Improving Privacy Protection, But by How Much?

Steve Coughlan, Dalhousie University Schulich School of Law
Improving Privacy Protection, But By How Much?

Steve Coughlan*

The discussion of reasonable expectation of privacy in *R. v. M. (A.)*\(^1\) is extremely useful. In the wake of *Tessling*,\(^2\) many courts had effectively reduced the protection offered by s. 8 based on two arguments: that what was detected was an emanation in the public domain similar to heat coming from a house, and that what was discovered merely related to informational privacy and was not part of the biographical core of such data. Justice Binnie’s decision puts paid the notion that either of these arguments is a trump card. He suggests that generalizing about “emanations” is not a useful approach, and that the nature of the particular technology used and its interference with liberty must be engaged in each time. With regard to informational privacy, he unambiguously reaffirms what had frequently been missed in *Tessling*, that the protection extends *at least* to the biographical core of personal information, but is not limited to that and extends further.

Although in one sense Justice Binnie’s position is a familiar one, that all the circumstances must be considered, really his underlying rationale is more than that. Justice Binnie’s decision recognizes that if police are using an investigative technique, then that is likely to be because they expect to find useful and informative data. The more likely it is that the data is useful and informative, the more likely it is that there is a reasonable expectation of privacy in it. That does not mean that the police are never entitled to gather such material, it simply means that we should not pretend that they are not “searching” when they do it. Rather, we should recognize that it is a search and then engage in the process of balancing individual and state interests that s. 8 requires.

In addition, Justice Deschamps’ view that it is necessary at this stage to produce an adjusted list of factors for consideration in deciding reasonable expectation of privacy is also sensible. For the most part courts simply work from the list established in *Edwards*.\(^3\) However, the *Edwards* list really is designed only with territorial privacy in mind: indeed, it was formulated before the Court had clearly articulated the notion that territorial, personal and informational privacy were different things. As a result, some factors on the list are an oddity in some con-

---

*Faculty of Law, Dalhousie University

\(^1\)Reported *ante* p. 314.


texts (the person will always be present for a personal search, while presence seems irrelevant if the issue is informational privacy) and the list omits factors that might be relevant in other contexts. A reformulated list would be a positive benefit.

The M. (A.) decision would be more useful if it was entirely clear exactly whom Justice Binnie is speaking for. Only Chief Justice McLachlin explicitly concurs with his judgment. The plurality of four judges state only “[a]s found by the Court of Appeal and by Binnie J., a search was conducted”. 4 If this can be taken to mean that Justice Binnie’s reasoning with regard to reasonable expectation of privacy is actually a majority decision of the Court, that is very helpful. If it simply means that the plurality agree with his conclusion but not necessarily his reasoning, that is unfortunate. In either case it would be helpful to know for certain.

Nothing in the companion case of Brown helps determine whether the plurality has adopted Binnie J.’s view in M. (A.). Indeed, that point raises an oddity in the way these two cases have been decided. The only real discussion of reasonable expectation of privacy occurs in M. (A.). Justice Deschamps does discuss the issue in Brown, and concludes that there was a reasonable expectation of privacy. The plurality and Justice Binnie, however, treat that question essentially as a non-issue in Brown: the plurality do not really refer to the question, and Justice Binnie states “[i]t is common ground that what occurred at the Calgary bus station was a warrantless search, and therefore presumptively unreasonable”. 5 In saying this, he is referring to a dog sniff being conducted of the accused’s bag.

The majority of Supreme Court judges in Brown treat the conclusion that the dog sniff constituted a search as a non-issue not requiring any comment. However, that the dog sniff was not a search was the sole basis upon which the Alberta Court of Appeal had decided the case. The Alberta Court of Appeal in Brown had done much more than reach the single conclusion that the dog sniff in question was not a search: they had suggested that Tessling called for a radically new approach to reasonable expectation of privacy in a variety of ways. Although in general terms it is clear that Justice Binnie has rejected the “emanations” approach which was part of that reasoning, there is much more left unaddressed.

Improving Privacy Protection, But By How Much?

Steve Coughlan*

The discussion of reasonable expectation of privacy in R. v. M. (A.)\(^1\) is extremely useful. In the wake of Tessling,\(^2\) many courts had effectively reduced the protection offered by s. 8 based on two arguments: that what was detected was an emanation in the public domain similar to heat coming from a house, and that what was discovered merely related to informational privacy and was not part of the biographical core of such data. Justice Binnie’s decision puts paid the notion that either of these arguments is a trump card. He suggests that generalizing about “emanations” is not a useful approach, and that the nature of the particular technology used and its interference with liberty must be engaged in each time. With regard to informational privacy, he unambiguously reaffirms what had frequently been missed in Tessling, that the protection extends at least to the biographical core of personal information, but is not limited to that and extends further.

Although in one sense Justice Binnie’s position is a familiar one, that all the circumstances must be considered, really his underlying rationale is more than that. Justice Binnie’s decision recognizes that if police are using an investigative technique, then that is likely to be because they expect to find useful and informative data. The more likely it is that the data is useful and informative, the more likely it is that there is a reasonable expectation of privacy in it. That does not mean that the police are never entitled to gather such material, it simply means that we should not pretend that they are not “searching” when they do it. Rather, we should recognize that it is a search and then engage in the process of balancing individual and state interests that s. 8 requires.

In addition, Justice Deschamps’ view that it is necessary at this stage to produce an adjusted list of factors for consideration in deciding reasonable expectation of privacy is also sensible. For the most part courts simply work from the list established in Edwards.\(^3\) However, the Edwards list really is designed only with territorial privacy in mind: indeed, it was formulated before the Court had clearly articulated the notion that territorial, personal and informational privacy were different things. As a result, some factors on the list are an oddity in some con-

---

*Faculty of Law, Dalhousie University

\(^1\)Reported ante p. 314.


texts (the person will always be present for a personal search, while presence seems irrelevant if the issue is informational privacy) and the list omits factors that might be relevant in other contexts. A reformulated list would be a positive benefit.

The M. (A.) decision would be more useful if it was entirely clear exactly whom Justice Binnie is speaking for. Only Chief Justice McLachlin explicitly concurs with his judgment. The plurality of four judges state only “[a]s found by the Court of Appeal and by Binnie J., a search was conducted”.\(^4\) If this can be taken to mean that Justice Binnie’s reasoning with regard to reasonable expectation of privacy is actually a majority decision of the Court, that is very helpful. If it simply means that the plurality agree with his conclusion but not necessarily his reasoning, that is unfortunate. In either case it would be helpful to know for certain.

Nothing in the companion case of Brown helps determine whether the plurality has adopted Binnie J.’s view in M. (A.). Indeed, that point raises an oddity in the way these two cases have been decided. The only real discussion of reasonable expectation of privacy occurs in M. (A.). Justice Deschamps does discuss the issue in Brown, and concludes that there was a reasonable expectation of privacy. The plurality and Justice Binnie, however, treat that question essentially as a non-issue in Brown: the plurality do not really refer to the question, and Justice Binnie states “[i]t is common ground that what occurred at the Calgary bus station was a warrantless search, and therefore presumptively unreasonable”.\(^5\) In saying this, he is referring to a dog sniff being conducted of the accused’s bag.

The majority of Supreme Court judges in Brown treat the conclusion that the dog sniff constituted a search as a non-issue not requiring any comment. However, that the dog sniff was not a search was the sole basis upon which the Alberta Court of Appeal had decided the case. The Alberta Court of Appeal in Brown had done much more than reach the single conclusion that the dog sniff in question was not a search: they had suggested that Tessling called for a radically new approach to reasonable expectation of privacy in a variety of ways. Although in general terms it is clear that Justice Binnie has rejected the “emanations” approach which was part of that reasoning, there is much more left unaddressed.

---
