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R. v. Spencer: Anonymity, the Rule of Law, and the Shrivelling of the Biographical Core

Chris Hunt and Micah Rankin

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Article abstract

The Supreme Court of Canada's recent decision in *R. v. Spencer* is likely to become a landmark decision on informational privacy. *Spencer* addressed the issue of whether an Internet user charged with possession and distribution of child pornography had a *Charter*-protected privacy interest in his Internet subscriber information. A unanimous Supreme Court answered this question in the affirmative, primarily because such information could lead to the identification of a user carrying out intimate or sensitive activities in circumstances where the user would believe that his or her activities would be carried out anonymously. The immediate practical consequence of *Spencer* is that police will henceforth be required to obtain prior judicial authorization before requesting a person's Internet subscriber information—a holding that squarely contradicts a number of recent appellate court decisions. In this comment, the authors argue that *Spencer* is likely to have a significant, and possibly transformative, impact on section 8 jurisprudence. In their view, the Court's recognition of "anonymity" as an independent value underlying section 8 of the *Charter* leads to a more robust account of privacy—an account that is more consistent with theoretical approaches to the concept. The authors argue that the recognition of a right to anonymity may also serve to support the rule of law by refocusing the section 8 analysis on unwanted scrutiny by the state. In addition, an emphasis on the right to anonymity may lead to a diminished role for the analytical device known as the "biographical core". The authors conclude their comment with a discussion of the Court's decision to admit the impugned evidence under section 24(2) of the *Charter*, arguing that the Court placed too much emphasis on the legal uncertainty surrounding the search.

R. v. Spencer: Anonymity, the Rule of Law, and the Shrivelling of the Biographical Core

*Chris Hunt and Micah Rankin**

The Supreme Court of Canada's recent decision in *R. v. Spencer* is likely to become a landmark decision on informational privacy. *Spencer* addressed the issue of whether an Internet user charged with possession and distribution of child pornography had a *Charter*-protected privacy interest in his Internet subscriber information. A unanimous Supreme Court answered this question in the affirmative, primarily because such information could lead to the identification of a user carrying out intimate or sensitive activities in circumstances where the user would believe that his or her activities would be carried out anonymously. The immediate practical consequence of *Spencer* is that police will henceforth be required to obtain prior judicial authorization before requesting a person's Internet subscriber information—a holding that squarely contradicts a number of recent appellate court decisions. In this comment, the authors argue that *Spencer* is likely to have a significant, and possibly transformative, impact on section 8 jurisprudence. In their view, the Court's recognition of "anonymity" as an independent value underlying section 8 of the *Charter* leads to a more robust account of privacy—an account that is more consistent with theoretical approaches to the concept. The authors argue that the recognition of a right to anonymity may also serve to support the rule of law by refocusing the section 8 analysis on unwanted scrutiny by the state. In addition, an emphasis on the right to anonymity may lead to a diminished role for the analytical device known as the "biographical core". The authors conclude their comment with a discussion of the Court's decision to admit the impugned evidence under section 24(2) of the *Charter*, arguing that the Court placed too much emphasis on the legal uncertainty surrounding the search.

Le jugement récent de la Cour suprême du Canada dans *R. c. Spencer* s'annonce en tant que décision historique en ce qui a trait au caractère privé des renseignements personnels. La Cour devait décider si un internaute reconnu coupable de possession et de distribution de pornographie juvénile jouissait néanmoins d'un intérêt en matière de vie privée protégé par la *Charte* concernant ses renseignements d'abonné aux services Internet. C'est d'une seule voix que la Cour suprême a répondu par l'affirmative, principalement parce que de tels renseignements permettent d'identifier un utilisateur s'adonnant à des activités intimes ou confidentielles alors que ce dernier croit agir sous le couvert de l'anonymat. Il s'ensuit que les policiers auront dorénavant à obtenir une autorisation judiciaire avant de recueillir les renseignements d'abonné aux services internet d'un individu—une décision qui contredit ouvertement plusieurs jugements récemment rendus par différentes cours d'appel canadiennes. Dans cette étude, les auteurs soutiennent que *Spencer* aura probablement un impact significatif, et possiblement transformateur, sur la jurisprudence relative à l'article 8. À leur avis, la reconnaissance par la Cour de « l'anonymat » comme valeur indépendante sous-tendant l'article 8 de la *Charte* entraîne une notion plus robuste de la vie privée—plus cohérentes avec la doctrine de l'article 8. Les auteurs soutiennent que la reconnaissance d'un droit à l'anonymat pourrait également servir à épauler la primauté du droit en recentrant l'analyse de l'article 8 sur les surveillances indésirables de l'État. En outre, une insistance sur le droit à l'anonymat pourrait entraîner un rôle atténué du dispositif analytique des « renseignements biographiques d'ordre personnel ». Les auteurs concluent leur commentaire en discutant de la décision de la Cour d'admettre la preuve contestée en vertu de l'article 24(2) de la *Charte*. Ils soutiennent notamment que la Cour a donné trop d'importance à l'incertitude juridique liée à la fouille.

* The authors are both Assistant Professors at Thompson Rivers University, Faculty of Law.

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Introduction

The Supreme Court of Canada's recent decision in *R. v. Spencer*[1] is likely to become a landmark decision on informational privacy. *Spencer* addressed the thorny question of whether an Internet user has a constitutionally protected privacy interest in Internet subscriber information. The unanimous Court answered this question in the affirmative, primarily on the basis that such information could lead to the "identification of a user with intimate or sensitive activities being carried out online" in circumstances where the user would believe that his or her "activities would be anonymous."[2]

Viewed narrowly, the Court's decision in *Spencer* could be read as little more than an incremental extension of a recent trend favouring a broad and purposive approach to section 8 of the *Charter*[3] in the context of modern information storage techniques.[4] The immediate practical consequence of *Spencer* is that police will henceforth be required to obtain prior judicial authorization before requesting a person's Internet subscriber information—a holding that squarely contradicts three recent appellate courts that came to the opposite conclusion.[5] But what of *Spencer*'s importance for section 8 of the *Charter* more generally? In our view, a close reading of *Spencer* signals a more fundamental shift in analysis and arguably portends a significant departure from recent case law.

In this comment, we argue that *Spencer* is likely to have a significant, and possibly transformative, impact on section 8 jurisprudence. *Spencer* marks the first occasion that the Supreme Court has recognized an independent normative role for the concept of anonymity when deciding whether an individual has a constitutionally protected privacy interest. Although scholars have frequently defined the concept of privacy with reference to anonymity, the Supreme Court's pre-*Spencer* jurisprudence had not done so, preferring instead to focus its analysis on the concepts of confidentiality and control of information when deciding whether section 8 was engaged.

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1 2014 SCC 43, [2014] 2 SCR 212 [*Spencer*].

2 *Ibid* at para 66.

3 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 8 [*Charter*].

4 On this trend, see e.g. *R v Morelli*, 2010 SCC 8, [2010] 1 SCR 253 [*Morelli*]; R *v Cole*, 2012 SCC 53, [2012] 3 SCR 34 [*Cole*]; *R v Vu*, 2013 SCC 60, [2013] 3 SCR 657 [*Vu*].

5 See *R v Spencer*, 2011 SKCA 144, 283 CCC (3d) 384 [*Spencer* Sask CA]; *R v Trapp*, 2011 SKCA 143, 377 Sask R 246 [*Trapp*]; *R v Ward*, 2012 ONCA 660, 112 OR (3d) 321 [*Ward*].

We argue that the Court's recognition of anonymity, as a normative value protected by section 8 of the *Charter*, is significant in at least three respects. First, the recognition of anonymity as an independent value leads to a more conceptually robust account of privacy. Much of the leading scholarship treats anonymity as one of the irreducible elements of privacy. The right to anonymity is, for instance, invoked in support of the right to be free from unjustifiably intrusive forms of state surveillance. Arguably, the section 8 jurisprudence to date has been impoverished by the Court's failure to give independent normative force to anonymity as an important aspect of privacy—a shortcoming *Spencer* undeniably overcomes.

The Court's recognition of anonymity is significant for a second and related reason: it may go some distance in answering those observers who have criticized the Court for neglecting the rule of law in developing its section 8 jurisprudence. Scholars such as Lisa Austin have argued that courts have focused too much on the content of information when assessing privacy claims, and have paid insufficient attention to the importance of preserving the rule of law.[6] Although anonymity and the rule of law are distinct concepts, they share a common concern about ensuring that individuals are free from unregulated state scrutiny. By recognizing anonymity as a discrete aspect of privacy, the Court's decision in *Spencer* may have positive implications for the relationship between privacy and the rule of law, and portends an important and principled amplification of the protection already afforded by section 8 of the *Charter*.

A third, and arguably no less significant, reason that *Spencer* is important is that it signals a more limited role for the analytical device known as the "biographical core" in the section 8 analysis. The biographical core refers to the notion that a *Charter*-protected interest in information will be more or less likely to be recognized depending on whether the information itself can be characterized as intimate or capable of revealing inferences about personal lifestyle choices. Over the years, the jurisprudential fortunes of the biographical core have waxed and waned, leading to uncertainty about both its precise meaning and its importance in determining whether section 8 is engaged. In *Spencer*, the biographical core barely received passing mention—and this notwithstanding the fact that it was virtually determinative of the issues in the lower courts. We argue below that this lack of engagement by the Court serves to minimize the concept's overall importance in the section 8 analysis, and conclude that this, coupled with the recognition of anonymity as a constitutionally protected aspect of privacy, may sound the death knell for the biograph-

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6 Lisa M Austin, "Getting Past Privacy? Surveillance, the Charter, and the Rule of Law" (2012) 27:3 CJLS 381 at 390.

ical core. In short, post-*Spencer*, the quality of the information is no longer the central focus of section 8; rather, or at least equally, it is the individual's interest in being free from unwanted scrutiny that determines whether a *Charter*-protected privacy interest is engaged.

The comment concludes with a brief discussion of the Court's analysis of section 24(2) of the *Charter*. In keeping with a number of recent decisions,[7] the Court, having found a *Charter* violation, declined to exclude the evidence. The Court noted that the law was uncertain and that, in this instance, the investigating officers reasonably believed that they were acting lawfully. In our view, the Court's conclusion on section 24(2) represents an overly permissive attitude toward the *Charter* violation in issue. The jurisprudence increasingly suggests that investigators may assume that they have free license to perform warrantless searches unless and until a court indicates otherwise. In our view, legal uncertainty should not automatically inure to the benefit of the police. Since, as a matter of law, warrantless searches are prima facie unreasonable, police should begin with the assumption that prior judicial authorization is required.

I. The Background and Facts

The facts of *Spencer* are simple.[8] The case arose out of an investigation related to the transmission of child pornography over the Internet. Such investigations have become increasingly complicated because of the relative ease with which child pornography can be produced, transmitted, and shared, and also because of the anonymity that the Internet affords.

The accused, Spencer, was connected to the Internet through an account registered to his sister with whom he lived in Saskatoon. He was using LimeWire, a well-known peer-to-peer file-sharing program, to download and exchange pornographic images of children. The police were able to identify the files containing the pornography and then used publically available software to monitor LimeWire in order to detect if this service was being used for unlawful purposes. Using the software, the investigators were able to see exactly what was being downloaded and exchanged by individual users of LimeWire but not the identity of the actual user. They could, however, ascertain a user's Internet Protocol (IP) address that indicated the general location of the computer. Upon discovering that one such IP address belonged to someone in Saskatoon, the police made a written "law enforcement request" to the IP service provider (Shaw) for the subscriber information pertaining to the specific computer user, in-

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7 See e.g. *Cole*, *supra* note 4; *Vu*, *supra* note 4.

8 See *Spencer*, *supra* note 1 at paras 1–4 for a description of the facts.

cluding the user's name, address, and telephone number. The request was made pursuant to section 7(3)(c.1)(ii) of the *Personal Information Protection and Electronic Documents Act*.[9] The IP provider complied with the request and, with the information obtained, the police successfully applied for a warrant to search Spencer's sister's house (where he lived) and seized his computer. The police thereafter located child pornography on Spencer's computer. He was accordingly charged with possessing and distributing child pornography over the Internet contrary to sections 163.1(3) and 163.1(4) of the *Criminal Code*.[10]

At trial, the central evidentiary issue was whether the police actions in obtaining this subscriber information from Shaw without prior judicial authorization amounted to an unreasonable search contrary to section 8 of the *Charter*. It was common ground that, in the absence of the subscriber information, the warrant would not have been granted and any search would have violated section 8. Spencer argued that the letter from the police to the Internet provider itself amounted to an unreasonable search. The trial judge disagreed, adopting the Crown's argument, and Spencer was convicted of possession of child pornography though, for unrelated reasons, he was acquitted of transmitting it.[11]

The Saskatchewan Court of Appeal dismissed Spencer's appeal from conviction, but allowed the Crown's appeal from his partial acquittal. Regarding the search argument, Justice Caldwell (for the majority) held that no search had taken place. He found that the appellant had a subjective expectation of privacy in the subscriber information, but determined that this was not objectively reasonable in the circumstances. Although Justice Caldwell was persuaded that the subscriber information fell within "the biographical core of personal information ... 'tending to reveal intimate details of the lifestyle and personal choices of an individual,'"[12] he concluded that the terms of the IP provider's service agreement, which allowed for cooperation with law enforcement, rendered any expectation of privacy objectively unreasonable.[13] The majority further held that, even if there had been a reasonable expectation of privacy, the search would have been lawful under section 487.014 of the *Criminal Code*, which authorizes peace officers to ask persons to voluntarily provide "documents, data or infor-

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9 SC 2000, c 5, s 7(3)(c.1)(ii) [*PIPEDA*].

10 RSC 1985, c C-46, ss 163.1(3)–(4).

11 See *Spencer* Sask CA, *supra* note 5 at para 10.

12 *Ibid* at para 22, citing *R v Plant*, [1993] 3 SCR 281, 84 CCC (3d) 203 [*Plant* cited to SCR].

13 *Spencer* Sask CA, *supra* note 5 at paras 31–33.

mation that the person is not prohibited by law from disclosing."[14] Justice Ottenbreit concurred in the result, but wrote separate reasons. In his view, Spencer could not have a *Charter*-protected privacy interest in the impugned subscriber information primarily because it did not fall within the biographical core protected by section 8.[15]

II. The Supreme Court of Canada's Decision

The Supreme Court of Canada, led by Justice Cromwell, unanimously rejected the conclusions of the courts below, holding that the police request for subscriber information did amount to an unconstitutional search within the meaning of section 8 of the *Charter*. In reaching this conclusion, the Court followed the framework it established in *R. v. Tessling*,[16] noting that the analysis turned on four key factors: (1) the subject matter of the search; (2) the claimant's interest in the subject matter; (3) the claimant's subjective expectation of privacy in the subject matter; and (4) whether this subjective expectation of privacy was objectively reasonable, having regard to the "totality of circumstances".[17]

The Supreme Court in *Spencer* dealt with the second and third *Tessling* factors briefly, holding that "Spencer's subjective expectation of privacy in his online activities can readily be inferred from his use of the network connection to transmit sensitive information" and that his "direct interest in the subject matter of the search is equally clear" because it involved a personal computer located in his place of residence, notwithstanding the fact that the IP address belonged to his sister.[18]

According to the Court, the "main dispute" turned on the first and fourth *Tessling* factors.[19] Regarding the first of these—how to characterize the subject matter of the search—the Court noted that "markedly divergent" views were expressed by lower courts on this question.[20] The trial judge, as well as Justice Ottenbreit of the Court of Appeal, adopted the Crown's narrow characterization of the impugned information, finding that it was simply a name, address, and telephone number matching a publically available IP address.[21] On this view, the subscriber information

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14 *Ibid* at para 41, n 2, citing *Criminal Code*, *supra* note 10, s 487.014.

15 *Spencer* Sask CA, *supra* note 5 at para 110.

16 2004 SCC 67, [2004] 3 SCR 432 [*Tessling*].

17 *Spencer*, *supra* note 1 at paras 17–18, citing *Tessling*, *supra* note 16 at para 32.

18 *Spencer*, *supra* note 1 at para 19.

19 *Ibid* at para 20.

20 *Ibid* at para 23.

21 *Ibid* at paras 24–25.

was seen as anodyne and hence incapable of touching upon Spencer's "biographical core".[22] For Justice Ottenbreit, moreover, "[t]he fact that this information might eventually reveal a good deal about the activity of identifiable individuals on the internet was, for him, 'neither here nor there.'"[23] In contrast, Justice Caldwell (for the majority) took a different approach, holding that "[i]t is important to look beyond the 'mundane'" nature of the information itself and to consider the "*potential* of that information to reveal intimate details of the lifestyle and personal choices of the individual" when it is combined with other information.[24] Justice Cromwell agreed with this latter interpretation, emphasizing that, in cases such as this one, where the precise nature of the subject matter of the search is difficult to characterize, courts should take a "broad and functional approach" by examining the relationship between the investigative technique and the claimant's privacy interest, while also considering the potential for this information to reveal other personal information.[25] Applying this approach, the Court concluded the subject matter was "not simply a name and address[,] ... [r]ather, it was the identity of an Internet subscriber which corresponded to particular Internet usage."[26]

Having characterized the subject matter of the search, the Court next turned to examine the fourth broad *Tessling* factor: whether Spencer's subjective expectation that Shaw would not disclose his subscriber information to the police was reasonable. Answering this question required the Court to elucidate once again the nature of Spencer's privacy interest in the impugned information, and the impact that Shaw's cooperation with the police had on that interest. The Court began by noting that it has long recognized three "types of privacy interests" (namely, territorial, personal, and informational privacy) that, while often overlapping and somewhat amorphous, serve as useful "analytical tools".[27] The Court explained that, while territorial privacy was engaged in this case because Spencer's computer use occurred in his place of residence, it was not a "controlling factor", since "Internet users do not expect their online anonymity to cease when they access the Internet outside their homes" via portable devices.[28]

Informational privacy was determined to be the primary interest engaged in *Spencer*. The Court's previous jurisprudence had identified two

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22 *Ibid* at para 25.

23 *Ibid*.

24 *Ibid* [emphasis added].

25 *Ibid* at para 26.

26 *Ibid* at para 32.

27 *Ibid* at para 35.

28 *Ibid* at para 37.

sub-dimensions of informational privacy: (1) privacy as "confidentiality" and (2) privacy as the right of an individual to "control" information about oneself.[29] In *Spencer*, the Court added the third concept of "privacy as anonymity" which it observed was "particularly important in the context of Internet usage."[30] Relying on a number of renowned privacy theorists, the Court noted that anonymity is important in the Internet context because it "guard[s] the link between ... information [about one's online activities] and the identity of the person to whom it relates," and thereby helps ensure that such activities remain private.[31] Preserving this link is important, the Court reasoned, because one's online activities generally engage "significant privacy interests".[32] Applying these principles, the Court concluded "that the police request to Shaw for subscriber information corresponding to specifically observed, anonymous Internet activity engages a high level of informational privacy."[33] As such, this factor militated strongly in favour of finding Spencer's expectation of privacy to be objectively reasonable.

The Court next turned to consider the extent to which the contractual and statutory framework governing the provision of internet services impacted Spencer's reasonable expectation of privacy. As concerns the contractual framework, Justice Cromwell emphasized that courts must "proceed with caution"[34] when considering general contracts of adhesion, for these are not individually negotiated and may not have been read by the consumer. Nevertheless, it held that the existence of the contract should have some impact on a claimant's privacy interests. This was so because "[a] reasonable [Internet] user would be aware that the use of the service would be governed by certain terms and conditions, and those terms and

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29 See *ibid* at paras 38–40. Confidentiality refers to information held by third parties in trust and confidence, such as medical information held by a physician, whereas privacy as control is anchored in the idea that "all information about a person is in a fundamental way his own, for him to communicate or retain for himself as he sees fit" (*R v Dyment*, [1988] 2 SCR 417 at 429, 55 DLR (4th) 503, citing *Privacy and Computers: A Report of the Task Force Established by the Department of Communications/Department of Justice* (Ottawa: Information Canada, 1972) at 13).

30 *Spencer*, *supra* note 1 at para 41.

31 *Ibid* at para 46.

32 *Ibid* at para 50. See also *Cole*, *supra* note 4 at para 47 ("Internet-connected devices 'reveal our specific interests, likes, and propensities, recording in their browsing history and cache files the information we seek out and read, watch, or listen to on the Internet'"); *Morelli*, *supra* note 4 at para 105.

33 *Spencer*, *supra* note 1 at para 51.

34 *Ibid* at para 54, citing *R v Gomboc*, 2010 SCC 55 at para 33, [2010] 3 SCR 211 [*Gomboc*].

conditions were readily accessible through Shaw's website."[35] The Court then analyzed three sets of interrelated—and ambiguous—contractual provisions that bore on Spencer's reasonable expectation of privacy and concluded that, taken together, these contractual provisions were "confusing and equivocal in terms of their impact on a user's reasonable expectation of privacy"[36] and, as such, could not militate against finding a reasonable expectation of privacy.

The Court then turned to examine *PIPEDA*, observing at the outset that it was "not much more illuminating" than the contractual terms of the IP service agreement.[37] *PIPEDA* imposes various substantive obligations on private sector organizations for the safe handling and nondisclosure of personal information. However, section 7(3)(c.1)(ii) permits organizations to disclose personal information without the data subject's knowledge or consent to government institutions pursuant to the latter's written declaration that it has "lawful authority" to acquire this information.[38] The Crown argued that this provision rendered Spencer's expectation of privacy objectively unreasonable. The Court disagreed. It held that this provision simply "lead[s] us in a circle" because "the issue is whether there was such lawful authority which in turn depends in part on whether there was a reasonable expectation of privacy with respect to the subscriber information."[39] But perhaps more importantly, the Court concluded that, instead of militating against an expectation of privacy, *PIPEDA* actually supported it. This was so because the protection of privacy is *PIPEDA*'s raison d'être, and it would therefore be "reasonable for an Internet user to expect that a simple request by police would not trigger an obligation to disclose personal information."[40] Having reached this conclusion, the Court concluded that, in the totality of circumstances, Spencer had a reasonable expectation of privacy in his subscriber information, and that a request by police that Shaw voluntarily disclose this information amounted to a "search" under section 8 of the *Charter*.[41]

Having determined that a search occurred, the Court then went on to consider whether it was reasonable. It is, of course, well established that a warrantless search is presumptively unreasonable and will only be found to be reasonable "if it is authorized by law, if the law itself is reasonable

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35 *Spencer*, *supra* note 1 at para 57.

36 *Ibid* at para 60.

37 *Ibid*.

38 *PIPEDA*, *supra* note 9, s 7(3)(c.1)(ii).

39 *Spencer*, *supra* note 1 at paras 61–62.

40 *Ibid* at para 62.

41 *Ibid* at para 74.

and if the manner in which the search was carried out is reasonable."[42] The second ground was not pursued by Spencer, and the third was dismissed perfunctorily.[43] Accordingly, the Court focused on the first ground—whether the search was authorized by law. The Court rejected the Crown's contention that either section 487.014(1) of the *Criminal Code* or section 7(3)(c.1)(ii) of *PIPEDA* could alone, or in combination, provide authority for the search in issue.[44] Accordingly, the warrantless search of Spencer's subscriber information was held to be unreasonable and section 8 of the *Charter* was violated.

In light of the Court's conclusion that section 8 was breached, it was required to undertake a fresh analysis of whether the evidence obtained should nevertheless be excluded pursuant to section 24(2) of the *Charter*. The Court applied the test as set out in *R. v. Grant*,[45] which requires consideration of "(1) the seriousness of the *Charter*-infringing state conduct, (2) the impact of the breach on the *Charter*-protected interests of the accused, ... and (3) society's interest in the adjudication of the case on its merits."[46] Regarding the first factor, the Court determined that the police conduct in requesting Shaw to disclose subscriber information could not be characterized as either a "wilful or flagrant disregard of the *Charter*."[47] Rather, the police acted in the reasonable belief that this request was a lawful means of obtaining information for law enforcement purposes. This factor militated in favour of not excluding the evidence in the circumstances of the case.[48] As for the second *Grant* factor, the Court held that the impact on Spencer's *Charter* interests was serious because the "violation of...anonymity exposed personal choices made by Mr. Spencer...to police scrutiny."[49] This finding militated in favour of excluding the evidence.[50] Finally, as concerns the third *Grant* factor, the Court held that it militated in favour of admission: the charge was serious, the evidence reliable, and society had a strong interest in adjudicating cases involving the safety of children on their merits. Balancing all of these factors, the Court determined that the evidence should not be excluded under section

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42 See *R v Collins*, [1987] 1 SCR 265 at 278, 38 DLR (4th) 508; *Spencer*, *supra* note 1 at para 68.

43 *Spencer*, *supra* note 1 at para 68.

44 *Ibid* at para 71.

45 2009 SCC 32, [2009] 2 SCR 353 [*Grant*].

46 *Ibid* at para 71.

47 *Ibid* at para 75, cited in *Spencer*, *supra* note 1 at para 77.

48 See *Spencer*, *supra* note 1 at para 77.

49 *Ibid* at para 78.

50 See *ibid*.

24(2). Accordingly, Spencer's conviction for possession of child pornography was confirmed.[51]

III. Critical Reflections on *R. v. Spencer*

Spencer is likely to have an immediate impact on law enforcement in Canada. Prior judicial authorization will now be required before police can obtain subscriber information, and neither *PIPEDA* nor the *Criminal Code* creates a lawful authority to obtain such information without a warrant. This marks a major shift in the law as three recent appellate decisions came to the opposite conclusion.[52] However, as important as *Spencer* is in its practical effects, it is our view that *Spencer* has the potential to have even more far-reaching consequences for the law of search and seizure. As we argue below, the Court's recognition of anonymity as an independent value animating section 8 will likely have substantial ramifications for the Court's understanding of privacy itself.

A. Anonymity: A Neglected Dimension of Section 8

The most significant feature of *Spencer* is the Court's express recognition that anonymity operates at the "foundation of a privacy interest" and "engages constitutional protection".[53] While some of the Court's section 8 jurisprudence appears premised (at least in part) on protecting an individual's interest in being anonymous,[54] the majority of the Court's decisions have focused on the informational content of, or control over, disputed information, rather than anonymity itself. An emphasis on anonymity

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51 See *ibid* at para 87.

52 See *Spencer* Sask CA, *supra* note 5; *Trapp*, *supra* note 5; *Ward*, *supra* note 5. In *Ward*, for example, Justice Doherty, for the unanimous Ontario Court of Appeal, held that the police request for subscriber information *did* in fact comply with the requirements of *PIPEDA*. He further held that, once a *PIPEDA* compliant request is made, the ISP then had to determine for itself whether disclosure to the police was reasonable, by balancing its own legitimate interests in "preventing the criminal misuse of its services" against the privacy interest engaged (*supra* note 5 at para 97). For an excellent discussion of *R v Ward*, see Andrea Slane, "Privacy and Civic Duty in *R v Ward*: The Right to Online Anonymity and the *Charter*-Compliant Scope of Voluntary Cooperation with Police Requests" (2013) 39:1 Queen's LJ 301.

53 *Spencer*, *supra* note 1 at para 48.

54 See *R v Wise,* [1992] 1 SCR 527, 70 CCC (3d) 193 [*Wise*]. In *Wise*, for example, Justice La Forest emphasized the importance for individuals, when engaged in "public acts", to be able to "merge into the 'situational landscape'" free from targeted identification (*ibid* at 558, citing Melvin Gutterman, "A Formulation of the Value and Means Models of the Fourth Amendment in the Age of Technologically Enhanced Surveillance" (1988) 39:2 Syracuse L Rev 647 at 706). However, much of the jurisprudence that followed *Wise* has said little as to whether section 8 protects a right to be free from scrutiny.

necessarily concentrates less on the content of the information per se, and instead recognizes that the protection of privacy may also entail freedom from scrutiny irrespective of the nature or content of the information in dispute. From our perspective, this feature of *Spencer* represents an important change in the section 8 jurisprudence.

The idea that the concept of privacy entails the right or ability to be anonymous is not new. Leading privacy scholars have long argued that anonymity is, conceptually at least, one of the essential "states" of privacy, and that the loss of anonymity necessarily results in a loss of some measure of privacy.[55] In her seminal work on the privacy, Ruth Gavison defined "privacy" by reference to three "irreducible elements": secrecy, seclusion, and anonymity.[56] Anonymity, according to Gavison, is best conceptualized as the "extent to which an individual is subject to [unwanted] attention."[57] In a similar vein, Alan Westin—whose work was cited by the Court in *Spencer*[58]—conceptualized anonymity as the act of individuals "performing public acts" while being free from "identification and surveillance".[59]

According to privacy scholars, anonymity is an independent aspect of privacy because it is functionally related to many of the underlying reasons why we value privacy in the first place. The socio-legal literature elucidating these values is vast and impossible to discuss in detail in this comment;[60] nevertheless, it is worthwhile touching upon a few key points that emerge from the privacy literature. Many scholars argue that privacy is intrinsically important because of its close relationship to the deontological values of human dignity and autonomy.[61] Dignity is often understood in Kantian terms: each individual should be treated as an end in them-

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55 See e.g. Alan F Westin, *Privacy and Freedom* (New York: Atheneum, 1970) at 31–32; Ruth Gavison, "Privacy and the Limits of Law" (1980) 89:3 Yale LJ 421 at 433.

56 Gavison, *supra* note 55 at 433. .

57 *Ibid* at 433, n 40.

58 *Spencer*, *supra* at note 1 at paras 40–45.

59 Westin, *supra* note 55 at 31. See also Andrea Slane & Lisa M Austin, "What's in a Name? Privacy and Citizenship in the Voluntary Disclosure of Subscriber Information in Online Child Exploitation Investigations" (2011) 57:4 Crim LQ 486 at 501.

60 For a detailed discussion of these values organized into deontological and instrumentalist categories, see Chris DL Hunt, "Conceptualizing Privacy and Elucidating Its Importance: Foundational Considerations for the Development of Canada's Fledgling Privacy Tort" (2011) 37:1 Queen's LJ 167.

61 The Supreme Court of Canada is clear that these values underpin informational privacy more generally (see *Alberta (Information and Privacy Commissioner) v United Food and Commercial Workers, Local 401*, 2013 SCC 62 at para 19, [2013] 3 SCR 733 [*Local 401*]).

selves and not as a means to furthering another person's ends.[62] Influential commentators have argued that exposing an individual to targeted surveillance (in other words, depriving them of desired anonymity) offends this Kantian imperative because it "transforms the self from *subject* to *object*."[63] Stanley I. Benn, for example, has persuasively argued that subjecting an individual to targeted surveillance is insulting in Kantian terms because it treats people as "objects or specimens ... and not as subjects with sensibilities, ends, and aspirations of their own."[64]

Depriving one of anonymity may impinge upon one's autonomy as well. Viewed in this way, anonymity is valued becomes it provides the freedom to experiment in public places—and public forums like the Internet—without being held to the behavioural norms to which one is expected to adhere when one's identity is known.[65] Of course, people often behave differently when they suspect that they are being watched, and this fear of surveillance itself "destroys the sense of relaxation and [behavioural] freedom" that anonymity confers.[66] This, in turn, can sometimes produce behavioural conformity, narrowing the range of autonomous choices available to the actor.[67]

Finally, some observers have argued that maintaining anonymity—or, in the words of one leading scholar, space for "unconstrained, unobserved ... intellectual movement"—encourages the development of "critical" subjectivity and, in turn, the robust expression of unconventional ideas.[68]

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62 See generally NA Moreham, "Why is Privacy Important? Privacy, Dignity and Development of the New Zealand Breach of Privacy Tort" in Jeremy Finn & Stephen Todd, eds, *Law, Liberty, Legislation: Essays in Honour of John Burrows QC* (Wellington: LexisNexis NZ, 2008) 231. For classic expositions of the dignitary basis of privacy, see Edward J Bloustein, "Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser" (1964) 39:6 NYUL Rev 962; Stanley I Benn, "Privacy, Freedom, and Respect for Persons" in J Roland Pennock & John W Chapman, eds, *Privacy* (New York: Atherton Press, 1971) 1; Charles Fried, "Privacy" (1968) 77:3 Yale LJ 475.

63 Jeffrey Rosen, "The Purposes of Privacy: A Response" (2001) 89:6 Geo LJ 2117 at 2124 [emphasis added].

64 Benn, *supra* note 62 at 6.

65 See Westin, *supra* note 55 at 32; Gavison, *supra* note 55 at 432, 434; Julie E Cohen, "Examined Lives: Informational Privacy and the Subject as Object" (2000) 52:5 Stan L Rev 1373 at 1424.

66 Westin, *supra* note 55 at 31.

67 See generally Fried, *supra* note 62 at 483. See also Hyman Gross, "Privacy and Autonomy" in Pennock & Chapman, *supra* note 62, 169 at 172–74.

68 Julie E Cohen, "Privacy, Visibility, Transparency, and Exposure" (2008) 75:1 U Chicago L Rev 181 at 195. For a discussion of how privacy facilitates free speech, see Eric Barendt, "Privacy and Freedom of Speech" in Andrew T Kenyon & Megan Richardson, eds, *New Dimensions in Privacy Law: International and Comparative Perspectives* (Cambridge: Cambridge University Press, 2006) 11.

Such expression, it has been noted, is essential for a healthy democracy[69]—a point recently emphasized by the Supreme Court of Canada when discussing the value of privacy more generally.[70]

Much more could be said about the relationship between privacy and anonymity. However, for present purposes it suffices to say that the Court's recognition of anonymity as a constitutionally protected value under section 8 in *Spencer* is laudable on the basis that it goes some measure toward aligning privacy under the *Charter* with theoretical currents in privacy scholarship. Moreover, since anonymity refers most basically to freedom from unwanted surveillance, the concept itself necessarily results in a subtle shift in analysis—one that is concerned as much with *state intrusion* as it is with characterizing the information at issue as *inherently private*. As we explain below, this may harken a return to the rule of law principles that the Court identified in its early *Charter* jurisprudence, and may also lead to the further marginalization of the so-called biographical core, an analytical device that has been rightfully criticized in recent years.

B. Anonymity and the Rule of Law

While the Court in *Spencer* does not expressly invoke concerns about the rule of law,[71] its recognition of anonymity portends an important shift in the Court's approach to section 8—one that is animated by a concern for unfettered state action, and which avoids reductionist attempts to examine information in isolation and to categorize it as being inherently private, intimate, or otherwise meaningful to the individual concerned.

The notion that section 8 of the *Charter* is concerned not only with the private interests of the individual, but also with controlling exercises of state power, is not a particularly controversial claim. The early section 8 jurisprudence is notable for its focus on curbing the potential for state abuse. In *Hunter v. Southam*, Justice Dickson (as he then was) stated that the express purpose of section 8 is to "protect individuals from unjustified state intrusions upon their privacy."[72] Similarly, in *R. v. Wong*,[73]

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69 See Hunt, *supra* note 60 at 216–17.

70 See *Local 401*, *supra* note 61 at para 22.

71 There are, needless to point out, many different accounts of the meaning of rule of law. Generally, these can be divided between procedural and formalist accounts, and accounts that hold that the rule of law entails a set of substantive guarantees (see Jeremy Waldron, "Is the Rule of Law an Essentially Contested Concept (in Florida)?" (2012) 21:2 Law & Phil 137 at 153–59).

72 *Hunter v Southam Inc*, [1984] 2 SCR 145 at 160, 11 DLR (4th) 641 [*Hunter*].

73 [1990] 3 SCR 36, 60 CCC 460.

Justice La Forest referred to George Orwell's classic dystopian novel, *1984*, and observed that it was "inconceivable that the state should have unrestricted discretion to target whomever it wishes for surreptitious video surveillance."[74] Justice La Forest added that the "notion that the agencies of the state should be at liberty to train hidden cameras on members of society wherever and whenever they wish is fundamentally irreconcilable with what we perceive to be acceptable behaviour on the part of government."[75]

While similar statements of principle can be found in more recent cases,[76] there has arguably been a gradual shift away from state conduct to a focus on the degree of intrusion on the individual.[77] Austin has persuasively argued that this shift has resulted in section 8 taking an unduly "narrow understanding of privacy that provides the strongest protection to closely held secrets and activities within the home."[78] She attributes this narrow approach to section 8 to a failure to examine the concept of privacy through the lens of the rule of law, and, in particular, to engage sufficiently with the early statements of principle that emphasized the dystopian consequences of an overreaching state. She concludes that refocusing section 8 on the rule of law would better highlight the democratic concerns surrounding state surveillance than does the current language of privacy.[79]

Austin illustrates her point through a discussion of two recent Supreme Court of Canada decisions involving surveillance: *R. v. Gomboc*[80]

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74 *Ibid* at 47.

75 *Ibid*.

76 In *Tessling*, for example, Justice Binnie emphasized the "normative" nature of the section 8 analysis (*supra* note 16 at para 42), noting that it is laden with value judgments, which later, in *R v Patrick*, he said requires courts, when assessing an individual's expectation of privacy, to keep front and centre a concern for the "long-term consequences of government action" (2009 SCC 17 at para 14, [2009] 1 SCR 579 [*Patrick*]). In *Ward*, Justice Doherty explained that statements such as these reveal that the reasonable expectation of privacy inquiry cannot be focused solely on the nature of the individual's privacy interest or on her expectations (both subjective and objective) in relation thereto. The normative approach to section 8 requires courts to also consider the broader question of the "degree of privacy needed to maintain a free and open society" (*supra* note 5 at para 86).

77 For a challenge to the Supreme Court's approach, see Lorne Neudorf, "Home Invasion by Regulation: Truckers and Reasonable Expectations of Privacy Under Section 8 of the *Charter*" (2012) 45:2 UBC L Rev 551. Neudorf argues that the reasonable expectation of privacy concept has increasingly resulted "in a weak conception of privacy that threatens the constitutional guarantee against unreasonable search and seizure" (*ibid* at 552).

78 Austin, *supra* note 6 at 390.

79 *Ibid* at 391.

80 *Supra* note 34.

(which concerned the monitoring of household electricity consumption to search for signs of a marijuana grow-op) and *R. v. A.M.*[81] (which concerned the use of sniffer dogs to detect drugs concealed in student backpacks). In both cases, the information gleaned (electricity records and odorous emanations, respectively) enabled the police to determine with a high degree of certainty the precise criminal activity that they were investigating. In *Gomboc*, the majority held that no search had occurred, primarily because the information was not meaningful, in the sense that it did not itself reveal intimate or private lifestyle choices occurring within the accused's house.[82] In contrast, in *A.M.*, a majority of the Court determined that a reasonable expectation of privacy was established because the sniffing revealed "specific and meaningful information" about whether drugs were in the bag.[83] Examined from the perspective of the rule of law, *Gomboc* and *A.M.* are difficult to reconcile. If the central objection is that the state is intruding into the lives of citizens without prior authorization or judicial control, then one would expect section 8 to be engaged in both instances. But the language of privacy led to fundamentally different conclusions in analogous situations.[84] For Austin, concerns about unconstrained state surveillance—and the potential that it has for arbitrary and discriminatory abuses—are more easily addressed through the "language of the rule of law" than through the "language of privacy".[85]

Although Austin's critique of the section 8 jurisprudence is insightful and powerful, it may be that a more robust account of privacy—one that recognizes the importance of anonymity, as *Spencer* does—is capable of addressing many of her concerns without entering into the fraught debate over the meaning of the rule of law. As we explained above, the significance of anonymity is that it places a premium on freeing the individual from the scrutiny of an overweening state. This is accomplished by recognizing that individuals not only have a privacy interest in intimate information, but should also be free from state interference. Consider again Austin's examples of *Gomboc* and *A.M.*: if the Court focused on a person's interest in remaining anonymous, in the sense of being free from state scrutiny, then the Supreme Court ought to hold that section 8 is engaged in both cases. This consistency in result would be reached without having

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81 2008 SCC 19, [2008] 1 SCR 569 [*AM*].

82 *Gomboc*, *supra* note 34.

83 *Ibid* at para 67.

84 They are analogous as, in each case, the police used non-invasive techniques to detect the presence of illegal activity, and the technique revealed precisely what they were looking for (drugs or unusual electricity consumption) with considerable accuracy, but did not reveal anything else about the individuals or their lifestyles.

85 Austin, *supra* note 6 at 392.

to draw directly on the rule of law itself, or having to determine conclusively whether the information at issue (odorous emanations and electrical consumption data) is inherently private and hence sufficiently meaningful to merit constitutional protection. Accordingly, principled protection is extended, and conceptually fraught debates are largely avoided.[86] Arguably, by firmly recognizing the importance of anonymity as a constitutionally protected dimension of privacy, *Spencer* may respond, albeit implicitly, to Austin's critique of the recent section 8 jurisprudence—and do so in a manner that avoids having to agonize over the ambit of the rule of law.

C. Anonymity and the Shrivelling Biographical Core

A final reason that *Spencer* may prove to be a lodestar for future section 8 jurisprudence is that it appears to relegate the analytical device known as the biographical core to a decidedly secondary status. The biographical core has proved to be an unwieldy concept, and one that has been the subject of persistent academic criticism, some of which appears to have been addressed by *Spencer*. In our view, reading *Spencer* as effectively marginalizing the biographical concept should be welcomed as a positive development that will facilitate greater coherence in section 8 jurisprudence.

The concept of the biographical core first appeared in Justice Sopinka's reasons in *R. v. Plant*.[87] Justice Sopinka rejected the contention that section 8 only protects information of a "personal and confidential nature," and proposed instead that it be construed purposively so as "to protect a biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state."[88] He explained that "[t]his would include information which tends to reveal intimate details of the lifestyle and personal choices of the individual."[89]

From the beginning, Justice Sopinka's articulation of the concept of the biographical core presented certain analytical problems. On the one hand, his references to "intimate details"—and indeed to the biographical core itself—suggested that section 8 was aimed primarily at protecting

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86 There are probably few topics that are as contested as the meaning of the rule of law. Indeed, some have argued that the rule of law is an essentially contested concept (see Waldron, *supra* note 71).

87 *Supra* note 12.

88 *Ibid* at 293.

89 *Ibid*.

what some commentators have called "deeply personal information".[90] Indeed, in *Plant*, Justice Sopinka held that the appellant did not have a reasonable expectation of privacy in computer records revealing a pattern of electricity consumption, largely because they could not be said to "reveal intimate details" about his personal lifestyle.[91] On the other hand, commentators have noted that it appears that Justice Sopinka did not intend the biographical core to operate as an abstract delineation of a "zone of privacy defined independently of the state," but rather he intended the concept to operate specifically "*in relation to the state* and special vulnerabilities to state abuse."[92] On this view, section 8 is concerned as much with ensuring that the state respects the rule of law as it is with safeguarding individual privacy.[93]

Subsequent Supreme Court of Canada cases have added further ambiguity to the meaning of the biographical core. In *Tessling*, for instance, Justice Binnie, for the Court, proposed multiple factors to guide courts in determining whether a subjective expectation of privacy is objectively reasonable. One of these factors involved assessing whether the informational content "exposed any intimate details of the respondent's lifestyle, *or* information of a biographical nature."[94] By using the alternative "or", Justice Binnie appeared to suggest that the biographical core means something different than intimate information about lifestyle choices.[95] More recently, in *Gomboc*, Justice Deschamps, for the majority, appeared to equate "biographical core data" with information that is "intimate".[96]

In addition to this uncertainty as to its precise meaning, a related difficulty concerns the biographical core's role in the overall determination as to whether section 8 is engaged. While the concept featured prominently in Justice Sopinka's reasons in *Plant*, there is no express suggestion in that case that information must fall within the biographical core to merit

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90 See David Matheson, "Deeply Personal Information and the Reasonable Expectation of Privacy in *Tessling*" (2008) 50:3 Can J Crim & Crim J 349 at 355–58.

91 *Plant*, *supra* note 12 at 293.

92 Austin, *supra* note 6 at 391 [emphasis in original].

93 See *ibid* at 392–96.

94 *Tessling*, *supra* note 16 at para 32 [emphasis added].

95 This bifurcation continues consistently throughout the judgment. See, for instance, where Justice Binnie identifies the question as being whether the police technology at issue exposed "any intimate details of the respondent's lifestyle *or* part of his core biographical data" (*ibid* at para 59 [emphasis added]) which he answered in the negative, holding that the information did not "touch on 'a biographical core of personal information', *nor* does it 'ten[d] to reveal intimate details of [his] lifestyle'" (*ibid* at para 62, citing *Plant*, *supra* note 12 at 293 [emphasis added]).

96 *Supra* note 34 at para 36.

constitutional protection. The concept, it seems, was intended to be one factor among many, albeit an important one.[97] The multi-factoral analysis subsequently described in *Tessling* is consistent with the biographical core being simply one factor among many to be assessed in the "totality of the circumstances."[98] The Court adopted a similar approach in *A.M.*[99] In that case, Justice Binnie stated that, as a matter principle, the "biographical core" is simply an "analytical tool", and that it was never intended to be "conclusive of the analysis of information privacy."[100]

Subsequent Supreme Court decisions have suggested a much more definitive role for the biographical core, casting it as something of a constitutional threshold that must be crossed before section 8 is engaged. For example, in *R. v. Patrick* (a case involving a police search of garbage outside of a home), Justice Binnie emphasized that the information found in the garbage fell within the biographical core information, suggesting that the biographical core was a prerequisite to engaging section 8.[101] Similarly, in *Gomboc*, Justice Deschamps for the majority, held that the "central issue" in the section 8 analysis was whether the information at issue (electricity records) "disclose[d] intimate details of the lifestyle and personal choices of the individual that form part of the biographical core data protected by the *Charter*'s guarantee of informational privacy."[102] She concluded that section 8 was not engaged because the electricity records in issue were meaningless and incapable of revealing any intimate activities inside the home. Importantly, Justice Deschamps based her decision on the similar findings of Justice Sopinka in *Plant* and Justice Binnie in *Tessling*, interpreting both cases as requiring that information be meaningful, in the

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97 Justice Sopinka called for a contextual approach applying multiple factors including: the nature of the information, the relationship to any party claiming confidentiality, the place the information was gathered, and the manner in which it was gathered. The biographical core was simply one factor (see *Plant*, *supra* note 12 at 293).

98 *Tessling*, *supra* note 16 at para 31. However, the application of that test in *Tessling* itself suggested otherwise. Justice Binnie's conclusion that the appellant's subjective expectation of privacy was objectively unreasonable was driven almost entirely by his determination that the information at issue (heat emanations from his home, detected by police using an infrared camera) did "not touch on 'a biographical core of personal information'" (*ibid* at para 62). As such, according to Justice Binnie, the appellant failed to cross what he called the "constitutional threshold" required to engage section 8 (*ibid*). See also Ian Kerr & Jena McGill, "Emanations, Snoop Dogs and Reasonable Expectations of Privacy" (2007) 52:3 Crim LQ 392 at 412–14; Jane Bailey, "Framed by Section 8: Constitutional Protection of Privacy in Canada" (2008) 50:3 Can J Crim & Crim J 279 at 295.

99 *Supra* note 81.

100 *Ibid* at para 68.

101 *Supra* note 76 at paras 31, 40.

102 *Supra* note 34 at para 35.

sense of revealing something "intimate", before section 8 of the *Charter* could be engaged.[103]

As the above suggests, the central tension that had emerged in the pre-*Spencer* jurisprudence was whether the biographical core amounts to a constitutional threshold that has to be satisfied before section 8 is engaged.[104] One of the difficulties with the "threshold approach" is that the Court has not offered a sufficiently clear definition of the concept, something which has caused much uncertainty in the application of section 8 across a range of recent surveillance cases.[105] Another difficulty is that treating the biographical core as a threshold question poses something of a "false dichotomy"; put simply, "meaningfulness" is not a binary characteristic, but rather a continuous spectrum in which all information is at least somewhat "meaningful".[106] A further problem is that a binary approach causes courts to analyze information in isolation, asking whether it *alone* is intimate, biographical, or capable *itself* of revealing meaningful insights into the individual's private life.[107] This approach has the potential of shrinking the scope of section 8 considerably because "*information can always be reduced to smaller and smaller bits of data*, which, through the reductive process, eventually no longer reveal biographical core information."[108]

In light of the persistent uncertainty concerning the meaning and role of the biographical core in the section 8 analysis, one would have expected the Court in *Spencer* to provide some further elucidation. It did not. Rather surprisingly, in fact, the biographical core hardly features in the judgment at all. Justice Cromwell mentions the phrase only twice, observing only that it was one of the central issues that divided the Saskatchewan Court of Appeal, and that the parties before the Supreme Court continued to take divergent views on whether subscriber information quali-

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[103] *Ibid* at para 38.

[104] See Stuart Hargreaves, "*R. v. Gomboc*: Considering the Proper Role of the 'Biographic Core' in a Section 8 Informational Privacy Analysis" (2012) 59:1 Crim LQ 86 at 100; Mathew Johnson, "Privacy in the Balance: Novel Search Technologies, Reasonable Expectations, and Recalibrating Section 8" (2012) 58:3&4 Crim LQ 442 at 491 (noting the Court's recent cases seemed to turn on whether the information was "meaningful" in the sense of being intimate or biographical).

[105] See William MacKinnon, "*Tessling, Brown, and A.M.*: Towards a Principled Approach to Section 8" (2007) 45:1 Alta L Rev 79 at 89.

[106] Johnson, *supra* note 104 at 491.

[107] For a discussion of this trend in recent cases, see Kerr & McGill, *supra* note 98 at 414–16; Johnson, *supra* note 104 at 491–92; MacKinnon, *supra* note 105 at 110–12.

[108] Kerr & McGill, *supra* note 98 at 414–15 [emphasis in original].

fied as biographical.[109] After making these observations, Justice Cromwell states that "s. 8 protection is accorded not only to the information which is itself of that [biographical] nature" but also covers mundane information if it tends to reveal intimate lifestyle choices when combined with other information.[110]

Could it be that Justice Cromwell intended to marginalize the biographical core in the overall section 8 analysis? In light of the central role that the biographical core played in the lower court decisions,[111] and indeed in the Supreme Court's previous jurisprudence, his scant engagement with the concept is certainly curious. In our view, *Spencer* may be read as signalling that the biographical core's normative importance is beginning to fade. Indeed, the fact that the Court in *Spencer* found that section 8 was engaged—without specifically holding that the impugned information touched upon the biographical core—must mean that it does not operate as a constitutional threshold.

In our view, the Court's approach—or lack of one—to the biographical core in *Spencer* is a positive jurisprudential development. Justice Cromwell's analysis avoids the problem of reductionism by making it plain that courts must now look beyond the ostensibly mundane nature of the information itself, and consider it in combination with other information when asking whether it tends to "reveal intimate lifestyle and personal choices of the individual."[112] Furthermore, by effectively treating the biographical core as simply one factor among many—as opposed to a prerequisite to engaging section 8—*Spencer* frees courts from having to come to a firm conclusion as to whether such meaningful inferences can be drawn or not. Accordingly, if the arguments are evenly matched on this question, courts can reach a neutral conclusion (characterizing the information as "somewhat meaningful"[113]) and then move on to the other *Tessling* factors to decide whether an individual has a constitutionally protected privacy interest. As mentioned already, this approach is more in keeping with the

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[109] See *Spencer*, *supra* note 1 at paras 24–25.

[110] *Ibid* at para 27, citing *Plant*, *supra* note 12 at 293.

[111] See *Spencer* Sask CA, *supra* note 5. Justice Caldwell states that Spencer is able to challenge the validity of a search under section 8 if he can "establish a personal privacy right in the Disclosed Information," indicating that the key issue of the case is whether or not the information searched goes to the heart of his biographical core (*ibid* at para 25). Further, in their concurring judgments, both Justice Cameron and Justice Ottenbreit briefly discuss their perspectives regarding whether or not the disclosed information touched Spencer's biographical core, suggesting the central importance of this issue (*ibid* at paras 97, 110).

[112] *Spencer*, *supra* note 1 at para 27.

[113] Johnson, *supra* note 104 at 491.

decidedly multi-factoral analysis initially proposed in *Plant* and refined in *Tessling*, and so is desirable from a precedential standpoint. It also frees courts from having to draw artificial lines based upon a false dichotomy of meaningfulness, which may facilitate clearer decision making in the future. This has a real practical appeal in the context of novel search technologies for, in these cases in particular, answering the meaningfulness inquiry in a yes or no manner is notoriously difficult.[114]

IV. The Relevance of Legal Uncertainty to the Exclusion of Evidence

One final aspect of *Spencer* warrants brief comment. Having found a breach of section 8, the Court spent a few paragraphs evaluating whether the evidence obtained by police should be excluded under section 24(2) of the *Charter*, pursuant to what is often called the *Grant* inquiry. As mentioned above,[115] the Court ultimately determined that the evidence should be admitted, a conclusion that turned mainly upon its holding that investigators had acted reasonably in light of the legal uncertainty surrounding the search. While Justice Cromwell cautioned that he did not want to be seen as encouraging the police to act without warrants in "gray areas", he nevertheless held that the "nature of the police conduct in this case would not tend to bring the administration of justice into disrepute."[116]

In our view, Justice Cromwell's conclusion on section 24(2) appears to be another disquieting example of warrantless searches being treated as reasonable where there is legal uncertainty at the time the search is conducted. Consider the Supreme Court's 2011 decision in *R. v. Cole*, where the Court found a violation of a high school teacher's section 8 rights after police officers searched his work-issued laptop for pornography.[117] The investigators believed that they were permitted to search the computer because it did not belong to the accused. The majority, over Justice Abella's dissent,[118] overturned the trial judge's finding that the police had acted

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[114] For a discussion, see Renee M Pomerance, "Redefining Privacy in the Face of New Technologies: Data Mining and the Threat to 'Inviolate Personality'" (2005) 9:3 Can Crim L Rev 273.

[115] See the last paragraph of Part I, above, where the authors discuss the section 24(2) analysis.

[116] *Spencer*, *supra* note 1 at para 77.

[117] *Supra* note 4.

[118] See *Cole*, *supra* note 4 at paras 107ff. Justice Abella held that, although it was not settled law that an individual could have a reasonable expectation of privacy in their workplace computer, thereby protecting the information stored with section 8 *Charter* rights, it was settled that "property rights [alone] did not determine whether a warrant was required" (*ibid* at para 114). Accordingly, she held the police conduct was egregious to the extent of bringing the administration of justice into disrepute, as the officer

egregiously and admitted the evidence on appeal. In reaching this conclusion, the majority observed that the police officer lacked "the guidance of appellate case law" and that he believed "erroneously but understandably, that he had the power to search without a warrant."[119]

The Court adopted a similar approach to section 24(2) in its 2013 decision in *R. v. Vu*.[120] There, the issue was whether the police required a warrant to search the contents of a computer seized incidental to an otherwise valid search of residence believed to contain a marijuana grow-operation. After determining that section 8 was breached,[121] the Court rejected the trial judge's conclusion that the police conduct was sufficiently egregious to warrant exclusion under section 24(2) of the *Charter*. In admitting the evidence, the Court remarked that the police department "had a policy of searching computers found on premises and there was no clear law prohibiting them from doing so."[122] Justice Cromwell added that "[g]iven the uncertainty in the law at the time and the otherwise reasonable manner in which the search was carried out, I conclude that the violation was not serious."[123]

The Court's conclusion in *Spencer* raises some concerns about the role that legal uncertainty plays in the section 24(2) analysis. While the Court in *Grant* itself emphasized that "ignorance of *Charter* standards must not be rewarded or encouraged and negligence or wilful blindness cannot be equated with good faith," the jurisprudence increasingly suggests that police will be treated as having acted reasonably and in good faith if there is no precedent clearly prohibiting their impugned activities.[124]

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acknowledged that he could have reasonably obtained a warrant, had the adequate experience to understand the settled law at the time of the search, and was aware of the possibility that Cole stored private information on the workplace computer (*ibid* at paras 114–19).

119 *Ibid* at para 86.

120 *Supra* note 4.

121 See *ibid* at paras 40–45 where Justice Cromwell details four reasons why a warrant authorizing the search of a premises does not extend to a computer found on the premises: (1) computers store large amounts of often personal information; (2) this information can be "automatically generated, often unbeknownst to the user;" (3) "a computer retains files and data even after users think that they have destroyed them," thus compromising "the ability of users to control the information that is available about them;" and (4) a computer does not constitute a "receptacle", something otherwise permissively searched under the authorizing warrant.

122 *Ibid* at para 69.

123 *Ibid* at para 71.

124 *Supra* note 45 at para 75. Other observers have suggested that the section 24(2) jurisprudence has evolved to the point where there is a virtual presumption that police have acted in good faith (see Jordan Hauschildt, "Blind Faith: The Supreme Court of Cana-

There are many reasons to be concerned about the suggestion that legal uncertainty itself serves to legitimize an unauthorized (i.e., warrantless) search by state officials. For one thing, legal uncertainty is endemic to our system of justice, based as it is on precedent. Even more importantly, the very idea that legal uncertainty could ever make a warrantless search reasonable appears to contradict the well-established principle that all warrantless searches are prima facie unreasonable. This was made plain in *Hunter*, perhaps the seminal case on section 8, where Justice Dickson (as he then was) explained that "the concept of 'unreasonableness' under s. 8 ... would require the party seeking to justify a warrantless search to rebut this presumption of unreasonableness" because such an approach best protects the purpose of section 8 (i.e., the prevention of state abuse through unjustified searches).[125] In our view, this presumption of unreasonableness itself belies any suggestion that police officers can be said to have acted reasonably in the face of legal uncertainty.

While we do not want to overstate the significance of *Spencer* for section 24(2) of the *Charter*, it does evidence a concerning tendency to permit police to act without lawful authority. Given that there was some statutory basis for the searches in *Spencer* (i.e., under *PIPEDA* and the *Criminal Code*), as well as divisions in the appellate jurisprudence, the Court's conclusions are more understandable. In general, however, the better approach—and the one that best protects privacy rights—is to require police to seek prior judicial authorization whenever their lawful authority to conduct a search is in doubt. If existing search and seizure powers are insufficient, or the requirement for prior judicial authorization is too onerous, then it is always open to Parliament to enact legislation that will grant the police the powers they need.

Conclusion

Spencer is unquestionably an important decision on many levels. Most obviously, and immediately, the case will have practical significance for law enforcement who will henceforth have to seek prior judicial authorization before seizing Internet subscriber information. It is also likely that the holding in *Spencer* will have broader practical implications in that it

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da, s. 24(2) and the Presumption of Good Faith Police Conduct" (2010) 56:4 Crim LQ 469). Indeed, even in *Grant* itself—a case that dealt with an unlawful detention—the police officer's decision to unlawfully detain was found to be understandable due to "considerable legal uncertainty" as to the meaning of detention. On this point, see also Don Stuart, "Welcome Flexibility and Better Criteria from the Supreme Court of Canada for Exclusion of Evidence Obtained in Violation of the Canadian Charter of Rights and Freedoms" (2010) 16:2 Sw J Intl L 313 at 328.

[125] *Hunter*, *supra* note 72 at 161.

prevents investigators from relying upon either *PIPEDA* or the *Criminal Code* in support of otherwise unlawful searches. Although we do not know how often police relied on those statutes to justify searches, we expect that it was not limited to the searches conducted in *Spencer*.

Yet *Spencer* is perhaps most important on the level of constitutional principle. The Court's explicit recognition that anonymity is a core element of privacy will almost certainly be welcomed by scholars who have long argued that it is functionally related to the values underpinning privacy. The Court's failure to previously recognize anonymity as a normative value underlying section 8 of the *Charter* meant that it offered a very diminished account of privacy, as well as one that offered less protection to citizens. As we have argued, the recognition of anonymity not only leads to a more robust account of privacy, but may also respond to the rule of law concerns identified by other observers.

Spencer is also important because it signals a further marginalization of the biographical core concept. *Spencer* is, as we have argued, important for its recognition that ostensibly mundane information may still engage section 8, a conclusion that helps overcome the "reductionist" trend in recent section 8 jurisprudence. By treating the biographical core as simply one factor among many, as opposed to a constitutional threshold, Justice Cromwell's reasons return the concept to the role it was arguably designed to play, and frees the Court from having to make a firm decision as to whether information is meaningful or not. In our view, all of this is for the good, and will likely facilitate clearer decision making in the future.