THE COURT OF APPEAL FOR SASKATCHEWAN

Citation: 2013 SKCA 47 Date: 2013-05-02

Between: Docket: CACR2126

Sandra Finley

Appellant

- and -

Her Majesty the Queen

Respondent

Coram:
Jackson, Richards & Herauf JJ.A.

Counsel:
Steven Seiferling for Sandra Finley
Catherine Galligan for the Federal Crown

Appeal:

From:	2012 SKQB 55
Heard:	November 11, 2012
Disposition:	Appeal Dismissed
Written Reasons:	May 2, 2013
By:	The Honourable Madam Justice Jackson
In Concurrence:	The Honourable Mr. Justice Richards
	The Honourable Mr. Justice Herauf

Jackson J.A.

I. Introduction

[1] When she received a request to complete the 2006 Long Form Population Census, Ms. Sandra Finley refused to do so saying Statistics Canada required information from within a biographical core of personal information that she wanted to keep private. She did not complete any aspect of the form, including the demand for her name. Ms. Finley believes the request to complete the Long Form Census violates her "right to privacy" under s. 8 of the *Canadian Charter of Rights and Freedoms*.

[2] Following her refusal to respond to the Census, the Attorney General in right of Canada charged Ms. Finley with failing to complete and submit the 2006 Long Form Population Census contrary to s. 31(b) of the *Statistics Act*, R.S.C. 1985, c. S-19. Section 31(b) provides that every person who, without lawful excuse, refuses to furnish any information that the person has been required to provide is guilty of an offence and liable on summary conviction to a fine not exceeding five hundred dollars or to imprisonment for a term not exceeding three months or to both.

[3] Ms. Finley did not dispute the factual underpinnings of the Crown's case. Rather, she sought relief having regard for ss. 8 and 24(1) of the *Charter*, on the basis that s. 31(b), insofar as it compels the collection of personal information by means of criminal sanction, is an interference with a reasonable expectation of privacy and is therefore unconstitutional. By way of remedy, she applied to the Provincial Court for a declaration that s. 31 of

the *Statistics Act* is of no force or effect, or, alternatively, a declaration that s. 31 of the *Statistics Act* shall be read down so that it does not apply to objections to completing the 2006 Long Form Census. In the further alternative, Ms. Finley sought a declaration that the protection of personal information pursuant to s. 8 of the *Charter* is a "lawful excuse" as set out in s. 31 of the *Statistics Act*.

[4] At trial, Whelan P.C.J. dismissed Ms. Finley's application and found her guilty of the offence of contravening s. 31(b) of the *Statistics Act*. By way of sentence, Whelan P.C.J. granted Ms. Finley an absolute discharge (see: 2011 SKPC 16; 367 Sask. R. 237).

[5] Ms. Finley appealed to the Court of Queen's Bench. Konkin J. dismissed her appeal (see: 2012 SKQB 55, 392 Sask. R. 53).

[6] Ms. Finley then appealed to this Court pursuant to s. 839(1)(a) of the *Criminal Code* and at the same time applied for leave. On the hearing of the appeal, the Court granted leave to appeal. For the reasons that follow, I have decided that the appeal should be dismissed.

II. Decision of the Provincial Court

[7] As part of its case against Ms. Finley, the Crown called Mr. Anil Arora, the Census Manager in 2006 and the person responsible for all aspects of the Census, including determining what questions should be proposed to Cabinet for inclusion in the Long Form Census. The Crown lead evidence through Mr. Arora on a number of subjects, including (i) the history of the statutory

mandate to conduct a national census; (ii) the objectives and use of census information; (iii) the users of census information; (iv) how Canada compares with other countries with respect to the collection of census data; (v) the degree to which confidentiality and anonymity is maintained with respect to the Census date; and (vi) the use of contractors such as Lockheed Martin Canada. Whelan P.C.J. provided a thoughtful analysis of the workings of Statistics Canada and the development and use of the 2006 Long Form Census, according to the above headings.

[8] Whelan P.C.J. also reviewed extensively Ms. Finley's evidence. She found that Ms. Finley's reasons for refusing to complete the Census were two-fold: (i) she objected to the role played by Lockheed Martin in the Census because of what she believed to be the parent company's activities in relation to armaments; and (ii) she objected to being required by law to relinquish control over what she regarded as a biographical core of personal information, including a belief that Canada might be compelled to release information gleaned by the Census to the United States pursuant to that country's *Patriot Act* (at para. 10).

[9] Whelan P.C.J. found that Ms. Finley's concerns regarding the role of Lockheed Martin were not sufficiently reliable or relevant to the *Charter* application, but they did help to explain Ms. Finley's conscientious objection to completing the 2006 Long Form Census (para. 37). Having made this finding, Whelan P.C.J. concentrated on Ms. Finley's objections relating to privacy.

[10] Whelan P.C.J. began her privacy analysis by addressing what the Crown characterized as a preliminary issue. According to the Crown, the requirement to complete a census is not a "search" at all. Whelan P.C.J. rejected this argument, saying that s. 31 comes under the purview of s. 8 of the *Charter*:

> [68] The Crown has raised a preliminary issue; whether there is a search or seizure of an existing thing, such that s. 8 of the *Charter* is engaged and the Court was provided thorough and thoughtful arguments in this regard. The constitutionality of s. 31 has been challenged insofar as it mandates a citizen to produce to Statistics Canada, information in written form. Decisions discussed above may be distinguished either because they address a remedy for exclusion under s. 24(2) of the *Charter* or because they did not pertain to s. 31 of the *Statistics Act* or analogous circumstances. I am persuaded on a balance of probabilities that s. 31 of the *Statistics Act* comes under the purview of s. 8 of the *Charter*. (emphasis added)

[11] Whelan P.C.J. then set forth the following propositions of law to enable her to determine if Ms. Finley had a reasonable expectation of privacy in the information demanded by Statistics Canada:

a. when considering whether an individual has a reasonable expectation of privacy for the purposes of s. 8 of the *Charter*, the totality of the circumstances must be considered: *R. v. Buhay*, 2003 SCC 30, [2003] 1 S.C.R. 631 at para. 18;

b. situations abound where the reasonable expectations of the individual with respect to confidentiality and the restricted purpose of information collected must be protected: *R. v. Plant*, [1993] 3 S.C.R. 281 at p. 292, quoting from *Dyment* [[1988] 2 S.C.R. 417] at pp. 429-30;

c. section 8 of the *Charter* should seek to protect a biographical core of personal information, which individuals in a free and democratic society would wish to maintain and control from dissemination to the state, including information that tends to reveal intimate details of the lifestyle and personal choices of the individual: *Plant*, *supra* at p. 293;

d. the factors that should be considered when assessing the totality of the circumstances include the existence of a subjective expectation of privacy and the objective reasonableness of the expectation: *R. v. Edwards*, [1996] 1 S.C.R. 128 at para. 45, citing *United States v. Gomez*, 16 F.3d 254 (8th Cir. 1994) at p. 256;

e. a reasonable expectation of privacy "can vary with the nature of the matter sought to be protected, the circumstances in which and the place where state intrusion occurs, and the purposes of the intrusion": *R. v. Patrick*, 2009 SCC 17, [2009] 1 S.C.R. 579 at para. 38, citing *R. v. Colarusso*, [1994] 1 S.C.R. 20, at p. 53; and *Buhay* at paras. 22, 23 and 24;

f. the "standard of reasonableness," which prevails in the criminal context, may not be the same as may be applied in an administrative or regulatory context: *British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3 at para. 52;

g. generally, an individual has a diminished expectation of privacy in respect of records and documents that he or she produces during the ordinary course of regulated activities: *R. v. Jarvis*, 2002 SCC 73,

[2002] 3 S.C.R. 757, at para. 72, citing, for example, e.g., *Thomson Newspapers* [[1990] 1 S.C.R. 425], at p. 507; and

h. differing levels of *Charter* protection may exist even under the same statute, depending on the circumstances: *R. v. Jarvis, supra* at paras. 55 and 56, citing *Wholesale Travel Group, Inc*, [1991] 3 S.C.R. 154 at p. 250.

[12] Applying this articulation of the law to the within matter, Whelan P.C.J. considered the following factors to determine how best to balance the individual and state interests at play: (i) the possession or control of the information and the nature of the information; (ii) the purpose of the intrusion; (iii) the guarantees of privacy once the information is in the hands of Statistics Canada; (iv) the historical use of the information; (v) the relationship between the parties and why Statistics Canada wants the information; (vi) the manner in which the information was obtained and the consequences of non-compliance; (vii) the ability to regulate access; (viii) the existence of a subjective expectation of privacy; and (ix) the objective reasonableness of the expectation.

[13] Whelan P.C.J. also considered the effect of the Government of Canada's announcement, made during the course of the trial, that Statistics Canada will retain the mandatory short form census that will collect basic demographic information, but in the future the long form census would be voluntary (see: para. 44). Whelan P.C.J. found this change in policy to be a relevant factor to consider in determining whether there is a reasonable expectation of privacy

in the information sought by the 2006 Long Form Census. She found the change of policy to be some evidence of the Government of Canada's sensitivity to the issue of compelling responses to the Long Form Census, but no more than that. She concluded by saying "[s]ection 31 remains in place and according to the July 13th announcement, the Government will continue to compel completion of the short form population census" (para. 78).

[14] In relation to all the factors considered, Whelan P.C.J. made these key findings:

> a. The information was sought for informational and statistical purposes. There is no interest in the individual responses; indeed the responses are protected by anonymity. The value is not in the individual information but in the aggregate of the information obtained. That information once in an aggregate form has many potential pro-social uses for governments, community, industry, universities, and private individuals and corporations. Ms. Finley expressed concern that the information may be put to a potentially injurious use against individuals but there was no evidence of that. (para. 73)
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> b. …the guarantees of anonymity and confidentiality that are in place meet or exceed what is called for to protect the identity of the respondent. (para. 74)
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> c. …management pursuant to the *Act* has been very cognizant and forward thinking in planning for censuses which meet the highest standards of confidentiality and anonymity. (para. 75)
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> d. …the statistical information developed by Statistics Canada with the responses received from Canadians has over time become an integral part of decision-making by governments with respect to benefits and programs made available to Canadians. (para. 75)
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> e. The information is sought from the Defendant/Applicant, not for a personal use but rather as it contributes to the aggregate collection, analysis and distribution of the resulting statistical information. There can be no doubt as to the general legitimacy of purpose in collecting this information and producing statistics in an aggregate form. (para. 76)
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> f. The *Statistics Act* contains penalties not to prohibit or limit the activities of individuals, as many regulatory statutory schemes are designed to do, but rather to ensure a viable informational response for good statistics. (para. 77)

> g. The information was not requested in pursuit of a criminal investigation. The adversarial context arises in the event of refusal which triggers the threat of prosecution and in the event of conviction, a fine or imprisonment, or both. The public goal of the enforcement provisions is not aimed at preventing, investigating, or prosecuting crime but rather at ensuring a good sample of responses and therefore reliable statistical information. (para. 79)
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> h. Many separate steps were taken by Statistics Canada before referring cases of noncompliance for consideration by the Canadian Prosecution Service. The goal of Statistics Canada is to encourage compliance. The witnesses conveyed information, to support this finding. Indeed it was evident that throughout, communications from Statistics Canada and the Defendant/Applicant were courteous. (para. 80)
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> i. …having regard to the privacy interest in records required for the purposes of the *Income Tax Act* … the Defendant/Applicant has an even greater reduced expectation of privacy regarding information sought under the *Statistics Act*. The assurances of anonymity and confidentiality distinguish this from other regulatory schemes, referred to in precedent, and are most material to this finding. (para. 81) (emphasis added)

[15] With respect to the objective reasonableness of the expectation, she concluded that the questions posed in the 2006 Long Form Census, given the guarantees of confidentiality and anonymity, did not amount to an unreasonable invasion of privacy (para. 82).

[16] Whelan P.C.J. then referred to "[b]alancing the societal interest in protecting individual dignity, integrity and autonomy with effective information gathering for statistical purposes". She concluded that "an appropriate balance has been struck between the societal interests of the individual's dignity, integrity and autonomy and the goal of effective information gathering for statistical purposes" (para. 83). She ended her analysis by saying: "I conclude therefore that there has not been a breach of s. 8 of the *Charter*" (para. 83).

[17] She also went on to hold that the "search" had been conducted reasonably:

> [84] … I found that the search and seizure was conducted reasonably. The approach taken was consistent with the goal of gathering information for statistics. Every effort was taken to inform the public and the individual of the importance of the census and the one-to-one dealings, evidenced in these proceedings were apparently carried out with the goal of encouraging compliance rather than pursuing individuals for noncompliance. In their direct dealings with the Defendant/Applicant, Ms. Finley, the employees and agents of Statistics Canada remained true to the general purpose of obtaining information for statistical purposes.

[18] In short, Whelan P.C.J. concluded that Ms. Finley had not discharged the burden of establishing that she had a reasonable expectation of privacy for the purposes of s. 8 of the *Charter*, and that in any event, the search was carried out in a reasonable fashion (para. 85). She then found Ms. Finley guilty of contravening s. 31(b) of the *Statistics Act* and granted her an absolute discharge.

III. Decision of the Court of Queen's Bench

[19] As this is a summary conviction matter, Ms. Finley appealed first to the Court of Queen's Bench pursuant to s. 813 of the *Criminal Code*, which permits a "defendant" to appeal from "a conviction." No statutory restrictions on the right of appeal exist.

[20] Ms. Finley put forward four arguments in the Queen's Bench: (i) the trial judge failed to consider all the factors in the appropriate test for information privacy pursuant to s. 8 of the *Charter*; (ii) the trial judge erred by failing to consider whether Ms. Finley had a lawful excuse pursuant to s. 31 of

the *Statistics Act*; (iii) the trial judge erred by failing to properly analyze the purpose of the collection of the census data and the nature of the data collected by Statistics Canada; and (iv) the trial judge erred by overemphasizing the use of the information to be collected by Statistics Canada (para. 3).

[21] For its part, the Crown continued to assert that s. 8 of the *Charter* does not apply since the answers are not in existence until the individual completes the Census, which means, according to the argument, that no specific "thing" is seized by the Statistics Canada (para. 4). Konkin J. dealt with the Crown's argument as a preliminary issue. He concluded that Whelan P.C.J. "rightly concluded that the requests under s. 31 of the *Statistics Act* engage s. 8 of the *Charter*" (para. 9).

[22] According to Konkin J., Ms. Finley's arguments can be distilled to her claim that because of the possible imposition of a penalty under the *Act* "the information gathered under that Act is much closer to a criminal or quasi-criminal gathering than a mere regulatory gathering of information" (para. 10).

[23] Relying in part on Professor Sherrin's article "Distinguishing *Charter* Rights in Criminal and Regulatory Investigations: What's the Purpose of Analyzing Purpose?" (2010), 48 Alta. L. Rev. 93, he concluded that "where a statute is more regulatory in nature, a person's expectation of privacy is much diminished" (para. 13). On this point, he wrote:

> [14] … Ms. Finley is being compelled to produce evidence under threat of committing an offence, but not evidence of an offence. This differentiates it from the criminal investigation. As such, under statutes like the *Statistics Act*, an

> individual may be compelled to answer and not receive the protections under s. 8 of the *Charter*. (emphasis added)

[24] He then reviewed two decisions pertaining to the application of s. 8 of the *Charter* to a demand for census information: *R. v. Holman* (1983), 28 Alta. L.R. (2d) 35 (Prov. Ct.) and *R. v. Gill*, [1995] 7 W.W.R. 61 (Man. Q.B.). In *Holman*, the Court determined that the demand for information in a census taken under the *Statistics Act* does constitute a search within the meaning of s. 8 of the *Charter*, but in any event, concluded that the demand was reasonable and did not infringe the rights guaranteed under s. 8. The Court in *Gill* followed *Holman* and found that "the exercise [of the demand to complete the census in that case] is not a breach of the accused's reasonable expectation of privacy" (at para. 36).

[25] In the within matter, Konkin J. adopted the reasoning in *Gill* to support his conclusion that Whelan P.C.J. did not err. He wrote:

> [17] … I am in agreement with the reasoning of Clearwater J. in the *Gill* case and with Judge Whelan when she concluded that while s. 8 of the *Charter* was engaged, there was no breach and, therefore, no remedy for Ms. Finley. While counsel for Ms. Finley raised issue with some of the considerations that Judge Whelan used in concluding that there was no breach, I find that given the reasoning she employed and the fact that the purpose for the collection of the census data is regulatory and not criminal, her conclusion is not assailable.

[26] With that, Ms. Finley applies for leave to appeal to this Court.

IV. Position of Ms. Finley on Appeal to this Court

[27] In her Notice of Appeal, Ms. Finley indicated that the summary conviction appeal court judge erred by:

a. failing to apply the appropriate legal test to s. 8 of the *Canadian Charter of Rights and Freedoms*, in failing to examine whether the Appellant had a reasonable expectation of privacy;

b. by concluding that the request for detailed census information does not amount to a search;

c. by incorrectly distinguishing between being compelled to produce evidence of an offence and being compelled to reveal intimate information under the threat of committing an offence;

d. by concluding that a person's privacy rights to refrain from revealing intimate, and entirely legal, details about their lives receives lesser protection than privacy rights to shelter illegal activity; and

e. by placing too great an emphasis on her refusal to provide any information.

[28] Ms. Finley's factum begins with her concerns about the decision of the trial judge, which may be summarized as follows: (i) the trial judge "did not analyze the nature of the questions asked in the Census" (Appellant's factum, para. 14); (ii) the trial judge does not explain the relevance of balancing societal interests and information gathering for statistical purposes or how it relates to the protections afforded to Ms. Finley through s. 8 of the *Charter* (Appellant's factum, para. 14); and (iii) she did not refer to the "biographical core of personal information" which has been recognized by the Supreme Court of Canada as protected under s. 8 of the *Charter* in *Plant* (Appellant's factum, para. 15).

[29] With respect to the summary conviction appeal court judge's decision, Ms. Finley has these specific concerns: (i) the judge erred by holding that the refusal to provide specific information in response to the specific questions asked in the Long Form Census was not a breach of s. 8 "because Ms. Finley had not put 'pen to paper'"; and (ii) the judge erred by holding that "under regulatory statutes, a person may be compelled by the government to answer government questions, and not receive the protections set out under s. 8 of the *Charter*" (Appellant's factum, para. 18).

[30] In her submissions to this Court, Ms. Finley stated her questions of law as follows:

> a. the summary conviction appeal court judge erred in law by failing to apply the proper test for informational privacy pursuant to s. 8 of the *Charter*, or by failing to consider whether Ms. Finley had a lawful excuse pursuant to s. 31 of the *Statistics Act*;
>
> b. the summary conviction appeal court judge erred in law by concluding that the census form had to be completed to constitute a breach of s. 8 of the *Charter*; and
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> c. the summary conviction appeal court judge erred in law by concluding that, "under statutes like the *Statistics Act*, an individual may be compelled to answer and not receive the protections under s. 8 of the *Charter*."

V. Position of the Crown in this Court

[31] The Crown's position may be stated succinctly. First, the Crown asserts that the compulsion to answer the questions contained in the 2006 Long Form Census under s. 31 of the *Statistics Act* does not engage s. 8 *Charter* protections for two reasons: (i) it is not, in itself, a search or seizure under s. 8 of the *Charter*; and (ii) it does not interfere with a reasonable expectation of privacy. Second, the Crown submits that if s. 8 is engaged, the search and seizure was reasonable and there was no breach.

VI. Did the summary conviction appeal court judge err by failing to apply the proper test for informational privacy pursuant to s. 8 of the *Charter*, or by failing to consider whether Ms. Finley had a lawful excuse pursuant to s. 31 of the *Statistics Act*?

[32] As the case law demonstrates, the factual circumstances that engage s. 8 of the *Charter* vary considerably. In that regard, it is an error to speak in terms of *the* proper test for informational privacy without recognizing the significant role that context plays in any given case. A general analytical framework exists, but as authorities like *Edwards*, *supra*, *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432 and *R. v. Gomboc*, 2010 SCC 55, [2010] 3 S.C.R. 211 demonstrate, what amounts to a reasonable expectation of privacy standard is a function of the nature of the information requested and the purpose for which it is made available. The case law also makes clear that whether one has an expectation of privacy *per se* is not determinative; instead, what is important is whether one ought to expect privacy in the circumstances, and if so, to what level, *i.e.* whether the expectation of privacy is objectively

reasonable. All of this has recently been exhaustively reviewed by this Court in *R. v. Trapp*, 2011 SKCA 143, [2012] 4 W.W.R. 648.

[33] In the within case, the summary conviction appeal court judge correctly found no error with the trial judge's overall analysis. The trial judge generally followed the analytical framework established by the case law. The analytical framework requires a judge first to consider whether the conduct of the state agent constituted a "search" within the meaning of section 8. Whether the conduct constitutes a "search" requires a determination, based on a consideration of the totality of the circumstances, that the individual has a reasonable expectation of privacy in the information demanded and the state intruded on that reasonable expectation (*Tessling, supra* at para. 32; *Patrick, supra* at para 26-28; and *Gomboc, supra* at para. 17-21; *R. v. Evans*, [1996] 1 S.C.R. 8; *Trapp, supra* at paras. 7-16). Without a reasonable expectation of privacy, s. 8 has no purpose to serve and is therefore not engaged.

[34] The second step requires a judge to determine whether the state action was reasonable (*Trapp* at para. 17). The second step is not reached if the applicant for relief does not establish that the conduct of the state agent amounted to a search which, as I have explained above, requires the applicant for relief to establish "a reasonable expectation of privacy" and an intrusion upon it. The trial judge followed this process, contextualized for the particular search in question, *i.e.* for the demand of personal information for the purposes of compiling the 2006 Census.

[35] Early in her reasons, the trial judge stated that she was persuaded "on a balance of probabilities" that s. 31 of the *Statistics Act* "comes under the

purview of s. 8 of the *Charter*" (para. 68). This was said in response to the Crown's preliminary issue, which was whether there can be a search at all because the Census elicits a response to questions as opposed to the production of known information or documents. I do not take the trial judge as saying anything more than that the state activity in question could be considered a search within the meaning of s. 8 of the *Charter*, assuming Ms. Finley was able to establish a reasonable expectation of privacy. From the whole of her reasons, it is clear the trial judge fully understood that the applicant for relief must demonstrate a reasonable expectation of privacy in order for the state activity in question to amount to a search.

[36] After the trial judge concluded that Ms. Finley had not established a reasonable expectation of privacy, she stated "there has not been a breach of s. 8 of the *Charter*" (para. 83). Strictly speaking, at that point in the analysis the trial judge had only completed the first stage, which was to determine whether the demand to complete the 2006 Long Form Census amounted to a search. I take the trial judge to mean that without a search, there could be no breach of s. 8.

[37] Ms. Finley stresses repeatedly that the error in the judgment under appeal is the absence of "any analysis of the nature of the information sought," and "any reference to the 'biographical core of personal information,' which has been recognized by the Supreme Court of Canada as protected under s. 8 of the *Charter*" (Appellant's factum, para. 15) in such decisions as *Plant*, *supra*. Ms. Finley considers "information such as the number of rooms in her house and whether the house is in need of repairs, her daily living activities, ethnic and cultural background (including place of birth), dwelling

information for the past five years, attempts to find work, transportation to and from work, educational information, place of birth of her parents, information regarding housework and volunteer work within the week preceding the completion of the Census, information on age, sex, marital status, family, employment and place of work, ethnic origin, income and earnings, and citizenship and immigration status" to be personal and private (Appellant's factum, para. 1). She argues that the summary conviction appeal court judge should have found the trial judge erred by failing to examine these questions.

[38] This argument assumes that simply because the questions trespass upon a "biographical core of personal information," a finding as to a breach of s. 8 must follow. It is quite clear the trial judge and the summary conviction judge found the information being gathered by the state either is or has the potential to be highly personal in nature, involving what many would view as a "biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state"—to use the words from *Plant* (at p. 293). I say this is quite clear because the trial judge need not have engaged in the extensive analysis she did unless the information trespassed on informational privacy. The point is that posing the question, whether the information protects a biographical core of information and answering it, does not resolve the issue as to whether a person has a reasonable expectation of privacy that s. 8 seeks to protect.

[39] Thus, the question is not whether Ms. Finley had an expectation of privacy or even a reasonable expectation of privacy in dictionary terms. The question must be linked to the overall context of the case. In this case, the

question must be cast in these terms: whether a reasonable person would expect to have privacy in the information requested by the 2006 Long Form Census, which the government wishes to collect exclusively for statistical purposes to aid it in implementing sound and effective public policy, with no criminal or quasi-criminal repercussions flowing from the disclosure of such information, and with the specific information collected being ultimately generalized and "delinked" from the individuals being required to so disclose. The trial judge answered this critical question negatively and the summary conviction appeal court judge found no error of law, mixed fact and law or fact in her conclusion.

[40] Ms. Finley was critical of the trial judge's conclusion that the 2006 Long Form Census strikes a "balance" between societal interests and information gathering for statistical purposes (para. 83), saying that she had engaged in a "section 1" analysis before determining whether part of the *Statistics Act* is unconstitutional. The trial judge could have expressed herself differently, but I do not take her as conflating the test for determining whether Ms. Finley had a reasonable expectation of privacy with a test to determine whether an unconstitutional provision could withstand a constitutional challenge. I take the trial judge as doing no more than the Supreme Court of Canada did in *Tessling* when Binnie J. mentioned "a balance must be struck" between the community's desire for privacy and for protection (para. 17). Here, of course, the balance must be struck between an individual's desire for privacy and society's desire for good government. The trial judge quite clearly found a reduced expectation of privacy based on the nature of the

inquiry, the purpose of the inquiry and the guarantees of confidentiality and anonymity present.

[41] Ms. Finley also argued that both the summary conviction appeal court judge and the trial judge erred by failing to consider her alternative argument, which was that the protection of personal information pursuant to s. 8 of the *Charter* is a "lawful excuse" as set out in s. 31 of the *Statistics Act*. This argument, too, is without merit. Once the Court determined that Ms. Finley has no reasonable expectation of privacy, no basis exists for a claim of "lawful excuse." Put another way, Ms. Finley did not demonstrate a lawful excuse apart from her claim to privacy.

[42] Ms. Finley submits that in determining whether she has a reasonable expectation of privacy, this Court should consider that Parliament has changed the law so as to make the completion of a long form census in the future voluntary rather than mandatory. She submits that this change in the law should persuade the Court to take a presumptive attitude and find an error of law simply because Parliament has made a prospective change in the laws.

[43] This argument, of course, is very much like Ms. Finley's main argument and can be answered, in part, by responding in the same way. The question is not whether Ms. Finley has an expectation of privacy, as those words are used in common speech, but whether she has a reasonable expectation of privacy recognized by law in the answers to the questions asked and in the context and for the purposes advanced and proven by the Crown. Moreover, Parliament did not change the law retroactively. The rule of law demands no less than that the courts interpret and apply the existing law as written.

[44] It bears repeating that in this Court Ms. Finley's argument is limited to a question of law in relation to the summary conviction appeal court judge's decision. Viewed through the limited lens of s. 839(1), Ms. Finley's arguments do not lead me to conclude that the summary conviction appeal court judge erred when he found no error of law in relation to the trial judge's conclusion that Ms. Finley did not have a reasonable expectation of privacy so as to sustain a claim of a *Charter* breach. But even if the summary conviction appeal court judge erred in this regard, the trial judge went on to find that the search was conducted reasonably. Again, having regard for the same factors that led her to conclude that Ms. Finley had no reasonable expectation of privacy for the purposes of s. 8 of the *Charter*, the summary conviction appeal court judge sustained that conclusion. His conclusion in that regard is correct in law.

VII. Did the summary conviction appeal court judge err by concluding the census form had to be completed to constitute a breach of s. 8 of the *Charter*?

[45] As I have indicated, the summary conviction appeal court judge decided expressly the other way on this point, as did the trial judge—and in Ms. Finley's favour. The summary conviction appeal court judge found specifically that "the Provincial Court judge rightly concluded that the requests under s. 31 of the *Statistics Act* engage s. 8 of the *Charter*" (para. 9). He compared the government's request to complete a census form to a request to obtain a wiretap. In the latter example, he reasoned no one would suggest that because the person under surveillance has not yet uttered the words that a warrant is not required. This is consistent with such authorities as *R. v.*

Duarte, [1990] 1 SCR 30 and *R. v. McKinlay Transport*, [1990] 1 S.C.R. 627 at pp. 641-42. Thus, there is no merit to this aspect of Ms. Finley's appeal.

[46] The Crown, it must be noted, challenges the trial judge's conclusion that a demand to complete a census can ever be considered a "search" at all but, for the purposes of Ms. Finley's appeal, the issue need not be addressed more fully than I already have.

VIII. Did the summary conviction appeal court judge err by concluding that, "under statutes like the *Statistics Act*, an individual may be compelled to answer and not receive the protections under s. 8 of the *Charter*?"

[47] The summary conviction appeal court judge made this statement (at para. 14), but there is nothing objectionable about it. Indeed it is trite law. Unless a court is satisfied that the state has intruded upon an individual's reasonable expectation of privacy, the individual will not be able to assert successfully that there has been a search let alone an unreasonable search or seizure. The summary conviction appeal court judge might have expressed this principle more clearly, but I have no doubt what he meant is that s. 8 does not protect all privacy interests, but reasonable expectations of privacy only. With regulatory statutes, like the *Statistics Act*, a person's reasonable expectations of privacy are considered to be lower than in other contexts (*McKinlay Transport*, *supra* at pp. 641-42). This does not mean a court is not required to undertake the close analysis that the trial judge did in this case, but it does mean that once the analysis is complete, the result may very well be that the person cannot claim the state action in question constituted a search for the purposes of raising a s. 8 *Charter* challenge.

IX. Conclusion

[48] Having regard for these reasons, I would dismiss the appeal.

DATED at the City of Regina, in the Province of Saskatchewan, this 2nd day of May, A.D. 2013.

"Jackson J.A."
Jackson J.A.

"Richards J.A."
Richards J.A.

"Herauf J.A."
Herauf J.A.