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Supreme Court rules hydro usage not protected by Charter rights

The Supreme Court of Canada has written the final chapter in a case which raises important issues about the protection of our privacy rights, which are safeguarded by the Charter of Rights and Freedoms.

The figure at the centre of the case is Daniel James Gomboc, who owned a home in southwest Calgary. Back in January 2004, police officers noticed that the windows in Gomboc's house were covered with condensation, the curtains were stained with moisture and the roof was free of snow — unlike the neighbouring houses.

The police officers then asked the local utility supplier to install a digital recording ammeter (DRA) to create a record of when electrical power was used in Gomboc's house.

The utility complied even though the police had not obtained a search warrant. The utility later gave police a printout of the DRA data, which suggested that the electricity use was consistent with a marijuana grow operation.

Using that evidence and their earlier observations, the police obtained a search warrant and upon entering the house discovered a sizeable grow-op. They seized 165.3 kilograms of bulk marijuana, and 206.8 grams of processed and bagged marijuana, as well as numerous items related to the grow operation.

At trial, Gomboc was convicted, but the Alberta Court of Appeal later overturned the conviction and ordered a new trial — one in which evidence from the DRA and possibly the search warrant itself would be excluded.

The Crown appealed to the Supreme Court of Canada, which released its decision in November. Seven of the nine judges on the court upheld the use of the DRA evidence without a search warrant and restored Gomboc's conviction. Two judges wrote a spirited dissent.

Not everyone was happy with the final outcome. "If you believe that when you turn on your lights, turn on your TV, or open your refrigerator, it is your own personal information, then you won't like this decision," said David Rose, counsel for the Canadian Civil Liberties Association, which participated in the case.

Rose told *The Lawyer's Weekly* that the privacy issue is very much alive in Ontario, where millions of homes and businesses now boast "smart meters" which record time-of-use and other electrical consumption data. Ontario's smart meters perform the same function as a DRA in Alberta.

The Gomboc decision will no doubt be invoked if the police in a future Ontario case obtain hydro consumption data from a utility without a warrant.

The main issues in the Gomboc case at the Supreme Court were whether his hydro consumption data revealed private information, and whether Gomboc had a reasonable expectation of constitutionally-protected privacy with respect to that information.

Key to the court's decision was an Alberta regulation which allows hydro customers to require the utility to keep their consumption data confidential from everyone, including the police.

Four of the judges said that the information gathered by the DRA was not sufficiently private and personal so it could be released without a warrant. The utility could give it to the police because the information was not obtained by a constitutionally protected "search."

Three more judges, including former Torontonians Rosalie Abella and Ian Binnie, disagreed and said that the DRA can yield personal information that was protected by the Charter. They ruled, however, that Gomboc did not have a reasonable expectation of privacy in the information because he failed to instruct his utility supplier to keep the information confidential.

Despite Gomboc's conviction, five out of the nine judges on the Supreme Court of Canada have now agreed, in rulings totalling more than 20,000 words, that Canadians do have privacy rights in the electrical readings coming from their homes — whether or not they instruct their utilities to keep the information private.

Except in Alberta, police in this country can't simply go and seize electrical readings from local hydro suppliers.

It all makes me feel sorry for the Alberta orchid grower whose home got raided by police because his electricity consumption profile resembled that of a typical marijuana grow-op.

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