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Are Tents a 'Home'? Extending Section 8 Privacy Rights for the Precariously Housed

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ARE TENTS A 'HOME'? EXTENDING SECTION 8 PRIVACY RIGHTS FOR THE PRECARIOUSLY HOUSED

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Abstract

The home, for most of us, is an obvious zone to assert privacy and property rights. However, this is not the case for those whose control of residential space is precarious. Our paper focuses on privacy rights under the Canadian constitution for those living in tents and, specifically, the judicial rejection of a tent as a home garnering legal protection under the *Charter of Rights and Freedoms*. We focus on a 2018 case from British Columbia, *R. v. Picard*, the only judicial decision that we could locate that has explored this question. In holding that the tent is not a home, *Picard* draws from the venerable castle doctrine, the deeply rooted legal principle that cements enhanced legal protection for the home. Drawing from legal geography, we argue that the castle doctrine is grounded in a particular legal-spatial imaginary, such that the home is represented in its ideal form as a privately owned detached dwelling. The connection between privacy rights and the home, as reflected in jurisprudence, is grounded in property rights, which formally excluded all but white men in colonial North America and continues to be linked to systemic inequality. As we illustrate in this paper, the exclusion of those in tents and other forms of precarious housing, including those dwelling in cars, from exercising enhanced privacy rights afforded to the home exacerbates the inequalities of the most vulnerable, such that the legal protections of "home" are not available to those living in tents. We conclude that the basis for the denial of tents as homes is legally flawed and should be reconsidered in future jurisprudence.

I. Introduction

In 2018, police seized drugs from Mr. Louis Picard's tent without a warrant. Mr. Picard's tent was located on the same stretch of sidewalk in Vancouver's Downtown East Side (DTES) for

[1] We are grateful for the conversations with numerous precariously housed people and advocates, whose lived experiences inspired this work. Many thanks as well for the excellent suggestions of three anonymous reviewers and from Louise Kenworthy. All errors and omissions are our own.

two years, and he had lived there with his girlfriend, never leaving the space unattended.[2] At the heart of the case was whether the accused's tent could be characterized as a "home" for judicial purposes. If so, the tent would afford Mr. Picard a high expectation of privacy under section 8 of the *Charter of Rights and Freedoms* and a search could only be conducted if the search was lawful, or with judicial pre-authorization, meaning a warrant.[3] Following a short analysis in a *voir dire* before trial, Justice Lee ruled that Mr. Picard's tent was not a "home" on the basis that it was on city property contrary to a city bylaw, which prohibited camping on city streets. Therefore, the drug evidence collected from the tent could be used against Mr. Picard at trial.[4] This case raises urgent questions as to how the courts engage in a contextual analysis of "home," as well as larger questions around the unequal access people have to privacy and protection from state intrusion in relation to their precarious housing and personal belongings.

To clarify, by 'precarious housing', we mean housing where residents do not have legal tenure or enforceable legal protection from removal, which may include insecure rental housing, rooming houses, shelters, transitional housing, vehicles, or tents or tarps public space.[5] For ethical and analytical reasons, we also avoid using the generic term "the homeless", given its derogatory connations, and the danger that it generalizes differentiated experiences. Instead, we use the term "houseless" or "unhoused" to refer to people such as Mr. Picard, reflecting the fact that he may not have access to secure shelter, but he does have a home. We also distinguish between the legal concept of "home", which we note with quotation marks, and the generic notion of home. While the latter is used in its everyday sense, the former refers to the judicial understanding of domestic shelter that is deserving of privacy protections.

To understand the *Picard* decision, we adopt a legal geographic perspective that analyzes home and property through a spatial lens, as discussed below.[6] We contribute to the literature on the place-based application of criminal sanctions by focusing on the particular overlap of municipal

[2] *R v Picard*, 2018 BCPC 344 [*Picard*].
[3] *Canadian Charter of Rights and Freedoms*, section 8, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11 [*Charter*].
[4] *Picard*, *supra* note 2.
[5] Nicholas Blomley, Alexandra Flynn & Marie-Eve Sylvestre, "Governing the Belongings of the Precariously Housed: A Critical Legal Geography" (2020) 16 Annual Review of Law and Social Sciences 165-181.
[6] Mona Lynch, "Mass Incarceration, Legal Change and Locale: Understanding and Remediating American Penal Overindulgence" (2011) 10 Criminology & Public Policy 671-98.

rules regarding the placement of tents in relation to Section 8 of the *Charter of Rights and Freedoms*, which reads: "Everyone has the right to be secure against unreasonable search or seizure."[7] Jurisprudence suggests that dwellings identified as "home" are granted greater protection under this section. We argue that Canadian courts have defined home too narrowly in the determination of one's reasonable expectation of privacy, ultimately privileging those with fee simple title or other more secure forms of land tenure, and disadvantaging those living precariously. In our view, Canadian courts should put more weight on other contextual factors that consider the nature of precarious housing, and the broader social context around housing crises. This broader context recognizes that people who are already rendered vulnerable in society – including Indigenous Peoples, people victimized by intimate partner violence, and people with disabilities (including those with addictions) – are also less likely to be protected by section 8. An expansive definition of home is a more equitable approach to the interpretation of section 8 and the definition of home, and aligns with the purpose of this *Charter* provision, which is to protect people, not places.

Our paper is structured as follows. First, we present the *Picard* decision, which turned on whether a tent located in one of Canada's poorest neighbourhoods can be considered a home under Section 8 of the *Charter*. Second, drawing from scholarship in legal geography, we examine the brief evolution of section 8 since the *Charter*'s emergence in 1982, concluding that courts have generally eroded the protection of section 8, but this reduction has been more significant for precarious housing contexts, including for people living in vehicles and trailers, couch surfing, and shelters. In the third section, we analyze the troubling conclusion in *Picard* and section 8 jurisprudence more broadly for those living precariously. We consider the increasing regulation of public spaces and anti-disorder by-laws and statutes that further limit privacy for people who are precariously housed. We conclude that a legal geography lens showcases how *Charter* interpretations limit legal designations of "home," ultimately devaluing the privacy interests of the precariously housed. With more than 235,000 Canadians experiencing houselessness each year, this paper raises the concerning lack of *Charter* protection for an

[7] *Canadian Charter of Rights and Freedoms*, s 8, Part 1 of the *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

important – and vulnerable – group of people.[8]

1. *R v Picard*: is a tent a "home"?

Between 2016 and 2018, Mr. Picard lived in a dome style tent in the 300-block of Alexander Street sidewalk in the City of Vancouver, in the heart of the DTES.[9] Beside the tent stood a rectangular bin for storage. Mr. Picard also used a metal rack on which several bicycles were kept, with a blue tarp attached to the metal rack covering the tent. Mr. Picard told the court that his tent was purchased with his welfare money and that he lived there with his girlfriend. Mr. Picard's belongings were kept inside the tent, and it was the location where his daily activities took place, like eating, shaving, and sleeping. Although the City of Vancouver prohibits placing a tent on city property under Bylaw 8735, the Vancouver Police Department and city officials only occasionally asked Mr. Picard to relocate the tent.[10] In response, Mr. Picard would move it to a different location along the same street or would remove the poles and put his tent against a building wall, without removing the items within the tent. When he was not by his tent, his girlfriend watched over it, ensuring the protection of the tent and his belongings, and preventing uninvited guests from entering.

In 2018, Mr. Picard was charged with three counts of possession for the purpose of trafficking, contrary to section 5(2) of the *Controlled Drugs and Substances Act* (*CDSA*).[11] The drugs were found by police in Mr. Picard's tent following his arrest when the tent was searched without a warrant. Drugs were also found on his person before the tent was searched. At the *voir dire* held before trial as to whether the drugs confiscated from the tent could be admitted as evidence, the court considered two issues: first, whether Mr. Picard had a reasonable expectation of privacy in the tent and, if so, whether the Crown needed to show exceptional circumstances to justify the search of Mr. Picard's tent without a warrant; and, second, whether the tent could be searched

[8] Stephenson Strobel, Ivana Burcul, Jia Hong Dai, Zechen Ma, Shaila Jamani, and Rahat Hossain, *Characterizing people experiencing homelessness and trends in homelessness using population-level emergency department visit data in Ontario* (Statistics Canada, 2021).
[9] *Picard*, *supra* note 2 at para 11.
[10] City of Vancouver, City Land Regulation By-law No. 8735 at section 3(d), online: <https://bylaws.vancouver.ca/8735c.pdf>.
[11] *Picard*, *supra* note 2 at para 2.

following Mr. Picard's arrest as an "incident to arrest." If the Crown could not show that it validly searched the tent, the evidence that the police collected from the tent would not be admissible at trial.

Justice Lee, who presided over the *voir dire*, took judicial notice of the fact that the case occurred in the context of a housing crisis and, as of 2018, many people were living in tents within the Downtown Eastside (DTES). The 2018 Vancouver count of 1522 living in shelters and 659 of whom were living on the street, for a total of 2,181 people.[12] This figure shows a 2% increase from the year prior, and part of a continued increase since the first count in 2005, to 2,223 in 2019.[13] Further, one-half of the respondents reported that they were living in this situation for less than one year, which is not unusual in Canada.[14] These numbers do not include those living precariously in other ways, including residing in rooming houses or in vehicles. The DTES has a long history of community activism, which exists alongside the struggle and survival, meaning that the DTES is a place that many people consider to be home, receive care, and are members of a larger community.[15]

The first question in the *voir dire* turned on whether Mr. Picard's tent was a "home" within the meaning of section 8 case law. If it were a "home", the Crown would need to show exceptional circumstances to justify the warrantless search, or else the collected evidence could have been held inadmissible under 24(2) of the *Charter*.[16] Section 8 jurisprudence does not include cases that have grappled with privacy rights in respect of tents. Therefore, Justice Lee looked to other

[12] Urban Matters CCC & BC Non-Profit Housing Association, *Vancouver Homeless Count 2018* (Vancouver, July 2018), online (pdf): <https://vancouver.ca/files/cov/vancouver-homeless-count-2018-final-report.pdf>. The Counts of 2018 and 2019 include those who do not "have a place of their own where they pay rent and can expect to stay for 30 days" as homeless. This includes people who are unsheltered – staying in the street, in alleys, doorways, parkades, vehicles, or beaches, in parks and in other public spaces and/or using homelessness services or staying in hospitals or jails and had no fixed address, and people staying at someone else's place…where they did not pay rent (i.e. couch surfing). This definition also includes sheltered people staying in temporary emergency shelters, detox centres, and transition houses.

[13] Homeless Services Association of BC, BC Non-Profit Housing Association, & Urban Matters CCC, *Vancouver Homeless Count 2019* (Vancouver, 2019), online (pdf): <https://vancouver.ca/files/cov/vancouver-homeless-count-2019-final-report.pdf>.

[14] *Ibid*.

[15] Marie-Eve Sylvestre, Nicholas Blomley, and Celine Bellot, *Red Zones: Criminal Law and the Territorial Governance of Marginalized People* (Cambridge: Cambridge University Press, 2020).

[16] We do not consider section 24(2) arguments. Our argument focuses specifically on whether a tent is a "home" and, therefore whether section 8 provides privacy rights for houseless individuals residing in tents.

legal references, including the definition of a "dwelling house" in section 2 of the *Criminal Code*, which states: "Dwelling-house means the whole or any part of a building or structure that is kept or occupied as a permanent or temporary residence, and includes (a) a building within the curtilage of a dwelling-house that is connected to it be a doorway or by a covered and enclosed passage-way, and (b) a unit that is designed to be mobile and to be used as a permanent or temporary residence and that is being used as such a residence."[17] This definition could arguably include a tent, which is a mobile structure used as a residence.

Mr. Picard's description of his experience and his sentiments suggested that his tent was a "home" under section 2(b), because his tent was his permanent or temporary residence and was designed to be mobile. However, neither counsel nor the judge were able to identify a case that considered the "dwelling house" definition in the *Criminal Code* in the context of a section 8 cases. Justice Lee did not cite related case law, for example, the reasoning in another privacy case concerning the search of a car, where the judge stated, "I note this is a motor vehicle. This isn't a house. This isn't a camper. This isn't a tent. This isn't living quarters,"[18] comparing the privacy rights in relation to a motor vehicle with those to living in a house, camper or tent. While he understood Mr. Picard's subjective perception of his tent as a home, Justice Lee held that it is "too simplistic to say that any residence or place which a person calls home is automatically a "home" in the legal sense, so as to entitle Mr. Picard to protection from a warrantless search save for exceptional circumstances."[19] Instead, Justice Lee argued that he needed to consider "all the circumstances of the particular case when assessing the claim for privacy."[20]

The circumstance that Justice Lee focused on was whether "there was a legal right for the occupant to reside on the property upon which lies the residence."[21] Justice Lee concluded that, "Mr. Picard did not have the legal right to erect a tent on the City sidewalk. He may have put up a tent and the City may have acquiesced in the presence of the tent, but that did not give to Mr. Picard a legal right to place the tent onto City property."[22] The absence of a real property interest

[17] Homeless Services Association of BC, *supra* note 14 at para 26, citing *Criminal Code*, RSC 1985, c C-46.
[18] *R v Young*, 2011 ONCJ 904 at para 20.
[19] *Ibid* at para 38.
[20] *Ibid* at para 36.
[21] *Ibid* at para 39.
[22] *Ibid* at para 40.

was key in Justice Lee's decision. Mr. Picard was prohibited from putting his tent on city property. Justice Lee dismissed Mr. Picard's argument that he had heightened expectations of privacy such that the Crown would need to justify the search and gave little weight to the state's longstanding tolerance of Mr. Picard's presence on the block. This meant that, for the purposes of section 8, Mr. Picard's tent could be searched even without a warrant.

The judge then considered the second question: whether the tent was within the search powers of police on the basis that Mr. Picard had been arrested. While our paper does not analyze this part of the reasoning, we provide the court's decision for helpful context, in particular that Mr. Picard's proximity to the tent allowed it to be searched as an incident of arrest. Justice Lee noted the requirements of a valid search: that (1) the individual searched has been lawfully arrested; (2) the search is truly incidental to the arrest in the sense that it is for a valid law enforcement purpose related to the reasons for the arrest; and (3) the search is conducted reasonably.[23] Even though Justice Lee did not consider Mr. Picard's tent to be a "home," Mr. Picard still had a reasonable expectation of privacy in the tent and its contents such that the search of the tent would need to satisfy these requirements.[24] The court held that the search was valid on the basis that: the tent was small and was in the immediate vicinity to where Mr. Picard was lawfully arrested; the tent was the site of the suspected drug trafficking; the search took place immediately after the arrest; and, the tent and its belongings were safeguarded.[25] Thus, the bylaw that permitted police to characterize his tent as waste or trash, and therefore remove it, meant that he needed to stay close to his tent at all times. This led to his tent being searched as an "incident to his arrest," since he was near his tent at the time that he was arrested and, therefore, his tent was able to be searched on that ground alone.[26]

The decision led to a set of problematic conclusions that ignore the reality of the lived experiences of those living in tents. Mr. Picard's tent could not be a "home" legally speaking because it was located on a sidewalk contrary to a local bylaw. However, because Mr. Picard

[23] *R. v. Saeed*, 2016 SCC 24 at 37.
[24] *Picard, supra* note 2 at para 42.
[25] *Ibid* at para 46-47.
[26] City of Vancouver, City Land Regulation By-law No. 8735 at section 3(c), online: <https://bylaws.vancouver.ca/8735c.pdf>.

was directly next to the tent when he was arrested, the search of the tent was justified on the basis that the search was an "incident of arrest." The court did not engage with Mr. Picard's need to remain close to his tent at all times or risk the theft or destruction of his tent and belongings, a frequent challenge for precariously housed people .[27] The court did not consider why Mr. Picard had to remain close to his tent and belongings: if he did not continuously safeguard his belongings, city bylaws could authorize city workers to render the property as "waste," "abandoned," and "trash," and destroy the property.[28]

In a narrow sense, Mr. Picard thus lost the highest degree of privacy rights because of municipal bylaws. The bylaw that denied the erection of tents on sidewalks and parks meant that his tent was not a legal "home" and therefore was not afforded the reasonable expectation of privacy given to dwelling houses. However, as we explore in this paper, there are more fundamental reasons why Mr. Picard was not granted privacy rights in respect of his home.

The *Picard* case was appealed on numerous grounds, including whether the judge erred in his characterization of the tent.[29] The British Columbia Court of Appeal (BCCA) dismissed the appeal on other grounds. The BCCA stated, "While the question whether a tent occupied by a person in the appellant's position is a home is a matter of significant public interest that will eventually have to be resolved," it would not be the court to answer this question.[30] This paper focuses on unpacking this latter question, that is, whether a tent may be considered a "home" and therefore entitled to enhanced privacy protection under the *Charter*. We do not consider the other important factors in the decision, including whether the search of the tent was justified on the basis that the search was an "incident of arrest," nor the relationship between sections 8 and 24(2). The threshold question of whether a tent is a "home," we argue, requires specific, overdue analysis given its impact on precariously housed people.

II. A Legal Geography of "People, not Places" in Section 8

[27] Nicholas Blomley, Alexandra Flynn, and Marie-Eve Sylvestre, "Governing the Belongings of the Precariously Housed: A Critical Legal Geography" (2020) 16 Annual Review of Law and Social Science 165-181.
[28] City of Vancouver, City Land Regulation By-law No. 8417, online: <https://bylaws.vancouver.ca/8417c.pdf>.
[29] *R v Picard*, 2020 BCCA 107 at para 6.
[30] *Ibid* at para 12.

Legal geography is a scholarly field that has been recognized by the British Columbia Supreme Court (BCSC) as as an important resource in understanding houselessness.[31] Legal geography focuses, in part, on the spatial reasoning, metaphors, and assumptions present within legal discourse and practice, including judicial reasoning.[32] In so doing, legal geography demonstrates that the "*where* of law matters" as "nearly every aspect of law is located, takes place, is in motion, or has some spatial frame of reference."[33]

1. How law makes space

Courts are institutionally powerful sites in which legal geographies are articulated and contested. Judicial actors regularly construct or rely on legal-spatial composites: some generalized, such as jurisdiction, the public-private divide, and citizenship; and others more particular, such as in relation to the workplace[34] or schools.[35] This may entail consequential evaluations of particular spaces. Justice Lee, like other legal practitioners, makes space through legal categorizations. He carves the world up into consequential zones. He draws boundaries. He makes scalar distinctions. In so doing, he produces particular legal geographies, like 'private space', the 'citizen', the 'municipal', and the 'national'.

Space can also be expressive, signaling certain social meanings. For example, Timothy Zick discusses the regulation of speech in public spaces in US courts, with courts routinely upholding sweeping restrictions of speech, such as the use of "protest pens" or exclusion zones, it being argued that this rests on a view of space as a neutral container or inert forum, countering that space is not simply a location within which speech occurs, but is constitutive of speech in

[31] See e.g. *Federated Anti-Poverty Groups of BC v. Vancouver (City)*, 2002 BCSC 105; *Abbotsford (City) v. Shantz*, 2015 BCSC 1909. In this case, the expert report used a legal geography framework to help guide the court in understanding panhandling in the context of adjudicating *Charter* rights.
[32] Nicholas K. Blomley, *Law, Space, and the Geographies of Power* (New York: The Guildford Press, 1994); Irus Braverman, Nicholas K. Blomley, David Delaney, & Alexandre Kedar, *The Expanding Spaces of Law* (Stanford, California: Stanford University Press, 2014); David Delaney, "Legal Geography I: Constituitivities, complexities, and contingencies" (2014) *Progress in Human Geography*, 96-102; Luke Bennett & Antonia Layard, "Legal Geography: Becoming Spatial Detectives" (2015) *9*(7) *Geography Compass* 406-422.
[33] Braverman et al, *supra* note 33.
[34] Nicholas K. Blomley and Joel C. Bakan, "Spacing Out: Towards a Critical Geography of Law" (1992) 30:3 661-690.
[35] Damien Collins, "Legal geographies-legal sense and geographical context: Court rulings on religious activities in public schools" (2007) 28:2 Urban Geography 181–197.

important ways.[36] Given that being in specific spaces is crucial to delivering key political messages, by denying access to certain spaces, law and legal actors participate in the definition and regulation of speech and dissent.[37] Thus, contemporary restrictions on public speech send a powerful signal about the value given to political dissent in particular spaces. Political speech appears as dangerous and violent, shaping political interventions and reducing engaged citizenship.

Courts also actively construct legal spaces that have particular effects on the poor. For example, anti-panhandling by-laws or statutes, which have been upheld by courts[38], prohibit particular activities within demarcated spaces.[39] Marie-Eve Sylvestre et al. document the widespread use of spatial restrictions, or "red zones," that are used by Canadian courts in conditions of release associated with bail or probation, noting the manner in which such geometric restrictions often efface the "lived geographies" of those subject to them, excluding vulnerable people from placed-based resources that are vital to their health and wellbeing.[40] Such spaces may have their own legal categorizations like "aggressive panhandling" that only apply in specific geographies.[41] Likewise, a cluster of tents in a city park that prohibits overnight camping may be termed a homeless encampment, where the same grouping of tents in a provincial park that permitted camping would go by no such term, even though the conduct is the same.

In deliberating on whether a tent is a "home", Justice Lee opts to frame the issue through a property lens. As noted, the fact that Mr. Picard does not have a legal right to the land upon which his tent is situated signifies, for Justice Lee, that it cannot be a "home", for section 8 purposes. While real property operates in more complicated ways, a powerfully enshrined

[36] Timothy Zick, "Speech and spatial tactics" (2006) 84:3 Texas Law Review 581-651.
[37] Sylvestre et al, *supra* note 16 at 206-207.
[38] E.g.: *R. v. Banks*, 2007 ONCA 19 (CanLII). Fair Change Community Legal Services in Toronto launched a new constitutional challenge in 2017 against the Ontario Safe Streets Act.
[39] See eg Dina Graser, "Panhandling for chance in Canadian law" (2000) 15 Journal of Law and Social Policy 45; and Nicholas Blomley, "How to Turn a Beggar into a Bus Stop: Law, Traffic and the 'Function of the Place'" (2007) 44 Urban Studies 1697-1712.
[40] Sylvestre et al, *supra* note 16.
[41] See eg Nicholas Blomley, "Homelessness, Rights, and the Delusions of Property" (2009) 30:6 Urban Geography 577-590; Nicholas Blomley, "The Right to Pass Freely: Circulation, Begging and the Mobile Self" (October 1, 2009), online: <https://ssrn.com/abstract=1481289>.

'ownership model' of property shapes judicial reasoning.[42] Property tends to look a particular way, in other words, echoing Cohen's famous description:

To the world:
Keep off X unless you have my permission, which I may grant or withhold.
Signed: Private citizen
Endorsed: The state[43]

The ownership model is also spatialized, legal geographers argue.[44] Real property is often understood as a set of rights that operate in regards to a bounded, exclusive territory. The ideal-typical form in contemporary Western liberal forms of property looks something like this: functionally, the presumption is that the rights of the owner (to use, occupy, alienate and so on) applies uniformly across and exclusively within a defined space, and are operative at all times. It is also presumed that these rights attach to an individual owner who therefore is assumed to command all the resources within this designated space. Unlike traditional notions of common right, the owner is also assumed to have the right to govern the access of others to this territory, allowing conditional access or denying it entirely. As such, the owner is assumed to have a territorial "gatekeeping function" that is not unduly constrained by the wishes and needs of others.[45]

By extension, other relationships to land, like Mr. Picard's interest in his tent, tend not to look like property, to the extent that they do not accord with this narrow territorial model. Moreover, the dominance of the ownership model invites a binary logic, in which one is either an owner, inside the protections of property, or imagined to be outside property. So it is, for example, that a person living in a tent on city land can be imagined as having a "no-property" status, even though they own the tent and have claimed the area for many years, as Mr. Picard did.[46] An alternative spatial imaginary, which we explore below in a discussion of "precarious property"

[42] Joseph Singer, *Entitlement: The Paradoxes of Property* (New Haven: Yale University Press, 2000).
[43] Felix Cohen, "Dialogue on Private Property" (1954) 9 Rutgers LRev. 357 at 374
[44] Nicholas Blomley, "The Territory of Property" (2006) 40:5 Progress in Human Geography 593–609.
[45] Larissa Katz, "Exclusion and Exclusivity in Property Law" (2008) 8 UTLJ 275.
[46] Jane B. Baron, "Homelessness as a property problem" (2004) 36:2 Urban Lawyer 273–288.

argues that everyone is always "inside" property, but under differentiated conditions of relative security and vulnerability.

2. A legal geography of privacy and home

The *Picard* case turns on several foundational legal geographies. Most immediately, a powerful spatialization relates to the concept of privacy. Privacy, according to a famous formulation by Brandeis, is "the right to be alone—the most comprehensive of rights and the right most valued by civilized man."[47] As Squires notes, privacy in this sense presumes territorial control:

> "The right to be alone includes choice about, and control over, when one is alone, and, as rights imply corresponding duties, privacy must be seen as a socially created and respected right to control when and where one appears to others. It is, however, importantly distinct from mere isolation or solitude, for privacy here involves more than simply being on your own; it entails power over the space which surrounds one."[48]

Privacy is thus fundamentally grounded in the control one has over territory. Within liberalism, privacy is conventionally imagined as a right that is produced through the bounding of a sphere deemed to be private. Squires writes that privacy "is therefore most often conceptualized as a right with a spatial location: a realm is a territory with borders; a sector is an area cut from a larger whole; a sphere is an object in space."[49]

If privacy is imagined as a "right with a spatial location," it reaches its apogee in the legal construction of the category of "home."[50] We think of "home" here as a particular spatial-legal composite. It may echo quotidian notions of home, while also departing from it. "Home" entails the designation of a parcel of space within the private sphere that is granted specific privacy protections, for example, from unwarranted state surveillance, as seen in the jurisprudence on section 8 of the *Charter* below. If a space is designated as a "home" it becomes a space into which state officials cannot enter without additional authority. "Home" denotes protection,

[47] Samuel Warren & Louis Brandeis, "The Right to Privacy" (1890) 4 Harvard Law Review 193 at 193.
[48] Judith Squires, "Private Lives, Secluded Places: Privacy as Political Possibility." *Environment and Planning D: Society and Space* 12, no. 4 (August 1994): 387–401 at 390.
[49] *Ibid* at 392.
[50] *Ibid*.

control, and security.

"Home" in this sense is inherently territorialized, reliant upon the ability to control power over the space that surrounds one. To control territory, in this sense, is to control others, and in so doing "to control when and where one appears to others."[51] A "home" is not a space of free entry, but akin to a fortification, echoing the old saw that "every man's house is his castle."[52] This phrase can be traced back to *Semayne's Case* in 1604, reported by Edward Coke, in which the Sheriff of London entered into a house to seize property to cover a personal debt. Although the court ruled that state officials may enter the space of the home when on lawful purposes, the expectation was that they would announce their purpose. Coke recounted: "the house of every one is to him as his castle and fortress, as well as for his defence against injury and violence, as for his repose . . . is a thing precious and favoured in law."[53] The castle metaphor has been frequently invoked, being described as one of the "oldest and most deeply rooted principles in Anglo-American jurisprudence," and one that continues to resonate.[54]

The castle doctrine invokes both moral and legal justification in protecting one's property and defending against perceived threats to one's person associated with an invasion of "home."[55] The "right" to enhanced protections in relation to one's "home" is grounded in the right to own property, which largely formally excluded all but White men in colonial North America, and continues to be linked to systemic inequality.[56] Jeannie Suk argues that the castle doctrine constructs trespass as a kind of boundary-crossing "beyond the protection of the law" and into a space in which "the state monopoly on violence" is suspended.[57] Suk concludes that only certain types of homes and homeowners merit this type of protection. Other lives and bodies retain only a tenuous right to belong and inhabit, as observed by former Supreme Court of Canada Justice

[51] *Ibid.*
[52] *Semayne's Case*, 1604 5 Co Rep 91a at 91b, 77 ER 194.
[53] *Ibid* at 195.
[54] JL Hafetz, "'A man's home is his castle?': Reflections on the home, the family, and privacy during the late nineteenth and early twentieth centuries" (2002) 8 William and Mary Journal of Women and the Law 175–242 at 175.
[55] See Jeannie Suk, *At Home in the Law: How the Domestic Violence Revolution is Transforming Privacy* (New Haven: Yale University Press, 2009).
[56] *Ibid* at 20.
[57] Suk, *supra* note 55 at 59.

Bertha Wilson, who stated, "A man's home may be his castle but it is also the woman's home."[58]

3. Privacy rights in Canadian law

Section 8 jurisprudence has evolved significantly in the four decades since the *Charter* was enacted, with the Supreme Court of Canada's (SCC) increasing justification of state intrusions on the public right to privacy.[59] Canadian jurisprudence has consistently maintained that expectations of privacy are greatest in the "home". Where privacy expectations are highest, state infringements, such as searches without warrants, require strong justification.

In *Hunter v Southam*,[60] Justice Dickson, writing for the majority of the SCC, interpreted section 8 for the first time, emphasizing that it protected "people, not places."[61] The SCC clarified that section 8 protection was not limited to the protection of property or to its association with trespass. Instead, section 8 is about privacy and dignity. As such, the SCC stated that searches conducted without a warrant are presumptively unreasonable. At this point in the development of the law, the SCC said that for almost all cases, police are required to obtain authorization according to the "reasonable and probable grounds" standard.[62] This standard was considered a threshold that must be passed for section 8 to apply – if there was a reasonable expectation of privacy, section 8 protections applied and the court must then consider the reasonableness of the search.[63] *Southam* thus departs from the sharply territorial, castle-like logic of privacy noted above. Privacy is attached to people, wherever they are located. It is not to be read from the territories they control.

However, following *Hunter*, the SCC modified the threshold test into a standard that offers less privacy protection, reverting to a territorial and propertied conception of its reach. Despite the continued reference to *Hunter* in case law today, Richard Jochelson and David Ireland described

[58] *R. v. Lavallee*, [1990] 1 SCR 852 at 124.
[59] See recently Richard Jochelson & David Ireland, *Privacy in Peril: Hunter v Southam and the Drift from Reasonable Search Protections* (Vancouver: UBC Press, 2019).
[60] *Hunter v Southam*, [1984] 2 SCR 145, 11 DLR (4th) 641 (SCC) [*Hunter*].
[61] *Ibid* at 158–159, citing the US Supreme Court in *Katz v United States*, 289 US 347 (1967) at 351.
[62] *Ibid* at 147.
[63] Jochelson & Ireland, *supra* note 59 at ch 2.

the evolution of the law into "privacy as an interest with a caveat."[64] In 1996 in *R v Edwards*,[65] the SCC adopted the "totality of the circumstances test", which regarded reasonable expectations of privacy on a spectrum. In *Edwards*, the court evaluated whether the accused had a privacy right to his girlfriend's apartment – he was allegedly storing drugs there and selling them from his car. His girlfriend cooperated with the police and provided access to the apartment. Here, the court held that Mr. Edwards could not exclude others from the apartment and therefore could not assert a reasonable expectation of privacy. *Southam* set out a two-prong test: did the accused have a right to privacy; and was the search an unreasonable intrusion on that right? The non-exhaustive factors to be weighed by the judge in this analysis include: presence at the time of search; possession or control of the property or place searched; ownership of the property or place; historical use of the property or item; the ability to regulate access; existence of a subjective expectation of privacy; and the objective reasonableness of the expectation.[66] This test was adopted from the United States (US) case *United States v Gomez*.[67] The adoption of the *Gomez* factors in Canadian law has been heavily criticized, given that the US Constitution expressly protects property rights and the Canadian *Charter* does not. Significantly, however, the adoption of these factors marked a distinct turn from the SCC's emphasis on "people, not places," instead invoking reading privacy rights from territorial (and propertied) arrangements.[68] In our view, the *Southam* test has ignored housing precarity. In applying the *Gomez* definition, those with precarious housing can arguably be deemed to not have "possession or control of the

[64] *Ibid*.
[65] *R v Edwards*, [1996] 1 SCR 128, 123 DLR (4th) 31 [*Edwards*].
[66] *Ibid* at para 6.
[67] *Ibid* at para 6 citing *United States v Gomez*, 16 F.3d 254 (8th) Cir. 1994), p 256 [*Gomez*]. While Canada has borrowed the legal test for privacy from the United States, the unique constitutional structures, specific legislative terminology and the development of case law have led to different decisions in relation to tent encampments and privacy. In *State of Washington v. Pippin*, No. 48540-1-II (State of Washington, Court of Appeal, 10 October 2017), a man living in a shelter he'd fashioned by draping a tarp over a fence and a guardrail in Vancouver, Washington was visited one morning by police. When officers knocked on the tarp, Mr. Pippin told them he was just waking up and would come out shortly. Instead of waiting for Mr. Pippin to emerge, officers lifted the tarp, revealing Pippin sitting up in his makeshift bed; as Mr. Pippin got out of bed, officers saw a bag containing methamphetamine. The State Court of Appeals held that by entering Pippin's tent without permission, police conducted an unlawful warrantless search of his home, violating Article I, section 7 of the Washington constitution, which mandates that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." In addition, the doctrine of "trespass to chattels" does not require a reasonable expectation of privacy, protecting the personal property interests in 4th amendment cases (David Reichbach, The Home Not the Homeless: What the Fourth Amendment has Historically Protected and Where the Law
is Going After *Jones* (2012) 47 University of San Francisco Law Review 377).
[68] Don Stuart, *Charter Justice in Canadian Criminal Law*, 6th edition (Toronto: Thomson Reuters, 2014) at 295–296.

property or place searched" or "ownership of the property," if the court applies these categories narrowly.

In *R v Tessling*, the SCC categorized privacy interests into personal, territorial, and informational privacy.[69] Personal privacy affords the highest constitutional protection, protecting bodily autonomy and the right not to have our bodies touched and explored. Territorial privacy is based on the primacy of privacy in the home where "our most intimate and private activities are most likely to take place."[70] Informational privacy concerns "the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others."[71] These categories may overlap in a given case, but are said to provide a helpful analytic tool for evaluating the reasonableness of one's expectation of privacy. Overall, section 8 is concerned with "dignity, integrity and autonomy" and seeks "to protect a biographical core of personal information which individuals in a free and democratic society would wish to control from dissemination to the state. This would include information which tends to reveal intimate details of the lifestyle and personal choices of the individual."[72] In this paper, we focus on territorial privacy with respect to defining the home, and informational privacy as it pertains to the intimate details and objects that are kept private within one's home; though, Justice Lee did not specify the nature of the privacy interest in this way in *Picard*.

Territorial privacy, as described in *Tessling*, and the emphasis on privacy in the home, is well established in section 8 caselaw.[73] The primacy of the "home" was first recognized in 1995 in *R v Silveira*.[74] Two years later in *R v Feeney*, Justice Sopinka stated that the high expectation of privacy in the "home" increased in the *Charter* era.[75] More recently, in 2010 in *R v Morelli* the SCC demonstrated that unlawful searches conducted in the home are considered among the most serious breaches; therefore, evidence obtained from such an infringement is more likely to be excluded under section 24(2) of the *Charter*, with all other factors being considered.[76]

[69] *R v Tessling*, 2004 SCC 67 [*Tessling*].
[70] *Ibid* at para 22.
[71] *Ibid* at para 23.
[72] *Ibid* at para 25.
[73] *Ibid*.
[74] *R v Silveira*, [1995] 2 SCR 297, 124 DLR (4th) 193 (SCC) [*Silveira*].
[75] *R v Feeney*, [1997] 2 SCR 13, 146 DLR (4th) 609 [*Feeney*].
[76] *R v Morelli*, 2010 SCC 8.

In 2009, in *R v Patrick*, the Court determined an accused was not afforded protection of section 8 regarding evidence obtained from a search of his garbage, which he placed at the edge of his property line.[77] The majority framed the interest as informational privacy, finding that the accused abandoned his privacy interest when the garbage was left for municipal collection, and open for any passerby to search through. The consideration of abandonment weighed heavily in the analysis, even though abandonment was only one consideration within the totality of the circumstances test that the Court outlined.[78] The garbage contained highly personal information, which could reveal a "householder's activities and lifestyle" which one would not want exposed to the public or police.[79] That the information was of a criminal nature did not alter this fact, as searches of private places could not be justified by "after-the-fact discovery" of criminal activity.[80] The subject matter must be framed broadly – what is the expectation of privacy within the bag itself? In any case, activities that are criminalized are precisely the personal activities that one would hope to keep from public view, including substance use.[81]

In concurring reasons in *Patrick*, Justice Abella characterized the privacy interest engaged around the primacy of the "home". She argued that this high expectation and protection of privacy extended to the personal information that is revealed in the garbage. While Justice Abella agreed with the result that no *Charter* violation occurred, she disagreed with how abandonment was framed as exposing one's personal information to the public and police at large. Instead, people put their garbage out to be transferred to the municipal waste disposal system, with the expectation that their personal information will not be scrutinized by the state.[82]

Overall, *Patrick* shows the erosion of section 8 privacy rights and the SCC's turn towards a weaker conception of privacy. This weaker conception weighs contextual factors, but this analysis disproportionately focuses on those factors that favour the interests of the state to be

[77] *R v Patrick*, 2009 SCC 17 [*Patrick*].
[78] *Ibid* at para 27 (the full test for this particular factual scenario is articulated at this pinpoint, drawing on the totality of the circumstances test and its articulation for informational privacy in *Tessling*).
[79] *Ibid* at para 30.
[80] *Ibid* at para 32.
[81] *Ibid*.
[82] *Ibid* at 76–92.

able to investigate and prosecute crime.[83] In *Patrick*, material evidence obtained is treated by the courts as a kind of information:

> "[In] the context of criminal investigations, cases such as *Patrick* demonstrate the court's willingness to construct material property as a bag of information when the informational component of the search begins to take primacy in the totality of circumstances calculi. This informational fetishism diminished protections in the content of home and home-style searches, turning material property into information streams that are open to the state's gaze."[84]

Jochelson and Ireland argue that the departure from a bright-line protection of territorial privacy is dangerous because it undermines the purposes of *Southam*'s original test, including that *Charter* rights should favour the individual right to privacy to the state's interest in interference.[85] The authors note that a shift away from individual privacy increases police powers, stating: "This thin conception of privacy is particularly dangerous in a context where national security is considered of paramount importance and where lukewarm protections are seen to be in the best interests of social cohesion."[86] While territorial privacy was generally reduced in all contexts in section 8 cases, the shift particularly exacerbates the impacts on those who are precariously housed, who are further unable to protect their belongings. *Picard* offered an opportunity to squarely examine privacy in the context of those who are unhoused where the state has acquiesced to a person remaining on the same city block for years.

III. Precarious Homes and Reasonable Expectations of Privacy

The previous section outlined the development of section 8 and the continued erosion of protection of privacy in the home generally, reliant on the concept of territorial privacy. In this section, we analyze Canadian case law and show that section 8 affords little protection to precariously housed people. While the latter may have homes, they do not have "homes" in the legal sense, in other words. The cases canvassed in this section identify the places within which precarious housed people reside, yet in no cases are they held to be homes entitled to expanded

[83] Richard Jochelson, "Trashcans and Constitutional Custodians: the liminal spaces of privacy in the wake of Patrick" (2009) 72:2 Sask L Rev 199; Jochelson & Ireland, *supra* note 56.
[84] Sylvestre et al, *supra* note 16 at 62.
[85] *Ibid* at 19.
[86] *Ibid* at 63.

privacy rights.[87] For those with a secure home, property easily appears as a zone of autonomy, rather than one of power and relationality. Therefore, there is merit in starting not at the institutional centre, but from property's margins. The best place to discuss ownership may be the places in which "… it appears in its absence, in confrontation with poverty, slavery, or unlawful occupation – property on the margins."[88]

Notionally, the idea of the home as a space of privacy and autonomy is available to all: all those who have a home, be they ever so lowly, are like the mighty baron in his castle. This was famously argued for by William Pitt in Parliament in 1763, approvingly cited in *Miller v United States*: "The poorest man may in his cottage bid defiance to all the force of the crown. It may be frail – its roof may shake – the wind may blow through it – the storm may enter, the rain may enter – but the King of England cannot enter – all his force dares not cross the threshold of the ruined tenement."[89] However, the reality is that the benefits of home are far from horizontal, but reflective of the hierarchical work that property law does in structuring differentiated yet interlocking relations of privilege and vulnerability.

In so doing, we draw on the concept of "precarious property."[90] According to Nicholas Blomley, real property rules governing access to shelter should not be thought of as creating an in/out binary, such that one is either inside or outside property. Rather, on the principle that we all access shelter through and in relation to others, whether one is an owner-occupier, tenant, or trespasser, property can best be thought of as a set of graduated relationships, governing access, and use. Property law and discourse frames these relationships in differentiated ways, privileging particular relations – notably that which upholds fee simple property. However, for most people, access and use of property for shelter depends on privileged others, who grant access under

[87] Homeless Services Association of BC, *supra* note 12**Error! Bookmark not defined.** (the majority of people who were recorded as unsheltered indicated spending the night outside (61%), while 17% reported staying at someone else's place or couch surfed, 11% stayed in a tent or makeshift structure, 5% in a vehicle or RV, and 4% in another unspecified place).
[88] AJ van der Walt, *Property in the Margins* (Hart Publishing, 2009); Gregory Alexander and Eduardo Pénalver, eds. Property and community (Cambridge: Cambridge University Press, 2009).
[89] 357 US 301 (158).
[90] Nicholas Blomley, "Precarious Territory: Property Law, Housing, and the Socio-Spatial Order" (2020) 52:1 Antipode 36; Carr, Helen, Brendan Edgeworth, and Caroline Hunter eds. *Law and the precarious home* (Oxford: Hart Publishing, 2018).

legally framed terms.[91] Shelter depends on negotiating what we can term a precarious property relationship, defined as "a right or tenancy held at the favour of and at the pleasure of another person, signifying a vulnerability to the will or decision of others."[92] In this sense, people who are houselessness are not property-less, but have far fewer rights to protect their property than those with secure housing. They know full well the relational work of property law that renders them more vulnerable.[93] Tenants, for example, "live under a precarious roof," with lesser interests in lands than owners who maintain a reversionary interest and the power to evict. [94] In this sense, property relations and "property law works to place us in positions of relative security and vulnerability,"[95] shaped by histories of colonialism, racialization, and capitalism.

1. Whose Home is a "Home"?

The legal geography in which home denotes the exclusive space of private property is more or less easy in cases involving secure housing that conform to the implicit spatial imaginary. But what of spaces in which privacy is invoked that do not conform to the dominant imaginary? Clearly, people make their homes in many settings, or develop expectations of privacy in many locations. At times, the courts have recognized that such spaces have "home"-like qualities to them.[96] Yet a review of case law on reasonable expectations of privacy in precarious housing contexts reveals that not all homes are equal with respect to privacy protection. A willingness to find a high expectation of privacy in one's home, if the court even considers the space as such, is significantly influenced by contextual factors concerning the precarity of the property interest. Those who access shelter through precarious property relations tend to have fewer privacy protection than those whose property interest accords with the dominant legal geographic conception of the home as a territorial castle. We canvass a few of these spaces below.

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[91] See eg Mari J. Matsuda, "Looking to the Bottom: Critical Legal Studies and Reparations" (1987) 22 Harv. C.R.-C.L. L. Rev. 323 (1987); Lorna Fox O'Mahony, "Property Outsiders and the Hidden Politics of Doctrinalism" (2014) 67 Current Legal Problems 409-445; Eduardo Moises Peñalver and Sonia K. Katyal, "Property Outlaws" (2007) 155 U. Pa. L. Rev. 1095; Marc L. Roark, "Under-Propertied Persons" (2017) 27:1 Cornell Journal of Law and Public Policy 1; and van der Walt, *supra* note 85.
[92] Baron, *supra* note 46 at 40.
[93] *Ibid* at 5.
[94] *Ibid*, citing Bruce Ziff, *Principles of Property Law* (Toronto: Carswell, 2018).
[95] *Ibid* at 49.
[96] See eg Justice Southin's dissent in *R v Grant* 1992 CanLII 5996 (BCCA).

Provisional Accommodations and Couch-Surfing

Couch surfing and short term stays at friends, family, and acquaintances' homes are commonly cited in the Vancouver "homeless count".[97] A review of section 8 cases shows that persons staying at others' homes are offered almost no privacy protection. In the *Edwards* case, discussed above, the SCC said that a third-party could not access section 8 protections. The accused held property at his girlfriend's home and had a key to access the unit, but he was not listed on the tenancy agreement, did not pay rent, and was described as "no more than an especially privileged guest."[98] In dissent, Justice La Forest critiqued the majority's adoption of US law and its emphasis on property interests, and argued that privacy is a broad public right which should not be eroded by excluding third-party section 8 breaches.[99] Justice Abella also dissented in the Ontario Court of Appeal (ONCA) decision, as the majority decision failed to account for the social realities of the relationship – Mr. Edwards and his girlfriend had been together for three years, he had a key, and had unrestricted access. Given this, Justice Abella argued that he had a reasonable expectation of privacy in the place.[100]

Vehicles and Trailers

Many people identified as houseless may live in their vehicles.[101] Nevertheless, prior scholarship has noted the stigma around "trailer trash" discourse and precarious living in mobile home parks where the risk of eviction is high.[102] As well, in a report published by Pivot Legal Society involving interviews with precariously housed people throughout BC, participants noted the challenge of finding parks where they could legally park their trailer.[103] Research on mobile

[97] Homeless Services Association of BC, *supra* note 12. While this paper does not consider the gendered aspects of homelessness counts, see eg Kaitlin Schwan, et al, *The Pan-Canadian Women's Housing & Homelessness Survey* (Toronto: Canadian Observatory on Homelessness, 2021), which notes that women experiencing homelessness are largely invisible for various reasons, including that studies of homelessness often fail to count women fleeing gender-based violence.
[98] *Edwards*, *supra* note 65 at para 47.
[99] *Ibid* at paras 58–69.
[100] *Ibid* at paras 23–27.
[101] Homeless Services Association of BC, *supra* note 12.
[102] Esther Sullivan, "Dignity takings and 'trailer trash': The case of mobile home park mass evictions" (2018) 92:3 Chicago-Kent Law Review 937.
[103] Pivot Legal Society, *Project Inclusion: Confronting Anti-Homeless and Anti-Substance User Stigma in British*

home parks in Alberta have also shown that many trailers in mobile-home parks are in disrepair, as they were not intended for long-term use, but the people who live in trailers depend on them.[104]

There is extensive case law on warrantless searches of vehicles, yet these cases largely do not engage with an analysis of whether the vehicle constitutes a "home". Instead, vehicles are classified as distinguishable from "homes", given the existence of statutory schemes which regulate driving for public safety and reduce the reasonable expectation of privacy. [105] For example in *R v Nolet*, the accused was pulled over in an empty commercial-tractor trailer and evidence was obtained in a warrantless search of the sleeper portion of the vehicle. While the accused did not testify about his subjective belief as to the sleeping portion of the vehicle, the SCC presumed that a reasonable expectation of privacy would be expected within the sleeper portion, given that it is a temporary mobile home. However, because the vehicle is also a place of work, the whole vehicle is therefore subject to a low expectation of privacy.[106] Therefore, even if a vehicle functions as a home, the high expectation of privacy is significantly eroded if the vehicle also functions as a workspace.

In contrast, trailers are considered "homes." In *Feeney*, the SCC reinforced the importance of the primacy of privacy in the home with respect to a trailer. [107] However, there is little engagement in the SCC decision as to how the trailer qualifies as a "home",[108] even though this case has frequently been cited for its preposition that the "home" affords the highest protection of privacy and that searches incident to arrest are presumptively unreasonable.[109] It is not clear, for

Columbia (2018), online: Pivot Legal Society (pdf) <https://d3n8a8pro7vhmx.cloudfront.net/pivotlegal/pages/3297/attachments/original/1543970419/project-inclusion-digital.pdf?1543970419>.

[104] Jeanette Waegemakers Schiff & Alina Turner, *Rural Alberta Homelessness* (Calgary: University of Calgary & Alberta Centre for Children, Family & Community Research, 2014) at 27, online: Government of Alberta (pdf) <http://www.humanservices.alberta.ca/documents/rural-alberta-homelessness.pdf>.

[105] James Fontana & David Keeshan, *The Law of Search and Seizure in Canada*, 9th ed (Toronto: LexusNexis, 2015) at 998 (note that some places could not be identified in case law; for example, there were no cases that concerned shelters and section 8).

[106] *R v Nolet*, 2010 SCC 24 [*Nolet*]

[107] *R v Feeney* [1995] BCWLD 562, 26 WCB (2d) (BCCA).

[108] *Ibid* (neither the SCC nor the BCCA decisions are clear on whether the trailer was also rented, or if it was only the property where the trailer was located that was rented).

[109] See e.g. *Picard*, *supra* note 2 at para 24; Jochelson & Ireland, *supra* note 56.

example, whether a court would consider a trailer a home if it is located on land illegally. Unlike *Picard*, the BCCA and SCC in *Feeney* did not give consideration to the legal status on which the trailer resided. Thus, someone who owns a trailer on land they lawfully rent may have more constitutional protection than someone residing in a trailer unlawfully residing in a park, regardless of the fact that both trailer residents might in fact have the same subjective privacy expectations with respect to their living space and belongings.

Lockers

The reasonable expectation of privacy expected in a rented locker may provide some guidance on the expectation of privacy that a court would afford to a shelter. In *R v Buhay*, the SCC found that the accused had a reasonable expectation of privacy in the contents of a locker, even though the owner of the locker had a master key. In this case, the police breached section 8 and the illicit drugs found within the locker were excluded, per section 24(2). While privacy was protected in this case, the SCC also clarified that the expectation of privacy in a rented locker is less than the expectation of privacy one has in the home, or even an office. The Court also stated that the decision may have been different if notices were posted by the owner of the locker, reserving a right to inspect the contents.[110] Don Stuart has hypothesized that this case could apply to searches conducted in shelters or perhaps to landlords who enter rental premises, pursuant to the existence of right to inspect conditions.[111]

Tents and Other Personal Property Items

The *Picard* case best illustrates that Canadian courts do not extend section 8 privacy protections to people living in severe housing precarity, given the failure to regard Mr. Picard's tent as a "home". While there is a rich body of research which considers how home is subjectively defined outside of the property law context,[112] and the *Edwards* factors consider the subjective

[110] *R v Buhay* 2003 SCC 30.
[111] Stuart, *supra* note 68 at 301; See e.g. *Residential Tenancy Act*, SBC 2002, c 78, s 29 (citing conditions in which a landlord can enter the rental unit).
[112] See e.g. Helen Carr, Brendan Edgeworth & Caroline Hunter (eds), *Law and the Precarious Home: Socio Legal Perspectives on the Home in Insecure Times* (Hart Publishing, 2018).

belief as relevant to the inquiry of the expectation of privacy, Justice Lee largely dismissed Mr. Picard's characterization of his tent as a home.

Justice Lee referred to *R v Howe* where a tent was considered a dwelling house as it related to establishing the offence of breaking and entering. [113] In that case, the tent was used by four people sleeping within it. Justice Lee distinguished *Howe*, given that the tent was located on land which the occupants had legal authority to be on, contrary to *Picard*. According to this distinction, a tent can constitute a "home," but will lose this character if trespass is committed with regards to the land on which the tent sits – if a precarious property relation exists, in other words. This reasoning leads to the logical conclusion that those who are precariously housed, especially those who are living in tents on city streets, will almost inevitably not have a "home" in law and, therefore, will be subject to increased precarity, including the possibility of seizure and disposal of tents as waste under municipal bylaws. If seizure and disposal of tents (or any other possession) were to take place on property legally characterized as "home," the result would be criminal liability for breaking and entering.

In reaching his determination that a tent is not a "home", Justice Lee also cited the trial decision in *R v Sappier*,[114] where the Court stated that, "the use to which the structure is put very often determines its character" and, as such, "very rudimentary housing can qualify as a dwelling house."[115] In *Sappier*, the tent was located on land belonging to a family member and was held to fall within the Criminal Code definition of "dwelling house."[116] However, Justice Southin in dissent in *R v Grant* stated that hypothetically, a "packing case in which a 'homeless' person sleeps and keeps his few pitiful belongings" may meet the definition of a dwelling house. *Grant* is not a case centrally concerned with the issue of whether tents are dwelling homes, and involved facts concerning a house which had not yet been occupied.[117] The decision was also reversed on appeal to the SCC. However, the SCC referred to Justice Southin's dissent in their rejection of the British Columbia Court of Appeal's (BCCA) majority opinion and did not

[113] *R v Howe* [1983] NSJ No 398, 9 WCB 450 (NSCA) [*Howe*].
[114] *R v Sappier*, 2005 NBPC 37.
[115] *Ibid* at para 22.
[116] *Ibid.*
[117] *R v Grant* [1992] BCWLD 1542, 14 BCAC 94 (BCCA) at para 70 [*Grant*].

expressly reject the hypothetical scenario described.[118] This was not however the central question at stake in the appeal, leaving the question untouched. While this case law could be used to argue that the personal property of people experiencing houselessness, such as a tent, may be considered a "home" by Canadian courts, the real impediment is any legal prohibitions on using the land underlying the tent.

2. The Territorial Boundaries of "Home" Beyond Section 8

Overall, then, Canadian courts have recognized reasonable expectations of privacy in some precarious housing contexts, but this privacy interest is often further territorially constrained by the limited property interests the claimant has in the space. In some cases, courts refuse to carve out any space, such as *Picard*, where Justice Lee acknowledges that Mr. Picard owns the tent, but the tent is located on city property which he illegally occupies. The Court was unwilling to recognize an expectation of privacy within the confined territory inside the tent that could engage section 8 protection.[119] As well, in *Nolet*, the SCC refused to carve out space within the truck-trailer where one would expect a higher expectation of privacy in the sleeper portion of the truck, given that the truck was also used for work.[120]

In tenancy contexts, courts are careful to draw boundaries of where section 8 protection applies. This specification can either enhance or reduce a tenant's privacy interest. For example, in *R v Golschesky*, the Saskatchewan Court of Appeal (SKCA) found that a warrant issued to search a house was improper to use for an apartment that was attached to the house but rented out separately. The accused in this case was a tenant in an upstairs self-contained apartment within a house, with a separate street entrance. The SKCA held that specific language in the warrant on which portion of the house the search applied is needed, which enhanced the accused's access to section 8 protection in this case.[121] In *R v Clarke*, the BCCA held that where occupants share common areas, and one occupant allows the police to search those common areas, there is no section 8 breach. However, in *Clarke*, the accused was the owner of the home and his girlfriend

[118] *R v Grant* [1993] 3 SCR 223, 8 WWR 257 (SCC).
[119] *Picard*, *supra* note 2.
[120] *Nolet*, *supra* note 106.
[121] *R v Golschesky*, 2013 SKCA 116.

who granted permission to search the common area was a tenant. When the police extended their search, looking under a pile of clothes that belonged to the accused, this was deemed a breach of his section 8 privacy interest.[122] This case contrasts with *Edwards*, where the accused was merely a privileged guest (not a tenant) and the SCC would not extend an expectation of privacy to his property that he kept within his girlfriend's house.[123]

According to the Ontario Court of Appeal in *R v Laurin*, reasonable expectations of privacy in tenancy contexts also do not extend to common areas that other tenants in a building or complex share. In that case, the police trespassed on the landlord's property, but smelling cannabis in the hallway did not engage the accused's section 8 interests because the police did not require the tenant's permission to be there. [124] In stark contrast, in *R v Harris*, citing *Laurin*, the Ontario Superior Court (ONSC) stated a reasonable expectation of privacy would be extended to shared spaces, including the hallway, for occupiers who have ownership in the condominium in a complex or apartment.[125] However, in *R v Prince* in 2019, the ONSC departed from *Harris* and stated that if there is a reasonable expectation of privacy within common areas of condominium buildings, then it should exist for both renters and owners.[126]

If terms of a lease specify that certain areas are subject to the control of the landlord, the tenant's expectation of privacy do not extend into those spaces either. For example, in *R v Arason*, the accused had no reasonable expectation of privacy on the roof as a tenant, given the lease agreement which reserved control of the roof to the landlord.[127] In contrast, in *R v DiPalma*, the fact that the strata corporation conducted roof repairs did not reduce the expectation of privacy for the accused's who was the owner of the unit. The police had to obtain the permission from each individual owner to access the roof. [128]

In sum, expectations of privacy in the home are reduced territorially in accordance with property

[122] *R v Clarke*, 2017 BCCA 153 [*Clarke*].
[123] *Edwards*, *supra* note 65.
[124] *R v Laurin*, [1997] OJ No 905, 113 CCC (3d) 519 (ONCA) [*Laurin*].
[125] *R v Harris*, 2018 ONSC 4298.
[126] R v Prince, 2019 ONSC 5567 at para 55.
[127] *R v Arason*, [1992] BCJ No 2558 [1993] BCWLD 190 (BCCA).
[128] *R v DiPalma*, 2008 BCCA 342.

precarity. The spaces and limitations of expectations in privacy are directly related to the precarity of the property interest. Courts are often unwilling to recognize smaller parcels of private spaces for precarious homes, including tents, commercial trucks, and people who may be couch surfing. Further, in tenancy, privacy is limited by reversionary interests of landlords and does not extend to shared common spaces, as it may extend to property owners. Fewer constraints on privacy exist in the homes of property owners.[129]

IV. Reduced Privacy in the Regulation of Public Spaces: Reimagining the Legal Geography of Home

Case law on spaces such as trailers suggests that spaces that are very clearly homes to many, are not "homes" insofar as the courts are concerned. Much of this turns on the fact that people in such situations have less control – they are at threat of eviction, they are not on the rental agreement, they are on city land – by virtue of the lack of property rights they enjoy. They have only some of the sticks in the bundle and/or are in precarious property situations based on their access to their home through the interests of others, who hold the dominant interest.[130] Privacy rights are thus tied to the right of control.[131]

The tent looks like Mr. Picard's home – he controls access, uses it to secure his stuff, and considers it his home. But is it a legal "home"? No, the court concludes, because Mr. Picard does not have a legal right to keep the tent on land to which he does not have a property interest. He has possession, but not title. Unlike the fee simple owner, he does not have a legally recognized right to use the land under his home. The fact that he lives on city land means that he is "homeless." Thus, section 8's legal conception of "home" is generally unavailable to those who do not have some claim to the land underlying where they live. In effect, Justice Lee renders a houseless person legally "homeless" as a result. As *Picard* illustrates, the Court's focus on bylaws which prohibit camping is the basis upon which there is no reasonable expectation of

[129] See also *R v Vi*, 2008 BCCA 481 (the accused was the owner of the property but not an occupant and lived elsewhere. While this reduced his expectation of privacy, section 8 was still engaged as an owner of the property.)
[130] Nicholas Blomley, "Precarious Territory: Property Law, Housing, and the Socio-Spatial Order" (2020) 52 *Antipode* 36-57.
[131] Warren & Brandeis, *supra* note 47.

privacy in his tent as a home. The only real distinction between Mr. Picard's tent and the tent in *Howe* was the fact that the tent was located on the sidewalk in violation of city bylaws.[132] As well, in *Feeney* where mobile homes were recognized as homes and deserving of high constitutional protection, the claimant maintained a legal interest in the land.[133]

Bylaws and laws across North America over-regulate the daily lives of people living in public spaces.[134] As Terry Skolnik notes, those who are houseless lack the freedom to perform basic needs without interference from the state owing to municipal bylaws and restrictions.[135] In Canada, provincial statutes such as Safe Street Acts regulating panhandling and municipal by-laws, proscribe public order.[136] Quebec is a key example of the use of municipal by-laws, but such bylaws exist in urban centres across the country, such as Ottawa and Winnipeg.[137] In the United States, these laws are often referred to as "quality of life ordinances" and include prohibitions on camping in public spaces. The rise of punitive bylaws coincided with the rise of houselessness and neoliberalism in the 1970s. More powerful groups pushed to "reclaim" public spaces such as sidewalks and parks from the precariously housed.[138] These laws deprive houseless people of forming "home-like spaces" by dispersing people into isolation, thereby worsening their housing precarity.[139] Many people living in their vehicles are displaced through bylaws that prohibit parking in public places, and there are limited options for affordable rentals

[132] *Picard*, *supra* note 2 at para 29.
[133] *Feeney*, *supra* note 75.
[134] See e.g. Sig Langegger & Stephen Koester, "Moving on, finding shelter: The spatiotemporal camp" (2017) 32:4 International Sociology 455 (research on quality of life laws in Denver, Colorado).
[135] Terry Skolnik, "How and Why Homeless People Are Regulated Differently" (2018) 43 Queen's LJ 297 at 313–19.
[136] See eg Joe Hermer and Janet Mosher, *Disorderly People: Law and the Politics of Exclusion in Ontario* (Halifax: Fern Publishing, 2002); and Bill O'Grady, Stephen Gaetz and Kristy Buccieri, "Tickets… and More Tickets: A Case Study of the Enforcement of the Ontario Safe Streets Act" (2013) 39:4 Canadian Public Policy 541-558.
[137] See eg Damian Collins & Nicholas Blomley, "Private Needs and Public Space: Politics, Poverty and Anti-Panhandling By-Laws in Canadian Cities" in Law Commission of Canada, ed, *New Perspectives on the Public-Private Divide*, (UBC Press, 2003); Marie-Eve Sylvestre, "Disorder and Public Spaces in Montreal" (2010) 31:6 Urban Geography 803; Catherine Chesnay, Céline Bellot and Marie-Eve Sylvestre, "Taming the Disorderly One Ticket at the Time: The penalization of Homeless People in Ontario and British Columbia: (2013) 55:1 Canadian Journal of Criminology and Criminal Justice 161-186; and Marie-Eve Sylvestre, Céline Bellot, Philippe Antoine Couture-Ménard and Alexandra Tremblay, « Le droit est une question de visibilité: l'occupation des espaces publics et les parcours judiciaires des personnes itinérantes à Montréal et Ottawa » (2011) 26 :3 Canadian Journal of Law and Society 531-561.
[138] Langegger & Stephen Koester, *supra* at 134 at 455
[139] *Ibid* at 455.

in mobile home parks.[140] In Vancouver's DTES, researchers have also documented how increased police presence and enforcement of parole and bail area restrictions affect residents' ability to access necessary harm reduction services.[141] To Christopher Essert, the lack of protection for houseless people means that they neither have the ability to lawfully exclude others, nor the ability to protect themselves from others' power of exclusion.[142] Such restrictions are not equally distributed: race, gender identity, sex, sexual orientation, age, and disability status (including substance use disorders) are significant factors for the increased risk of people who are houseless. Indigenous Peoples are overrepresented among Canadian residents who are experiencing houselessness, despite only making up 6% of the general Canadian population.[143] The unequal burdens of housing precarity for these groups further render certain members of society even more vulnerable by failing to confer section 8 *Charter* protection to people who are precariously housed.

We can also trace four consequential legal geographies that Justice Lee marginalizes in the reasoning in *Picard*. First, it is unsurprising that there are very few cases considering whether tents can be considered homes for the purposes of section 8 of the *Charter*, precisely because most precariously housed people are routinely going to court because they are being harassed and surveilled by police on a routine basis by virtue of the criminalized and marginalized spaces they occupy. Making a section 8 argument requires access to legal assistance. For every discrete legal argument and application advanced, additional legal services are needed. In *Picard*, Justice Lee considered whether the evidence from the tent should be excluded before the trial itself. The more resources you have, the more luxury a defendant has to challenge elements of a case. Because government funding is minimal, legal aid lawyers have to make strategic decisions about what arguments are just not worth advancing. People in the DTES who are constantly policed and facing charges are less likely to make section 8 applications and to simply take plea

[140] See eg Pivot Legal Society, *supra* note 103.
[141] See eg Alexandra B. Collins et al., "Policing space in the overdose crisis: A rapid ethnographic study of the impact of law enforcement practices on the effectiveness of overdose prevention sites" (2019) 73 International Journal of Drug Policy 199; and R. McNeil, H. Cooper, W. Small and T. Kerr, "Area restrictions, risk, harm, and health care access among people who use drugs in Vancouver, Canada: A spatially oriented qualitative study" (2015) 35 Health & Place 70-78.
[142] Christopher Essert, "Property and Homelessness" (2016) 44 Philosophy and Public Affairs 266 at 276.
[143] Yale Belanger et al, "Homelessness, Urban Aboriginal People, and the Need for a National Enumeration" (2013) 2:2 Aboriginal Policy Studies 4.

bargains or may be diverted into drug court. So, we are less likely to see a rich jurisprudence of considerations of "home" where precariously housed defendants are involved.[144]

Second, the DTES, where Picard lives, has its own legal geography that cannot be divorced from the specifics of the case.[145] While Mr. Picard might have a "reasonable expectation of privacy" in legal terms, in practical terms, it is likely that his life, like that of criminalized and marginalized people in general, particularly houseless people, is one of radical visibility and surveillance by both state and private actors.[146] As Andrea Brighenti notes, while "the search for visibility is in many cases a search for social recognition – visibility as empowerment," being seen and watched leads to subjugation and disempowerment.[147] Visibility is a double-edged sword: while we need visibility for recognition, visibility, notably in the discipline society, quicky becomes surveillance. This exacerbated visibility, however, shows just how important privacy is to houseless individuals. Such people are rarely thought of as neighbours or residents, but instead are characterized as clients and vagabonds. As Przybylinksi observes, the precarious nature of the property interest that members of a sanctioned encampment held ensured that they were unable to assert privacy rights.[148] As well, the social and governance structures of tent encampments may not be easily understood within definitions of "home" used in privacy context. For example, an analysis of housing projects and houselessness encampments in Fresno, California demonstrated that "anti-homeless policing" and housing provision mutually constrain houseless people's expressions of home, such that struggles over domestic space have become integral to the contemporary politics of US houselessness.[149] Contemporary policy is marked by

[144] Albert Currie, "Riding the Third Wave: Rethinking Criminal Legal Aid Within an Access to Justice Framework," (Canada: DOJ, Research and Statistics Division, 2015) at 7–9, online: <www.justice.gc.ca/eng/rp-pr/csj-sjc/ccs-ajc/rr03_5/rr03_5.pdf> [perma.cc/AFL5-SS3Q] [DOJ, Riding the Third Wave]. See also Marc Galanter, "Why the 'Haves' Come out Ahead: Speculations on the Limits of Legal Change" (1974) 9:1 *Law & Society Review* 95–160.
[145] Sylvestre et al, *supra* note 16.
[146] Tony Sparks, "Broke Not Broken: Rights, Privacy, and Homelessness in Seattle" (2010) 31:6 Urban Geography 842-862.
[147] Andrea Brighenti: Visibility: A Category for the Social Sciences", (2007) 55 *Current Sociology*, 323-342 at 336. See also Marie-Eve Sylvestre, Céline Bellot, and Philippe Antoine Couture Ménard, and Alexandra Caroline Tremblay, Le droit est aussi une question de visibilité: occupation des espaces publics et parcours judiciaires des personnes itinérantes à Montréal et à Ottawa (Law is Also a Question of Visibility: Homeless Peoples' Occupation of Public Spaces and Judicial Trajectories in Montreal and Ottawa) (2011) 26 (3) Revue canadienne de droit et société, 531-561,
[148] Stephen Przybylinski, "Liberalizing Democracy: Property, Citizenship, and the Constrained Promise of Self-Governing Houseless Communities" (2020). *Dissertations - ALL*. 1258, online: https://surface.syr.edu/etd/1258.
[149] Jessie Speer, "It's not like your home": Homeless Encampments, Housing Projects, and the Struggle over Domestic Space" (2017) 49:2 Antipode 517-535.

a clash between competing visions of home, with housing projects in Fresno modelled on privatized and surveilled apartments, and those living in tent encampments asserting alternative notions of home grounded in community rather than family, mutual care rather than institutional care, and appropriation rather than consumption.[150] Local officials thus struggle to see alternative domestic spaces such as tent encampments as homes.

Third, Justice Lee did not ask why Mr. Picard is sleeping in a tent to begin with. To do so would require a systemic analysis of processes of expulsion and exclusion, many of them spatialized (e.g. eviction) that place Mr. Picard into this space of maximal risk and vulnerability. Taking this seriously would require a more contextual and sensitive evaluation of the situation, such that "privacy" is of heightened significance to Mr. Picard in particular. The section 8 test for evaluating a reasonable expectation of privacy suggests that a contextual analysis is possible based on the "totality of the circumstances" test.[151] But the reasonable expectation of privacy in Mr. Picard's case is evaluated as low, despite there being many factors that should have been in his favour – he had not abandoned his tent and he had a high subjective expectation of privacy in the subject matter, as he regarded the tent as a home and held intimate property items within his tent (e.g. hygiene products and illicit drugs and paraphernalia). Instead, the totality of the circumstances test emphasizes the real property interest above the other factors within the contextual analysis, mischaracterizing the principles articulated within the test, and the values that underpin section 8, including dignity, integrity, and autonomy.

Fourth, Justice Lee's conclusion that the tent was not a "home" due to the lack of compliance with municipal bylaws raises serious questions about how city enforcement should be understood. Informal housing, such as Mr. Picard's tent, necessarily entails noncompliance with existing property laws, land use regulations and building codes.[152] But informality should not be thought of as simply the alternative to state action. As Ananya Roy argues, informality is a form of "calculated deregulation," which involves planning and coordinating, where regulatory power

[150] *Ibid.*
[151] *R. v. Patrick*, [2009] 1 S.C.R. 579.
[152] Noah J. Durst & Jake Wegmann, "Informal Housing in the United States" (2017) IJURR 282 at 284.

is purposely withdrawn.[153] The state unevenly ignores and legitimates certain extralegal housing market activities while condemning and seeking to eradicate others.[154] For example, in Vancouver, the city government routinely turned a blind eye to illegal secondary suites except in very narrow circumstances, even though they are contrary to municipal bylaws.[155] This selective enforcement of existing rules and laws means that not all noncompliant housing is equally informal. It suggests that some informal housing, but not all, is grounded in a property interest otherwise considered legitimate. Informal housing is not uniform; it requires an analysis beyond simply which rules and laws govern land, but also which of these rules are actively enforced by the state, and in which contexts. By its very nature, the reality of having no formal housing means that a person will be subject to rules of land owned by another.[156] A blanket version that all such housing is not a home is counter to the experiences of those living within tents, whose accounts include security, protection, and mutual organization. Moreover, the reliance on the sanctions of particular bylaws to determine the application of other laws embody Mona Lynch's observations that criminal and penal law are shaped by the local norms and culture.[157]

In our view, the determination of "home" based on bylaw compliance is based on characterizations of property, privacy, and political recognition that are ultimately exclusionary.[158] Within the logic of propertied citizenship, the precariously housed appear as dependent subjects in need of discipline and management yet incapable of knowing or acting in their own best interest.[159] Yet attempts by low-income people to attain political or legal recognition as active, rights-bearing citizens require a level of public visibility that is fraught

[153] Ananya Roy, (2009) "Why India cannot plan its cities: informality, insurgence, and the idiom of urbanization" (2009) 8:1 *Planning Theory* 76–87 at 83.
[154] Karen Tranberg Hansen and Mariken Vaa, eds. Reconsidering Informality: Perspectives from Urban Africa (Uppsala: Nordiska Afrikainstitutet, 2004); L. Groenewald, et al. "Breaking down the binary: Meanings of informal settlement in southern African cities" in Bekker, S. & Fourchard, L. (eds.) *Governing Cities in Africa: Politics and Policies* (Cape Town, HSRC Press, 2013); Ann Varley, "Postcolonialising Informality?" (2013) 31:1 *Environment and Planning D: Society and Space* 4–22.
[155] Guest contributor, "Why does the City of Vancouver shut down brand new basement suites and evict renters?" City Hall Watch (9 April 2021).
[156] Durst & Wegmann, *supra* note 152 at 286.
[157] *Ibid*. See also Mariana Valverde, "Jurisdiction and Scale: Legal `Technicalities' as Resources for Theory" (2009) 18:2 Social & Legal Studies 139-157.
[158] Sparks, *supra* note 146 at 847.
[159] Ananya Roy, "Paradigms Of Propertied Citizenship: Transnational Techniques of Analysis" (2003) 38:4 *Urban Affairs Review* 463–91

with difficulty.[160] Close attention to the role of privacy in relation to houselesness offers a useful and powerful lens to better understand how the construction of the houseless as citizenship's "other" is produced, maintained, and contested in urban space.

Privacy has long been considered fundamental to liberal conceptions of citizenship.[161] Citizenship is understood most immediately as a legal status. If one is a citizen, they are a member of a polity with rights-protections and privileges which are conferred on them by the sovereignty of a nation-state. Within the liberal tradition specifically, citizenship is predominantly realized through the protection of individualized rights.[162] Primary among those rights is that of property and the pursuit to acquire property.[163] Historically, property ownership itself constituted liberal citizenship, albeit only for white males.[164] Although property ownership itself no longer demarcates individual citizenship, property rights and the liberal values associated with ownership remain a prominent aspect of citizenship within liberal-democracies today.

It follows from the notion that property remains indispensable to liberal citizenship that one cannot have certain citizenship rights and privileges protected without ownership or access to property. The ownership of, and ability to access, land is a relationship with property that is particularly fraught for houseless people.[165] Without a secure interest in property—that is, by not having the legal rights to access propertied space for oneself— houseless people are denied citizenship protections essential for securing their livelihoods. Such a model of propertied-citizenship maintains the ability for those with secure interests in property to leverage their power against those without secure interests in land through economic, political, and legal means. As Roy argues, the liberal "paradigm of propertied citizenship" recognizes only the

[160] Andrea Brighenti, "Visibility: A category for the social sciences" (2007) 55:3 Current Sociology 323–342.
[161] Judith Squires, "Private lives, secluded places: privacy as political possibility" (1994) 12 Environment and Planning C 387-401.
[162] T.H. Marshall and Tom Bottomore. *Citizenship and Social Class* (London: Pluto Press, 1992).
[163] Thomas Janoski and Brian K. Gran, "The Foundations of Legal and Political Citizenship" (2002). *Faculty Publications*. 1508, online: <https://scholarlycommons.law.case.edu/faculty_publications/1508> at 18.
[164] Sallie Marston, "Gender, citizenship, and the making of the American nation" (1990) 8:4 Environment and planning D: Society and Space 449-458.
[165] Jeremy Waldron, "A Right-Based Critique of Constitutional Rights" (1993) 13 Oxford J. Legal Stud 18; Don Mitchell, "The Annihilation of Space by Law: The Roots and Implications of Anti-Homeless Laws in the United States" (1997) 29 *Antipode* 303-335).

formal rights of property to which all informal claims to space are deemed illegible and thus outside of proper citizenship.[166] From this perspective, to be a propertied-citizen is to have one's citizenship benefits protected, if not promoted, over those lacking a secure interest right to property.[167] But this creates a double-bind: the logic of propertied citizenship means that one's lack of private property signifies one's moral unfitness for the exercise of rights-bearing citizenship.[168]

Picard is a product of an overall degradation of privacy protection under section 8, which has disproportionately deprived the protection of privacy, dignity, integrity, and autonomy for people who are precariously housed. Despite the many contextual factors which might go towards the protection of Mr. Picard's home, including his subjective belief it was his home, the fact that he had not abandoned the tent, and the personal and intimate information revealed within his tent (including drugs and drug paraphernalia), Justice Lee appeared focused on property law interests, which prohibit camping on the sidewalk. Because Mr. Picard's access to shelter is 'precarious', his right to privacy is diminished. This outcome is part of a broader development of section 8 where precarious property relations are afforded less protection than people with stronger property interests. In this case, the court could have adopted a contextual analysis that recognized a tent as a home without disproportionately weighing a real property interest against other interests and which reflected concern for human dignity for people who are precariously housed. While Justice Lee took judicial notice of Vancouver's housing crisis, he could have put more weight on this fact, and also taken judicial notice of the longstanding gaps in adequate housing for the most vulnerable, and the state's tolerance of Mr. Picard's presence on city streets, rather than simply concluding that Mr. Picard did not have the legal right to erect a tent on the City sidewalk.[169] A contextual analysis would have recognized Mr. Picard's heightened expectations of privacy such that the Crown would need to justify the search under section 8 of the *Charter*. Such an interpretation could have been grounded in the principles the SCC has already laid out

[166] Ananya Roy, "Paradigms Of Propertied Citizenship: Transnational Techniques of Analysis" (2003) 38:4 *Urban Affairs Review* 463–91 at 475.
[167] *Ibid*.
[168] *Ibid* at 475. argues, it is ultimately houseless persons' lack of access to private property and its privileges that justifies the usurpations of privacy represented by the "spatial techniques of fortification, eviction, and surveillance that are used to manage the homeless." See also Sparks, supra note 146 at 848.
[169] Picard, *supra* note 2 at para 37, 40.

for us. Mr. Picard has greater need of privacy protections, perhaps, than do those with more secure property interests.[170]

V. Conclusion: Restoring home to the houseless

Warren and Brandeis, in their seminal paper on the right to privacy, wrote that "[p]rivacy is the most fundamental of all rights … the right to one's identity."[171] For them, the right to privacy was closely linked to the ability to have control over the content of one's public thoughts and actions, and is therefore fundamentally linked to the exercise of one's rational autonomy. Yet for individuals experiencing houselessness, this "most fundamental" right is systematically denied. On the surface, this denial seems obvious. Privacy and property have long gone hand in hand. As Blomley points out, a dominant perspective views the function of property as "serving to protect the privacy of the individual."[172] From this it is easy to surmise that those who lack the privilege of property likewise lack the privacy it affords. While true, this reading belies a more complicated reality. Not only are those experiencing houselessness routinely denied the material constitutional privacy protections as a consequence of their lack of property, but within the logic of propertied citizenship one's lack of private property signifies one's moral unfitness for the exercise of rights-bearing citizenship. Thus, as Roy argues, it is ultimately houseless persons' lack of access to private property and its privileges that justifies the usurpations of their privacy embodied by the "spatial techniques of fortification, eviction, and surveillance that are used to manage the homeless."[173]

In 1997, before Justice La Forest retired from his position on the bench, he strongly criticized this turn in the law in *R v Belnavis*.[174] In dissent, he critiqued the majority's emphasis on "legalistic property concepts" rather than emphasizing citizens' actual expectations of privacy and protection from state interference. This approach creates unequal protection of the law and is

[170] Sparks, *supra* note 146.
[171] Samuel Warren & Louis Brandeis, *supra* note 47 at 193.
[172] Nicholas Blomley, "The Borrowed View: Privacy, Propriety, and the Entanglements of Property" (2005) 30:4 *Law & Social Inquiry* 617-661 at 618.
[173] Roy, *supra* note 159 at 475.
[174] *R v Belnavis*, [1997] 3 SCR 341, 151 DLR (4th) 443 (SCC).

"wholly inappropriate in a free society and quite simply disturbing in its general implications."[175] In scathing words he wrote, "The majority pay lip service to the proposition, insisted upon in *Hunter*, that section 8 of the *Charter* was intended to protect people not places."[176] Justice La Forrest also accused the majority of having little "feel" for the fact that section 8 cases come before courts when crimes have been committed, but that these cases set the boundaries of police powers for all people in their everyday interactions.[177]

Justice La Forest's words are even more relevant today. This analysis, and other analysis of section 8 jurisprudence,[178] has documented the continued erosion of section 8 even after Justice La Forest's warnings in 1997. *Picard* may be the first case where a Canadian court has been directly tasked with assessing warrantless searches of people on the extreme ends of property precarity, living in tents. But outside judicial scrutiny, the erosion of section 8 privacy has been felt acutely in the daily lives of people living precariously whose most intimate living activities and belongings are subjected to perpetual police intrusions.[179] These police intrusions render people even more vulnerable, given the overrepresentation of Indigenous people, people victimized by violence, people who use drugs (or people who struggle with addiction), and other groups who experience structural disadvantages in society and who are experiencing houselessness. The *Charter* is meant to protect all people. An emphasis on private property interests in section 8, as opposed to the spaces that are, in fact, homes to precariously housed people, clearly deprives some groups of constitutional protection more than others by emphasizing places, not people.

[175] *Ibid* at para 50.
[176] *Ibid* at para 61.
[177] *Ibid* at para 65.
[178] See Jochelson & Ireland, *supra* note 56.
[179] See Pivot Legal Society, *supra* note 103; Langegger & Koester, *supra* note 134; Collins, *supra* note 36; Collins et al, *supra* note 137.