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Is R v Gomboc really only about a homeowner's expectation of privacy or is there more to it?

By Brian Seaman

Cases Considered:
R. v. Gomboc, 2010 SCC 55

The late November 2010 decision of Canada's Supreme Court in *R. v. Gomboc* has come to represent one of two things in the divergent views of its critics and supporters. For critics from a civil libertarian perspective, our highest court's approval of a power company's act, pursuant to a warrantless police request, of monitoring a homeowner's electrical usage and then providing that information to police engaged in a criminal investigation represents yet another example of a culture of authoritarianism that seems to be creeping into Canada's judiciary. On the other hand, for the "law and order" crowd, especially those who see warrants as pesky obstacles to simply letting the police get on with it and just do their jobs, homeowners have no reasonable expectation of privacy over information about their electrical usage, so the Supreme Court's decision that an authorizing warrant was not required is spot on. Furthermore, even if there was a breach of any privacy interest a person may have here, then it was so trivial that any fuss over it is unwarranted.

The facts that led to Daniel Gomboc standing trial on serious drug-related charges are straightforward. A Calgary police officer in Mr. Gomboc's neighbourhood on an unrelated incident noticed something unusual about his house: although it was winter, there was no snow on the roof (unlike all the other homes in the area), there was heavy condensation on the windows and the curtains were stained with moisture. The officer referred the matter to the drug unit, which assigned two officers to investigate. They made similar observations, detected the scent of "growing marijuana," and described the house as sweating profusely. Taking these as indicia that the dwelling was possibly being used as a marijuana grow-op, police subsequently placed the home under surveillance, questioned Mr. Gomboc's neighbours, and then asked *Enmax* (the local power supplier) to place a device called a digital recording ammeter (DRA) on the property to monitor the power cycling for it – a request made without a warrant and with which the utility complied. Five days after placing the device on the power line to the house, *Enmax* released the data to the police, explaining that the DRA had shown unusual power cycling that was inconsistent with typical household usage. Based on the totality of evidence, the police obtained a warrant to search Mr. Gomboc's home, where they found marijuana plants, several bags of harvested marijuana in the freezer, and various other items associated with the production and sale of marijuana. Mr. Gomboc was charged with possession of marijuana for the purpose of trafficking, production of marijuana and theft of electricity.

At trial, defence counsel made an application to exclude the evidence obtained from the search of the dwelling based on the argument that the installation of the DRA was made without a prior

warrant. However, the trial judge decided to admit the evidence, based on the *Code of Conduct Regulation*, Alta. Reg. 160/2003, made pursuant to Alberta's *Electric Utilities Act*, SA 2003, c.E-5.1, which authorizes a utility company to hand over customer information to law enforcement authorities when the customer is the subject of a criminal investigation, unless the homeowner had specifically informed the company beforehand that s/he did not want such information to be shared. Based on the evidence before her, the trial judge (Justice M.C. Erb) convicted Mr. Gomboc on the drug charges. However, on appeal, the Alberta Court of Appeal decided 2-1 to order a new trial after finding that Mr. Gomboc had a subjective expectation of privacy in the power consumption and power cycling information that the DRA disclosed and this expectation was, moreover, objectively reasonable (2009 ABCA 276 per Justices Peter Martin and Ronald Berger, Justice Clifton O'Brien dissenting). Furthermore, the majority held that the Regulation could not be interpreted to imply a homeowner's consent to allow a utility to collect information at the request of law enforcement unless the homeowner had expressly said s/he did not want such information to be disclosed. I will return to this point later, as it represents in my view an interesting analytical point that could very well resurface as an argument in cases similar to Mr. Gomboc's in the future.

By a 7-2 majority (Chief Justice Beverley McLachlin and Justice Morris Fish dissenting), the Supreme Court of Canada overruled Alberta's Court of Appeal and restored the trial judgment. For Justices Marie Deschamps, Louise Charron, Marshall Rothstein and Thomas Cromwell, the pivotal factor on which this case turned was the extent to which DRA technology reveals private information. For them, the information obtained from conventional, nonintrusive investigatory methods of police observation and their discreet enquiries of neighbouring residents supported the inference that marijuana was being grown in Mr. Gomboc's home. Thus, the information about power usage and cycling that the DRA revealed was simply one more piece of information to support the warrant to search the premises and was, moreover, information that revealed nothing about the intimate details of what was going on inside Mr. Gomboc's home but simply showed the amount of electricity being used and how it was being cycled. For these four justices, Mr. Gomboc's pattern of electrical consumption was simply one more piece of information along with other indicia (for examples, no snow on the roof, heavy condensation on the windows), obtained by nonintrusive means, that in its totality supported the warrant to conduct an intrusive search of the premises (at para. 11). They drew a distinction between the incidental, nonintrusive information disclosed by the meter placed on the power line and biographical core data about the dwelling's occupants, the latter of which would constitute an occupant's privacy interest and thus attract the constitutional protection afforded to it by section 8 of the *Canadian Charter of Rights and Freedoms*, which guarantees the right to be secure from unreasonable searches (at para. 36).

Justices Ian Binnie, Louis LeBel and Rosalie Abella, agreeing in the result in a separate opinion, also discussed the issue of a person's privacy interests in their own dwelling. Then, rather significantly in my view, they acknowledged that a concern about the warrantless use of DRA technology in aid of a police investigation was "well founded" (at para. 82). They even went so far as to suggest that they might have decided the case differently but for the fact that the relationship between Mr. Gomboc and Enmax was governed by a provincial law that allowed him to request that his customer information (which includes the pattern and amount of his electrical use) be kept confidential. His failure to make this request, when combined with his counsel's failure to challenge the constitutionality of the relevant provincial legislation, operated to, in the honourable Justices' view, remove any objective expectation of privacy in the information yielded by the DRA device (at para. 56).

With respect to the majority view of the Supreme Court, I think the dissent of Chief Justice McLachlin and Justice Fish, along with the majority decision of Alberta's Court of Appeal, leaves open the door to criminal defence lawyers in future cases similar to Mr. Gomboc's to make a tenable argument that the Regulation at issue is unconstitutional because it is *ultra vires* the purpose of its enabling legislation.

According to section 10(3)(f) of the *Code of Conduct Regulation*:

> 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 <u>if the disclosure is not contrary to the express request of the customer</u>;…. [emphasis added]

It is a trite rule of statutory interpretation that all parts of legislation, including regulations, must be read in accordance with the section that sets out the purpose of the legislation. The enabling legislation is the *Electric Utilities Act*. A reading of section 5, which sets out the purposes of the Act, indicates nothing pertaining to the gratuitous and warrantless disclosure of any kind of customer information, be it personal identifiers or otherwise, to law enforcement authorities. Not surprisingly, section 5 talks about things like providing Albertans with an energy grid; one that is efficient and market driven based on fair and open competition. There is nothing in the purpose section to indicate a public utility in Alberta must act as the gratuitous agent of a law enforcement agency when asked to do so by the police.

Justice Martin, writing a majority judgment at the Alberta Court of Appeal, said, rightly in my view, that the Regulation had to be strictly construed and not interpreted to impose an implied consent on a homeowner's part to the power company gathering data on behalf of law enforcement in a matter that is not relevant to his or her relationship with the power supplier, unless the homeowner has expressly objected to the release of such information (at para. 24). He characterized such an action as trespassing on the homeowner's property and pointed out, again rightly so, that such conduct is something the police are not permitted to do in the absence of a warrant. That being so, how could a Regulation made pursuant to legislation regulating the sale and distribution of power be interpreted to give law enforcement agencies authority to do what they would not otherwise have the power to do under the supreme law of the land, the *Canadian Charter of Rights and Freedoms*? In the eloquent words of Martin, J.A.:

> If it were otherwise, the police could recruit any agency with limited access to a home to exploit that access to gather information for them. For example, the mailman to look into the windows while at the house delivering mail and report his observations; or the cable TV provider to report the viewing habits and preferences of the subscriber. <u>Such unauthorized state surveillance of its citizens is offensive to the basic tenets of our society and would render the protection of a reasonable expectation of privacy over one's home, illusory.</u> (at para. 25, emphasis added)

Interestingly, Chief Justice McLachlin was also of the view that the Regulation at issue could not be interpreted to give a utility broad powers to act as an agent of law enforcement for the purpose of spying on its customers (at para. 146). Furthermore, in her reasons, McLachlin, C.J. argued that it was unreasonable to impute to consumers prior knowledge of the particulars of a complex regulatory framework, especially a Regulation that included a presumption of such awareness that, in its application, diluted constitutional rights and freedoms (at para. 139).

By way of conclusion, I argue that it offends the rules of traditional statutory interpretation, and is repugnant as well to principles of natural justice and indeed the *Charter of Rights and Freedoms* itself, to give a public utility the power to gratuitously act as an agent of law enforcement as part of a criminal investigation. This also invites the observation that the Regulation at issue trenches on a power that should ordinarily fall within the ambit of federal lawmaking responsibility under section 91 of the *Constitution Act 1867*. Granted, defenders of the Regulation are left free to argue that if there is an intrusion on federal powers and if there is an offense to individual privacy and liberty that it is a merely incidental to the interest of a utility in monitoring how power is consumed for billing purposes and thus serves the statutory purpose of the market efficiency of the power grid. Be that as it may, any acknowledgment of that position would be of mere rhetorical significance since, as it turned out, the liberty of a power grid customer, Daniel Gomboc in this case, was indeed eventually taken away by the state. Therefore, because a conviction under Canada's *Criminal Code* carries with it the prospect of a loss of liberty, especially for more serious offenses like drug trafficking, this is all the more reason for a court in the future to examine the *Electric Utilities Act*'s *Code of Conduct Regulation* with a much more critical eye than the majority of the Supreme Court of Canada did in the case of Mr. Gomboc.