toilet?⁷⁵ The dissenters see the plurality’s decision as “an incremental but ominous step toward the erosion of the right to privacy guaranteed by section 8”⁷⁶ because they fear that the majority’s approach will be unable to distinguish such cases from the situation in *Gomboc* itself. There is nothing wrongful or shameful about a person’s pattern of sleeping and waking, or about the contents of a person’s bathroom cupboard, but it is no one’s business either. One can assume that watching a television program via a regulated provider such as Bell or Rogers is always lawful (otherwise they would not be permitted to broadcast it), but for the state to keep records of what people watch is likely to inhibit their Charter-protected interests in freedom of thought, opinion and expression. Who would not be affected in their choice of what to watch, or when to sleep, or what to keep in the cupboard, by the knowledge that the state, in its unfettered discretion, could keep track? These examples may seem remote from the DRA that was at issue in *Gomboc*, but the logic of the risk approach makes it hard to distinguish them. The surveillance approach is much more likely to protect the values underlying the section 8 privacy interest because it more effectively takes into account the concern about unfettered intrusion into areas where individuals are likely to engage in, or to leave information about, the activities that are central to the privacy interest protected by section 8.

⁷⁴ *Id.*, at paras. 128-129.

⁷⁵ *Id.*, at para. 100.

⁷⁶ *Id.*, at para. 97.

V. CONCLUSION

Section 8 of the Charter protects a reasonable expectation of privacy. The reason for protecting a reasonable expectation of privacy is to create a zone of privacy in which every individual can engage in activities that are essential to the making of the human self but that are often considered shameful or embarrassing, and may be seriously inhibited, if routinely recorded or exposed to observation by others. The Supreme Court of Canada's methodology for determining the existence of a reasonable expectation of privacy contains two dominant methodological strands — the risk approach, which focuses on the factual vulnerability of the place or the information, and the surveillance approach, which focuses on concerns about unfettered use of the technique in question. In *Gomboc*, these two competing approaches come face to face. The investigative technique at issue is a device that records the pattern of electricity use over time. Is there a reasonable expectation of privacy in this information? The four-judge plurality regards the information itself as relatively unintrusive, but is also moved by the relative ease with which it could be gathered by the utility, while apparently remaining unconcerned about the impact of this kind of observation on the values protected by the right to privacy. In contrast, the remaining five judges, like La Forest J. in *Duarte*, recognize that the relative ease of gathering information about what is going on in a home through techniques of electronic surveillance does not mean that the inhabitants of the home have no reasonable expectation of privacy. It is not the ease of information-gathering, but its impact on the human interests in authenticity, intimacy and self-presentation that should be protected by section 8 of the Charter, and should drive the question of the reasonable expectation of privacy.

