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Privacy at home focus of much court debate

Just how much privacy can a person expect in the comfort of his or her own home, free from any government intrusion? That was the question considered in August by a three-judge panel of the Alberta Court of Appeal. The case involved the home of Daniel James Gomboc 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.

After making these observations, the police officers asked Enmax Power Corp., the local utility supplier, to install a digital recording ammeter (DRA) to create a record of when electrical power was used in the premises.

Enmax complied, even though the police had not obtained a search warrant. Five days later, Enmax provided the police with a printout of the data obtained from the DRA. The record 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.

Gomboc was later convicted of production and possession of marijuana for the purpose of trafficking. His appeal to the Alberta Court of Appeal was heard last November, and its decision was released in August.

The central issue in the appeal was whether the use of the digital ammeter without a warrant was an unreasonable search contrary to Section 8 of the Canadian Charter of Rights and Freedoms.

Justice Peter Martin writing for two of the judges (there was one dissent) ruled that Gomboc had an "objectively reasonable expectation of privacy regarding the information obtained by the DRA," and that it was violated by the utility company. The electronic surveillance amounted to an unreasonable search and seizure, and the court ordered a new trial presumably one without the DRA evidence.

In reaching its decision, the Alberta court referred to two decisions of the Supreme Court of Canada upholding the citizen's right to privacy. In the 1995 *Silveira* case, Justice Peter Cory wrote, "There is no place on earth where persons can have a greater expectation of privacy than within their 'dwelling-house.'"

Martin also relied on the Supreme Court's decision in the *Walter Tessler* case. *Tessler* was initially convicted of various marijuana offences based on evidence of the heat signature of his house obtained by an RCMP aircraft using a Forward Looking Infrared (FLIR) camera. The Ontario Court of Appeal reversed the conviction, only to have the Supreme Court of Canada restore it.

In *Ottawa*, Justice Ian Binnie referred to the home as "being the place where our most intimate and private activities are most likely to take place," but decided that the heat profile of the house did not expose any intimate details of *Tessler's* lifestyle or part of his "core biographical data." It only showed that some activities in the house generated heat.

The court in the *Tessler* case restored the conviction using a "totality of circumstances test." Based on the same test, Martin ruled that Gomboc's conviction had been improper.

The Alberta court said that the utility company's actions were similar to those of a mailman looking into the windows of a home while delivering mail, and then reporting his observations to the authorities, or a cable TV supplier reporting the viewing habits and preferences of a subscriber. Without a search warrant, all of these activities are improper, and would render the protection of a reasonable expectation of personal privacy in one's home illusory.

As a result of his amateur agricultural endeavours, Daniel James Gomboc has entered the legal history books as the subject of a fascinating landmark case on privacy rights. The full text is available at <http://www.canlii.org/en/ab/abca/doc/2009/2009abca276/2009abca276.html>.