A Reasonable Expectation of Privacy in Dealings with Police Undercover: The Need for Clarity and Correction

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ABSTRACT

In seminal early cases on section 8 of the *Charter of Rights and Freedoms*, the Supreme Court of Canada addressed whether a person waives a reasonable expectation of privacy (REP) when dealing with an undercover officer. The holdings in *R v Duarte* (1990), *R v Wong* (1990), and *R v Evans* (1996) give rise to the principle that we do not waive a REP in state intrusions of which we are not aware. Police cannot manufacture the waiver of a REP by donning a disguise. Later Supreme Court authority on section 8 affirms this principle. But a line of authority in British Columbia and Quebec holds the opposite: inviting an undercover officer into a home entails a waiver of privacy against the state. This article examines these cases to show how they are premised on a misreading of *Duarte*, *Wong*, and *Evans*, and why the Supreme Court should overturn them.

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I. INTRODUCTION

A person has standing under section 8 of the *Charter* where a state agent has conducted a search against them.[1] The Supreme Court of Canada has held that a state agent carries out a search under section 8 where they conduct an examination or do something with an investigative purpose that interferes with a person's reasonable expectation of privacy in a place or thing.[2] Where an agent has done this, the search will not be reasonable under section 8 unless it was authorized by a reasonable law and carried out reasonably.[3]

Do police carry out a search where they act surreptitiously and without informed consent? In three of its seminal early decisions under section 8—*R v Duarte*, *R v Wong*, and *R v Evans*[4]—Canada's Supreme Court dealt with the question of whether a suspect still retains a reasonable expectation of privacy when dealing with police acting undercover. While the scenarios were different, a consistent principle emerges from these cases: we do not waive a privacy interest against state intrusions into a place or thing unless the waiver is informed. Police cannot manufacture a waiver of a person's privacy by donning a disguise.

In *Duarte*, the Court held that while we run the risk that a person we divulge our secrets to could turn out to be a tattletale, this does not mean

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1 *Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [*Charter*]; section 8 reads: "Everyone has the right to be secure against unreasonable search or seizure."

2 Justice Sopinka's definition in *R v Evans*, 1996 CanLII 248 (SCC), at para 4 [*Evans*], continues to be cited: "it is only where a person's reasonable expectations of privacy are somehow diminished by an investigatory technique that s. 8 of the Charter comes into play." See also *R v Campbell*, 2024 SCC 42 at para 174 [*Campbell*], referring to an "examination or investigatory technique…" that "invades a reasonable expectation of privacy".

3 *R v Collins*, 1987 CanLII 84 (SCC) at para 23 [*Collins*]; *R v Fearon*, 2014 SCC 77 at para 12. All of the same applies to a seizure, which the Supreme Court has defined as "the taking of a thing from a person by a public authority without that person's consent" (*R v Dyment*, 1988 CanLII 10 (SCC) at para 26 [*Dyment*]). In *R v Cole*, 2012 SCC 53 at para 34 [*Cole*], Fish J held: "a taking is a seizure, where a person has a reasonable privacy interest in the object or subject matter of the state action and the information to which it gives access."

4 *R v Duarte*, [1990] 1 SCR 30, 1990 CanLII 150 [*Duarte*]; *R v Wong*, [1990] 3 SCR 36, 1990 CanLII 56 [*Wong*]; and *Evans*, *supra* note 2.

we should accept the risk that they might also be wearing a police wiretap.[5] In *Wong*, the Court held that even though the accused was indiscriminate when handing out invitations to a gaming operation in a hotel room—running the risk that anyone could turn up, including police—he still retained a reasonable privacy interest in the room, since the event was meant to take place behind closed doors.[6] In *Evans*, the Court held that the implied invitation to knock at a person's front door extended to the police, even in plain clothes, but only for the purpose of communicating with a resident and not to gather evidence about the inside of their home.[7]

Key to all these decisions is a rejection of what the Court in *Duarte* refers to as the risk analysis.[8] The risk that a person we invite into a private space—a conversation, a hotel room, our front door—could turn out to be a state agent cannot form the basis of the inference that a suspect no longer retains a privacy interest against the state carrying out a *search* in that space. The Court holds in each of these cases that where police act surreptitiously to gain entry to a private space, they intrude upon a reasonable expectation of privacy where they take steps amounting to a search. Which is to say, police intrude on a privacy interest whenever they do more than merely communicate—*i.e.*, whenever they gather evidence aside from what can be gleaned from verbal communication alone.[9] We run the risk of dealing with an undercover officer at any time. Running that risk does not imply tacit

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5 *Duarte*, *ibid*.

6 *Wong*, *supra* note 4.

7 *Evans*, *supra* note 2. In *Evans* police are not acting undercover, but as canvassed in Part I below, they do not identify themselves until the occupant opens his front door and police begin making the observations they came to make.

8 *Duarte*, *supra* note 4 at 39.

9 In *Duarte*, *ibid* at 57, Sopinka J for the majority held that "[a] conversation with an informer does not amount to a search and seizure within the meaning of the *Charter*." The Court has affirmed this point elsewhere; see, e.g., *R v Fliss*, 2002 SCC 16 [*Fliss*], holding that an officer could testify to a conversation recorded in violation of section 8, Arbour J (in dissent, but not on this point) noting at para 12: "a conversation with an informer, or a police officer, is not a search and seizure. Only the recording of such conversation is." See also *R v Mills*, 2019 SCC 22 [*Mills*], Karakatsanis holding at para 42: "This Court has long recognized that s. 8 does not prevent police from communicating with individuals in the course of an undercover investigation. This is because an individual cannot reasonably expect their words to be kept private from the person with whom they are communicating."

acceptance of being searched. The Court has consistently rejected the risk analysis as a basis for determining privacy.[10]

However, a line of appellate decisions—from *R v Gallaugher* in Ontario,[11] to *Joseph c R* and *Contant c R* in Quebec,[12] to *R v Roy* in British Columbia[13]—has given rise to a contrary principle, one that revives the risk analysis the Supreme Court had rejected in *Duarte*. Although *Gallaugher* can be read as consistent with Supreme Court authority on its facts, courts continue to cite it for propositions found in the other three cases.[14] In *Joseph* and *Contant*, the Quebec Court of Appeal held that because the accused in each case was dealing drugs out of their apartment and willing to receive anyone who might come knocking, they ceased to have a privacy interest against undercover officers. They had converted their home into a quasi-public drug store—a finding that, for reasons to be explored below, conflicts with the majority's holding in *Wong*.[15] The Court of Appeal for British Columbia in *Roy* adopted the reasoning in *Joseph* and *Contant* on this point, but also added a further rationale for why the accused waived a privacy interest: because unlike *Evans*,[16] where the invitation to attend the home was implied, here it was explicit. *Evans*, however, held the contrary: a person

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10 In recent cases, the Court has done this by holding that the risk arising from a lack of control over information (in the hands of a third party or through their access to it) does not render a privacy expectation in relation to it unreasonable. For example, in *R v Marakah*, 2017 SCC 59 at para 40 [*Marakah*], McLachlin CJ, for the majority, writes: "The Crown argues that Mr. Marakah lost all control over the electronic conversation with Mr. Winchester because Mr. Winchester could have disclosed it to third parties. However, the risk that recipients can disclose the text messages they receive does not change the analysis: *Duarte*, at pp. 44..." See also *Campbell*, *supra* note 2, at paras 66-68; *R v Jones*, 2017 SCC 60 at paras 40-45; *R v Spencer*, 2014 SCC 43 at para 46 [*Spencer*]; *R v TELUS Communications Co.*, 2013 SCC 16 at para 41 [*Telus*]; and *Cole*, *supra* note 3 at para 58.

11 *R v Gallaugher*, 1999 CanLII 2242 [*Gallaugher*].

12 *Joseph c. R.*, 2008 QCCA 2515 [*Joseph*], application for leave to appeal to SCC dismissed, 2009 CanLII 27238 (SCC).; *Contant c. R.*, 2008 QCCA 2514 [*Contant*], application for leave to appeal to SCC dismissed, 2009 CanLII 27237 (SCC).

13 *R v Roy*, 2010 BCCA 448, application for leave to appeal to SCC dismissed, [2010] SCCA No 448.

14 These cases are canvassed in Part II below.

15 *Wong*, *supra* note 4.

16 *Evans*, *supra* note 2.

does not waive privacy if the waiver is not informed.[17] Yet courts across Canada continue to cite *Gallaugher*, *Joseph*, *Contant*, and *Roy* to find that section 8 was not engaged when undercover officers entered private space to gather various kinds of evidence.[18]

Prior scholarship has overlooked this line of appeal cases.[19] And while the Supreme Court's evolving jurisprudence on a reasonable expectation of privacy has been subject to commentary from various angles, most of it over the past decade has concerned the scope of privacy in digital information in a broad sense.[20] Less attention has been paid to the question of whether and how expectations change when dealing with police undercover. This paper seeks to fill these gaps in the scholarship by revisiting the central holdings in *Duarte*, *Wong*, and *Evans* to offer clarity on the common thread running through them about what privacy expectations are retained in this context. It then canvases the rulings in *Gallaugher*, *Contant*, *Joseph*, and *Roy* to show how the latter three decisions (and cases relying on them) are inconsistent

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17 *Evans*, *ibid* at para 11; this point is canvased in more detail in Part II below.

18 The cases are discussed in Part II below.

19 Secondary sources have noted one or more of these cases in passing, but to this author's knowledge none contain a discussion of the merits of these holdings. See e.g., James A Fontana & David Keeshan, *The Law of Search and Seizure in Canada*, 13th ed (Toronto: LexisNexis, 2024) at s 1.01, citing all four appeal court decisions at issue here and asserting without qualification: "Generally, an undercover operator's entry into private premises at the invitation of an accused, implied or express, for the purposes of arranging a drug transaction does not breach a person's reasonable expectation of privacy and is therefore not a 'search' within the meaning of s. 8." See also Steve Coughlan, Gerry Ferguson & Lee Seshagiri, *Annual Review of Criminal Law* (Toronto: Thompson Reuters, 2011) at chapter 2 and *Crankshaw's Criminal Code of Canada* (Thompson Reuters: looseleaf service) at § CHA8:4, both noting *Roy*, *supra* note 13 in passing.

20 For a general overview of the Court's evolving doctrine, see Hamish Stewart, "Normative Foundations for Reasonable Expectations of Privacy" (2011) 54 SCLR 335. On aspects of the doctrine in relation to digital privacy, see Lisa M Austin, "Information Sharing and the 'Reasonable' Ambiguities of s.8 of the Charter" (2007) 57 UTLJ 499; Steven Penney, "The Digitization of Section 8 of the Charter: Reform or Revolution?" (2014) 67 SCLR 505; and Michelle Biddulph, "The Privacy Paradox: *Marakah*, *Mills*, and the Diminished Protections of Section 8" (2020) 43:5 Manitoba LJ 161; David Ireland & Richard Jochelson "The Reasonable Expectation of Privacy: Digital Interests in the Supreme Court of Canada in Section 8 Jurisprudence (2010-2020)" in Christopher DL Hunt & Robert Diab, eds, *The Last Frontier: Digital Privacy and the Charter* (Toronto: Thompson Reuters, 2021) at 7.

with Supreme Court authority—specifically, that neither dealing drugs out of one's home nor explicitly inviting an officer into a home suffice to waive privacy. It concludes by outlining why the Supreme Court should overturn the holding in these three cases: in short, because they revive the risk analysis and the reasons that we should reject it are still sound.

II. PART I: REVISITING DUARTE, WONG, AND EVANS

Two closely related principles emerge from *Duarte*, *Wong*, and *Evans* that appeal and trial courts canvassed in Part II will depart from.[21] The first is that when we put ourselves in a situation in which a visitor, guest, or interlocutor *could* be a state agent without our knowledge, we do not tacitly waive privacy or cease to hold a reasonable privacy interest in that space just because we have shown a willingness to deal with that person. The second is that an explicit invitation to an undercover officer is not a valid waiver of privacy or does not entail valid consent to enter private space to search or seize — because dealing with police undercover does not vitiate the general rule that consent under section 8 is valid only if it is informed. The Supreme Court has continued to affirm these principles.

A. *Duarte*

In *R v Duarte*,[22] the Supreme Court considered police use of a provision in the *Criminal Code* that deals with surreptitious recording. One section in Part VI (at the time Part IV.1) of the *Code* makes it an offence to surreptitiously record the audio of a conversation to which one is not a party.[23] But the *Code* carves out an exception to the offence for making an audio recording of a conversation to which one *is* a party.[24] The remainder

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21 *Duarte*, *supra* note 4, *Wong*, *supra* note 4, *Evans*, *supra* note 2.

22 *Supra* note 4.

23 *Criminal Code*, RSC 1985, c C-46 [*Code*], currently s 184(1); at the time, this was in s 178.11(1), which stated: "Every one who, by means of an electromagnetic, acoustic, mechanical or other device, wilfully intercepts a private communication is guilty of an indictable offence and liable to imprisonment for five years." The wording is the same in s 184(1) except that it requires that a person intercept "knowingly" rather than "wilfully".

24 *Code*, *ibid*, currently s 184(2); at the time, this was in s 178.11(2). The section states (and did back then): "Subsection (1) does not apply to (a) a person who has the consent to

of Part VI sets out authority for police to obtain a warrant to conduct a wiretap.

In *Duarte*, police rented an apartment for an informant and installed audio-visual recording equipment on the wall.[25] An undercover officer, along with an informant who was aware of the wire, met there with the accused to discuss a cocaine deal. An officer made notes reviewing the tapes of the recording. Duarte was charged with conspiracy to import a controlled substance. The Crown sought to rely on the exception for one-party consent recording in the *Code* to support the claim that the audio portion of the wiretap did not interfere with a reasonable privacy interest on the part of the accused, and thus a warrant was not required. The trial judge held that the recording was obtained in violation of section 8. The Court of Appeal disagreed (for reasons explored below).

In a six to one decision, the Supreme Court of Canada held that the consent audio recording exception in what is now Part VI does not violate section 8—it is not an unreasonable law. But police use of a consent audio recording engages a reasonable privacy interest. Justice La Forest for the majority held that while a person talking to an informant has no privacy interest in what they tell a state agent, they do have a reasonable expectation that the agent will not make a recording of their conversation without a warrant. By intruding on this interest, a state agent making a surreptitious recording carries out a search within the meaning of section 8.[26] Alone in dissent, Justice Lamer, as he then was, preferred the reasoning of Cory J,

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intercept, express or implied, of the originator of the private communication or of the person intended by the originator thereof to receive it".

25 The Court in this case does not parse the distinction between audio and video, treating the surveillance at issue as comprising only the audio. The reason for being vague about what is at issue (audio alone or 'electronic surveillance' comprising both audio and video) has to do with the wording of the provisions at issue. Section 178.11(1) and its present equivalent, s 184(1) prohibits capturing a 'private communication' using an 'electro-magnetic, acoustic, mechanical or other device.' A 'private conversation' is defined in s 183 to mean "any oral communication, or any telecommunication..." An 'electro-magnetic, acoustic or other device is defined in s 183 to mean "any device or apparatus that is used or is capable of being used to intercept a private communication, but does not include a hearing aid". This could conceivably include a device that captured only video but made it possible to make out a private communication.

26 *Duarte*, *supra* note 4 at 42.

then at the Court of Appeal for Ontario, who held the privacy interest not to be reasonable.

Justice Cory had found persuasive US Supreme Court authority which held there to be no meaningful distinction between permitting an undercover officer to testify to a conversation with a suspect and relying on a recording to bolster their memory.[27] If an officer with perfect recall could testify without impediment, why permit an accused to rely on flaws in an officer's memory when a complete version of the conversation is available?[28] The claim here, as La Forest J characterizes it, is that "participant surveillance is inherently less offensive than third party surveillance because the agent of the state hears nothing that his interlocutor did not intend him to hear."[29] Any violation of privacy by the state is "complete when the confidence of the person under suspicion is gained."[30] Putting it in broad terms, La Forest J asserts that "[i]n effect, the court [below] chose to treat the risk that an interlocutor will divulge one's words and the risk that he will make a permanent electronic record of them at the behest of the state as being of the same order of magnitude."[31]

But La Forest J took a different view, drawing on a contrary line of US authority at the state and trial level. Regulating surveillance is not aimed at shielding us from the risk that a recipient will divulge our secrets, since "[n]o set of laws could immunize us from that risk."[32] It is concerned rather with "a risk of a different order... the much more insidious danger inherent in allowing the state, in its unfettered discretion, to record and transmit our words."[33] This leads to one of the most memorable passages in section 8 jurisprudence:

> The reason for this protection is the realization that if the state were free, at its sole discretion, to make permanent electronic recordings of our private communications, there would be no meaningful residuum to our right to live our lives free from surveillance. The very efficacy of electronic surveillance is such that

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27 La Forest J at 39-42 *ibid* summarizes Cory J's decision and his reliance on *Lopez v United States*, 373 US 427 (1963) [*Lopez*] and *United States v White*, 401 US 745 (1971).

28 La Forest, *ibid* at 40 citing *Lopez*, *ibid*, at 438-39 for this argument.

29 *Duarte*, *supra* note 4 at 41.

30 *Ibid*.

31 *Ibid* at 42.

32 *Ibid* at 44.

33 *Ibid*.

> it has the potential, if left unregulated, to annihilate any expectation that our communications will remain private. A society which exposed us, at the whim of the state, to the risk of having a permanent electronic recording made of our words every time we opened our mouths might be superbly equipped to fight crime, but would be one in which privacy no longer had any meaning.[34]

The state does need to conduct wiretaps to enforce the law, he concedes, but the question is how to strike the right balance between police interest and privacy. Parliament has done this, La Forest J notes, by requiring a warrant for surreptitious recording issued on probable grounds and investigative necessity.[35]

The crucial element of the holding for the purpose of this paper is La Forest J's unequivocal rejection of the 'risk analysis' as a means of determining whether and when we retain a reasonable expectation of privacy. The focus here is on the risk of being recorded, but at the core of the analysis is the notion of *tacit* permission. As La Forest J writes:

> Since we can never know if our listener is an informer, and since if he proves to be one, we are to be taken to be tacitly consenting to the risk that the state may be listening to and recording our conversations, we should be prepared to run this risk every time we speak. I conclude that the risk analysis relied on by the Court of Appeal, when taken to its logical conclusion, must destroy all expectations of privacy.[36]

We cannot be taken to tacitly accept the risk of being recorded because recording entails something fundamentally different in nature from being tattled upon. Something about being recorded instills a chilling effect, and permitting police to record arbitrarily would render the possibility ever present.[37] To be clear, however, it is the gathering of evidence *beyond mere*

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34 *Ibid*.

35 *Ibid* at 44-45. In the wake of *Duarte*, what is now Part VI of the *Code* has evolved somewhat, allowing for wiretap warrants in different situations, on different conditions that are more or less onerous depending on whether a participant consents, there are exigent circumstances, or neither is the case. For an overview of these provisions, see Robert Diab & Chris DL Hunt, *Search and Seizure* (Toronto: Irwin Law, 2023) at chapter 6.

36 *Duarte*, *supra* note 4 at 47-8.

37 On the nature of this chill, La Forest J, *ibid* at 49, cites the dissenting opinion of Hufstedler J in *Holmes v Burr*, 486 F (2d) 55 (1973): "All of us discuss topics and use expressions with one person that we would not undertake with another and that we would never broadcast to a crowd. Few of us would ever speak freely if we knew that all our words were being captured by machines for later release before an unknown and potentially hostile audience. No one talks to a recorder as he talks to a person."

conversation that is objectionable here. The privacy interest affirmed in this case is not in the communication itself, but in the gathering of evidence *about* the communication—in the conduct of a *search* in relation to it.

One might ask at this stage: if an officer can testify to a conversation they had with a suspect, why can they not testify to what they saw in a person's living room? Does *Duarte* not simply prohibit undercover police from making a surreptitious *recording* of what they see in a private space? Would it not be an overstatement to say that it prohibits an officer from testifying as to what they *saw*? I am suggesting that this would be a misreading of *Duarte* because it overlooks the difference between testifying as to a communication one has received, which does not entail a search, and testifying to observations made when looking around a place (visited for that purpose), which does entail a search.[38]

More crucially for the purposes of this paper, *Duarte* held that a person's consent to speak to a person who turns out to be a state agent does not provide tacit consent to being recorded—which is to say, to being searched. The Court held that police needed a warrant here precisely because the consent to speak to a state agent could not be valid consent to being recorded where the consent was not informed. This reading is consistent with the Supreme Court's two most recent decisions canvassing *Duarte* in some detail.

Briefly, in *R v Mills*,[39] an undercover officer exchanged email and Facebook messages with an accused charged with child luring and took screenshots of the exchange. Notably, *Duarte*'s central holding about consent to speak not providing tacit consent to record (*i.e.*, search) remains undisturbed. In this case, a plurality of Justices (Abella, Gascon, Brown JJ, and Moldaver J concurring) held that police had not conducted a search here because the accused lacked an objectively reasonable privacy interest in communications with a child who was a stranger to him. But an assumption running through the four opinions in this decision is that if the accused's communication with the undercover officer had engaged a privacy interest

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38 See the holdings on this distinction cited in *Duarte*, *Fliss*, and *Mills*, cited above in note 9. It is worth noting that speech engages other protections, including the right to silence, to counsel, and the right against self-incrimination in ss 7, 10(b), and 11(c) of the *Charter* respectively, along with the common law confessions rule (*R v Oickle*, 2000 SCC 38) and Mr Big (*R v Mack*, 2014 SCC 58).

39 *Supra* note 9.

and constituted a form of surreptitious surveillance, consent to engage in the conversation would not provide consent for the recording (*i.e.*, a waiver of privacy). For Karakatsanis J and Wagner CJ, the exchange did not constitute a *surreptitious* recording; for the Moldaver-Brown plurality, it was not private; but for Martin J, it was a surreptitious recording, it was private, and it attracted the rule in *Duarte*. For no member of the Court was permission to converse tacit permission to make a surreptitious recording.

In *Campbell*,[40] police arrested G for drug dealing and lawfully seized his phone incident to arrest. Seeing incoming messages on the lockscreen from 'Dew,' a supplier, they began texting in response, pretending to be G. Over a two-hour exchange, police arranged a delivery with Dew and arrested Dwayne Campbell when he turned up with drugs. Campbell argued that police had intruded upon a reasonable privacy interest he had in the textual exchange with G. Both the Ontario Court of Appeal and Supreme Court of Canada agreed.[41] Aside from Côté J, who held the conversation not to be private, the entire Court found that Campbell had not waived a privacy interest by agreeing to converse, in writing, with a person he thought was G. Deception did not make the intrusion lawful.

B. *Wong*

Police were investigating 'floating' gaming operations conducted by members of the Asian-Canadian community in various hotel rooms in downtown Toronto.[42] Wong had passed out notices in restaurants and bars written in "Chinese characters" inviting people to attend an operation in a nearby hotel.[43] Police considered the possibility of having an Asian officer attend undercover but concluded that their officers were too well known among the community to escape notice. They considered seeking a warrant for video surveillance, but the *Code* had no explicit provision for this. Proceeding without a warrant, police installed a small video camera in the curtain valence and watched from an adjacent room as they recorded five sessions of the operation. Wong and ten others were charged with gaming offences.

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40 *Supra* note 2.

41 *R v Campbell*, 2022 ONCA 666; *Campbell*, *supra* note 2.

42 *Wong*, *supra* note 4 at 41.

43 *Ibid.*

Writing for a majority of five judges, La Forest J frames this case as a companion to *Duarte*, but with a focus on video rather than audio surveillance.[44] As with audio recording, La Forest J notes that making a video recording constitutes a search.[45] Much of the opinion expands upon the reasoning in *Duarte* to the effect that whether we enjoy a reasonable expectation of privacy in a given situation cannot rest on the risk we run of the space being subject to secret video surveillance — since technology now makes this possible almost anywhere. But La Forest J adds a new means of assessing whether a person has a reasonable privacy interest in a given situation by framing the question in normative terms. It should ultimately depend on "whether, by the standards of privacy that persons can expect to enjoy in a free and democratic society, the agents of the state were bound to conform to the requirements of the *Charter* when effecting the intrusion in question."[46] The idea of the state being free to place "hidden cameras on members of society wherever and whenever they wish" was clearly "irreconcilable with what we perceived to be acceptable behaviour on the part of the government."[47] As was the case in *Duarte*, La Forest J holds that

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44 Three judges signed on to La Forest J's opinion (Dickson CJ, L'Heureux-Dubé and Sopinka JJ) and writing separately, Wilson J concurred with La Forest J's reasons on section 8 but offered a separate opinion on s 24(2).

45 *Wong*, *supra* note 4 at 42.

46 *Ibid* at 45-6. This is an idea the Court has continued to affirm. Justice Karakatsanis, writing for the majority in *R v Bykovets*, 2024 SCC 6 held at para 7 [*Bykovets*]: "our Court has applied a normative standard to reasonable expectations of privacy. We have defined s. 8 in terms of what privacy *should* be — in a free, democratic, and open society". Justice Côté, writing in dissent in that case at para 120: "the inquiry is normative, not descriptive [...] The objective is to determine what degree of privacy one ought to have, not what degree of privacy one actually has." Most recently, in *Campbell*, *supra* note 2, Jamal J at para 51, for the majority, cited *Wong* (*supra* note 4 at 50) in holding: "The question is not 'whether persons who engage in illegal activity behind the locked door of a hotel room have a reasonable expectation of privacy' (a content-driven approach), but rather 'whether in a society such as ours persons who retire to a hotel room and close the door behind them have a reasonable expectation of privacy' (a content-neutral approach)." Justice Jamal's opinion, with Rowe J concurring, forms a majority in *Campbell*. See also *R v Tessling*, 2004 SCC 67, at para 42; *R v Reeves*, 2018 SCC 56, at para 28; and *Campbell*, supra note 2 at para 51.

47 *Wong*, *supra* note 4 at 47.

the risk of being video recorded is a risk of a different kind from "the risk that our activities may be observed by other persons".[48]

The key question in this case was whether the open nature of the invitation — the fact that anyone, including police, might turn up — rendered Wong's expectation of privacy *in the room* unreasonable. For the Court of Appeal, and for Lamer CJ and McLachlin J in dissent at the Supreme Court, it did (for reasons canvassed below). For the La Forest majority (and Wilson J concurring on this point), contending that an open invitation necessarily entails a waiver of privacy in the room entailed a "variant of the risk analysis" rejected in *Duarte*.[49] The logic being that if anyone could turn up, nothing that happened in the room could be private. Justice La Forest held that the question should be framed differently: "whether in a society such as ours persons who retire to a hotel room and close the door behind them have a reasonable expectation of privacy."[50] The fact that police might be among the attendees did not mean the meeting was not still meant to be private.[51] He notes that "a multitude of functions open to invited persons are held every week in hotel rooms across the country" and many will "often be strangers to each other."[52] But while people at these meetings "cannot expect their presence to go unnoticed by those in attendance", they cannot be assumed to "tacitly consent to allowing the state unfettered discretion to make a permanent recording of the proceeding."[53]

Wong might be read for the narrow proposition that a room to which many people are invited, giving rise to the risk of police being among them, is one in which we still retain an interest in not being surreptitiously recorded by video—*i.e.*, an interest against one *form* of search. But this reading overlooks the significance of the Court's holding about privacy in

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48 *Ibid* at 48

49 *Ibid* at 49.

50 *Ibid* at 50.

51 *Ibid* at 51: "Nor, with respect, can I attach any importance to the fact that in the circumstances of this case the appellant may have opened his door to strangers, or circulated invitations to the gaming sessions. I am simply unable to discern any logical nexus between these factors, and the conclusion that the police should have been free to videotape the proceedings in the hotel room at their sole discretion."

52 *Ibid.*

53 *Ibid.*

the space at issue. Despite the indiscriminate nature of the invitations, Wong retained a privacy interest *in the room* because it was a room "to which selected members of the public had access, [and] he had seen to it that activities in the room were conducted behind locked doors and drawn drapes."[54] This meant that *any* search conducted within it engaged section 8, not just a search with a camera.

In dissent, Lamer CJ, writing for himself and McLachlin J, agreed with much of what La Forest had to say about privacy in hotel rooms in general, but took issue with his analysis of the circumstances in this case. By extending invitations "indiscriminately… passing out numerous notices in public restaurants and bars," Wong had "thereby, invit[ed] the public into the hotel room."[55] It would be "impossible to conclude that a reasonable person, in the position of the appellant, would expect privacy in these circumstances."[56] Yet Lamer CJ insisted this did not reprise a form of the risk analysis: "I am not equating the risk that strangers will be in the hotel room with the risk that the police will be electronically recording the activity in the room."[57] As he put it: "[t]he issue is not so much concerned with risk as it is with reasonable expectations. Here it was not reasonable for the appellant to expect that strangers, including the police, would not be present in the room."[58] In short, police did not need a warrant, because the room had become a public place. Notably, however, Lamer CJ adds: "[t]he appellant may well have had a reasonable expectation of privacy in the hotel room had he extended a few invitations to particular individuals."[59] He does not indicate whether Wong would retain a privacy interest if the individuals happened to be undercover officers, but given that he did not qualify the assertion, the suggestion here is that Wong would retain privacy in this case.

Two things to note about Lamer CJ's dissent. The proposition that inviting anyone into a room renders it a public place is a proposition the majority rejects—but it is one that forms the basis of *Joseph*, *Contant* and

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54 *Ibid* at 52.

55 *Ibid* at 63.

56 *Ibid*.

57 *Ibid*.

58 *Ibid*.

59 *Ibid*.

Roy.[60] The majority in *Wong* rejects this reasoning because it refuses to overlook other important facts: "that activities in the room were conducted behind locked doors and drawn drapes"—*i.e.*, conducted with the intention that it be a closed-door session. The fact that police might be among the "select members of the public" who turn up does not render the expectation of privacy here any less *reasonable* (though for the dissent it did). Put another way, the majority rejects the distinction Lamer CJ drew between risk and reasonableness ("[t]he issue is not so much concerned with risk as it is with reasonable expectations"[61]). The conclusion that Wong lacked a *reasonable* privacy interest because of the nature of invitation only makes sense within a chain of reasoning to the effect that since almost anyone was invited, anyone *could* include police. For Lamer CJ, Wong's interest could not be reasonable because it rested on a risk of public and therefore police intrusion.

A second point to highlight here is that for both the dissent *and* the majority, the focus is not on the form of search (a camera versus mere observations), but on whether Wong retained a privacy interest in the room. To read *Wong* as pertaining strictly to video surveillance would be too narrow a reading; its central holding pertains to privacy in a hotel room to which members of the public were invited to attend a closed-door session. It was because the room remained private that police needed a warrant to conduct a search within it. The form of search they happened to conduct involved a video recording, but it might have been mere observations by an undercover officer—as occurs in *Evans*.

Justice La Forest's approach in *Wong*—taking a broader, holistic view of the facts in assessing whether a privacy interest is reasonable—anticipates the direction of later Supreme Court authority on point. In *R v Edwards*,[62] a case dealing with territorial privacy, Cory J, for the majority, held that "[a] reasonable expectation of privacy is to be determined on the basis of the totality of the circumstances."[63] Among the factors to be considered are a person's possession or control of a space, their ability to regulate access to it, their subjective expectation of privacy, and the objective reasonableness

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60 *Joseph* and *Contant*, *supra* note 12; Roy, *supra* note 13.

61 *Wong*, *supra* note 4 at 63.

62 [1996] 1 SCR 128 [*Edwards*].

63 *Ibid* at para 45.

of that expectation.[64] The majority's reluctance in *Wong* to confine the analysis to the fact that invitations to the hotel room were indiscriminate is consistent with the wider lens approach in *Edwards*. The open nature of the invitations had to be considered together with the fact that Wong had control over access, possession of the space, and a subjective expectation that it would be a closed-door session.

C. *Evans*

In *R v Evans*,[65] police received an anonymous tip about a neighbour growing marijuana in their home. They investigated criminal records and electricity consumption, and visually scanned the house from the street, but found nothing to substantiate the tip. An officer testified that before concluding the file, he considered the possibility of knocking at the door to ask the resident directly about the allegation. He assumed that three things might happen: the person would not answer; they would answer but deny it; or "we could get a whif [sic] or a smell might come out at us."[66] Two officers in plain clothes knocked at the door and Evans opened it. The officers identified themselves as police and could smell marijuana. They arrested Evans, obtained a warrant to search, and he was charged with possession for the purpose of trafficking.

The central issue in this case was whether the sniff at the door constituted a search within the meaning of section 8. For the majority, the sniff amounted to a search because it was a thing done for an investigative purpose that intruded upon a reasonable expectation of privacy.[67] Evans had a privacy interest in his home (and odours emanating from it) that he did not waive in the implied invitation to knock. Police—even in plain clothes—could rely upon the invitation to approach and knock, but the scope of the invitation extended no further than to carry out a communication. It did not entail tacit consent to police coming onto

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64 *Ibid*; the Court continues to affirm this holistic approach: see *Bykovets*, *supra* note 46 at para 45 and *Campbell*, *supra* note 2 at para 39.

65 *Evans*, *supra* note 2. The facts are canvassed at paras 28 to 31.

66 *Ibid* at para 30.

67 Justice Sopinka's opinion was joined by Cory and Iacobucci JJ. Justice La Forest wrote a brief concurring opinion expressing "substantial agreement" with Sopinka J's reasons, noting at *ibid* at para 2: "I fully agree that the police went on the accused persons' premises to search. They had no other business there."

residential property to make observations for an investigative purpose. When officers detected an odour at the door, they were not making a happenstance observation, because their purpose in *coming* to the door was in part to make that observation.[68]

The dissent in *Evans* held that the knock at the door and whiff of marijuana did not involve a search under section 8.[69] Police did not exceed the scope of the implied invitation to knock. That gave police authority to be at the front door, where they happened to smell marijuana. Justice Major compared the risk that an invitee might turn out to be an officer to the risk in *Duarte* that a person might turn out to be a tattletale.[70] As in *Duarte*, where an officer is free to testify to what he heard, an officer here should be free to testify to what he or she observed. But the flaw in Major J's reasoning becomes overt at one point:

> Both *Duarte* and *Wong* dealt with police officers making secret, permanent recordings of activity conducted by individuals who had no idea they were under surveillance. In this appeal, the officers approached the house openly, in broad daylight, and the appellants retained choice and control over whether or not to open the door. In exercising that choice, they took the risk that whoever was standing there would use their senses, in the same way that choosing to speak to others is an assumption of the risk that they will repeat what has been said.[71]

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68 *Evans*, *supra* note 2 at para 9. At the time of this writing, the Supreme Court of Canada has heard arguments in the appeal of the decision in *R v Singer*, 2023 SKCA 123, but not yet rendered its decision. *Singer* is one of a recent body of cases that cites *Evans* to determine whether police conducted a search when they came onto private property in an impaired driving investigation. The Saskatchewan Court of Appeal in *Singer* follows the approach in a series of cases that draw a distinction — consistent with *Evans* — between police acting within the implied invitation when they come onto property with the strict purpose of communicating so as to advance the investigation and police exceeding the implied invitation when they enter with the purpose of gathering evidence against the occupant. As the Court holds at para 64: "Just as the implied licence to knock does not extend an invitation to the police to approach the door for the purpose of gathering evidence against the occupant, by conversing with and using their senses to determine if the occupant exhibits signs of intoxication, there is no implied invitation to enter the driveway to investigate the owner by gathering such evidence."

69 Justice Major authored a dissenting opinion joined by Gontier J, and L'Heureux-Dubé J concurred with Major in a separate opinion.

70 *Evans*, *supra* note 2 at para 49.

71 *Ibid* at para 50.

The analogy Major J seeks to draw here is to equate a visitor at the door (possibly a neighbour) with an untrustworthy interlocutor. Since either can tattletale on what they saw, smelled, or heard, Evans could have no privacy in observations *any* person might have made at the door—including police. But the analogy is false. It overlooks the fact that when a tattletale turns out to be a state agent, they have not carried out a search in the one case (merely hearing the accused tell them a secret), but they *have* carried out a search in the other (visiting a private place intending to make observations). Justice Major would be correct about Evans having no privacy against a neighbour *reporting* to police that she detected an odour of marijuana at the door (regardless of her intentions). But he overlooks the difference between the two situations.

Setting this issue in Major J's dissent aside, a crucial facet of the majority's difference with the dissent pertains to its reasoning about tacit consent. As Sopinka J writes:

> Clearly, occupiers of a dwelling cannot be presumed to invite the police (or anyone else) to approach their home for the purpose of substantiating a criminal charge against them. Any "waiver" of privacy rights that can be implied through the "invitation to knock" simply fails to extend that far.[72]

Asserting that an occupant cannot be "presumed to invite" police to approach their home to conduct a search is tantamount to saying that consent to do this must be overt—which is to say, it must be informed. What other reason could there be for not *presuming* it?

Justice Sopinka's holding that consent to be searched here cannot be presumed is consistent with Supreme Court holdings on consent needing to be informed in order to constitute a valid waiver of privacy or valid authority to conduct a search. In *R v Borden*,[73] a case where police took a

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[72] *Ibid* at para 9. To support this view, Sopinka J draws an analogy to *Duarte*, *supra* note 4. He notes in para 11 at *Evans*, supra note 2, that in *Duarte* the Court held in effect that "while an individual may explicitly 'invite' another to engage in private conversation, the invitation cannot be extended to authorize an activity with a different purpose, namely, the surreptitious recording of what is said." Where a state agent acting on the invitation does so with a different purpose, they "exceed the bounds of that invitation, [and] the activity in question may constitute a 'search' for constitutional purposes." Similarly here, by exceeding the implied invitation to knock "for the purpose, *inter alia*, of securing evidence against the occupant"—*i.e.*, making observations—police are "engaging in a search of the occupant's home."

[73] *R v Borden*, [1994] 3 SCR 145, 1994 CanLII 63 [*Borden*], Iacobucci J's opinion was joined by La Forest, Gonthier, and Major JJ.

hair sample from an accused who waived the right to counsel, Iacobucci J for the majority—asserting a point the entire court agreed with—held:

> In order for a waiver of the right to be secure against an unreasonable seizure to be effective, the person purporting to consent must be possessed of the requisite informational foundation for a true relinquishment of the right. A right to choose requires not only the volition to prefer one option over another, but also sufficient available information to make the preference meaningful.[74]

He cited the Court's earlier decisions in *R v Dyment*[75] and *R v Colarusso*[76] to affirm the point that "consent to the taking of blood can be limited to a taking for certain purposes only", a point that "reveals a link between the scope of a valid consent and the scope of the accused's knowledge in relation to the consequences of that consent."[77]

The common thread in *Duarte*, *Wong*, and *Evans* is that whether section 8 is engaged turns on whether the place or thing searched is something over which we retain a reasonable privacy interest; and we do not waive an interest—against being recorded, in the privacy of a closed-door gathering, or in our home—tacitly or implicitly when dealing with police undercover or without the waiver being informed. Police can take advantage of surreptitious means to gain our confidence and learn things we might tell them. There are, as noted, other protections that pertain to things we might say: the right to silence and to counsel, the right against self-incrimination, the common law confessions rule, and Mr. Big.[78] The purpose of section 8, by contrast, is to protect a person's reasonable expectation of privacy in a place or thing.[79] The cases canvassed here affirm that this expectation is not waived or rendered unreasonable because we agree to deal with a class of persons who might turn out to be undercover officers acting with an investigative purpose. Holding otherwise would reprise a form of the risk analysis the Court rejected in *Duarte* and *Wong*, and it would run contrary to the Court's holding that valid consent needs to be informed in *Evans*,

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74 *Ibid* at 162. Chief Justice Lamer (joined by Gonthier J) concurs on this point at 153-4, but takes a position on uses of evidence once consent is obtained (McLachlin J agrees with Lamer CJ's opinion) but consider the breach of s 8 "derivative" of breaches of s 10(a) and (b) of the *Charter*.

75 *Dyment*, *supra* note 3 (dating to 1988).

76 [1994] 1 SCR 20 [*Colarusso*].

77 *Borden*, *supra* note 73 at 163.

78 See the sources cited in note 38 above.

79 *Hunter et al v Southam Inc.*, [1984] 2 SCR 145 at 159, 1984 CanLII 33.

Borden, *Dyment*, and *Colarusso*. In order to gain entry into a home without a warrant, police would only need to don a disguise (*e.g.*, pretend to be a hydro employee) to obtain an 'explicit invitation' to enter. If this is all it takes to circumvent the need for a warrant, it would render the requirement for a warrant—or indeed privacy in a home—meaningless.

III. PART II: APPELLATE AUTHORITY DEPARTING IN PRINCIPLE

Soon after the Supreme Court decided *Evans*, a line of appellate authority began to emerge in Ontario, Quebec, and British Columbia holding that undercover officers do not carry out a search when they enter a home strictly for the purpose of conducting a drug deal. Two of these authorities, *Gallaugher* and *Joseph*,[80] can be read as consistent—or not inconsistent—with *Duarte* and *Evans* in holding that an officer's entry into the home did not violate section 8 because the officer sought only to communicate with the accused and not to make observations. Police in these cases did not carry out a search. In *Joseph*, *Contant*, and *Roy*, however, the court holds that the appellant waived privacy in his home simply by showing a willingness to invite any drug purchaser into that space, contrary to the majority's reasons in *Wong*. And, finally, in *Roy*,[81] police attend a private space with an investigative purpose and make observations, *i.e.*, they do more than merely communicate. Yet the court overlooks this distinction and finds that a search has not been carried out. I canvas all four decisions briefly to trace the development of this line and to make clear how the facts and law differ in each case.

A. *Gallaugher*

In this brief decision, the Ontario Court of Appeal affirmed the legality of police conduct within the accused's home on the basis of a key finding at trial: "The trial judge found as a fact that the police officer went to the appellant's place of business (which was also his residence) on the pretext of buying a dock as a Christmas present for his wife but for the true purpose of determining if the appellant would agree to discuss the sale of drugs with

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80 *Gallaugher*, *supra* note 11, and *Joseph*, supra note 12.

81 *Contant*, supra note 12, and *Roy*, *supra* note 13.

him."[82] Once inside the home, the officer "saw marijuana in plain view in several places in the kitchen" and later obtained a warrant.[83]

The court distinguishes the facts in this case from those in *Evans* on the basis that "the police officer did not enter the premises to search".[84] That is to say, he went only to communicate rather than to make observations, and thus did not conduct a search within the meaning of section 8 (since we do not have a privacy interest in the things we might say). If the officer's purpose was only to communicate, *Gallaugher* does not stand for the proposition that if a person deals drugs out of their home to anyone who might come by, they waive a privacy interest against the state and tacitly consent to be searched. Yet, in *Roy* and later cases, it is cited to this effect.[85]

B. *Joseph*

An informant told police that the accused and another man, P, were selling crack out of the accused's apartment in Montreal. Police surveilled the building and confirmed suspicious activity relating to another apartment, along with that of the accused. An undercover officer knocked on the door of the latter apartment and two women answered. The officer showed them $40 and when they asked him what he wanted, he said "2 rocks." He was told: "go next door and see Nicolas, J". He knocked at the second apartment of interest to police but no one answered. He went back to the first apartment and a woman told him that she would take him elsewhere to buy drugs. As the two walked away from the building, P appeared in a window summoning them back to the accused's apartment. P invited them in and then said "I thought you were with her … I don't know you."[86] The officer asked P if he would agree to sell to him if he came

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82 *Gallaugher*, *supra* note 11 at para 1.

83 *Ibid* at para 2.

84 *Ibid* at para 3.

85 *Roy*, *supra* note 13 at para 25; *R v Felger*, 2014 BCCA 34 [*Felger*], noting the Crown's reliance on *Gallaugher* at para 23; *R v Pearson*, 2022 ABKB 655 at para 288. The court in *R v Merritt*, 2017 ONSC 1648 [*Merritt*] cites *Gallaugher* at para 107 for two propositions: dealing drugs out of one's home waives privacy and also the point that an express invitation to an undercover officer is a valid waiver of privacy so long as the officer does not exceed the invitation. I canvass this latter proposition in more detail in relation to *Roy* and *Evans*, below.

86 *Joseph*, *supra* note 12 at para 15.

back with the person who referred him and P said yes. Using this information, police obtained a warrant to search the apartment.

In a unanimous decision of the Quebec Court of Appeal, Dufresne J held that the officer's visit and invited entry into the apartment did not constitute a search for two reasons—two that he conflates:

> The undercover officer visits the appellant essentially to conduct a transaction, that is, to purchase the products being sold there. I consider that, under the circumstances, this does not constitute a search, as the appellant's apartment was accessible to anyone seeking to buy drugs, and the appellant had, at least implicitly, waived a reasonable expectation of privacy.[87]

One reason, then, was that—as in *Gallaugher*, which is not cited here, and in distinction to *Evans*, which is cited—the officer's purpose was only to communicate and not to make observations.[88] On this point, *Joseph* is consistent with *Evans*, because it does not appear that any information gleaned from the visit and used to obtain the warrant involved observations inside a private space aside from the occupant's willingness to sell drugs (*i.e.*, police used only what was communicated to them). [89]

However, the second reason Dufresne J set out for finding there was no search here is contrary to the holding in *Wong*.[90] Since, as he puts it, "the appellant's apartment was accessible to anyone seeking to buy drugs, [...the occupant] had, at least implicitly, waived a reasonable expectation of privacy."[91] This is, in essence, what Lamer CJ and McLachlin J held in

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87 *Ibid* at para 34; in the original: "L'agent double se rend chez l'appelant essentiellement dans le but de conclure une transaction, c'est-à-dire d'acheter les produits qu'on y vend. J'estime qu'il ne peut s'agir, dans les circonstances, d'une fouille, puisque l'appartement de l'appelant était accessible à quiconque voulait se procurer de la drogue et que l'appelant avait, au moins implicitement, renoncé à une attente raisonnable en matière de protection de vie privée."

88 *Ibid* at para 29: "He went to the appellant's apartment for the sole purpose of concluding a drug transaction in a known place, according to the information collected so far, to do such a business there."

89 See *Tremblay c R*, 2020 QCCA 1131 for a more complex set of facts involving a similar analysis, and a reliance upon *Evans* and *Joseph*. In this case, an undercover officer knocks on the door of a suspected stash house in an effort to trick an occupant to remove drugs from the home or reveal their location within it. The Court of Appeal affirms, at paras 31-32, the finding at trial that the officer's intention was strictly to communicate and thus section 8 was not engaged.

90 *Wong*, *supra* note 4.

91 *Joseph*, *supra* note 12 at para 34.

dissent in *Wong*. Because Wong had been so indiscriminate in handing out invitations—because *anyone* could have turned up in the hotel room—he had effectively invited the public into the room. The same reasoning is applied here: since anyone could turn up and be invited inside the apartment (as this officer was), the accused had waived his privacy in it.[92] Yet this assertion directly contradicts the majority holding in *Wong*. For the majority, as canvassed in Part I of this paper, the fact that anyone might turn up to Wong's room was not conclusive; what mattered more in assessing privacy was whether the occupants' intention was to conduct a 'closed-door' meeting.

In this case, P's reluctance to deal with the officer as a complete stranger belies an intention to deal with anyone or to invite anyone into the apartment. P allowed the officer to enter the "corridor" of the suite, but he was no longer welcome once P realized that he was not "with her".[93] This suggests an intention to vet who enters and to retain privacy in the space.[94]

C. *Contant*

In this companion decision also authored by Dufresne J, the Court of Appeal is again unanimous in finding that an undercover officer had not conducted a search. But the facts in this case differ materially from those in *Joseph*.

Police received a tip from a known informant that drugs were being sold out of an apartment at an address in Montreal where a man and woman resided. Further investigation confirmed the suspicions and identified Contant as a person of interest, and an undercover officer attended the apartment. After a brief conversation over the intercom, the officer was let in, and Contant opened the door of the apartment and invited him in. The officer held out $40 and asked for two rocks of crack. A woman also present

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92 *Ibid* at para 26: "This potential client, whether already known to the appellant, such as the woman who appeared on the scene at the time when the double agent was there, or whether he is an unknown or a double agent, does not infringe the appellant's right to his or her peace of mind or her private life." Note that although P invited police in, the evidence was that Joseph was dealing from the apartment as well. The Crown was not relying on P's conduct as an implied waiver of Joseph's privacy.

93 *Ibid* at para 15.

94 A clearer contrast between *Wong* and *Joseph* can be found in *R v Felger*, *supra* note 81, and *R v Fitt*, 1995 NSCA 47 [*Fitt*], aff'd 1996 CanLII 251. The facts in these cases and the contrast they present are canvassed in Part III of this paper, below.

told him they needed to have the drugs delivered. The officer returned forty minutes later and waited briefly until a man arrived delivering drugs to Contant. Contant then went to the kitchen, indicating that he was going to boil them to make crack, and then gave the officer two rocks. The officer then obtained a warrant. The case suggests—but is not entirely clear—that the affidavit to obtain the warrant contained the observation that Contant made the crack in the kitchen.[95]

Justice Dufresne offers the same two reasons he set out in *Joseph* for why the officer had not conducted a search in his two visits to the apartment.[96] In doing so, the court once again conflates the issues of intention and waiver, stemming in this case from the trial judge having made the same conflation.[97] As with *Joseph*, Dufrene J holds this case to be similar to *Gallaugher* and not inconsistent with *Evans*, on the basis that the officer came only to communicate rather than to make observations. Yet, the holding is contrary to *Wong* (as with *Joseph*) since the finding here that there was no search rests partly on the assertion that by dealing drugs out of his home, the occupant had converted it into a public place.

However, Dufresne J's holding in *Contant* that what the officer did here is different from what the officers did in *Evans* is questionable. The evidence here does not support the finding of a limited intention on the officer's part to communicate rather than to make observations—and Dufresne J does not point to any evidence to support this. He merely asserts that the officer "went to the appellant's apartment with the sole aim of carrying out a drug transaction at a location that [...] was known as one where that type of business took place."[98] But while the officer may have had a limited purpose on the first visit, his purpose on the second was at

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95 *Contant*, *supra* note 12 at para 36 noting generally that "information" from the officer's dealings with the accused were included in the application for the warrant.

96 The entire "analysis" section in *Contant* is cut and pasted from *Joseph* with minimal revision. Compare paras 19 to 37 in *Contant*, *supra* note 12 with paras 18 to 37 of *Joseph*, *supra* note 12.

97 *Contant*, *supra* note 12 at para 19; as Dufresne J notes, "[t]he trial judge concluded that the appellant could not claim that his privacy was violated if he chose [TRANSLATION] 'to traffic in narcotics from his home and to respond to the requests made there'."

98 *Ibid* at para 30.

best unclear. The evidence points instead to the officer returning precisely in order to make observations to include in the application for the warrant.

When the officer left the apartment the first time, he had grounds to arrest and to obtain a search warrant. The likeliest explanation for his purpose in returning (forty minutes later) was to make observations about the *presence* of drugs in the apartment. He did not come back only to be told 'we have the drugs,' since he knew this already. He may have returned simply to maintain the integrity of the investigation—though neither the trial court nor the Court of Appeal made this finding. The more compelling inference to draw here is that the officer came back to *see* the drugs.

Contant thus differs from *Joseph* in that the officer did make observations in the apartment (boiling the drugs) and would appear to have relied upon them to obtain a warrant. And in contrast to *Gallaugher*, the officer did not make these observations by happenstance. He made them on a second visit, knowing before he arrived that drugs would be present. The holding that the officer's purpose in returning a second time was limited to communication is therefore consistent with *Evans* but appears to be without foundation.

D. *Roy*

By the time the British Columbia Court of Appeal decided *Roy* in 2010,[99] all of the distinctions drawn in the earlier cases were lost. The holding in *Roy* runs contrary to Supreme Court authority by reviving the risk analysis rejected in *Duarte*, following the dissent over the majority in *Wong*, and misreading the central holding in *Evans*.

Police were gathering evidence against a suspected criminal organization and, in the process, came across Roy, who was not one of their targets. Through intermediaries, police arranged to sell 100 pounds of marijuana to Roy for $160,000. Police asked to see the money before concluding the sale, with the intention of intercepting Roy in possession of the money on his way to that meeting. But Roy was not inclined to leave his home with the money and invited an intermediary to meet him there, where he showed him a substantial amount of cash. The next day, an undercover officer came to Roy's home with another intermediary. Roy invited both in, showed them $135,000 in cash and said that he had another 35 or 40,000

[99] *Roy*, *supra* note 13.

available on the premises. Roy also showed the officer a supply of marihuana in the garage. The officer then signaled the arrest team, which conducted a search of the premises to secure evidence. The trial judge found that Roy had no expectation of privacy against police by virtue of the express invitation to the undercover officer to meet at the home.[100]

Writing for a unanimous panel of the British Columbia Court of Appeal, Lowry J cited *Gallaugher*, *Joseph*, and *Contant* to hold that police had not conducted a search here for a number of reasons that blur crucial distinctions in those earlier cases.[101] To begin with, as Lowry J writes:

> Here, in much the same way as in *Contant* and *Joseph*, the undercover officer attended the residence of the accused for the purpose of concluding a drug transaction. The appellant had refused to complete one aspect of the transaction—viewing the purchase money—in any location other than his private residence. By so doing, the appellant converted his residence to a place of business and thus altered his reasonable expectation of privacy in his home.[102]

With respect, the first sentence is patently erroneous. In the Quebec cases, officers went to buy drugs. In this case, police went to *see* something. They were *already* conducting a transaction. The third sentence repeats the error in *Joseph* and *Contant* canvassed above: applying the reasoning of the dissent in *Wong* rather than that of the majority and thereby reviving a form of the risk analysis (*i.e.*, since anyone could turn up, Roy ran the risk of police being among them). In this case, the conflict between Lowry J's reasoning and the majority holding in *Wong* is even clearer, since Roy is overtly relying on the intimacy of his home to ensure the meeting is private. His intention to hold a 'closed door' meeting could not be more apparent.

Justice Lowry also finds that police had not conducted a search here because, unlike the facts in *Evans*, where police acted on an implied invitation, the officer in this case acted on an explicit invitation and did not exceed its scope.[103] To support this assertion, Lowry J cites Sopinka J's opinion in *Evans* for the point that "an individual's expectations of privacy cannot be infringed by conduct that has been authorized by the individual in question.[104] From this, Lowry J concludes that "[s]o long as the police act

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100 The trial decision is summarized at para 16, *ibid.*

101 *Roy*, *supra* note 13 at para 25.

102 *Ibid* at para 28.

103 The idea of drawing this distinction and seizing upon the explicit invitation is found in *Joseph*, *supra* note 12 at para 27.

104 *Evans*, *supra* note 2 at para 12, cited in *Roy*, *supra* note 13 at para 30.

in accordance with the express invitation, they cannot be said to intrude upon the privacy interests of the occupant."[105] Roy invited the officer to look at the money and to look inside the garage; the officer did that and nothing more. Unlike *Evans*, he did not exceed the invitation.

Justice Lowry misreads *Evans*. He overlooks a crucial point in that decision. Police exceeded the implied invitation in *Evans* because they came to make (and did make) observations rather than merely communicate. But they also exceeded the invitation, because, as Sopinka J put it: "Clearly, occupiers of a dwelling cannot be presumed to invite the police (or anyone else) to approach their home for the purpose of substantiating a criminal charge against them."[106] Justice Lowry assumes that an explicit invitation is a valid waiver of privacy despite being uninformed—but Sopinka J is clear on this point: a waiver against police cannot be presumed. This is really a way of saying that we do not waive a privacy interest against police unless it is overt *and* informed.[107] More crucially, Lowry J's assertion that a direct but uninformed invitation constitutes a valid waiver is contrary to the holdings in *Borden*, *Dyment*, and *Colarusso*—which were overlooked in *Roy* altogether.[108] The accused in *Borden* also directly consented to the taking of a hair sample, but the Supreme Court was unanimous in holding that it was not valid because it was not informed.

To sum up, the decisions in *Gallaugher* and *Joseph* might be read as consistent with Supreme Court authority on their facts. However, the holdings in *Joseph*, *Contant*, and *Roy* about waiving privacy by virtue of

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105 *Roy*, *supra* note 13 at para 30.

106 *Evans*, *supra* note 2 at para 9.

107 To counter a potential point of confusion, in *Roy*, *Evans*, *Colarusso*, *Dyment*, and *Borden*, the question of whether the accused had provided valid consent went to the question of whether they had waived their privacy interest and not whether police could rely on consent as authority to conduct a search. (That is to say, *Roy* cannot be distinguished from Supreme Court authority on this basis.) This common element to these cases can be gleaned from the fact that the central question in each case is whether a search or seizure had been conducted (i.e., whether what police did infringed a reasonable privacy interest or whether the accused had waived that interest), rather than whether the waiver or consent formed valid authority for the search or seizure (whether it was 'authorized by law'). See e.g. *Roy*, *supra* note 13 at paras 22 and 23; and *Borden*, *supra* note 73 at 161: "It must therefore be shown that the taking of the sample in respect of this appeal was accompanied by his consent. In the absence of such consent, there was a seizure".

108 *Borden*, *supra* note 73; *Dyment*, *supra* note 3; *Colarusso*, *supra* note 76.

dealing drugs and (in the case of *Roy*) explicit invitations to undercover officers being valid are holdings that conflict with the rulings in *Duarte*, *Wong*, and *Evans* (and other Supreme Court authority on consent). The line of appeal cases canvassed here evolves incrementally to the point of a clear departure in *Roy*. Later cases following these decisions suggest that the departure is having an impact.

E. *Later jurisprudence*

In *R v Nuttal*,[109] the Supreme Court of British Columbia held that the accused, charged with various terrorism offences, had no privacy interest in items left in a hotel room that they had asked an undercover officer to seize for disposal. Justice Bruce applied *Roy*, noting that the appeal court in that case "rejected the notion that the express or implied invitation extended to an undercover officer who entered a private residence to view purchase money for a planned drug deal was breached because the officer's true purpose was to collect evidence against Mr. Roy."[110] In other words, consent to the officer in this case was valid, despite being uninformed.

In *R v Felger*,[111] the British Columbia Court of Appeal cited *Gallaugher*, *Joseph*, *Contant* and *Roy* for part of the rationale in affirming a trial decision that the accused had no privacy interest in a store selling marijuana-related items with a sign in the front window saying police were not welcome.[112] Justice Garson, writing for the court, cites the four decisions noted here as setting out two "overlapping lines of authority":

> The first is a line of authority to the effect that there is no expectation of privacy in a publicly accessible place of business. The second line holds that where an undercover police officer is "invited" to a place that is normally private, such as a home, the invitation, even though it is unknowingly extended to an undercover officer, waives any expectation of privacy.[113]

She holds that *Roy* "demonstrates both principles."[114] The facts in *Felger* are notably different from those in *Roy*, providing a clearer basis for the lack of a reasonable privacy interest (for reasons canvassed in Part III of this paper).

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109 2014 BCSC 2355.

110 *Ibid* at para 45.

111 *Felger*, *supra* note 85.

112 Citations to these cases appear at para 41 *ibid*.

113 *Ibid* at para 40.

114 *Ibid* at para 41.

Suffice it to say here that police did more than communicate in this case.[115] They made observations in the store over five visits and used the information in the affidavit to obtain the warrant—and thus the holding here does not turn on police intention having been limited to communication.

In *Boucher c. R.*,[116] police carrying out a search with a warrant did not identify themselves upon entry to the accused's home, but instead had an undercover officer gain entry first by knocking and being invited in. On appeal, Boucher argued that police had not complied with requirements for a no-knock entry in *R v Cornell*,[117] rendering the manner of search unreasonable. In a per curiam decision, the court rejected this submission and found the search reasonable. But the court also cited *Joseph* for the proposition that since the appellant had used the home as a place to conduct drug transactions, he had waived his privacy interest and the search did not engage section 8.[118]

R v Merrit[119] is a case mainly about whether an email exchange with an undercover officer constituted a surreptitious recording, but the court also deals with whether an undercover officer's entry into a trailer at the invitation of the accused engaged a reasonable privacy interest. The court finds that it did not engage a reasonable interest in part because the officer's purpose was to retrieve things requested by the accused and to "cover up their prior warranted search."[120] But Justice Dawson also notes:

> My conclusions are based on a series of cases which hold that when, during an undercover operation, a police officer enters a home or other premises where drugs are being sold or where they enter at the invitation of the occupant so they can engage in some aspect of a drug transaction, no violation of s. 8 of the Charter is occasioned. That is because the occupant has abandoned, modified or waived their REP to the extent provided in the invitation. So long as the undercover officer acts within the scope of an express or implied invitation s. 8 is not engaged.[121]

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115 *Ibid* at para 49.

116 2016 QCCA 1083 [*Boucher*].

117 2010 SSC 31, at para 24, cited in *Boucher*, *ibid* at para 11.

118 *Boucher*, *supra* note 116 at para 16, citing paras 25 and 26 of *Joseph*, supra note 12.

119 *Supra* note 85.

120 *Ibid* at para 106.

121 *Ibid* at para 107.

The honourable Justice then cites *Gallaugher*, *Joseph*, *Contant*, *Roy* and *Felger* for these propositions (without distinguishing the cases to which they attach).[122]

In *R. v Elite Farm Services Ltd.*,[123] a meat processing company claimed that a civilian had acted as a state agent in conducting an unreasonable search of a farming operation. The civilian, L, was an animal activist working for a company to which the accused corporation held a contract for service. The court in this case found that L was not a state agent. But it also held that even if he were an agent, since the accused had invited L to visit the farm, the company lacked a reasonable privacy interest against L conducting a surreptitious recording at the farm. Justice Crabtree cited *Roy* for the proposition that "where the police officer acted in accordance with the express invitation, it cannot be said that the officer was intruding upon the privacy interests of the occupant."[124] Once again, contrary to *Evans*, an express invitation is held to be valid despite not being informed.

This overview of later cases is meant to show how the two propositions emerging from the *Gallaugher-Roy* line—drug dealing in a home converting it into a public place and an express invitation being valid without being informed—have been absorbed in Canadian criminal law without further assessment. Any sense of their conflict with larger principles in *Duarte*, *Wong*, and *Evans* has been lost.

IV. PART III: WHY THE SUPREME COURT OF CANADA SHOULD INTERVENE AND HOW

As noted earlier, while *Gallaugher* can be read as consistent with Supreme Court authority,[125] it is cited along with *Joseph*, *Contant*, and *Roy* for the two propositions noted above purporting to involve implied waivers of privacy.[126] The aim in the first two parts of this paper was to show why these propositions are contrary to the principles emerging from *Duarte*,

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122 *Ibid.*

123 2021 BCSC 2061.

124 *Ibid* at para 93.

125 *Gallaugher*, *supra* note 11.

126 *Joseph*, *supra* note 12, *Contant*, *supra* note 12, *Roy*, *supra* note 13.

Wong, and *Evans*.[127] In this part, I briefly outline an argument for why Canada's apex court should intervene to overturn them and how it should clarify the law.

The argument is twofold. First, the principles emerging from the early Supreme Court cases canvassed in Part I remain current. Second, the appellate decisions canvassed in Part II deal with a set of facts and issues that are not fundamentally different from those in *Duarte*, *Wong*, and *Evans*—and the appeal cases do not offer a compelling reason to take a different approach.

V. THE CURRENCY OF THE PRINCIPLES IN DUARTE, WONG, AND EVANS

Briefly, as noted earlier, the Supreme Court of Canada has continued to reject the risk analysis as a means of determining whether a person retains a reasonable expectation of privacy.[128] The Court has done so by rejecting the notion that a thing or place is no longer private when in the hands of (or accessible to) a third party and thus beyond a person's control. In cases that include *Cole*, *Spencer*, *Telus*, and *Marakah*, the Court has affirmed that the risk that a third party can disclose intimate data or files to others, including police, should not be a *normative* reason to expect that the items are no longer private.[129] We trust our friends, contacts, and intermediaries, such as Telus or Shaw, with our intimate communication. To assume that the risk of disclosure on their part is morally equivalent to the risk of state intrusion is implausible. The latter is a risk of a different order.[130] Most recently at the time of this writing, the Court in *Campbell* applied this reasoning to a case directly involving an undercover officer intruding on a recorded conversation assumed to be private.[131] The fact that Campbell

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127 *Duarte*, *supra* note 4, *Wong*, *supra* note 4, *Evans*, *supra* note 2.

128 See the cases cited *supra* note 10.

129 *Cole*, *supra* note 3, and *Spencer*, *Telus*, and *Marakah*, *supra* note 10.

130 *Marakah*, *supra* note 10, McLachlin CJ at para 40 holding: "To accept the risk that a co-conversationalist could disclose an electronic conversation is not to accept the risk of a different order that the state will intrude upon an electronic conversation absent such disclosure."

131 *Campbell*, *supra* note 2, Jamal J, for the majority, noting at para 66: "Sharing control of

could not control who would receive his texts—the risk that it could be a state agent—did not render the privacy interest unreasonable.

The majority's approach to privacy in relation to undercover police in *Wong* and *Evans* is also still current. Since *Edwards*, the Court has continued to assess the reasonableness of a privacy expectation not by taking a narrow view of it but by considering the totality of the circumstances.[132] Just as the indiscriminate nature of the invitations in *Wong* was not decisive on their own for deciding whether the hotel room was private, control would not be a decisive factor in later cases. The Supreme Court should affirm that the same reasoning applies here: a willingness to invite strangers into a home to conduct a drug transaction does determine the question of privacy.

The Court gestured in this direction in *Campbell.* Justices Martin and Moreau writing for the dissent made overt a proposition implicit in the majority decision in that case: "the totality of the circumstances remains the correct approach to assessing whether a claimant has a reasonable expectation of privacy [...] including in cases where there is an undercover aspect to the police conduct."[133] This in turn is a way of saying that nothing about dealing with police undercover overturns the Court's jurisprudence on consent needing to be informed in order to constitute a waiver of privacy or valid authority for a search.[134]

As noted earlier, in *Campbell*, police seized the phone of a person to whom a drug supplier was sending texts and began impersonating the recipient. The entire Court, aside from Côté J, held that the accused retained a privacy interest in the exchange with police despite being duped. Consent to communicate with an officer undercover did not provide tacit consent to police to enter the virtual space of the chatroom at issue. The Supreme Court should apply this logic in a case involving an undercover

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the information at issue may diminish without necessarily eliminating a person's reasonable expectation of privacy"; and at para 68: "The relevant question under s. 8 is not whether the individual reasonably expected the subject matter of the search to remain private from just anybody; what matters is whether they reasonably expected it would remain private from *state intrusion*" (citing Duarte, *supra* note 4 at p 46).

132 *Edwards*, *supra* note 62 at paras 31 and 45; *Marakah*, *supra* note 10 at para 10, quoting *Spencer*, *supra* note 10 at paras 17-18.

133 *Campbell*, *supra* note 2 at para 39.

134 *Evans*, *supra* note 2, *Borden*, *supra* note 73, *Dyment*, *supra* note 3, and *Colarusso*, *supra* note 76.

officer invited into a residence or other private space. It should clarify the law—and overturn the *Roy* and *Contant* line of authority—by holding that an uninformed invitation does not constitute a valid waiver of privacy or valid consent to enter and search.

I turn next to the appellate decisions canvassed in Part II to show that they do not point to a set of facts or issues that call for a break with the principles set out in Supreme Court authority—and how they might be distinguished from cases that do.

A. *Converting private into public space by dealing*

The discussion of *Joseph* and *Contant* in Part II of this paper outlined the conflict between the appeal court's holding about privacy in a home where drugs are being dealt and the majority's holding in *Wong*.[135] For the Quebec Court of Appeal, dealing out of one's home converts it into a public place because anyone could turn up to make a purchase. For the majority in *Wong*, this reduced the question of privacy to a risk analysis. Also important for the majority was whether the space continued to function as private in some meaningful way (a closed-door session, 'drawn drapes'). The court in *Joseph*, *Contant*, and *Roy* overlooks this dimension altogether, being quick to find an implied waiver of privacy in the mere risk that police could be among any of the strangers with whom the occupants of a home were willing to transact within the home. The reasoning here also runs contrary to the principle in *Duarte*, *Wong*, and *Evans* that wherever a person intends to maintain a measure of privacy in their dealings with others—including strangers—no waiver of that privacy can be implied without being informed. Nothing on the facts in *Joseph*, *Contant*, or *Roy* signals an intention to give up privacy in the home at issue.

A situation that does call for a different analysis can be found in *R v Felger* and *R v Fitt*.[136] Contrasting these cases with the *Gallaugher-Roy* line helps make clear why the two kinds of cases should be treated differently—and why in one kind of case a person waives a reasonable privacy interest and in the other kind they retain it.

In *Felger*, the accused ran a store in Abbotsford, BC that sold various "marijuana-related products" and posted a sign in the window that read:

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[135] *Joseph*, *supra* note 12, *Contant*, *supra* note 12, *Wong*, *supra* note 4.

[136] *Felger*, *supra* note 85; *Fitt*, *supra* note 94.

"No Police Officers Allowed In The Store Without A Warrant. Especially Badges #315 & 325".[137] There could be no reasonable privacy interest here because, contrary to *Wong*, although the invitation was open to any and all potential visitors aside from police, the accused in this case could not be said to retire to a closed-door session with 'drawn drapes,' as in *Wong*. Having a sign in the window excluding police was not the same as Wong and fellow guests closing the door. Police could still see into the store from the sidewalk, could witness people coming and going, some carrying merchandise. What was taking place inside could be *readily observed* from outside. Quite apart from the risk of police intrusion, surreptitious or otherwise, no occupant or visitor in the store could reasonably expect their visit to be private against anyone.

In *Fitt*, the Nova Scotia Court of Appeal found that the accused had no privacy interest in a room where illegal gaming machines could be accessed by the public.[138] The room was situated within the dispatch office of a taxi company, in a small adjacent room with no door. The front door of the taxi office was located on a main city street, and a dispatcher testified that "all kinds of people played the machines".[139] Overturning the finding at trial that a search of the room had violated section 8, Hallett J held that: "[a] business establishment that is open to the public with an implied invitation to all members of the public to enter has no reasonable expectation of privacy from having a police officer enter the area of the premises to which the public is impliedly invited."[140] Chief Justice Lamer, for the Supreme Court of Canada, in a one sentence ruling, dismissed the accused's appeal "substantially for the reasons given by Mr. Justice Hallett."[141] The proposition about businesses open to the public not being private is not the same as saying a person converts their home to a public place *by virtue* of dealing drugs from within it. Something more than a mere inclination to deal with potentially anybody is necessary to convert a place into a public space.

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137 *Felger*, *supra* note 85 at para 4.

138 *Fitt*, *supra* note 94.

139 *Ibid* at 2.

140 *Ibid* at 3.

141 *R v Fitt*; *R v Kouyas*, 1996 CanLII 251 (SCC).

Put another way, recalling the test in *Edwards*,[142] there was evidence in *Joseph*, *Contant*, and *Roy* that the accused sought to retain a measure of privacy in their home by controlling or choosing who could gain entry. This is clearest in *Joseph* and *Roy*. In *Joseph*, the roommate was reluctant to deal further with the officer once he became aware the officer was a stranger (*i.e.*, he was not 'with her'); the officer at that point was no longer welcome. In *Roy*, the accused sought to meet at his home precisely because it offered intimacy or seclusion for a confidential meeting. It was only because he assumed the intermediary and undercover officer were trustworthy that he chose to invite them. This was not an open invitation to anyone who might come along.

Contant is closer to the line. The officer makes contact with the occupants through the intercom and is buzzed in; the occupants make a decision about who to let in and do so again at the door of the apartment. They may be indiscriminate about who they invite in, suggesting that this may be closer in nature to the gaming room in *Fitt*. 'All kinds of people' might have turned up and been served. But one might also argue this was still not a place to which *anyone* was invited to enter without being vetted individually by the occupants.

The point, however, is not that a residence can never be converted to a public place by virtue of a decision to deal drugs out of a home. The point is that the determination should turn on more than the mere fact that a person was prepared to conduct transactions out of their home and deal with people they did not know. The facts in a case involving dealing out of a home should be distinguished from those in *Wong* only where it is clear that they are closer in nature to those in *Fitt*–*i.e.*, where occupants extend an implied invitation to the public and they no longer retain an expectation of privacy in the space in the sense of exerting choice or control over who to admit. This nuance is lost in the *Joseph* to *Roy* line of cases and the Supreme Court should correct it to draw a clearer line between the two scenarios. In the one case, a person maintains a reasonable expectation that police only overcome through deception. In the other case, a person lacks a *reasonable* expectation through both their conduct, the physical or social arrangement, and the nature of the invitation.

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142 *Edwards*, *supra* note 62 at para 45.

B. *Implied consent and undercover police*

The need for clarity on the second proposition at issue here is even greater. The holding in *Roy* that an explicit invitation to an undercover officer constitutes a valid waiver of a privacy interest is contrary to the Supreme Court's holdings in *Evans*, *Borden*, *Dyment*, and *Colarusso* about consent under section 8 needing to be informed.[143]

As noted in Part I, Sopinka J in *Evans* held for the majority that by attending a private space with the intention of making observations, police exceeded the implied invitation to knock. But he also held that "[c]learly, occupiers of a dwelling cannot be presumed to invite the police (or anyone else) to approach their home for the purpose of substantiating a criminal charge against them."[144] An invitation cannot be presumed here because a person would not invite police to enter *if they knew they were police*; which is to say, a valid waiver of privacy must be informed. But why? Why should consent be informed in the case of officers acting undercover?

Justice Sopinka defended the central holding in *Evans* in light of policy considerations. His focus in this part of his reasons was on why an officer's intentions should be relevant to the determination of whether police exceed the implied invitation to knock. If intention were held to be irrelevant, he reasoned, police could conduct random, surreptitious spot checks door to door, giving rise to an "Orwellian vision of police authority is beyond the pale of any 'implied invitation'."[145] But his logic applies equally to the validity of an invitation itself. If police could gain lawful entry into a home—could obtain a waiver of privacy—by securing an explicit invitation by deceit, this would render the requirement to obtain a warrant meaningless. Entry into any home police sought to search could be gained by pretending to be any kind of repair or sales person. The sanctity of the home would become a mirage.

VI. CONCLUSION

The Supreme Court of Canada in *Duarte*, *Wong*, and *Evans* carefully considered the scope of privacy in dealings with police undercover and with

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143 *Roy*, *supra* note 13, Evans, *supra* note 2; *Borden*, *supra* note 73; *Dyment*, *supra* note 3; and *Colarusso*, *supra* note 76.

144 *Evans*, *supra* note 2 at para 9.

145 *Ibid* at para 13.

the scope of tacit consent in dealing with police. A thread running through these cases holds that we retain privacy in intimate spaces to which police gain entry through surreptitious means. While gaining entry in disguise (or acting surreptitiously) may permit police to communicate and gather evidence of things said to them in a private space, conduct amounting to a search—making a recording of the conversation or making observations in the space—interferes with privacy where it is done without informed consent. The Court also held that a person retains privacy in a space despite being indiscriminate about who they invite, so long as the evidence supports an intention to retain the intimate or closed-door character of the space. Courts of Appeal in BC and Quebec have departed from these holdings on facts that do not warrant a different approach—a departure that the Supreme Court of Canada should clarify and correct. The Court's reasoning in its seminal early cases still makes better sense and offers strong and important protections of the right to be secure against unreasonable search or seizure.

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