



SUPREME COURT OF CANADA

CITATION: R. v. Gomboc, 2010 SCC 55

DATE: 20101124

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BETWEEN:

Her Majesty The Queen

Appellant

and

Daniel James Gomboc

Respondent

- and -

Attorney General of Ontario, Attorney General of Quebec

and Canadian Civil Liberties Association

Interveners

CORAM: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron,
Rothstein and Cromwell JJ.

REASONS FOR JUDGMENT:

(paras. 1 to 54)

Deschamps J. (Charron, Rothstein and Cromwell JJ.
concurring)

REASONS CONCURRING IN

RESULT:

(paras. 55 to 96)

Abella J. (Binnie and LeBel JJ. concurring)

McLachlin C.J. and Fish J.

JOINT REASONS DISSENTING IN

RESULT:

(paras. 97 to 152)

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R. v. GOMBOC

Her Majesty The Queen

Appellant

v.

Daniel James Gomboc

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**Attorney General of Ontario, Attorney General of Quebec
and Canadian Civil Liberties Association**

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Indexed as: R. v. Gomboc

2010 SCC 55

File No.: 33332.

2010: May 19; 2010: November 24.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron,
Rothstein and Cromwell JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Constitutional law — Charter of Rights — Search and Seizure — Warrantless request by police to electric utility company for installation of digital recording ammeter to measure flow of electricity into a residence suspected of housing a marijuana grow operation — Information from digital recording ammeter indicating pattern consistent with grow operation — Observations of police and information from digital recording ammeter basis for warrant to search residence — Whether reasonable expectation of privacy existed in the information obtained from the digital recording ammeter — Whether installation of digital recording ammeter violated the rights of the accused to be secure against unreasonable search and seizure — Canadian Charter of Rights and Freedoms, s. 8 — Electric Utilities Act, S.A. 2003, c. E-5.1 — Code of Conduct Regulation, Alta. Reg. 160/2003

Police — Powers — Search powers — Warrantless request by police to electric utility company for installation of digital recording ammeter to measure flow of electricity into a residence suspected of housing a marijuana grow operation — Information from digital recording ammeter indicating pattern consistent with grow operation — Observations of police and information from digital recording ammeter basis for warrant to search residence — Whether police search powers exercised in manner that infringed right of accused to be secure against unreasonable search — Canadian Charter of Rights and Freedoms, s. 8.

An officer with the Calgary Police Service Drug Unit informed the Southern Alberta Marijuana Investigation Team about a residence in Calgary that he believed might be involved in producing marijuana. That same afternoon, officers conducted a reconnaissance of the residence and made inquiries of neighbours. Based on the observations of the officers and the neighbours questioned, the police contacted the utility company to request the installation of a digital recording ammeter (“DRA”) which would measure electrical power flowing into the residence which was owned by G. The resulting DRA graph showed a pattern of cycling of approximately 18 hours, a pattern consistent with a marijuana grow operation. An officer re-attended at G’s residence to conduct a second external viewing. On the basis of her observations and the information provided to her, including the DRA graph, the officer obtained a search warrant. As a result of the search, the police seized 165.33 kilograms of bulk marijuana, 206.8 grams of processed and bagged marijuana located in a freezer, and numerous items relating to a marijuana grow operation. G was charged with possession of marijuana for the purposes of trafficking and production of marijuana and theft of electricity. A *voir dire* was conducted to consider G’s application to exclude the evidence disclosed by the search on the basis that no warrant had been obtained prior to the installation of the DRA. The trial judge relied on the *Code of Conduct Regulation* made pursuant to Alberta’s *Electric Utilities Act* as statutory support for police access to the DRA data. The DRA evidence was therefore admitted and G was found guilty of the drug-related offences. A majority of the Alberta Court of Appeal allowed G’s appeal and ordered

a new trial, concluding that G had a subjective expectation of privacy in the DRA information which was also objectively reasonable. The majority further concluded that the *Regulation* could not be interpreted to imply the homeowner's consent to allow a utility company to gather information at the request of the state.

Held (McLachlin C.J. and Fish J. dissenting): The appeal is allowed and the conviction entered at trial is restored.

Per Deschamps, Charron, Rothstein and Cromwell JJ.: A critical factual consideration, on which much of the disagreement in this case turns, is the degree to which the use of DRA technology reveals private information. The evidence was that marijuana grow operations are not investigated using only DRA data and that DRA technology is employed late in an investigation and after conventional investigative methods support the inference that marijuana is being grown in the home. DRA data are used as one more investigative tool to dispel the belief that a grow operation is on the premises and even operate in favour of the defence in approximately half of the times. The importance of what the DRA discloses and what inferences the DRA data support is central to this case. The findings of the lower court concluding that a reasonable expectation of privacy in the DRA data does exist because some information about what is taking place in a house could be inferred are not supported by any evidence on the record. The DRA is a technique that reveals nothing about

the intimate or core personal activities of the occupants. It reveals nothing but one particular piece of information: the consumption of electricity.

Before reaching the question of whether a search is reasonable within the meaning of the *Charter*, the accused must first establish that a reasonable expectation of privacy existed to trigger the protection of s. 8. The facts of this case straddle two privacy interests recognized in the jurisprudence: informational and territorial. There is every reason, however, for proceeding with caution when deciding what independent constitutional effect disclosure clauses similar to those in the *Regulation* may have on determining a reasonable expectation of privacy.

Determining the expectation of privacy requires examination of whether disclosure involved biographical core data, revealing intimate and private information for which individuals rightly expect constitutional privacy protection. The appropriate question is whether the information is the sort that society accepts should remain out of the state's hands because of what it reveals about the person involved, the reasons why it was collected, and the circumstances in which it was intended to be used. The combined effect of the *Regulation* and s. 487.014 of the *Criminal Code* establishes that not only was there no statutory barrier to the utility company's voluntary cooperation with the police request, but express notice that such cooperation might occur existed. This is one factor amongst many which must be weighed in assessing the totality of the circumstances. The central issue in this case is thus whether the DRA discloses intimate details of the lifestyle and personal

choices of the individual that form part of the biographical core data protected by the *Charter*'s guarantee of informational privacy. The evidence available on the record offers no foundation for concluding that the information disclosed by the utility company yielded any useful information at all about household activities of an intimate or private nature that form part of the inhabitants' biographical core data. The DRA's capabilities depend of course on the state of the technology at the time of its use. As DRA technology now stands, it is not capable of giving access to the occupants' personal information. Instead, the DRA data merely yield an additional piece of information to evaluate suspicions — based on an independent evidentiary foundation — police already have about a particular activity taking place in the home.

A final factor affecting the informational privacy analysis is the fact that G's interest in the electricity use data was not exclusive. G's electricity consumption history was not confidential or private information which he had entrusted to the utility company. As the supplier of electricity, the utility company had a legitimate interest of its own in the quantity of electricity its customers consumed. Consequently, it is beyond dispute that the utility company was within its rights to install a DRA on a customer's line on its own initiative to measure the electricity being consumed. The utility company was not an interloper exploiting its access to private information to circumvent the *Charter* at the behest of the state; rather, its role is limited to the wholly voluntary cooperation of a potential crime victim.

While a territorial privacy interest involving the home is a relevant aspect of the totality of the circumstances informing the reasonable expectation of privacy determination, the *Charter*'s protection of territorial privacy in the home is not absolute. Where, as in the case at bar, there was no direct search of the home itself, the informational privacy interest should be the focal point of the analysis. The fact that the home was the focus of an otherwise non-invasive and unintrusive search should be subsidiary to what the investigative technique was capable of revealing about the home and what information was actually disclosed. The fact that the search includes a territorial privacy aspect involving the home should not be allowed to inflate the actual impact of the search to a point where it bears disproportionately on the expectation of privacy analysis.

Per Binnie, LeBel and **Abella** JJ. — Throughout the development of its s. 8 jurisprudence, the Court has consistently recognized the overriding constitutional importance of the privacy interests connected with activities taking place inside the home. Given the overriding significance of protecting these privacy interests, the concerns regarding the warrantless use of DRAs are well founded. And this case may well have been differently decided but for a crucial factor: the relationship between G and his utilities provider is governed by a recently enacted public statute, which entitles G to request confidentiality of his customer information. He made no such request. Nor did he challenge the constitutionality of the relevant provision. This

combines to determinately erode the objective reasonableness of any expectation of privacy in the DRA data.

DRA data indicating a certain cyclical pattern permits a strong inference of the presence of a marijuana grow operation in a residence. The existence of such activity is presumptively information about which individuals are entitled to expect privacy because it is information about an activity inside the home and is, therefore, personal information. The fact that the activity is criminal does not, under our jurisprudence, remove it from the expectation of and entitlement to privacy protection and, therefore, the requirement of a warrant. The DRA is a surveillance technique that yields usually reliable inferences as to the presence within the home of one particular activity: a marijuana grow operation.

The fact, however, that the customer in this case can request that his or her information be protected means essentially that under the *Code of Conduct Regulation*, the customer is presented with the unrestricted ability to control the expectation of privacy in his or her relationship with the utility company. G made no such request, yet urges the Court to treat his expectation of privacy as if he had. There is no room for interpretive creativity in this case because there is no ambiguity in the language of the provisions. DRA information, whenever it is collected, is, necessarily, “customer information” pursuant to the *Regulation* and, as such, information under s. 10(3)(f) of the *Regulation* that can be collected by the utility company and disclosed “without the customer’s consent” to the police investigating

an offence. An examination of the totality of the circumstances involves consideration of all, not just some, of the relevant circumstances. There can be no examination of the totality of the relevant circumstances without including the fact that the *Regulation* exists. It cannot, therefore, be seen as neutral or irrelevant. The contractual terms the *Regulation* creates are not only clear and unambiguous; they are also clearly relevant to an objective assessment of the reasonableness of any expectations of privacy G may have had in the DRA information, regardless of whether he decided to inform himself of the legal parameters of his relationship with his utility provider. When considered among all the circumstances of this case, the legislative authority provided by the *Regulation* is in fact determinative and leads to the conclusion that any expectation of privacy that G may have had was objectively unreasonable. In the absence of a reasonable expectation of privacy, the collection of the DRA information in this case did not constitute a “search” within the meaning of s. 8.

Per McLachlin C.J. and Fish J. (dissenting): This appeal raises core issues regarding the protection of privacy safeguarded by s. 8 of the *Charter*. When we subscribe for public services, we do not authorize the police to conscript the utilities concerned to enter our homes, physically or electronically, for the purpose of pursuing their criminal investigations without prior judicial authorization. Considering the totality of the circumstances, a reasonable person would not accept that the type of information at issue, collected for the reasons and in the manner that it was, should be freely available to the state without prior authorization. G is presumed

to have a subjective expectation of privacy within his home. The existence of an obscure regulation that the reasonable person is unlikely to understand does nothing to render G's subjective expectation objectively unreasonable. G had a reasonable expectation of privacy in the DRA data, the intrusion and transmittal of the information gleaned constituted a search and this search was not authorized by law.

A search occurs when state conduct interferes with an individual's reasonable expectation of privacy. Whether an expectation of privacy is reasonable depends on whether the individual concerned has (1) a subjective expectation of privacy in the subject matter of the alleged search, and (2) whether that subjective expectation is objectively reasonable. The test for subjective expectation of privacy is a low hurdle and individuals are presumed to have a subjective expectation of privacy regarding information about activities within the home. Thus, resolution of this issue turns on whether G's expectation of privacy was objectively reasonable. The factors relevant to determining an objectively reasonable expectation of privacy include the subject matter of the search, the place of the search, whether the privacy interest was abandoned or waived, the degree of intrusiveness, and, in some cases, the presence of a regulatory framework that would diminish any expectation of privacy. In our view, the resolution of this issue turns on the last two factors above: the degree of intrusiveness and the presence of a regulatory framework.

We begin with the issue of intrusiveness. While the DRA does not indicate the source of electrical consumption within the residence, it produces

detailed information as to the amount of electricity being used in a home and when it is being used. In addition, DRAs are extremely accurate in disclosing the existence of plant growing operations within a house. The fruits of a search need not produce conclusive determinations about activities within a home in order to be considered informative and thus intrusive. The significance of the DRA data derives from its utility in making informed predictions concerning the probable activities taking place within a home. Predictions of this sort, while not conclusive, nonetheless convey useful private information to the police. Such evidence of criminal activity, or of a connection to criminality, has previously been considered by this Court to be very personal biographical information.

The constitutionality of a search does not hinge on whether there are even more intrusive search methods the police could have improperly used. It is unhelpful to compare a DRA search conducted without a warrant to a physical search conducted with a warrant. It is hardly apparent that the use of DRAs will reduce the total intrusion into a suspect's territorial privacy as the use of a DRA only serves as a substitute for a physical search of a suspect's home if the police could have obtained a warrant to search the home.

The remaining issue in determining whether a search occurred is whether the *Regulation* negates or reduces the objectively reasonable privacy interest the other factors suggest. A reasonable person would not have concluded that his or her expectation of privacy in activities inside the home was negated because of the

Regulation. The average consumer signing up for electricity cannot be expected to be aware of the details of a complex regulatory scheme which permits the utility company to pass information on electricity usage to the police, especially when a presumption of awareness operates to, in effect, narrow the consumer's constitutional rights. In addition, if they were made aware of the *Regulation* — something that did not happen in this case — reasonable consumers would likely not read it as permitting the intrusion at issue. Finally, although the *Regulation* is not a criminal law, the provisions relied upon by the Crown are explicitly criminal rather than regulatory in purpose. We conclude that G had a reasonable expectation of privacy in the DRA data and that the intrusion and transmittal of the information gleaned thus constituted a search.

If a search is established, the court must then determine whether the search was reasonable. The search in this case was not reasonable. The warrantless use of the DRA was not shown to be reasonably necessary to the police activity, as the police unit in this case has demonstrated by virtue of its general policy of applying for warrants before attaching DRAs to transformers located on private property. Moreover, while the *Regulation* permits the disclosure of “customer information”, it does not authorize the utility company to operate as an agent for the police for the purpose of spying on consumers. The DRA data that concerns us here was not pre-existing information in a utility company subscriber's file. Although the utility company might have chosen to collect this data on its customers on its own initiative and for its own purposes, it neither did so nor manifested any intention to do

so in this case. Accordingly, it has not been demonstrated that the search was authorized by law and as such, G's rights under s. 8 of the *Charter* were infringed. We would affirm the judgment of the Court of Appeal and dismiss the appeal against that judgment to this Court.

Cases Cited

By Deschamps J.

Referred to: *R. v. Plant*, [1993] 3 S.C.R. 281; *R. v. Cheung*, 2005 SKQB 283, 267 Sask. R. 214, rev'd 2007 SKCA 51, 293 Sask. R. 80; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *R. v. Edwards*, [1996] 1 S.C.R. 128; *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432; *R. v. Kang-Brown*, 2008 SCC 18, [2008] 1 S.C.R. 456; *R. v. Patrick*, 2009 SCC 17, [2009] 1 S.C.R. 579; *R. v. Collins*, [1987] 1 S.C.R. 265; *R. v. Colarusso*, [1994] 1 S.C.R. 20; *R. v. Johnston*, [2002] A.J. No. 843 (QL); *R. v. Evans*, [1996] 1 S.C.R. 8; *R. v. Silveira*, [1995] 2 S.C.R. 297; *R. v. Feeney*, [1997] 2 S.C.R. 13.

By Abella J.

Referred to: *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *R. v. Jarvis*, 2002 SCC 73, [2002] 3 S.C.R. 757; *R. v. Plant*, [1993] 3 S.C.R. 281; *R. v. Edwards*, [1996] 1 S.C.R. 128;

R. v. Wise, [1992] 1 S.C.R. 527; *R. v. Patrick*, 2009 SCC 17, [2009] 1 S.C.R. 579; *R. v. Colarusso*, [1994] 1 S.C.R. 20; *R. v. Silveira*, [1995] 2 S.C.R. 297; *R. v. Feeney*, [1997] 2 S.C.R. 13; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559; *R. v. Rodgers*, 2006 SCC 15, [2006] 1 S.C.R. 554; *Charlebois v. Saint John (City)*, 2005 SCC 74, [2005] 3 S.C.R. 563.

By McLachlin C.J. and Fish J. (dissenting)

R. v. Law, 2002 SCC 10, [2002] 1 S.C.R. 227; *R. v. Nolet*, 2010 SCC 24, [2010] 1 S.C.R. 851; *R. v. Buhay*, 2003 SCC 30, [2003] 1 S.C.R. 631; *R. v. Edwards*, [1996] 1 S.C.R. 128; *R. v. M. (M.R.)*, [1998] 3 S.C.R. 393; *R. v. Collins*, [1987] 1 S.C.R. 265; *R. v. Caslake*, [1998] 1 S.C.R. 51; *R. v. Dersch*, [1993] 3 S.C.R. 768; *British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3; *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432; *R. v. Plant*, [1993] 3 S.C.R. 281; *R. v. Kang-Brown*, 2008 SCC 18, [2008] 1 S.C.R. 456; *R. v. Waterfield*, [1963] 3 All E.R. 659; *Dedman v. The Queen*, [1985] 2 S.C.R. 2.

Statutes and Regulations Cited

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

Code of Conduct Regulation, Alta. Reg. 160/2003, ss. 1(e), 10(1), (3)(f).

Controlled Drugs and Substances Act, S.C. 1996, c. 19, ss. 5(2), 7(1).

Criminal Code, R.S.C. 1985, c. C-46, ss. 326(1)(a), 487, 487.014.

Electric Utilities Act, S.A. 2003, c. E-5.1.

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Lerner, Jack I., and Deirdre K. Mulligan. “Taking the ‘Long View’ on the Fourth Amendment: Stored Records and the Sanctity of the Home”, 2008 *Stan. Tech. L. Rev.* 3.

Ontario. Information and Privacy Commissioner. “SmartPrivacy for the Smart Grid: Embedding Privacy into the Design of Electricity Conservation”. Ontario: The Future of Privacy Forum, November 2009.

Westin, Alan F. *Privacy and Freedom*. New York: Atheneum, 1970.

APPEAL from a judgment of the Alberta Court of Appeal (Berger, O’Brien and Martin JJ.A.), 2009 ABCA 276, 11 Alta. L.R. (5th) 73, 460 A.R. 150, 462 W.A.C. 150, 247 C.C.C. (3d) 119, 70 C.R. (6th) 81, 197 C.R.R. (2d) 199, [2010] 1 W.W.R. 642, [2009] A.J. No. 892 (QL), 2009 CarswellAlta 1250, setting aside the accused’s conviction and ordering a new trial. Appeal allowed, McLachlin C.J. and Fish J. dissenting.

Ronald C. Reimer and Susanne Boucher, for the appellant.

Charles R. Stewart, Q.C., and David Andrews, for the respondent.

Christine Tier, for the intervener the Attorney General of Ontario.

Brigitte Bussières and *Gilles Laporte*, for the intervener the Attorney General of Quebec.

David S. Rose and *John J. Navarrete*, for the intervener the Canadian Civil Liberties Association.

The judgment of Deschamps, Charron, Rothstein and Cromwell JJ. was delivered by

DESCHAMPS J. —

[1] After an investigation raised suspicions that a marijuana grow operation was likely located in Mr. Gomboc’s home, police approached the utility providing electricity to the home (“Enmax”) and requested that they install a digital recording ammeter (“DRA”) on its power line. A DRA allows electricity use to be recorded and allows disclosure of patterns of electricity use closely associated with marijuana grow operations. This appeal raises the question of whether Mr. Gomboc had a reasonable expectation of privacy in information about the pattern of use of electricity disclosed by the DRA. In my view, no reasonable expectation of privacy in that information arises in this case. Section 8 of the *Canadian Charter of Rights and Freedoms* is therefore not engaged and the decision of the Alberta Court of Appeal (2009 ABCA 276, 11 Alta. L.R. (5th) 73) should be reversed.

[2] I have read the reasons of the Chief Justice and Fish J. I take a different approach to the principles applicable and do not agree with their view of the evidence adduced in this case. I have also read the reasons of my colleague Abella J. and agree with her conclusion on the outcome of this case. My reasons for doing so do not rely solely on the governing regulatory scheme but depend instead on the totality of the circumstances. The nature and quality of the information in this case, its remoteness from the “biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state” (*R. v. Plant*, [1993] 3 S.C.R. 281, at p. 293), and the legislative scheme permitting disclosure of customer information to authorities investigating an offence combine to weigh against finding a reasonable expectation of privacy in this case.

1. Facts and Background

[3] The chronology of events surrounding the police investigation and the installation of the DRA is set out in the reasons of Abella J. and need not be repeated. However, further comments on DRA technology and what it discloses are necessary to explain why the totality of the circumstances must be assessed in reaching the outcome of this case.

[4] Evidence about the DRA was supplied by the testimony of Detective Sergeant Roger Morrison of the Calgary Police, who was the sole expert to testify. He described a DRA as a small electrical meter that measures power in one-amp

increments. It is installed by Enmax on the power line delivering electricity to a suspected home either in an underground transformer or in a transformer box located above ground. If the transformer is not situated on the suspect's property, as in the present case, the police simply ask Enmax to install the device on the power line. If the transformer is located on the suspect's property, police obtain a warrant to gain lawful access to it.

[5] The DRA usually remains on the power line for five days, measuring the flow of electricity into the house. The information it records is used to produce a graph which displays the pattern of electricity use. Investigators then analyze the graph to detect cyclical patterns of electricity use over 12 or 18 hours which support the inference that marijuana is being grown on the premises. The electricity use patterns correspond to 12- and 18-hour periods when lights attached to timers are shone on the marijuana plants to stimulate growth. The periods when the lights are in use are reflected in higher electrical usage on the graph (A.R., at pp. 97-99).

[6] A critical factual consideration, on which much of the disagreement in this case turns, is the degree to which the use of DRA technology reveals private information. It is common ground that the distinctive electricity use patterns disclosed by the DRA data support a strong inference that a grow operation is on the premises. Such grow operations often involve marijuana. However, the existence of these distinctive electricity use patterns, though strongly correlated with a marijuana grow operation, does not establish that marijuana is the crop being grown.

[7] I agree with the Chief Justice and Fish J. (at para. 123) that evidence revealed need not be conclusive to be intrusive, but in this case, contrary to their assertion, there was evidence as to the predictive value of the DRA data. Indeed, Det. Sgt. Morrison also gave evidence about what is not revealed by DRA technology in its current form. The evidence is that there was absolutely no reliable inference to be made concerning the occupants or their activities in the house besides the grow operation. Indeed, Det. Sgt. Morrison was asked whether the DRA data disclosed any of the following:

- how many occupants live in the residence
- whether any occupants are home at a particular time
- whether anyone is watching television
- whether anyone is using a computer
- whether anyone is listening to a stereo
- whether anyone is taking a bath, sitting in a hot tub, or showering
- whether anyone is cooking or washing dishes
- the gender of the occupants
- the political affiliation of the occupants
- the sexual orientation of the occupants
- where electricity is being used in the house
- whether any electrical devices are on a timer

His answer to each was “no”. I find in his answers no room for speculation as to the possibility of DRA data disclosing any information the nature of which Det. Sgt. Morrison said could not be revealed.

[8] Though DRA data are highly reliable predictors of a marijuana grow operation, Det. Sgt. Morrison testified that false positives can and do occasionally occur. In one instance, the distinctive electricity use patterns usually associated with

a marijuana grow operation resulted from electricity being used to grow orchids (A.R., at p. 103).

[9] Investigators analyzing DRA data must therefore always be alert to the possibility that suspicious electricity use patterns might result from an energy-intensive grow operation involving a legitimate crop. Det. Sgt. Morrison's testimony indicates that they are.

[10] The evidence was that marijuana grow operations are not investigated using only DRA data and that DRA technology is employed late in an investigation typically initiated following a tip from an organization such as Crime Stoppers and after conventional investigative methods — visual surveillance of suspicious premises, like observing irregular driving patterns, the way the house and yard are kept etc., conversations with neighbours, research about the home available in public records — support the inference that marijuana is being grown in the home. The hypothetical question of whether DRA data alone can provide sufficient evidence to obtain a search warrant was not put to Det. Sgt. Morrison, and the reasons for not using these data alone were not given by the witness. However, put in context, his testimony reveals that use of DRA data is the culminating point of the investigation:

Q Are marijuana grow operation investigations conducted in Calgary using only the results of digital recording ammeters?

A No.

Q Please explain.

A The entire investigation -- it's quite a long and arduous procedure. It is again the full reconnaissance of the property, full research of the area, possible discussions with area residents. All of these -- and possible surveillance. All of these -- possibly a [FLIR]. All of these are investigative aids. The DRA is -- we do it at the end of the investigation, and this is just yet another investigative aid we use to determine if we believe there's a marijuana grow operation lurking in the home. [A.R., at p. 100]

[11] In fact, DRA data are also used as one more investigative tool to dispel the belief that a grow operation is on the premises. They even operate in favour of the defence in approximately half of the times:

Q You indicated earlier that you have reviewed approximately 800 graphs --

A Yes.

Q -- produced by digital recording ammeters, but in only about 400 of those cases search warrants have been applied for and granted.

A Yes.

Q Please explain why that is.

A Well, in the investigation, we may have some indications or some signs through the investigations that a marijuana grow operation may be present. However, placing or getting a returned graphical printout has showed that it would be inconsistent in that home to have a marijuana grow operation, so we have not executed a search warrant.

So although we may have had reasonable and probable grounds to enter on a search warrant for a marijuana grow operation, essentially the DRA graph has eliminated that home, and so we did not go in. [A.R., at pp. 103-104]

In that sense, DRA data serve to end an investigation and protect a suspect against more intrusive techniques.

[12] Thus, as Det. Sgt. Morrison indicated, the DRA data are sometimes used even if the police already have reasonable and probable grounds to believe that illegal activities are being conducted in a house. It follows that the legal issue the use of DRA data raises does not depend on whether or not the Crown, in this case, made a concession on the lack of reasonable grounds to obtain a search warrant. It suffices to point out that the questionable nature of that concession was even mentioned by Martin J.A. in his reasons for judgment in this case.

[13] We must therefore proceed on the following factual footing: the DRA measurements reveal the quantity of electricity being used in one-ampere increments over a period of time. Over several days, the DRA can be configured to record a pattern of electrical usage. Those patterns in turn can be interpreted by a person with expertise investigating marijuana grow operations to support the inference that a grow operation exists on the premises. A grow operation is strongly correlated with the likelihood that marijuana is the crop being grown on the premises but the relationship between the two is not absolute. In practice, the police use the DRA data, along with other fruits of their investigation, to show that there are reasonable and probable

grounds justifying the issuance of a warrant to search the house for evidence of a growing operation producing marijuana.

[14] The importance of what the DRA discloses and what inferences the DRA data support is central to this case. Lower courts concluding that a reasonable expectation of privacy in the DRA data does exist have speculated that some information about what is taking place in a house could be inferred (see, e.g. *R. v. Cheung*, 2005 SKQB 283, 267 Sask. R. 214, at paras. 45-62, where the case law is reviewed, rev'd 2007 SKCA 51, 293 Sask. R. 80). For example, Martin J.A. in the Alberta Court of Appeal wrote: "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. This applies to all homes, regardless as to whether they are being used for marijuana grow operations" (para. 17). In the same vein, the Ontario Privacy Commissioner voiced concerns about the prospect of smart meters revealing information about activities taking place in the home, a factor which the intervener the Canadian Civil Liberties Association ("CCLA") submits should militate in favour of recognizing a reasonable expectation of privacy in the case at bar. These assertions are not supported by any evidence on the record. They are only speculations on techniques that have not been used or evaluated in this case. The only evidence adduced on this point is that of Det. Sgt. Morrison on behalf of the Crown, which contradicts any suggestion that the DRA data disclose anything more than the possibility of a grow operation in the house. While my colleague Abella J. finds the

DRA “intrusive enough to yield usually reliable inferences as to the presence within the home of one particular activity: a marijuana grow operation” (at para. 81), I am of the view that the DRA is a technique that is more protective of personal information than most other investigation techniques. It reveals nothing about the intimate or core personal activities of the occupants. It reveals nothing but one particular piece of information: the consumption of electricity.

[15] The DRA data adduced at trial are in graph form and are consistent with Det. Sgt. Morrison’s testimony about what information about the home is disclosed by the DRA. It is reproduced in an appendix to these reasons. The information turned over to police consists of a single-line graph recording patterns of electricity use over a five-day period. The untutored eye would derive very little meaning from viewing this chart. If told that the line graph represents electricity use in a house, it is possible to detect that amounts of electricity used in the house vary from day to day and over the course of a day. However, the graph shows nothing of the purposes for which the electricity is being used. The sum total of what an ordinary person would glean from the chart is the total consumption of electricity in the house and that use is variable and not constant, the latter fact being obvious to anyone familiar with the routine of a home. Any further inferences regarding activities taking place in the home require not only specialized training in the interpretation of the DRA graph but, most importantly, additional information about the home obtained from other sources.

[16] The following analysis proceeds in accordance with this factual backdrop.

2. Analysis

2.1 *Applicable Legal Principles*

[17] This Court's foundational decision in *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, established that s. 8 of the *Charter* protects a right to privacy. Principles delineating the right to privacy laid down in *Hunter* apply with equal force today. Section 8 of the *Charter* protects "people, not places" (p. 159). Like all *Charter* rights, the s. 8 right to privacy is not absolute — instead, the *Charter* protects a reasonable expectation of privacy. Dickson J. (as he then was) framed determination of a reasonable expectation of privacy in the following terms:

The guarantee of security from unreasonable search and seizure only protects a reasonable expectation. This limitation on the right guaranteed by s. 8, whether it is expressed negatively as freedom from "unreasonable" search and seizure, or positively as an entitlement to a "reasonable" expectation of privacy, indicates that an assessment must be made as to whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement. [Emphasis in original; pp. 159-60.]

[18] In *R. v. Edwards*, [1996] 1 S.C.R. 128, a majority of this Court held that a "reasonable expectation of privacy is to be determined on the basis of the totality of

the circumstances” (para. 45). In subsequent cases, the reasonable expectation of privacy analysis proceeded in two steps, asking whether the accused had a subjective expectation of privacy and whether that expectation of privacy was objectively reasonable (*R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432, at para. 19; *R. v. Kang-Brown*, 2008 SCC 18, [2008] 1 S.C.R. 456; and *R. v. Patrick*, 2009 SCC 17, [2009] 1 S.C.R. 579).

[19] In *Tessling*, Binnie J. wrote that because privacy is a varied and wide-ranging concept, the s. 8 jurisprudence has evolved to recognize a number of privacy interests, namely:

(i) personal privacy, involving bodily integrity and the right not to have our bodies touched or explored;

(ii) territorial privacy, involving varying expectations of privacy in the places we occupy, with privacy in the home attracting heightened protection because of the intimate and private activities taking place there;

(iii) informational privacy, involving “the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others” (at para. 23, quoting A. F. Westin, *Privacy and Freedom* (1970), at p. 7).

Tessling also recognized that these categories, though analytically useful, do not necessarily exist in isolation and may overlap.

[20] If, in the first instance, a reasonable expectation of privacy is determined to exist, a search intruding upon that interest will engage s. 8 of the *Charter*. Because the *Charter* protects only against unreasonable searches, the next step after a reasonable expectation of privacy has been established is to inquire whether the search is reasonable. A search involving a *Charter*-protected privacy interest will be reasonable if the police are authorized by law to conduct the search, if the law authorizing the search is reasonable, and if the search is conducted in a reasonable manner (*R. v. Collins*, [1987] 1 S.C.R. 265, at p. 278). In most cases, this requires obtention of a search warrant requiring police to satisfy a judicial authority that there are reasonable and probable grounds to believe that a search will reveal evidence of an offence (see, e.g., *Criminal Code*, R.S.C. 1985, c. C-46, s. 487). In certain situations where only a lowered expectation of privacy is recognized, police must instead have a reasonable suspicion that a search will uncover evidence of an offence before they may undertake it (see, e.g., *Kang-Brown*). Where no reasonable expectation of privacy is established, no threshold justification is required because the search does not trigger *Charter* protection (see, e.g., *Patrick*).

[21] Thus, before reaching the question of whether a search is reasonable within the meaning of the *Charter*, the accused must first establish that a reasonable

expectation of privacy existed to trigger the protection of s. 8. It is this issue which I now address.

2.2 A Reasonable Expectation of Privacy in Home Electricity Use Information

[22] The present case straddles two categories of privacy interests recognized in the jurisprudence. The primary privacy interest asserted is a claim to informational privacy protecting the electricity use information which Enmax obtained after installing the DRA and turned over to the police. Territorial privacy is also relevant because the information sought involved an activity taking place within Mr. Gomboc's home.

[23] The facts of this case also place it at the intersection of two of the Court's earlier cases where informational and territorial privacy interests overlapped. The first is *Plant*, which established that a homeowner has no expectation of privacy in electricity use records maintained by a utility. The circumstances of this case also resemble those in *Tessling*, where the privacy interest asserted involved heat patterns emanating from a private home and photographed by police overflying it in an aircraft. In both cases, information was sought because it was capable of supporting in some measure the inference that marijuana was being grown in a private home. The principles laid down in both cases consequently have considerable relevance to the case at bar, although their applicability must take into account the peculiarities of this case, notably Enmax's role as a third party cooperating with a police request and

the *Code of Conduct Regulation*, Alta. Reg. 160/2003, governing the confidentiality of Enmax's customer information. Informational and territorial privacy remain useful tools for organizing the analysis, and they provide the headings under which I assess whether the expectation of privacy asserted is objectively reasonable. I reiterate before undertaking that analysis that context is crucial and that reasonable expectation of privacy is assessed in the totality of the circumstances.

2.2.1 Subjective Expectation of Privacy

[24] The available evidence makes clear that Mr. Gomboc exhibited a strong desire for privacy in his habits of electricity use. The electricity meter on the property — the usual device employed to measure the quantity of electricity being used in a home — had been deliberately bypassed to prevent it from performing this function. The only reason can be a desire to shield his electricity use from detection.

[25] In addition, the Court recognized in *Patrick* that a subjective expectation of privacy can be presumed in respect of activities taking place in the home (para. 37).

[26] I conclude, then, that Mr. Gomboc did exhibit a subjective expectation of privacy in the pattern of electricity use disclosed by the DRA monitoring.

2.2.2 Is the Expectation of Privacy Reasonable in the Totality of the Circumstances?

2.2.2.1 *The Informational Privacy Interest*

[27] The *Charter* guarantee of informational privacy protects the right to prevent certain personal information from falling into the hands of the state. The scope of constitutional protection will vary depending upon the nature of the information and the purpose for which it is made available (*R. v. Colarusso*, [1994] 1 S.C.R. 20, at p. 53; *Patrick*, para. 38).

[28] In *Plant*, Sopinka J. rejected a categorical approach to informational privacy, protecting only information that is “personal and confidential” (p. 293). He framed the constitutional protection given to informational privacy in the following purposive terms:

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. [p. 293]

Sopinka J. also outlined factors that could form the basis for a reasonable expectation of privacy which included: “the nature of the information itself, the nature of the relationship between the party releasing the information and the party claiming its confidentiality, the place where the information was obtained, the manner in which it was obtained and the seriousness of the crime being investigated” (p. 293).

[29] The facts underlying *Plant* are similar to those in the case at bar. The police had consulted electricity use records of a home as part of a marijuana grow operation investigation. Information about relative electricity use in the neighbourhood was included alongside visual observations about the home in an affidavit to obtain a search warrant. The accused's argument that the electricity consumption records were obtained through a warrantless search that violated s. 8 of the *Charter* was rejected by this Court for two reasons. The first involved the nature of the information, about which Sopinka J. said:

The computer records investigated in the case at bar while revealing the pattern of electricity consumption in the residence cannot reasonably be said to reveal intimate details of the appellant's life since electricity consumption reveals very little about the personal lifestyle or private decisions of the occupant of the residence. [p. 293]

A further reason for rejecting the reasonable expectation of privacy claim took into account the relationship between the accused and the utility. That relationship did not involve confidence or a contractual obligation of confidentiality. Instead, the utility's policy was to permit police access to its electronic records via a password-protected computer. Electricity consumption records of a particular address were available to the public at large (p. 294).

[30] As in *Plant*, the nature and quality of the information disclosed by the DRA and the absence of an expectation of confidentiality in respect of Enmax's customer information form part of the totality of the circumstances informing the

reasonableness of the privacy expectation in the present case. I will examine the impact of each, starting with the absence of a confidentiality expectation.

[31] The terms governing the relationship between Enmax and its customers are highly significant. Mr. Gomboc's expectation of privacy is informed by the *Code of Conduct Regulation* enacted pursuant to the *Electric Utilities Act*, S.A. 2003, c. E-5.1. The regulations permit disclosure of customer information "to a peace officer for the purpose of investigating an offence if the disclosure is not contrary to the express request of the customer" (s. 10(3)(f)). Mr. Gomboc did not request that his customer information be kept confidential. The *Code of Conduct Regulation* dovetails with s. 487.014 of the *Criminal Code*, which confirms that a peace officer may ask a person to voluntarily provide information that the person is not otherwise prohibited by law from disclosing. Their combined effect establishes that not only was there no statutory barrier to Enmax's voluntary cooperation with the police request, but express notice that such cooperation might occur existed.

[32] Rather than concluding, as my colleague Abella J. does, that the legislative scheme is sufficient to erode the expectation of privacy in this case, I prefer to view it as one factor amongst many which must be weighed in assessing the totality of the circumstances. I do not need to pronounce on the issue of whether this legislative scheme alone is sufficient or not to dissolve any expectation of privacy. Taking that approach, I do not endorse the other extreme position taken by the Chief Justice and Fish J. that the average consumer could not be expected to know that

consumption data obtained by the electricity provider may be subject to varying degrees of confidentiality pursuant to relevant legislation. In our highly regulated energy supply environment, it would be unreasonable for anyone to expect energy data not to be dealt with in one way or another by the rules organizing that industry.

[33] That Enmax was at liberty to disclose the information weighs heavily against giving the asserted expectation of privacy constitutional recognition. However, in view of the multitudinous forms of information that are generated in customer relationships and given that consumer relationships are often governed by contracts of adhesion (while noting that in this case Mr. Gomboc was at liberty to prevent the disclosure but did not elect to do so), there is every reason for proceeding with caution when deciding what independent constitutional effect disclosure clauses similar to those in the *Code of Conduct Regulation* may have on determining a reasonable expectation of privacy.

[34] Even if the regulations had been silent on disclosure of energy consumption, the quality and nature of the information disclosed to the police would nonetheless have informed the totality of the circumstances surrounding the expectation of privacy. Determining the expectation of privacy requires examination of whether disclosure involved biographical core data, revealing intimate and private information for which individuals rightly expect constitutional privacy protection. This is consistent with Binnie J.'s comment in *Tessling* that the expectation of privacy is a "normative rather than a descriptive standard" (para. 42). Thus, the fact that the

person claiming an expectation of privacy in information ought to have known that the terms governing the relationship with the holder of that information allowed disclosure may not be determinative. Rather, the appropriate question is whether the information is the sort that society accepts should remain out of the state's hands because of what it reveals about the person involved, the reasons why it was collected, and the circumstances in which it was intended to be used.

[35] This brings us to the central issue in this case: whether the DRA discloses intimate details of the lifestyle and personal choices of the individual that form part of the biographical core data protected by the *Charter's* guarantee of informational privacy.

[36] The Chief Justice and Fish J., Abella J., and the majority in the Court of Appeal seem to accept that the DRA discloses some information about activities or lifestyle choices associated with the home. I do not share this conclusion. The evidence available on the record offers no foundation for concluding that the information disclosed by Enmax yielded any useful information at all about household activities of an intimate or private nature that form part of the inhabitants' biographical core data.

[37] The only evidence on the record is the uncontradicted expert testimony of Det. Sgt. Morrison. It is summarized above, but I reiterate that when presented with a list of private and intimate activities and asked whether the DRA revealed any

information about these activities, he answered “no”. The DRA data disclosed no personal information comparable to that contained in the garbage put out for collection in which this Court recently held that there was no reasonable expectation of privacy in *Patrick*. Indeed, the DRA reveals very little about what is taking place in the home. As the Saskatchewan Court of Queen’s Bench aptly noted, “the DRA would give no information at all as to the normal activities going on in the home and no intimate details of the occupants’ lifestyles” (*Cheung*, at para. 62). The Alberta Court of Queen’s Bench also noted that “a next-door neighbour or person on the street would likely have more information on what was going on in a house than the information obtained from the DRA” (*R. v. Johnston*, [2002] A.J. No. 843 (QL), at para. 6).

[38] Investigators evidently request installation of the DRA for a specific purpose. The DRA data support a strong inference that a grow operation is located in the home, which in turn is strongly correlated with the cultivation of marijuana. The respondent and my colleague Abella J. conclude that the data’s reliability in supporting the inference that a grow operation is present in the home weighs in favour of finding a reasonable expectation of privacy in that information. For the Chief Justice and Fish J., the strength of the inferences makes this case distinguishable from *Plant* and *Tessling*, where no expectation of privacy was found in heat signature and electricity consumption information also used to support the inference that a grow operation existed in a home. With respect for the contrary view, I disagree that the stronger inference that the DRA data support meaningfully distinguishes the

information it discloses from that in which this Court concluded that there is no reasonable expectation of privacy. As observed by the Saskatchewan Court of Appeal, the distinction involves a “difference of degree only and not a difference that changes the substantive result of the analysis” (*Cheung*, at para. 23). Indeed, the nature of the information has not changed nor is what was disclosed by the DRA about private and intimate activities in the home any more revealing than the information at issue in *Tessling* and *Plant*.

[39] Focussing on the inferential strength of the DRA data in isolation concentrates the analysis too narrowly. We must consider instead the totality of what it is capable of disclosing and the degree to which it invades the privacy of the residents of the home. The criminality of the activity the DRA discloses does not remove it from the ambit of *Charter*-protected privacy rights (*Patrick*, at para. 32). However, as this Court said in *Patrick*, “[t]he issue ought to be framed in terms of the privacy of the area or thing being searched and the potential impact of the search on the person [or thing] being searched, not the nature or identity of the concealed items” (para. 32). Viewed in this light, the DRA’s disclosure about electricity use has no greater impact than electricity consumption records or the home’s heat signature upon the occupants of the home and the privacy of their activities therein.

[40] The DRA’s capabilities depend of course on the state of the technology at the time of its use. We are cautioned by the intervener the CCLA about the looming prospect of smart meters being deployed across the country and the possibility of data

they record revealing how electricity is being used in homes. A similar concern arose in *Tessling* about the theoretical possibility of what FLIR technology might eventually reveal about activities in the home. The conclusion there applies with equal force to the case at bar:

[T]he reasonableness line has to be determined by looking at the information generated by *existing* FLIR technology, and then evaluating its impact on a reasonable privacy interest. If, as expected, the capability of FLIR and other technologies will improve and the nature and quality of the information hereafter changes, it will be a different case, and the courts will have to deal with its privacy implications at that time in light of the facts as they then exist. [para. 29]

The CCLA's submissions about smart meters raise concerns about theoretical capabilities and potential future uses of technology rather than realistic privacy concerns applicable in the present case. As DRA technology now stands, it is not capable of giving access to the occupants' personal information. Instead, the DRA data merely yield an additional piece of information to evaluate suspicions — based on an independent evidentiary foundation — police already have about a particular activity taking place in the home. Having concluded that the evidence adduced does not establish that the DRA is meaningfully more invasive of privacy than the electricity consumption records in *Plant* or the heat signatures in *Tessling*, I would, as this Court did in the latter case, leave the privacy implications of the more evolved technology to be decided when a comprehensive evidentiary record has been developed.

[41] A final factor affecting the informational privacy analysis and diminishing Mr. Gomboc's expectation of privacy in the information disclosed by the DRA is the fact that his interest in the electricity use data was not exclusive. His electricity consumption history was not confidential or private information which he had entrusted to Enmax. As the supplier of electricity, Enmax had a legitimate interest of its own in the quantity of electricity its customers consumed. Consequently, it is beyond dispute that Enmax was within its rights to install a DRA on a customer's line on its own initiative to measure the electricity being consumed. That it was not a regular practice by Enmax in no way diminished its freedom to install the DRA. It is also beyond dispute that if Enmax installed the DRA on its own initiative and discovered the same suggestive pattern of electricity use, it could have turned this information over to police.

[42] The Chief Justice and Fish J. take exception to what they variously describe as Enmax being co-opted or conscripted by the police to engage in a search which the authorities could not have conducted independently. They raise the spectre of letter carriers and delivery persons being asked to pry into private homes in the course of their ordinary duties. On the facts of this case, such comparisons are unavailing. Enmax was not an interloper exploiting its access to private information to circumvent the *Charter* at the behest of the state. As the Crown stresses in its submissions, Enmax's role is limited to the wholly voluntary cooperation of a potential crime victim. The coercive undertones evoked by describing Enmax as being co-opted or conscripted are entirely inapposite to the case at bar. As noted

above, if the police had merely notified Enmax of a potential electricity theft and the utility had proceeded on its own initiative to install a DRA and turn over what it disclosed, no *Charter* violation would have arisen. Only by misguidedly elevating form over substance would a contrary conclusion result solely because Enmax installed the DRA subsequent to a police request for cooperation. Indeed, as mentioned, it is clear from s. 487.014 of the *Criminal Code* that no prior judicial authorization is necessary to cooperate with an investigation provided disclosure of the information requested is not otherwise prohibited by law. As the *Code of Conduct Regulation* establishes no such prohibition, Enmax's role is of no import to the *Charter* analysis.

[43] Considerations relevant to the informational privacy analysis therefore lead to the conclusion that no expectation of privacy in the electricity consumption information was objectively reasonable. Disclosing information about electricity consumption is not invasive nor revelatory of the respondent's private life. It does not yield anything meaningful in terms of biographical core data that attracts constitutional protection. Disclosure was explicitly permitted by the applicable regulatory scheme. Enmax had an interest in the information, which was not entrusted to it with any expectation of confidentiality, and it employed legitimate means to gather the information. None of the factors relevant to the informational privacy analysis support a conclusion that the information in question was of the sort that attracts *Charter* protection.

2.2.2.2 *The Territorial Privacy Interest*

[44] The marijuana grow operation in this case was situated in Mr. Gomboc's home. The DRA data at issue disclosed information about electricity consumption taking place in the home. A territorial privacy interest involving the home is therefore a relevant aspect of the totality of the circumstances informing the reasonable expectation of privacy determination.

[45] The case law has long recognized a heightened constitutional expectation of privacy in our dwellings (*R. v. Evans*, [1996] 1 S.C.R. 8; *R. v. Silveira*, [1995] 2 S.C.R. 297; *R. v. Feeney*, [1997] 2 S.C.R. 13; *Tessling* and *Patrick*). Viewed purposively, the rationale behind the elevated expectation of privacy is that although s. 8 of the *Charter* protects “people, not places”, the home is where our most intimate and personal activities often take place (*Tessling*, at para. 22). In recognizing a heightened expectation of privacy in the home, the law thus employs “the notion of place as an analytical tool to evaluate the reasonableness of a person's expectation of privacy” (para. 22 (emphasis in original)).

[46] As is true of all constitutional rights, the *Charter's* protection of territorial privacy in the home is not absolute. The Constitution does not cloak the home in an impenetrable veil of privacy. To expect such protection would not only be impractical; it would also be unreasonable.

[47] In discharging their duties, many legitimate avenues are open to police seeking information about activities taking place in the home. As in the present case, they are free to view the home while in the public areas surrounding it. They may take up a position in a publicly accessible location and note what or who is entering and leaving the home. They may ask neighbours about what they have observed taking place around the home. None of this information, though capable to varying degrees of supporting inferences about what is taking place in the home, attracts *Charter* protection. Indeed, in the case at bar, police had already exhausted these legitimate means to build a foundation for the belief that a marijuana grow operation was taking place in the home. I note that they had already spoken to neighbours, learning that the living pattern of the occupants was odd for the neighbourhood; the neighbours had noticed unusual condensation, steam emanating from the house (the house was “sweating”), and closed blinds on many windows, and while standing on an adjacent public footpath, Constable McCallum could be “absolutely certain” that it was marijuana she was smelling.

[48] Also noteworthy here is that the home itself was never *directly* the object of a search. The location where the search took place was not the home but the transformer box where the power lines entering the home could be accessed. After some confusion in the courts below about whether the transformer was located on Mr. Gomboc’s property, it was common ground before this Court that it was not. Accordingly, no direct territorial privacy interest is engaged in this case.

[49] Recent cases have recognized overlapping informational and territorial privacy when activities suspected of taking place in the home are under investigation (*Tessling* and *Patrick*). Where, as in the case at bar, there was no direct search of the home itself, the informational privacy interest should be the focal point of the analysis. The fact that information about the home was being sought requires that the informational privacy analysis be alive to the heightened privacy interest that the law recognizes for our homes. However, although informational and territorial privacy interests concerning the home may overlap in certain situations, this Court held under similar circumstances in *Tessling* that the fact that a home was involved “is an important factor but it is not controlling and must be looked at in context and in particular ... in relation to the nature and quality of the information made accessible” by the alleged search (para. 45).

[50] Both the majority in the Court of Appeal and my colleagues place undue emphasis, in my view, on the fact that the information sought by police involved the home, effectively treating it as controlling without adequately addressing what it revealed about the home. The fact that the home was the focus of an otherwise non-invasive and unintrusive search should be subsidiary to what the investigative technique was capable of revealing about the home and what information was actually disclosed. I have analyzed the nature and quality of the information about the home and activities taking place therein and concluded that it reveals nothing meaningful related to the *Charter*’s protection of biographical core information of an intimate and personal nature. Where this is true, the fact that the search includes a

territorial privacy aspect involving the home should not be allowed to inflate the actual impact of the search to a point where it bears disproportionately on the expectation of privacy analysis.

[51] A final observation relevant to the territorial privacy aspect of this case is that the DRA as it is presently employed can in fact *enhance* overall territorial privacy. A DRA is generally used once the investigation is quite advanced to confirm or dispel suspicion of a marijuana grow operation founded on other evidence. When the DRA does not disclose electricity use cycles consistent with the presence of a marijuana grow operation in the home, police abandon the investigation. Where this happens, DRA technology enhances territorial privacy by ending an investigation before it proceeds to its most invasive stage: a thoroughgoing search of the home authorized by a search warrant. Viewed in the totality of the circumstances, then, the effects of the DRA on territorial privacy are by no means solely detrimental to privacy but in fact have actually spared numerous homeowners the inconvenience of police entering and searching their homes.

[52] Thus it would be a strange world if the police could have access to the electricity billing which yields less accurate information, but not to DRA data for the very reason that they are more accurate. Canadians would lose the benefit of this technology and would be exposed to more intrusive investigation methods.

[53] I would therefore conclude that nothing in the territorial privacy analysis displaces the conclusions I have drawn on the informational privacy aspects of this case.

3. Conclusion

[54] I would therefore allow the appeal and restore the conviction entered at trial.

The reasons of Binnie, LeBel and Abella JJ. were delivered by

ABELLA J. —

[55] In Alberta, the terms of the relationship between a homeowner and his or her utility company are set out by a recently enacted public statute (*Electric Utilities Act*, S.A. 2003, c. E-5.1, *Code of Conduct Regulation*, Alta. Reg. 160/2003 (“the *Regulation*”). One of those terms, set out in a clear and unambiguous provision, states that a homeowner can request the confidentiality of “customer information”. If this confidentiality is sought, the utility company cannot disclose the information to anyone, including the police. If, however, no such request is made, the utility company is authorized to disclose it to the police for the purpose of investigating an offence.

[56] This case involves a homeowner who did not request confidentiality. Nor did he challenge the constitutionality of the *Regulation*. As a result, the police were able to obtain information from the utility company about electricity consumption in his home. Inferences drawn from that information allowed the police to obtain a search warrant. The search of the home revealed a marijuana grow operation. The homeowner argued that the police conduct in obtaining the information from the utility company breached his expectations of privacy and triggered a violation of s. 8 of the *Canadian Charter of Rights and Freedoms*. To succeed, he was obliged to prove that his expectations were, objectively, reasonable.

[57] In my view, given the fact that the information emanated from his home, the most protected of privacy spheres, he may well have succeeded but for the existence of the *Regulation*, which makes any expectation of privacy objectively unreasonable. The issue is not whether the homeowner had a *subjective* expectation of privacy – he can reasonably be assumed to have had one. This case turns on the reasonableness of that expectation *objectively*. Because the *Regulation* dictates the terms of a homeowner's relationship with the utility company, it therefore also defines the *objective* reasonableness of the expectations he or she may reasonably have about any privacy interests inherent in that relationship.

[58] In the absence of either the homeowner's request for confidentiality or a *Charter* challenge, it is my respectful view that the 2003 public statute

determinatively diminished the objective reasonableness of the customer's expectation of privacy in this case and, accordingly, the strength of his s. 8 claim.

Background

[59] On January 27, 2004, Constable Steve Kelly of the Calgary Police Service Drug Unit informed Constable Patricia McCallum, also of the Drug Unit at that time, about a residence in Calgary that he believed, based on his observations, might be involved in producing marijuana. He had observed condensation, steam, and covered windows at the residence, and had smelled marijuana near it.

[60] That same afternoon, Constable McCallum and a partner from the RCMP conducted a reconnaissance of the residence as part of the Southern Alberta Marijuana Investigation Team ("SAMIT"), a joint forces operation between the Calgary Police Service and the RCMP. Constable McCallum made the following observations:

- Unlike other windows in the area, those of the residence under observation had varying levels of condensation, and some of its windows "appeared to be wet";
- Four of the five windows on the south side of the residence had blinds that were closed;

- The back of the residence was surrounded by a brown wooden fence, approximately six feet high, through which Constable McCallum could see patio doors and an adjacent window with closed blinds;
- Constable McCallum briefly caught the smell of growing marijuana while walking on the public pathway to the south of the house (about 10 to 15 feet back from the edge of the residence), and also caught this smell when standing in front of the residence, about 20 feet from it;
- Two vents on the north side of the residence had a buildup of ice;
- Unlike on other houses in the area, ice crystals, about six inches in length, were projecting out of the “chimney-type of opening” on the roof of the house and “steam-like condensation” was coming out of it;
- There was steam emanating from under the deck.

Constable McCallum also made inquiries of neighbours. They advised her that they had heard strange noises coming from inside the residence and had noticed things at the residence that were odd for the neighbourhood: condensation on the windows; an appearance that the house was “sweating”; open windows in the middle of the winter; and, in the evening, no lights when other houses had lights on. To Constable McCallum, these observations appeared to be consistent with a marijuana grow operation.

[61] Based on Constable McCallum's observations, the police contacted the utility company to request the installation of a digital recording ammeter ("DRA"). A DRA is a small electrical meter that measures electrical power flowing into a residence in one-amp increments. It is installed by the utility company, usually for an average of five days. After this period, a graph is produced by the utility company, showing electricity usage. Because marijuana is typically grown in 12- and 18- hour light cycles, patterns indicating such cyclical, high usage of electricity are often indicative of a marijuana grow operation within the home.

[62] The owner of the home was Daniel James Gomboc. Mr. Gomboc's electricity was supplied by Enmax, the electrical service provider for the area.

[63] The DRA was attached on January 29, 2004, and it remained in place until February 2, 2004. The DRA graph showed a pattern of cycling of approximately 18 hours, a pattern consistent with a marijuana grow operation.

[64] Constable McCallum re-attended at Mr. Gomboc's residence to conduct a second external viewing on February 2, 2004. She noted some new staining under one of the windows, changes in the levels of condensation, and that the ice stack on top of the roof had grown from six to eight inches in one week. A neighbour told Constable McCallum that he/she had observed a great deal of steam coming out of the vent on the roof of the residence, which continued through the evening and night, and

that a white male with no shirt on had opened the blinds on one of the windows, wiped off the condensation, and then closed the blinds again.

[65] On the basis of her observations and the information provided to her, including the DRA graph, Constable McCallum obtained a search warrant. As a result of the search, the police seized 165.33 kilograms of bulk marijuana, 206.8 grams of processed and bagged marijuana located in a freezer, and numerous items relating to a marijuana grow operation.

[66] On January 6, 2005, Mr. Gomboc was charged with possession of marijuana for the purposes of trafficking and production of marijuana contrary to ss. 5(2) and 7(1) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19. He was also charged with theft of electricity under s. 326(1)(a) of the *Criminal Code*, R.S.C. 1985, c. C-46.

[67] A *voir dire* was conducted at the beginning of the trial to consider Mr. Gomboc's application to exclude the evidence disclosed by the search on the basis that no warrant had been obtained prior to the installation of the DRA. Crown counsel at trial took the position that, on these facts, without the DRA evidence, there were no reasonable and probable grounds to obtain a search warrant. At the hearing before us, not surprisingly, the Crown questioned why such a concession had been made in the face of so much other physical evidence, but acknowledged that at this late stage of the process, it was bound by the trial Crown's position.

[68] At the *voir dire*, Detective Roger Morrison, a member of the SAMIT and an expert in the area of the investigation of marijuana grow operations, testified that while a DRA cannot provide information about many personal aspects of the home, it can help in determining whether a marijuana grow operation is taking place. In discussing the potential significance of DRA data, Detective Morrison stated:

We look for the cyclical pattern or cyclical use of electricity in growing marihuana.

...

What this graph allows us to do is it gives us information on approximate 12 and/or 18-hour [electricity] use. It allows us, with experience, to draw an inference on what the electrical use in there -- the inference that marihuana may be grown inside. It gives us reasonable and probable grounds.

He indicated that the level of amperage shown in the cycling pattern on the graph showing DRA data from Mr. Gomboc's house was "certainly not" consistent with electricity usage at a normal household, even if its residents had placed most or all of their electrical appliances on 12- or 18-hour timers.

[69] Detective Morrison also testified about the high degree of reliability of DRA data in identifying homes in which a marijuana grow operation is taking place. He indicated that in the approximately 400 cases in which he had seen DRA information used to obtain a search warrant, there was only one where no evidence of a marijuana grow operation was found.

[70] The trial judge, Erb J., relied on the *Regulation* as statutory support for police access to the DRA data. She held that the *Regulation* provides “legislative support for police access to the electrical consumption information and provid[es] a sense of what a citizen’s reasonable expectations of privacy regarding electrical consumption records are”. Since there was no evidence that Mr. Gomboc made any “express request” for any level of confidentiality of his electrical consumption records, as allowed by the *Regulation*, the *Regulation*’s effect was to considerably lessen the degree of privacy that he could expect in the information at issue. The DRA evidence was therefore admitted and Mr. Gomboc was found guilty of the drug-related offences. The Crown agreed to the dismissal of the theft of electricity charge.

[71] A majority in the Alberta Court of Appeal allowed Mr. Gomboc’s appeal and ordered a new trial (2009 ABCA 276, 11 Alta. L.R. (5th) 73). Martin J.A. concluded that Mr. Gomboc had a subjective expectation of privacy in the DRA information which was also objectively reasonable. He noted that the DRA technology was much more intrusive and revealing than the Forward Looking Infra-Red (“FLIR”) technology at issue in *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432, and “must, as a matter of common sense, also disclose biographical or private information”(para. 17). He also concluded that the *Regulation* could not be interpreted to imply the homeowner’s consent to allow a utility company to gather information at the request of the state.

[72] O'Brien J.A. dissented, concluding that Mr. Gomboc could not “reasonably expect privacy with respect to records of his electrical usage, when the law provides that such information may be disclosed to the police without his consent” (para. 86).

[73] For the reasons that follow, I agree with O'Brien J.A.'s conclusion.

Analysis

[74] Section 8 of the *Charter* states:

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

The issue in this appeal is whether the police investigative technique in this case of requesting Enmax to install a DRA without a warrant intruded on Mr Gomboc's reasonable expectation of privacy and violated s. 8 of the *Charter*.

[75] Since *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, it has been accepted that s. 8 of the *Charter* protects “people, not places”, including their right to privacy (p. 159). Dickson J. explained how s. 8 protects privacy interests:

The guarantee of security from unreasonable search and seizure only protects a reasonable expectation. This limitation on the right guaranteed by s. 8, whether it is expressed negatively as freedom from “unreasonable” search and seizure, or positively as an entitlement to a

“reasonable” expectation of privacy, indicates that an assessment must be made as to whether in a particular situation the public’s interest in being left alone by government must give way to the government’s interest in intruding on the individual’s privacy in order to advance its goals, notably those of law enforcement. [Emphasis in original; pp. 159-60.]

(See also *R. v. Jarvis*, 2002 SCC 73, [2002] 3 S.C.R. 757.)

[76] The personal nature of the protection was emphasized in *R. v. Plant*, [1993] 3 S.C.R. 281, where Sopinka J. concluded that while s. 8 protects “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” (at p. 293), there was no reasonable expectation of privacy in electrical billing records accessed via a computer terminal by the police:

The purpose of s. 8 is to protect against intrusion of the state on an individual’s privacy. The limits on such state action are determined by balancing the right of citizens to have respected a reasonable expectation of privacy as against the state interest in law enforcement. . . . It is, therefore, unnecessary to establish a proprietary interest in the thing seized.

...

Consideration of such factors as the nature of the information itself, the nature of the relationship between the party releasing the information and the party claiming its confidentiality, the place where the information was obtained, the manner in which it was obtained and the seriousness of the crime being investigated allows for a balancing of the societal interests in protecting individual dignity, integrity and autonomy with effective law enforcement. [pp. 291 and 293]

[77] And in *R. v. Edwards*, [1996] 1 S.C.R. 128, Cory J. clarified that the approach to s. 8 should take place in two steps:

There are two distinct questions which must be answered in any s. 8 challenge. The first is whether the accused had a reasonable expectation of privacy. The second is whether the search was an unreasonable intrusion on that right to privacy. [para. 33]

Thus, a particular activity will only constitute a “search” for the purposes of s. 8 of the *Charter* where an individual has a reasonable expectation of privacy in the information sought by that activity (*R. v. Wise*, [1992] 1 S.C.R. 527, at p. 533).

[78] The test in *Edwards* was further developed in *Tessling*, where Binnie J. confirmed that whether an individual has a reasonable expectation of privacy depends on the subject matter of the information sought, whether the individual had a direct interest in this subject matter, whether the individual had a subjective expectation of privacy in the subject matter, and whether such an expectation of privacy in the subject matter was also objectively reasonable (at para. 32; see also *R. v. Patrick*, 2009 SCC 17, [2009] 1 S.C.R. 579, at para. 27, *per* Binnie J.). The final branch of inquiry, focusing on the objective reasonableness of the expectation of privacy, may entail consideration of a wide array of relevant factors and circumstances. As La Forest J. wrote in *R. v. Colarusso*, [1994] 1 S.C.R. 20, at p. 53, “[t]he need for privacy can vary with the nature of the matter sought to be protected, the circumstances in which and the place where state intrusion occurs, and the purposes of the intrusion.” As such, the determination of whether a reasonable expectation of privacy exists must ultimately be assessed “in light of the totality of the circumstances of a particular case” (*Edwards*, at para. 31(emphasis added)).

[79] Throughout the development of this jurisprudence, the Court has consistently recognized the overriding constitutional importance of the privacy interests connected with activities taking place *inside the home* (*Plant*, at p. 302, *per* McLachlin J. (concurring in the result); *R. v. Silveira*, [1995] 2 S.C.R. 297, at para. 140, *per* Cory J.; *R. v. Feeney*, [1997] 2 S.C.R. 13, at para. 43, *per* Sopinka J.; *Tessling*, at paras. 13 and 22, *per* Binnie J.; *Patrick*, at paras. 19 and 40, *per* Binnie J., and at paras. 77, 79, and 83, *per* Abella J. (concurring in the result)).

[80] This brings us to the information in this case. A DRA measures the flow of electricity, in one-amp increments, going into a residence over a specific period of time, usually five days. It was unequivocally accepted by the courts and the parties in these proceedings that DRA data indicating a certain cyclical pattern permits a strong inference of the presence of a marijuana grow operation. The existence of such activity, in my view, is presumptively information about which individuals are entitled to expect privacy because it is information about an activity *inside the home*. The information is, therefore, personal information. The fact that the activity is criminal does not, under our jurisprudence, remove it from the expectation of and entitlement to privacy protection and, therefore, the requirement of a warrant (*Patrick*, at para. 32).

[81] As a result, I respectfully disagree with Deschamps J.'s conclusion that the DRA is insufficiently revelatory. I agree instead with Mr. Gomboc that the DRA data can in fact reveal more personal information about a customer than the billing

records at issue in *Plant* because of the strong and reliable inference that can be made from the patterns of electricity consumption it conveys. It is undisputably more revealing than what Binnie J. suggested was the “meaningless” information provided by the FLIR data in *Tessling* (para. 58). FLIR data, Binnie J. found, was capable of supporting a “number of hypotheses including as *one* possibility the existence of a marijuana grow-op” (para. 53 (emphasis in original)). In contrast, the DRA is a surveillance technique that is intrusive enough to yield usually reliable inferences as to the presence within the home of one particular activity: a marijuana grow operation. The nature of this information evokes the words of McLachlin J. in her concurring reasons in *Plant*, where she observed that “[t]he very reason the police wanted [the electricity consumption records at issue] was to learn about the appellant’s personal lifestyle, i.e., the fact that he was growing marihuana” (p. 302). DRA data gives such information to the police with a high degree of certainty. (See also “SmartPrivacy for the Smart Grid: Embedding Privacy into the Design of Electricity Conservation”, The Future of Privacy Forum (November 2009), at pp. 9-11.)

[82] Given the overriding significance of protecting the privacy interests in one’s home, the concerns regarding the warrantless use of DRAs seem to me to be well founded. And this case may well have been differently decided but for a crucial factor: the relationship between Mr. Gomboc and his utilities provider is governed by a regulatory scheme, which, in my view, effectively erodes the objective reasonableness of any expectation of privacy in the DRA data.

[83] The relevant provisions of the *Regulation* state that customer information can be disclosed to police investigating an offence unless the customer has expressly requested confidentiality. The exact wording is as follows:

1 In this Regulation,

...

(e) “customer information” means information that is not available to the public and that

(i) is uniquely associated with a customer,

(ii) could be used to identify a customer, or

(iii) is provided by a customer to an owner;

...

10 ...

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

...

(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;

[84] Under this scheme, Enmax was entitled to divulge Mr. Gomboc’s “customer information” — that is, information “not available to the public” that “is

uniquely associated with a customer” — “to a peace officer for the purpose of investigating an offence” so long as “the disclosure is not contrary to the express request of the customer”.

[85] The fact that the customer can request that his or her information be protected means essentially that under this *Regulation*, the customer is presented with the unrestricted ability to control the expectation of privacy in his or her relationship with Enmax. A request by a customer to prohibit disclosure of customer information revokes the legislative authority for its disclosure. Mr. Gomboc made no such request, yet urges the Court to treat his expectation of privacy as if he had.

[86] As previously noted, the constitutionality of the *Regulation* was not challenged either before this Court or at any stage of the proceedings. Mr. Gomboc, however, argued that the *Regulation* must nonetheless be read in accordance with *Charter* “values” and interpreted so as to prevent Enmax from collecting information to assist the investigative efforts of the police.

[87] With respect, this is an approach which has been clearly rejected by this Court. There is no doubt that the application of *Charter* values can be a valuable interpretive tool, but it is only to be used where there is genuine ambiguity (*Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559). It cannot be used as a freewheeling *deus ex machina* to subvert clear statutory language, or to circumvent the need for direct *Charter* scrutiny with its attendant calibrated

evidentiary and justificatory requirements. As Iacobucci J., writing for a unanimous Court, confirmed in *Bell ExpressVu*:

... to the extent this Court has recognized a “*Charter* values” interpretive principle, such principle can only receive application in circumstances of genuine ambiguity, i.e., where a statutory provision is subject to differing, but equally plausible, interpretations.

...

... if courts were to interpret all statutes such that they conformed to the *Charter*, this would wrongly upset the dialogic balance. Every time the principle were applied, it would pre-empt judicial review on *Charter* grounds, where resort to the internal checks and balances of s. 1 may be had. In this fashion, the legislatures would be largely shorn of their constitutional power to enact reasonable limits on *Charter* rights and freedoms, which would in turn be inflated to near absolute status. Quite literally, in order to avoid this result a legislature would somehow have to set out its justification for qualifying the *Charter* right expressly in the statutory text, all without the benefit of judicial discussion regarding the limitations that are permissible in a free and democratic society. Before long, courts would be asked to interpret this sort of enactment in light of *Charter* principles. The patent unworkability of such a scheme highlights the importance of retaining a forum for dialogue among the branches of governance. As such, where a statute is unambiguous, courts must give effect to the clearly expressed legislative intent and avoid using the *Charter* to achieve a different result. [Emphasis in original; at paras. 62 and 66.]

[88] More recently, Charron J. observed in *R. v. Rodgers*, 2006 SCC 15, [2006] 1 S.C.R. 554, at para. 18, that it is “well settled that, in the interpretation of a statute, *Charter* values as an interpretative tool can only play a role where there is a genuine ambiguity in the legislation” (emphasis in original). Absent ambiguity, as Charron J. explained, a court that interprets a clear statutory provision “so as to accord with its view of minimal constitutional norms”, risks “effectively [trumping] the constitutional analysis, [rewriting] the legislation, and [depriving] the government

of the means of justifying, if need be, any infringement on constitutionally guaranteed rights” (para. 20; see also *Charlebois v. Saint John (City)*, 2005 SCC 74, [2005] 3 S.C.R. 563, at para. 23).

[89] I see no room for interpretive creativity in this case because I see no ambiguity in the language of the provisions. “[C]ustomer information” is defined as information that is “uniquely associated with a customer”. DRA information is information relating to the electrical flow and consumption of electricity in a specific home, something that is obviously “uniquely associated with a customer”.

[90] This means that DRA information, whenever it is collected, is, necessarily, “customer information” and, as such, information under s. 10(3)(f) of the *Regulation* that can be collected by Enmax and disclosed “without the customer’s consent” to the police investigating an offence.

[91] Absent a direct *Charter* challenge, we must presume the *Regulation* to be constitutional. And absent any ambiguity, we must treat its clear meaning as binding. According to the *Regulation*, the relationship between the customer and the company is such that the company is legally authorized to collect and disclose customer information to the police unless the customer expressly requests its non-disclosure. Mr. Gomboc made no request to the utility company to protect the confidentiality of his customer information. He therefore did not revoke the legislative authority that allowed Enmax to hand over his information to the police.

[92] McLachlin C.J. and Fish J. are of the view that “a reasonable person would not have concluded that his or her expectation of privacy in activities inside the home was negated because of the *Regulation*” (para. 139). They also suggest that “[t]he average consumer . . . cannot be expected to be aware of the details of a complex regulatory scheme” (para. 139). Based on this “judicial notice”, and despite the absence of any actual evidence as to Mr. Gomboc’s state of knowledge, they impute a lack of awareness to him that justifies their conclusion that the *Regulation* had no impact on the reasonableness of his expectation of privacy.

[93] Leaving aside the policy wisdom of using the attributed or notional ignorance of an average customer about his or her contractual obligations for purposes of assessing the reasonableness of privacy expectations, this is an approach, with great respect, which conflates the subjective and objective branches of the privacy inquiry. As Binnie J. notes in *Patrick*, the subjective branch of analysis considers “whether the appellant had, or is presumed to have had, an expectation of privacy in the information . . . [while the] ‘reasonableness’ of an individual’s belief in the totality of the circumstances of a particular case is to be tested at the second objective branch of the privacy analysis” (para. 37 (emphasis in original)). They are distinct inquiries. The second, objective branch is predicated on an assessment of all relevant facts. An individual’s actual — or imputed — knowledge is undoubtedly relevant when assessing whether there is a subjective expectation of privacy. But when assessing the *objective* reasonableness of the expectation, unsubstantiated assumptions about a customer’s state of awareness should not be determinative.

Allowing such assumptions to govern collapses the two branches of the inquiry into a single inquiry into subjectivity.

[94] Such an approach also artificially limits the factual record by effectively reading out the existence of the *Regulation*. An examination of the “totality of the circumstances” involves consideration of *all*, not just some, of the relevant circumstances. There can be no examination of the totality of the relevant circumstances without including the fact that the *Regulation* exists. It cannot, therefore, be seen as neutral or irrelevant. The contractual terms the statutory scheme creates are not only clear and unambiguous; they are also clearly relevant to an objective assessment of the reasonableness of any expectations of privacy Mr. Gomboc may have had in the DRA information, regardless of whether he decided to inform himself of the legal parameters of his relationship with his utility provider.

[95] In my view, when considered among all the circumstances of this case, the legislative authority provided by the *Regulation* is in fact determinative and leads to the conclusion that any expectation of privacy that Mr. Gomboc may have had was *objectively* unreasonable. In the absence of a reasonable expectation of privacy, the collection of the DRA information in this case did not constitute a “search” within the meaning of s. 8.

[96] I would allow the appeal, set aside the Court of Appeal's decision directing a new trial, and restore the convictions of Mr. Gomboc under ss. 5(2) and 7(1) of the *Controlled Drugs and Substances Act*.

The following are the reasons delivered by

THE CHIEF JUSTICE AND FISH J. —

I. Introduction

[97] Invoking a series of decisions which are readily distinguishable, the Crown urges us in this case to take an incremental but ominous step toward the erosion of the right to privacy guaranteed by s. 8 of the *Canadian Charter of Rights and Freedoms*.

[98] We would decline to do so.

[99] In our view, this appeal involves neither an isolated nor a *technical* matter regarding electrical consumption only. It raises core issues regarding the protection of privacy safeguarded by s. 8 of the *Charter*.

[100] Every day, we allow access to information about the activities taking place inside our homes by a number of people, including those who deliver our mail, or repair things when they break, or supply us with fuel and electricity, or provide

television, Internet, and telephone services. Our consent to these “intrusions” into our privacy, and into our homes, is both necessary and conditional: necessary, because we would otherwise deprive ourselves of services nowadays considered essential; and conditional, because we permit access to our private information for the sole, specific, and limited purpose of receiving those services.

[101] A necessary and conditional consent of this sort does not trump our reasonable expectation of privacy in the information to which access is afforded for such a limited and well-understood purpose. When we subscribe for cable services, we do not surrender our expectation of privacy in respect of what we access on the Internet, what we watch on our television sets, what we listen to on our radios, or what we send and receive by e-mail on our computers.

[102] Likewise, when we subscribe for public services, we do not authorize the police to conscript the utilities concerned to enter our homes, physically or electronically, for the purpose of pursuing their criminal investigations without prior judicial authorization. We authorize neither undercover officers nor utility employees acting as their proxies to do so.

[103] This case concerns a police operation that co-opted an electric utility, Enmax, to install a digital recording ammeter (“DRA”) on its power line in order to generate, record and disclose to the police otherwise non-existent data for the purposes of an ongoing criminal investigation.

[104] Such actions go beyond the voluntary cooperation of a private actor with the police. In our view, they constitute a search that infringes s. 8 of the *Charter*.

[105] Ultimately, the appeal raises two issues. The first concerns the intrusiveness of the DRA. In this regard, we are in essential agreement with Justice Abella (Binnie and LeBel JJ. concurring): “Given the overriding significance of protecting the privacy interests in one’s home, the concerns regarding the warrantless use of DRAs seem ... to be well founded” (para. 82). Moreover, according to our colleague, Mr. Gomboc’s unreasonable search claim “may well have succeeded but for the existence of the *Regulation*” (para. 57). The second issue concerns the effect of the *Regulation*. On this issue, we are unable to agree with Justice Abella that the *Regulation* is conclusive.

II. The Law

A. *The Analytical Framework*

[106] The s. 8 analysis consists of two steps: (1) whether the state action constitutes a search; and if so, (2) whether the search was reasonable: *R. v. Law*, 2002 SCC 10, [2002] 1 S.C.R. 227.

[107] A search occurs when state conduct interferes with an individual’s reasonable expectation of privacy: *Law*. Whether an expectation of privacy is

reasonable depends on whether the individual concerned has (1) a subjective expectation of privacy in the subject matter of the alleged search, and (2) whether that subjective expectation is objectively reasonable: *R. v. Nolet*, 2010 SCC 24, [2010] 1 S.C.R. 851, at para. 30. The onus of proof of reasonable expectation lies on the *Charter* claimant: *Nolet*.

[108] The determination of “objective reasonableness” requires a contextual analysis, which takes into account the totality of the circumstances, viewed through the lens of what a reasonable person would expect: *R. v. Buhay*, 2003 SCC 30, [2003] 1 S.C.R. 631, at paras. 18 and 21; *R. v. Edwards*, [1996] 1 S.C.R. 128, at para. 31. The following factors are relevant:

- The subject matter of the search: that is, the nature of the information obtained or sought to be obtained;
- The place of the search: for example, whether it intrudes on the subject’s home or person, as opposed to more public places;
- The degree of intrusiveness, or the amount of information that could potentially be revealed;
- A legislative or regulatory framework authorizing the search, and of which the individual may be expected to be aware (see below);
- Whether the expectation of privacy has been abandoned or waived; and
- Any other factors that may strengthen or weaken the expectation of privacy.

[109] In weighing these factors, the court should consider any countervailing interests that might reduce a reasonable person's privacy expectation. For example, in *R. v. M. (M.R.)*, [1998] 3 S.C.R. 393, the need to maintain a safe school environment was held to be a factor reducing the reasonable expectation of privacy, because "[s]tudents know that their teachers and other school authorities are responsible for providing a safe environment and maintaining order and discipline in the school" (para. 33).

[110] If a search is established, the court must then determine whether the search was reasonable. A warrantless search is presumptively unreasonable: *Nolet*. To establish that a warrantless search is reasonable, the state must generally establish, on a balance of probabilities, that the search was authorized by law, that the authorizing law was reasonable, and that the manner in which the search was conducted was reasonable: *Nolet*, at para. 21; *R. v. Collins*, [1987] 1 S.C.R. 265, at para. 23; and *R. v. Caslake*, [1998] 1 S.C.R. 51, at para. 10. A search that is not authorized by law may nonetheless be reasonable if there was an emergency "in the sense of the evidence being in danger of being destroyed if the time were taken to obtain a search warrant": *R. v. Dersch*, [1993] 3 S.C.R. 768, at pp. 778-79.

B. *The Impact of Authorizing Legislation*

[111] The existence of authorizing legislation is clearly relevant to the question whether a warrantless search was authorized by law at the second step of the s. 8

analysis. However, authorizing legislation may also be relevant at the first step of the analysis, in determining whether there was a reasonable expectation of privacy.

[112] For example, in *British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3, individuals engaged in the securities market were held not to have an expectation of privacy over business records they were required, under a regulatory scheme, to disclose. In making that finding, the Court noted that “[t]he greater the departure from the realm of criminal law, the more flexible will be the approach to the standard of reasonableness. The application of a less strenuous approach to regulatory or administrative searches and seizures is consistent with a purposive approach to the elaboration of s. 8” (para. 52).

[113] The Court went on to say that individuals engaged in the securities market were presumed to know about the rules that governed their conduct within the industry:

All those who enter into this market know or are deemed to know the rules of the game. As such, an individual engaging in such activity has a low expectation of privacy in business records. In fact, “there will be instances in which an individual will have no privacy interest or expectation in a particular document or article required by the state to be disclosed”: *McKinlay Transport, supra*, at pp. 641-42. [para. 64]

As a result, no expectation of privacy could be claimed.

[114] The effect of a regulatory scheme to reduce an individual's expectation of privacy was most recently affirmed in *Nolet*. Speaking of commercial trucking, a highly regulated field, Binnie J. quoting in part from the Saskatchewan Court of Appeal, stated: "The [truck drivers] would be well aware of the possibility of mandatory inspections and searches. ... Accordingly, there can be little expectation of privacy...". He concluded: "A stop may quickly precipitate a search, and the occupants either know or ought to know of that reality and govern themselves accordingly" (para. 31).

[115] Although *Branch* and *Nolet* involved factual situations very different from the one before us in this case, they are helpful guides as to the reasons that legislation may reduce an otherwise existent expectation of privacy. When weighing the impact of legislation on the expectation of privacy, courts should consider whether: (1) the search being challenged is regulatory — in which case, it is more likely to reduce an individual's expectation of privacy — or criminal in nature; (2) whether the subject of the legislation is part of a highly regulated area; and (3) whether a reasonable person in the circumstances of the individual being searched would or should know about the legislation. The legislation is only one factor that is to be considered when determining whether an expectation of privacy is objectively reasonable and it may be insufficient to negate an expectation of privacy that is otherwise particularly compelling. As Justice Binnie explained in *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432, the expectation of privacy is a "normative rather than a descriptive standard": para. 42.

III. Application

A. *Was There a Search?*

[116] To determine whether the police action in this case constituted a search, we must decide if Mr. Gomboc had a subjective expectation of privacy that was objectively reasonable. If no such expectation existed, no search took place.

[117] The subjective test is a low hurdle, and individuals are presumed to have a subjective expectation of privacy regarding information about activities within the home: *Tessling*, at para. 38. Thus, resolution of this issue turns on whether Mr. Gomboc's expectation of privacy was objectively reasonable.

[118] The factors relevant to determining an objectively reasonable expectation of privacy, as discussed above, include the subject matter of the search, the place of the search, whether the privacy interest was abandoned or waived, the degree of intrusiveness, and, in some cases, the presence of a regulatory framework that would diminish any expectation of privacy. Ultimately, the question is whether a reasonable person in the place of Mr. Gomboc would have expected his DRA-revealed electricity information to remain private.

[119] In our view, the resolution of this issue turns on the last two factors above: the degree of intrusiveness and the presence of a regulatory framework. The

first three factors, although not dispositive, suggest a reasonable expectation of privacy. The subject matter of the search was DRA data, which sheds light on private activities within the home. This subject matter could not have been otherwise discovered, as it was not in the public view. The place of the search was a home, the most private of locations. And there was no issue of abandonment.

[120] We turn then to the issue of intrusiveness. Here, Justice Deschamps finds that the DRA data is not intrusive in the constitutional sense. In so doing, she relies heavily on the evidence of Det. Sgt. Morrison to conclude that the DRA is “[not] meaningfully more invasive of privacy than the electricity consumption records in *Plant* or the heat signatures in *Tessling*” (para. 40).

[121] Det. Sgt. Morrison was asked at trial whether he could use DRA information to make certain determinations about a home. The determinations included whether any occupants are home at a particular time, whether anyone is watching television, whether anyone is using a computer, whether anyone is listening to a stereo, whether anyone is taking a bath, sitting in a hot tub, or showering, whether anyone is cooking or washing dishes, the gender of the occupants, the political affiliation of the occupants, the sexual orientation of the occupants, where electricity is being used in the house, and whether any electrical devices are on a timer. For each question, he responded that he could not make the relevant determination (A.R., at pp. 101-102).

[122] From this testimony, Justice Deschamps concludes: “The evidence available on the record offers no foundation for concluding that the information disclosed by Enmax yielded any useful information at all about household activities of an intimate or private nature that form part of the inhabitants’ biographical core data” (para. 36).

[123] With respect, we disagree. The fruits of a search need not produce *conclusive* determinations about activities within a home in order to be considered informative and thus intrusive.

[124] The significance of the DRA data derives from its utility in making informed *predictions* concerning the *probable* activities taking place within a home. Predictions of this sort, while not conclusive, nonetheless convey useful private information to the police. For instance, DRA data may be used to make extremely reliable predictions regarding the existence of a plant growing operation within a house. The large-scale growing of plants within one’s home is a private activity, and a surveillance technique capable of making strong predictions regarding its existence is an intrusion on the occupant’s privacy, even though such predictions are only rationally drawn inferences and not demonstrably certain conclusions.

[125] Because we do not believe that DRA data needs to be used to make conclusive determinations in order for the data to be considered private information, we do not find Justice Deschamps’ reliance on Det. Sgt. Morrison’s testimony

helpful. Det. Sgt. Morrison was not asked whether he could use the DRA to make predictions regarding the probable activities taking place within a home. He was only asked whether he could make conclusive determinations regarding certain activities. Without evidence concerning the type of predictions he could make using the DRA, Det. Sgt. Morrison's testimony on this issue is unhelpful.

[126] In the absence of evidence on the predictive value of DRA data, we agree with Justice Martin of the Alberta Court of Appeal that "the court must consider the nature of the particular surveillance technique to determine whether there is an intrusion to the privacy within the home": 2009 ABCA 276, 11 Alta. L.R. (5th) 73, at para. 15. We have evidence before us regarding the operation of the DRA. From it, we can draw certain inferences about the DRA's intrusiveness.

[127] DRA devices record the flow of electricity to a residence over a period of time. In doing so, they measure the amount of electricity being used at a given point based on one amp increments. While the DRA does not indicate the source of electrical consumption within the residence, it produces detailed information as to the amount of electricity being used in a home and when it is being used: *Gomboc*, at para. 16.

[128] The intervener the Canadian Civil Liberties Association ("CCLA") submits that this type of information can be used to make several intrusive predictions regarding the probable activities taking place within a home. The CCLA submits,

correctly in our view, that these predictions may include whether anyone is home, the approximate time at which the occupants go to bed and wake up, and guesses as to particular appliances being used. Of course, these predictions cannot be made with certainty. However, they do have the potential to reveal private or “biographical” information, and are significantly more reliable than any predictions that can be made using the electricity-usage information collected in *R. v. Plant*, [1993] 3 S.C.R. 281.

[129] In addition, DRAs are extremely accurate in disclosing the existence of plant growing operations within a house. This is evident from the Crown’s own evidence at trial, where Det. Sgt. Morrison testified that DRA devices had been used to a nearly 100 percent success rate in identifying marijuana grow operations, and can give the police the reasonable and probable grounds necessary to obtain a search warrant:

What this graph [of DRA data] allows us to do is it gives us information on approximate 12 and/or 18 hour use. It allows us, with experience, to draw an inference on what the electrical use in there -- the inference that marijuana may be grown inside. It gives us reasonable and probable grounds. [Emphasis added.]

[130] Therefore, while DRAs may be used in conjunction with other evidence, they are not just “one more investigative tool” (Deschamps J., at para. 11). Such evidence of criminal activity, or of a connection to criminality, has previously been considered by this Court to be “very personal” biographical information: *R. v. Kang-Brown*, 2008 SCC 18, [2008] 1 S.C.R. 456, at para. 175. Even if DRA evidence *alone* were not sufficient for a warrant, the point would remain. The Crown has

conceded that it would not have been able to obtain a warrant in this case without the DRA evidence obtained by the police through Enmax.

[131] Without drawing a formal conclusion on the issue, Justice Abella makes similar findings. She concludes that information emanating from a home is “presumptively information about which individuals are entitled to expect privacy” (para. 80); that a DRA reveals “personal information about a customer”; and that DRA data is “intrusive enough to yield usually reliable inferences as to the presence within the home of one particular activity” (para. 81). Justice Abella also notes that concerns about the use of DRAs are “well founded” in light of “the overriding significance of protecting the privacy interests in one’s home” (para. 82).

[132] The Crown attempts to rebut these arguments by drawing an analogy between this case and *Plant*, where the Court found that no reasonable expectation of privacy applied to bi-annual electricity consumption information. The analogy fails. Academics have explained the inferences that hourly consumption data can yield this way:

Electricity consumption patterns generated from advanced metering infrastructure will reveal variations in power consumption that can be associated with various household activities; detailed power consumption information can reveal personal sleep, work, and travel habits, and likely identify the use of medical equipment and other specialized devices (if not ordinary appliances).

(J. I. Lerner and D. K. Mulligan, “Taking the ‘Long View’ on the Fourth Amendment: Stored Records and the Sanctity of the Home”, 2008 *Stan. Tech. L. Rev.* 3, at para. 41)

Such inferences constitute intimate details about an individual's lifestyle. And they cannot be drawn from a bi-annual total of power consumption.

[133] *Tessling* is also of little assistance to the Crown. The information collected by the FLIR heat-seeking device at issue in that case was described by this Court as both “meaningless” and “mundane” (at paras. 36 and 55 (emphasis deleted)). Those labels, for reasons we have already explained, do not apply to the information collected by a DRA.

[134] Justice Deschamps contends as well that the use of a DRA serves as a substitute for more intrusive investigatory techniques. In her opinion, DRAs can “enhance overall territorial privacy” by providing evidence that rules out a suspect before any physical search of the home is conducted (at para. 51 (emphasis in original)). With respect, this assertion does not withstand scrutiny for at least three reasons.

[135] First, the constitutionality of a search does not hinge on whether there are even more intrusive search methods the police could have improperly used. Section 8 rights are hollow indeed if a search without warrant may be justified on the grounds that the police could have done worse. As mentioned earlier, the Crown concedes that the police could not have obtained any search warrant at all without the grounds provided by the DRA. If the Crown is wrong in making this concession, there is no excuse at all for conducting a DRA search without a warrant.

[136] Second, we find it unhelpful to compare a DRA search conducted without a warrant to a physical search conducted with a warrant. The issue on this appeal is whether warrants should be required for the use of DRAs in police investigations. Justice Deschamps' reasons may well support the view that a search by DRA pursuant to a warrant is preferable to a physical search of a home. They do not, however, provide grounds for concluding that the police may perform a DRA search without prior judicial authorization.

[137] Finally, it is hardly apparent that the use of DRAs will reduce the total intrusion into a suspect's territorial privacy. The use of a DRA only serves as a substitute for a physical search of a suspect's home *if the police could have obtained a warrant to search the home*. In many cases, the police will not have reasonable grounds to obtain a warrant for a physical search prior to using the DRA. In these cases, the DRA will not serve as a substitute for a physical search — it will instead serve as part of the evidentiary basis for authorizing the physical search. Even where the DRA data does not yield grounds for a physical search, the suspect's total territorial privacy will have suffered by virtue of the DRA search itself.

[138] The remaining issue in determining whether a search occurred is whether the *Code of Conduct Regulation*, Alta. Reg. 160/2003 (“the *Regulation*”) of the *Electric Utilities Act*, S.A. 2003, c. E-5.1, which permits disclosure of certain information to the police, negates or reduces the objectively reasonable privacy interest the other factors suggest. The argument is essentially that Mr. Gomboc could

have requested an exemption from this provision but failed to do so; as a result, he consented to a diminution of his privacy interest and cannot be said to have had a reasonable expectation of privacy in the DRA data.

[139] In our view, a reasonable person would not have concluded that his or her expectation of privacy in activities inside the home was negated because of the *Regulation*. This is not a situation, like *Branch* or *Nolet*, where a reasonable person engaged in the highly regulated fields of securities trading or trucking would be expected to be aware of the relevant legislation. The average consumer signing up for electricity cannot be expected to be aware of the details of a complex regulatory scheme — the vast majority of which applies to the companies providing services, and not to the consumers themselves — which permits the utility company to pass information on electricity usage to the police, especially when a presumption of awareness operates to, in effect, narrow the consumer’s constitutional rights.

[140] In addition, if they were made aware of the *Regulation* — something that did not happen in this case — reasonable consumers would likely not read it as permitting the intrusion at issue. They might reasonably suppose that the information passed to police would be information gathered in the normal course of utility operations. However, they would not read the provision as permitting the police to ask the utility company to take special measures, including the installation of new technology such as a DRA, to obtain information the company neither already had nor intended to obtain about what was happening inside their house.

[141] Finally, although the *Regulation* is not a criminal law, the provisions relied upon by the Crown are explicitly criminal rather than regulatory in purpose. In light of all of these differences between this situation and the cases of *Branch* and *Nolet*, we are of the view that the legislation in this case did not render Mr. Gomboc's expectation of privacy unreasonable.

[142] Considering the "totality of the circumstances", a reasonable person would not accept that the type of information at issue — collected for the reasons and in the manner explained — should be freely available to the state without prior authorization. Contrary to Justice Abella's suggestion, our consideration of the reasonable person does not "collapse[] the two branches of the inquiry into a single inquiry into subjectivity" (para. 93). Mr. Gomboc is presumed to have a subjective expectation of privacy within his home. The existence of an obscure regulation that the reasonable person is unlikely to understand does nothing to render Mr. Gomboc's subjective expectation objectively unreasonable. We conclude that the respondent had a reasonable expectation of privacy in the DRA data and that the intrusion and transmittal of the information gleaned thus constituted a search.

B. *Was the Search Reasonable?*

[143] The police had no warrant for the search, rendering it presumptively unreasonable. In order to overcome this presumption, the Crown bears the burden of establishing, on a balance of probabilities, that (1) the search was authorized by law,

(2) the law itself is reasonable, and (3) the manner in which the search was carried out is reasonable.

[144] In order to demonstrate that the search was authorized by law, the Crown must show common law or legislative authorization. The Crown attempts to show common law authorization by relying upon the ancillary police powers doctrine articulated in *R. v. Waterfield*, [1963] 3 All E.R. 659 (C.C.A.). To succeed, the Crown must show that: (1) the search “fell within the general scope of the duties of a police officer under statute or common law”; and (2) the “interference with liberty was necessary for the carrying out of the particular police duty and [was] reasonable, having regard to the nature of the liberty interfered with and the importance of the public purpose served by the interference”: *Dedman v. The Queen*, [1985] 2 S.C.R. 2, at p. 35.

[145] Without commenting on whether the first branch of the *Waterfield* test is satisfied, the warrantless use of the DRA in this case fails the second branch of the test. The search was not shown to be reasonably necessary to the police activity, as the police unit in this case has demonstrated by virtue of its general policy of applying for warrants before attaching DRAs to transformers located on private property. This is not a case like *Kang-Brown* where police used a sniffer dog to detect drugs in the bag of a suspicious-looking person at a bus station. A police “stop and search”, by virtue of its exigent nature, provides a more compelling reason for

expanding common law police powers than a situation like the present where a warrant can be obtained in a timely fashion with appropriate grounds.

[146] The Crown argues also that there was legislative authorization for the search, by virtue of the *Regulation*. We do not agree. The *Regulation* permits the disclosure of “customer information”. It may be that “customer information” includes routinely collected consumption rates, thus permitting disclosure of energy usage without a warrant. However, the *Regulation* does not authorize the utility company to operate as an agent for the police for the purpose of spying on consumers. The DRA data that concerns us here was not pre-existing information in an Enmax subscriber’s file. Rather, the police enlisted the company to install the device in order to gather new information about the respondent for the purpose of pursuing an ongoing criminal investigation of which he was the target.

[147] We also note that the relevant section of the *Regulation* [s. 10(3)(f)] is an exception to the general rule of confidentiality set out in s. 10(1), which states:

Neither an owner or a retailer, nor an officer, employee, contractor or agent of an owner or retailer may disclose customer information to any person without the consent of the person that is the subject of the information . . .

As an exception to this general rule, s. 10(3)(f) must be interpreted restrictively. It must also be interpreted in accordance with our constitutional values, notably respect

for our privacy, the sanctity of our homes, and security against unreasonable searches or seizures.

[148] Although Enmax might have chosen to collect this data on its customers on its own initiative and for its own purposes, it neither did so nor manifested any intention to do so in this case. The information, we reiterate once more, was gathered in response to a police request for assistance with a criminal investigation. It did not exist prior to the police action. In our view, the regulatory scheme should not be interpreted to authorize police agents to act in a manner forbidden to the police themselves.

[149] Accordingly, we are of the view that the Crown has not demonstrated that the search was authorized by law.

IV. Remedy

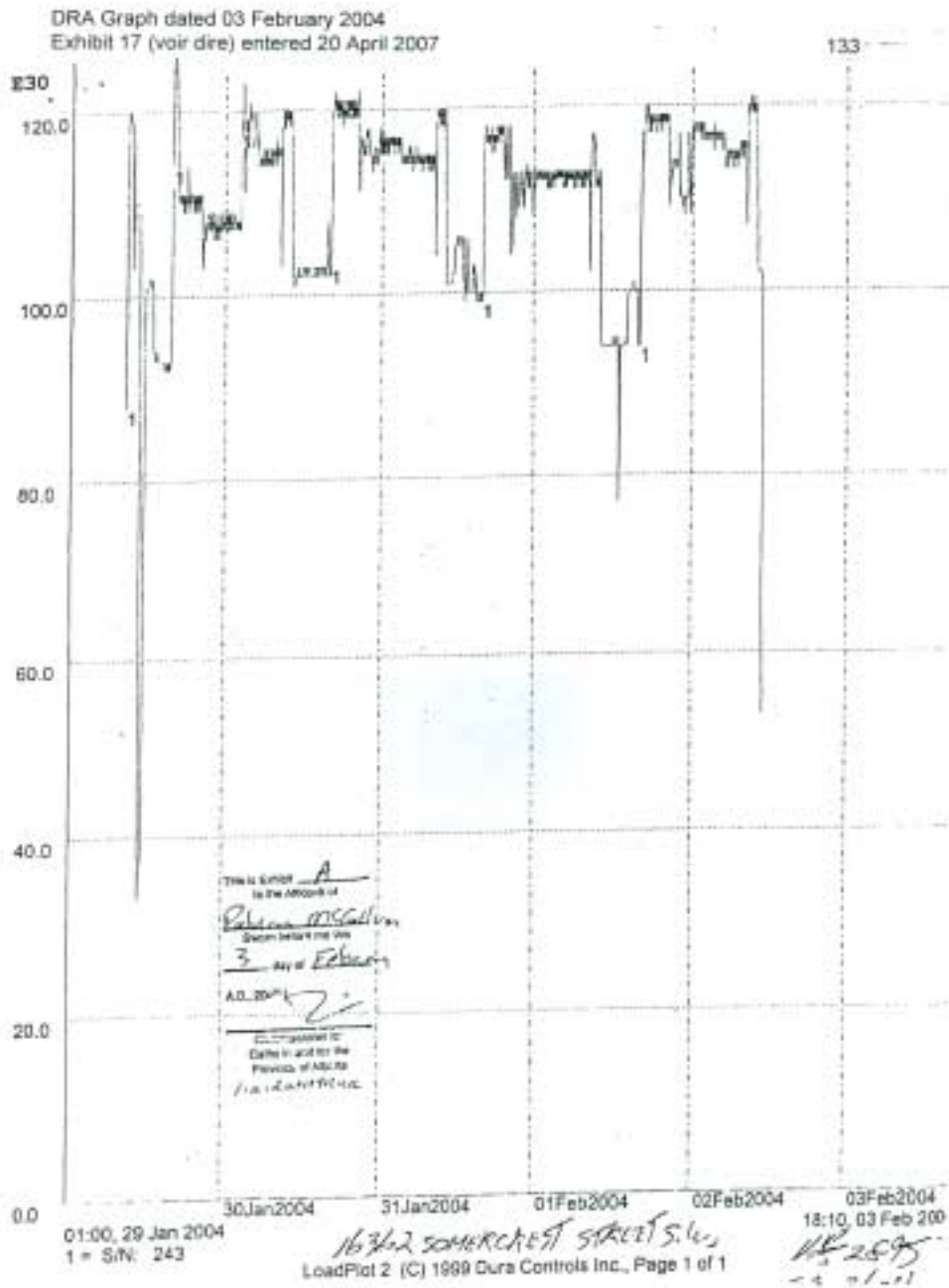
[150] For the reasons given, we are satisfied that Mr. Gomboc's rights under s. 8 of the *Charter* were infringed in this case. We now turn to the question of remedy.

[151] Before this Court, the Crown made no submissions under s. 24(2) regarding the issue of exclusion of the evidence obtained. Instead, we have been urged by both the Crown and Mr. Gomboc's counsel to return the file to the trial court for a determination under s. 24(2) of the *Charter*, should we find that the DRA

data was acquired by the police in violation of s. 8. This was the order made in the Court of Appeal, since it is common ground that the s. 24(2) issue requires further evidence and argument.

[152] In the result, we would affirm the judgment of the Court of Appeal and dismiss the Crown's appeal against that judgment to this Court.

APPENDIX



Appeal allowed, MCLACHLIN C.J. and FISH J. dissenting.

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