Foiled Again: Calgary Police Breach Privacy Rights with Grow-Op Electricity Monitoring

A new decision of the Alberta Court of Appeal on section 8 of the *Charter*, the right to be secure against unreasonable search or seizure, reinforces privacy protections and makes it harder for police to collect evidence of illegal drug production.[1] The decision, *R. v. Gomboc*, applies privacy standards articulated by the Supreme Court of Canada in another recent Calgary case, *R. v. Patrick*.[2]

In 2007, Daniel James Gomboc was convicted of two drug offences. Police had obtained a search warrant, entered his house in southwest Calgary, and found an indoor grow operation "involving hundreds of marihuana plants."[3] At trial, the judge rejected Gomboc's argument that the warrant was improperly obtained and the evidence should be excluded.[4] Gomboc appealed the evidence issue to the Alberta Court of Appeal. The issue on appeal was how the Calgary Police Drug Unit had obtained the warrant to enter his house. In January 2004, police saw condensation and stains on Gomboc's windows and curtains, and noticed there was no snow on his roof. They told the Drug Unit, who visited Gomboc's neighbourhood and noticed his house was "sweating profusely" and smelled of marijuana.[5] The Drug Unit asked Enmax, the local electricity provider, to install a digital recording ammeter (DRA) to record power consumption in Gomboc's house. Enmax complied without insisting on a warrant. After five days, Enmax gave the police a graph that showed Gomboc's use of electricity was consistent with running a grow operation. This data, combined with the appearance and the smell of the property, was the basis for the search warrant and the arrest of Gomboc.[6] At trial, the Crown conceded that police could not have obtained a search warrant without the data from Enmax. The judge considered Gomboc's arguments about privacy of data and his objections to the warrant, but concluded that excluding evidence obtained under the warrant would bring the administration of justice into disrepute.[7] Gomboc's argument on appeal was that the warrant was issued based on information – the electricity records – that amounted to an unconstitutional search, and therefore the decision to admit the evidence was an error.[8] **Majority Decision** The majority of the Alberta Court of Appeal accepted Gomboc's argument: "[T]he information obtained from the DRA was subject to a reasonable expectation of privacy, … its collection and disclosure to the police amounted to a search, and … the search was unreasonable in the absence of prior judicial authorization."[9]The court answered "yes" to all three questions in the "totality of circumstances test" set out in *Patrick*:

> *(i) did the appellant have a subjective expectation of privacy? (ii) was the expectation objectively reasonable? (iii) if there was a reasonable expectation of privacy, was it violated by police conduct?[10]*

Justice Martin, writing for the majority of the court, commented:

> *In my opinion, the expectation of privacy extends beyond simply the information as to the timing and the amount of electricity used. It is also objectively reasonable to expect that the utility would not be co-opted by the police to gather additional information of interest only to the police, without judicial authorization. Indeed, I expect that the reasonable, informed citizen would be gravely concerned, and would object to the state being allowed to use a utility to spy on a homeowner in this way.[11]*

The majority was nonetheless perplexed by the Crown's concession that police could not have obtained a search warrant without the Enmax data. The appearance and smell of Gomboc's house should, the court reasoned, have offered "ample grounds to secure a search warrant without the DRA evidence."[12] If so, the evidence obtained under the search warrant would not be "tainted" by the use of Enmax data in obtaining the warrant, even though the data was obtained improperly. The court therefore ordered a new trial for Gomboc.[13] **Dissent** Justice O'Brien wrote a lengthy and detailed dissent that takes a contrasting view of the privacy interest in data on activity in the home. He compares the Enmax data to readings of heat escaping from the house that can be obtained by an aircraft, concluding: "Such investigative measures may properly be used by the authorities to detect criminal activity, which otherwise may not be discernable, without encroachment on the constitutional rights of citizens to be free of unreasonable searches."[14] The dissent also emphasizes that, as an Enmax customer, Gomboc could not reasonably expect that his electricity consumption data would remain private: provincial regulations for electricity providers and the terms and conditions of electric utility service both specify that data may be provided to the police.[15] O'Brien concludes that section 8 of the *Charter* was not breached. He also agrees with the trial judge that, even if the data was improperly obtained, to exclude the evidence from the resulting search would bring the administration of justice into disrepute.

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[1] Daryl Slade, "Alberta court rules marijuana grow-op detector violates privacy" *Calgary Herald* (22 August 2009); Kevin Martin, "Cops powerless to use energy data" *Calgary Sun* (22 August 2009). [2] *R. v. Gomboc*, 2009 ABCA 276; *R. v. Patrick*, 2009 SCC 17. [3] *R. v. Gomboc*, *supra* note 2 at para. 40. [4] *Ibid*. at paras. 44-49. [5] *Ibid*. at paras. 3-4. [6] *Ibid*. at paras. 5 and 16. [7] *Ibid*. at paras. 44-49. [8] *Ibid*. at para. 51. [9] *Ibid*. at para. 8. [10] *Ibid*. at paras. 11-12. [11] *Ibid*. at para. 21. [12] *Ibid*. at para. 29. [13] *Ibid*. at paras. 28 and 32. [14] *Ibid*. at paras. 77-78. [15] *Ibid*. at para. 95.