

2020

Whose Right is it Anyway? Adjudicating Charter Rights in the Context of Multiple Rights Holders

Ryan Liss

Faculty of Law, Western University

Follow this and additional works at: <https://digitalcommons.osgoode.yorku.ca/sclr>



Part of the [Law Commons](#)



This work is licensed under a [Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License](#).

Citation Information

Liss, Ryan. "Whose Right is it Anyway? Adjudicating Charter Rights in the Context of Multiple Rights Holders." *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 94. (2020). <https://digitalcommons.osgoode.yorku.ca/sclr/vol94/iss1/11>

This Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference by an authorized editor of Osgoode Digital Commons.

Whose Right is it Anyway? Adjudicating Charter Rights in the Context of Multiple Rights Holders

Ryan Liss*

I. INTRODUCTION

Many of the rights and freedoms prescribed in the *Canadian Charter of Rights and Freedoms* (Charter) protect aspects of life that rights holders engage in collaboratively, rather than in isolation. Our protection from unreasonable search and seizure extends to houses that we may inhabit with family members or roommates.¹ Our freedom of expression and religion prohibits state censorship of novels co-written by multiple authors and prohibits restriction on religious rites practised as a community.² Our freedom of association guarantees the rights of multiple members of a union to collectively bargain together.³ Our right to a speedy trial applies to the trial of multiple co-accused just as it does to the trial of an individual.⁴ Yet, while protecting collaborative aspects of life, the protections of the

* Assistant Professor, Faculty of Law, Western University. J.S.D. (Yale); LL.M. (Yale); J.D. (Toronto); Hons. B.A. (Toronto). My thanks to Ben Berger, Kate Berger, Faisal Bhabha, Emma Cunliffe, Lisa Kerr, Mabel Lai, Joanna Langille, Sonia Lawrence, Margaret Martin, David Sandomierski, Anthony Sangiuliano, Zoë Sinel, François Tanguay-Renaud, Emily Kidd White and the participants in the 2019 Osgoode Constitutional Cases Conference and the Western Law Faculty Workshop for helpful comments and discussions. Thanks are also due to the anonymous peer reviewer for their helpful and generous feedback. Finally, my thanks to Alan Yuen and Tammy Chu for their helpful research assistance.

¹ *R. v. Reeves*, [2018] S.C.J. No. 56, 2018 SCC 56 (S.C.C.) [hereinafter “*Reeves*”], citing *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

² *Cf. Syndicat Northcrest v. Amselem*, [2004] S.C.J. No. 46, 2004 SCC 47 (S.C.C.).

³ See, e.g., *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] S.C.J. No. 27, 2007 SCC 27 (S.C.C.). But see Brian Langille, “The Freedom of Association Mess: How We Got into It and How We Can Get out of It” (2009) 54 McGill L.J. 177-212 (discussing the Supreme Court’s confusion on whether freedom of association is a right we *each* possess).

⁴ See, e.g., *R. v. Gopie*, [2017] O.J. No. 4963, 2017 ONCA 728 (Ont. C.A.).

Charter apply to each of us, individually. As a result, it is inevitable in these contexts — where multiple rights holders possess claims “equal to and overlapping with” one another⁵ — that conflicts will arise.

This seems, at least at first glance, to be precisely what occurred in the case of *R. v. Reeves*.⁶ At issue in *Reeves* was the accused’s right to be free from unreasonable search and seizure under section 8 of the Charter.⁷ However, the target of the state’s search and the state’s seizure were places occupied and objects used by Reeves *together with another* — specifically, with Reeves’s common law spouse. The two parties had different perspectives on how they preferred to exercise the section 8 rights protecting them against state intervention into their home and against state seizure of a computer they owned and used together. Reeves’s spouse chose to waive her section 8 rights that would otherwise insulate that place and that object from the State’s intervention: she consented to the State’s entrance into the home and the State’s seizure of the computer. This led the State to evidence of crimes perpetrated by Reeves. However, Reeves later asserted, *he* had never waived *his* section 8 protection to that same place and object. Thus, he argued, the State’s conduct violated his section 8 rights, and the evidence collected should be excluded at trial.

In this article, I consider how courts should approach contexts of equal and overlapping rights claims under the Charter, using *Reeves* as a case study. While such claims might initially appear novel, they seem more familiar when we recast them not as “overlapping” rights claims (as the Crown described them in *Reeves*) but rather as *competing* rights claims. As I will argue, this reframing directs us to our ordinary tool for balancing Charter claims against other competing constitutional values including “public safety, order, health, or morals or *the fundamental rights and freedoms of others*” — namely, proportionality.⁸

In making this argument, this article will proceed in four parts. In Part II, I describe the challenge of overlapping rights posed by *Reeves*. The majority concluded that Reeves’s protection against seizure of the

⁵ See *R. v. Reeves*, [2018] S.C.J. No. 56, 2018 SCC 56, at para. 18 (S.C.C.) (recounting the Crown’s description of such context).

⁶ As I discuss below, there may be a further nuance to how we understand *what* precisely is being balanced in the case that is not captured by the idea of overlapping rights alone. See note 80, and accompanying text.

⁷ *R. v. Reeves*, [2018] S.C.J. No. 56, 2018 SCC 56 (S.C.C.).

⁸ *R. v. Big M Drug Mart Ltd*, [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295, at 337 (S.C.C.) (emphasis added). See also, *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103, at 136 (S.C.C.); *R. v. N.S.*, [2012] S.C.J. No. 72, 2012 SCC 72 (S.C.C.).

computer persisted even though his spouse consented to the State's conduct (by waiving her own section 8 rights in the shared computer). Though she may have sought to waive her right, the majority observed, "... [w]aiver by one rights holder does not constitute waiver for all rights holders."⁹ Thus Reeves's own section 8 protection endured. Finding that the seizure of the computer amounted to a violation of Reeves's rights and justified the exclusion of the evidence, the majority determined it was unnecessary to decide what they identified as the more difficult question before them of whether one cohabitant can consent to entry by the State (by waiving her own section 8 right to exclude the State) into a shared home without the consent of the other co-habitants.

Yet in her concurring opinion, Côté J. argued that we should not avoid the difficult question of whether one resident can consent to the State's entry into a shared home. Indeed, for Côté J., the example of the shared home put the challenge of adjudicating overlapping rights front and centre. If Reeves's spouse cannot invite the State into her home, she stressed, does this not undermine her *own* right to privacy? Where one rights holder cannot exercise her own right in the manner she seeks to simply because doing so would infringe upon another rights holder's protection, this would seem to deny her ability to exercise her own right. And if the State were not permitted to enter the house when Reeves's spouse sought to waive her section 8 protection in the space, this "would, in essence, subjugate her rights to his."¹⁰

Justice Côté's concurrence raises the question of why we cannot simply resolve the issue of overlapping rights claims by allowing one rights holder to waive the right of another. The majority rejected this possibility, but the explanation the majority provides for why this would be problematic is wanting. And, if Reeves's spouse could waive Reeves's section 8 protection in the home, this would obviate the challenge raised by *Reeves* in a simple and straightforward way.

In Part III, I turn to the question of why we cannot waive the rights of another. I argue that to understand why it would be so problematic to allow one party to waive the rights of another, we need to consider the relationship between state authority and constitutional rights. The best account of what justifies the robust public authority of the state, especially in the context of criminal law, is that such authority is necessary to secure the equal autonomy and dignity of all members of

⁹ *R. v. Reeves*, [2018] S.C.J. No. 56, 2018 SCC 56, at para. 52 (S.C.C.).

¹⁰ *Id.*, at para. 127 (Côté J., concurring).

society under the law. The authority of the state is necessary to secure autonomy on a *horizontal* basis — that is, between each member of the community; such authority is intended to ensure one private person cannot decide how to treat another at will. However, creating such robust authority brings a danger that the public authority — backed by coercive power — will act to violate the autonomy and dignity of its citizens. This is where constitutional rights come in, to secure the autonomy and dignity of the individual on a *vertical* basis, from overreach of state power. This structure demonstrates why permitting one person to waive the constitutional rights of another would be so problematic: it would undermine the very purpose of state authority, by allowing one person to determine what can be done with the person, property, or information of another.

However, this cannot be the end of the story. As Côté J. suggested, in the context of *overlapping* rights, if we cannot consent to a waiver of a right on behalf of another, this would seem to prevent us from acting upon our own rights in a meaningful way.¹¹ In Part IV, I suggest that despite seeming to complicate the problem, the account of state authority I have described actually offers a possible resolution to the conflict of overlapping rights. We should not see these rights claims as overlapping, but rather as distinct conflicting claims. And for those embracing the model of state authority I have described, there is “a mechanism through which we can ensure any resolution of that conflict is justifiable in terms of that same account of legitimate state action” — proportionality reasoning.¹²

With this analysis in hand, in Part V, I return to the Court’s decision in *Reeves*. Viewing overlapping rights claims as competing claims suggests that the best way to resolve them is through a proportionality assessment. The section 8 rights of Reeves’s spouse should not constrain Reeves’s own right, but they may justify recognizing a *limitation* on his right.

I also argue in Part V that while the Crown, the majority, and Côté J. portrayed the case as one concerning an overlapping rights claim, there might be a different way to view the case suggested by Moldaver J.’s concurring opinion. Justice Moldaver does not challenge directly the reading of the case that the others offer; however, implicit in his decision is the view that while *Reeves* does indeed involve a conflict of rights, it is

¹¹ On the ways in which waiver of a right may or may not represent an exercise of that right, see note 63 and accompanying text.

¹² See Malcolm Thorburn, “Proportionality” in David Dyzenhaus & Malcolm Thorburn, eds., *Philosophical Foundations of Constitutional Law* (Oxford: Oxford University Press, 2016) 306, at 321-22.

a conflict of a *different* sort. Nevertheless, while he offers a different characterization of the issue, his analysis demonstrates that the solution ought to be the same: in cases of conflicting rights, the best resolution is through proportionality.

Finally, in my concluding section, I offer some observations as to how the approach proposed in the article might be relevant for overlapping rights claims outside of the context of section 8.

II. REEVES AND THE CHALLENGE OF OVERLAPPING RIGHTS

On October 22, 2012, a police officer arrived at the home Thomas Reeves shared with his common law spouse, Nicole Gravelle. Earlier in the day, Gravelle had reported to Reeves's probation officer that she believed she had found evidence of criminal activity on the home computer they shared. At the time, Reeves was in police custody on unrelated charges. Gravelle agreed to let the police officer enter the home and signed a consent form allowing him to take the computer. Reeves was later charged on the basis of the evidence found on the computer.¹³ Prior to the trial, Reeves brought an application challenging the police entrance into the home and seizure of the computer as violations of his section 8 rights, and sought to have the evidence excluded under section 24(2).¹⁴ By the time the case reached the Supreme Court, the principal legal issues concerned whether and how Gravelle's consent to the police's entry and seizure of the computer affected Reeves's Charter rights.

1. The Question Posed by Reeves

Section 8 of the Charter, on which Reeves relied, protects the right of everyone "to be secure against *unreasonable* search and seizure."¹⁵

¹³ *R. v. Reeves*, [2018] S.C.J. No. 56, 2018 SCC 56, at paras. 6-7 (S.C.C.); *R. v. Reeves*, [2015] O.J. No. 6750, 2015 ONCJ 724, at paras. 1-13 (Ont. C.J.). Reeves was charged with possession of and accessing child pornography.

¹⁴ Before the lower courts, Reeves also argued that the police detention of the computer without complying with ss. 489.1 and 490 of the *Criminal Code*, R.S.C. 1985, c. C-46, and errors in the information to obtain a search warrant under which the eventual search of the computer was carried out were violations of section 8 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. The Application Judge and Court of Appeal both found in Reeves's favour on these issues, and the Crown conceded these points when the case reached the Supreme Court. See *R. v. Reeves*, [2018] S.C.J. No. 56, 2018 SCC 56, at paras. 9, 10, 15 (S.C.C.).

¹⁵ Charter, *id.*, s. 8 (emphasis added).

Applying section 8 requires asking two core questions, one defining the scope of the protected privacy right secured by section 8, and the other defining when state infringement of that right might be justified.¹⁶ First, did the accused have a *reasonable* expectation of privacy in the subject matter of the search or seizure? This question serves as the threshold for engaging constitutional protection; in contexts where an accused does not have a reasonable expectation of privacy, police conduct will not count as a “search or seizure” for the purposes of section 8 and thus will not be restricted in any way by the provision.¹⁷ Second, if the accused does have a privacy right in the affected subject matter, was the state conduct nonetheless reasonable? That is, accepting that the action was a search or seizure, was it a *reasonable* one? As the Court concluded in *Collins*, a search or seizure will be found to be reasonable “if it is authorized by law [such as under a warrant], if the law itself is reasonable and if the manner in which the search [or seizure] was carried out is reasonable.”¹⁸

However, where an individual has a reasonable expectation of privacy in the subject matter of the search that would ordinarily give rise to a restriction on state conduct concerning that subject matter, it is always open to her to consent to the state conduct at issue. Doing so — if the consent is freely given and informed — amounts to a waiver of section 8’s protection.¹⁹ In such contexts, the state conduct will not constitute a search or seizure and thus need not be reasonable.

¹⁶ Overall, this assessment considers “whether in a particular situation the public’s interest in being left alone by government must give way to the government’s interest in intruding on the individual’s privacy in order to advance its goals, notably those of law enforcement.” *Hunter v. Southam Inc.*, (*sub nom. Canada (Combines Investigation Acts, Director of Investigation and Research) v. Southam Inc.*) [1984] S.C.J. No. 36, [1984] 2 S.C.R. 145, at 159-60 (S.C.C.) [hereinafter “*Hunter*”]. Referring to the threshold stage as defining a privacy “right” could be debated, as s. 8 does not protect a right to privacy but only a reasonable expectation of privacy. Thus, the threshold stage could be described as assessing a privacy “entitlement” or “interest”. However, the Court has at times described this as assessing a privacy “right” and I follow them in doing so. See, e.g., *R. v. Reeves*, [2018] S.C.J. No. 56, 2018 SCC 56, at para. 31 and elsewhere (S.C.C.); *R. v. Dymnt*, [1988] S.C.J. No. 82, [1988] 2 S.C.R. 417, at 435-36 (S.C.C.) (La Forest J., concurring) (shifting between reference to right to privacy and privacy interest); *R. v. Edwards*, [1996] S.C.J. No. 11, [1996] 1 S.C.R. 128, at para. 33 (S.C.C.).

¹⁷ See, e.g., *R. v. Patrick*, [2009] S.C.J. No. 17, 2009 SCC 17 (S.C.C.) [hereinafter “*Patrick*”]. See also, Hamish Stewart, “The Normative Foundations for Reasonable Expectations of Privacy” (2011), 54 S.C.L.R. (2d) 335-355, at 335-336 (discussing the significance of this threshold).

¹⁸ *R. v. Collins*, [1987] S.C.J. No. 15, [1987] 1 S.C.R. 265, at 278 (S.C.C.).

¹⁹ *R. v. Borden*, [1994] S.C.J. No. 82, [1994] 3 S.C.R. 145, at 160-62 (S.C.C.) [hereinafter “*Borden*”]; *R. v. Wills*, [1992] O.J. No. 294, 7 O.R. (3d) 337 (Ont. C.A.) [hereinafter “*Wills*”].

This is where the challenge posed by *Reeves* arises. The nub of the argument between the Crown and the defence concerned the effect that one rights holder's consent to state conduct has on a privacy right they both possessed — on “a privacy interest in [a] place that is equal to and overlapping with the privacy interests of the other co-residents.”²⁰

The issue in *Reeves* was not entirely one of first impression. The Supreme Court had previously held in *Cole* that a third party could not waive the Charter rights (and section 8 rights in particular) possessed by another person.²¹ Nevertheless, the Crown argued in *Reeves*, that where the consenting party has an overlapping and equal claim to the privacy interest at issue, the situation is fundamentally different: such individuals should not be thought of as third parties under the framework developed in *Cole*. In the Crown's view it would “not be reasonable for one co-habitant to expect that his or her right to exclude others will trump another co-habitant's right to admit others.”²² Indeed, anything short of recognizing that Gravelle's rights had displaced Reeves's claim under section 8 “grants insufficient protection to *her* privacy rights.”²³

Writing for the majority, Karakatsanis J. disagreed. She concluded, at least with respect to the computer, that Reeves's reasonable expectation of privacy persisted despite Gravelle's waiver. And once his privacy rights were engaged by his reasonable expectation of privacy, Gravelle could not waive them on his behalf. Justice Karakatsanis opted, however, to leave the issue of a resident's invitation of the state into a shared home for another day. Justice Côté concurred in the result, concluding that Reeves's constitutional rights had been violated by conduct that was not at issue by the time the case reached the Supreme Court. However, she disagreed with the majority on the issues before the Court, holding that based on Gravelle's waiver Reeves no longer had a reasonable expectation of privacy in either the computer or the home. And finally, Moldaver J. offered a concurring opinion, in which he agreed with the majority's approach to the computer, yet concluded that the issue of the shared home should be canvassed. As I discuss in Part V below, he believed that Reeves may have had a reasonable expectation of privacy in the home, but that the police entry in this context would be a justifiable infringement of that right.

²⁰ *R. v. Reeves*, [2018] S.C.J. No. 56, 2018 SCC 56, at para. 18 (S.C.C.).

²¹ *R. v. Cole*, [2012] S.C.J. No. 53, 2012 SCC 53 (S.C.C.) [hereinafter “*Cole*”].

²² *R. v. Reeves*, [2018] S.C.J. No. 56, 2018 SCC 56, at para. 18 (S.C.C.).

²³ *Id.*, at para. 45 (emphasis in the original).

2. Reeves's Rights

Writing for the majority, Karakatsanis J. stressed the stakes raised by the case; the issue had the potential to affect the privacy interests of all individuals across the country living with others in a home or sharing a computer.²⁴ In light of the case's potential implications, she sought to resolve the issue before her as narrowly as possible: finding that the seizure of the computer breached Reeves's rights under section 8 and justified exclusion of the evidence, she left the question of the state's invitation into a shared home for another day.²⁵

Justice Karakatsanis observed that there were two ways to interpret the Crown's claim that, because Gravelle had "an equal and overlapping privacy interest in the computer, its removal with her consent did not constitute a 'seizure' within the meaning of the *Charter*."²⁶ First, this could mean that Reeves *no longer had a reasonable expectation of privacy* in the computer in light of Gravelle's consent.²⁷ On this logic, there was no violation of section 8 when the State took the computer, because Reeves no longer had a privacy right in it and thus he was outside the ambit of section 8's protection.

However, Karakatsanis J. determined, this line of argument was inconsistent with the Court's long-standing insistence that reasonable

²⁴ *Id.*, at paras. 2, 23-26. See also *Id.*, at para. 74 (Moldaver J., concurring) (noting the issue of consent entry to a joint home "has the potential to affect a large swath of Canadian society by shifting our understanding of the right to be free from unreasonable search or seizure.").

²⁵ *Id.*, at paras. 20, 22-23, 26. Indeed, by the time of oral argument, Reeves had conceded that the entry into the joint home did not violate his s. 8 rights. *Id.*, at para. 16. However, his argument did not concern the question of whether Reeves had a reasonable expectation of privacy or whether Gravelle could consent to a waive of Reeves's rights. Rather, counsel for Reeves suggested that the police entry to interview Gravelle may not have been a "search" under s. 8. See *Id.*, at para. 72 (Moldaver J., concurring). However, as Moldaver J., indicates in his concurring opinion, this suggestion is inconsistent with the s. 8 jurisprudence which interprets search as "any state action that intrudes upon a reasonable expectation of privacy." *Id.*, at para. 72, citing, *inter alia*, *R. v. Evans*, [1996] S.C.J. No. 1, [1996] 1 S.C.R. 8, at para. 11 (S.C.C.).

²⁶ *Reeves, id.*, at para. 40. Justice Karakatsanis also addressed and dismissed the argument that the mere fact of sharing the computer with others meant that Reeves lacked a reasonable expectation of privacy in it. While control and ownership are relevant in assessing our reasonable expectations of privacy, they are not determinative; thus, the mere fact of joint ownership and use of a computer may diminish an expectation of privacy, it cannot extinguish it. *Id.*, at para. 36. As has been accepted by the Court cases such as *Vu* and *Morelli*, we possess heightened privacy interests in the data contained in personal computers we use: *R. v. Vu*, [2013] S.C.J. No. 60, 2013 SCC 60 (S.C.C.); *R. v. Morelli*, [2010] S.C.J. No. 8, 2010 SCC 8 (S.C.C.). Justice Karakatsanis also concluded that even in the context of a seizure of a computer (rather than a seizure) informational privacy is engaged as it was seized for the purpose of retaining the data for the very purposes of a future search. *Reeves, id.*, at paras. 30-35.

²⁷ *Reeves, id.*, at para. 40.

expectation of privacy is a normative concept rather than a descriptive concept.²⁸ The mere fact that a co-user has access to the information contained on a shared computer and could share that information with the state, does not mean that we *should* accept that the other users no longer have a reasonable expectation of privacy in that computer *vis-à-vis* the state. Indeed, the Supreme Court explicitly rejected this sort of risk-based approach to assessing what expectations of privacy are reasonable in *Duarte*, breaking with the approach to the issue followed in the United States.²⁹

It was not reasonable to suggest, Karakatsanis J. determined, that “by choosing to share our computer with friends and family, we are required to give up our *Charter* protection from state interference with our private lives.”³⁰ Thus, she concluded,

... We are not required to accept that our friends and family can unilaterally authorize the police to take things that we share. The decision to share with others does not come at such a high a price in a free and democratic society.³¹

Moreover, while the privacy rights of one co-rights holder (including her right to both shield and expose her own domains of privacy) may “attenuate a reasonable expectation of privacy [of other rights holders] ... they cannot eliminate it.”³² Thus, Reeves’s reasonable expectation of privacy in the computer, while perhaps diminished by Gravelle’s consent, nonetheless remained. And a diminished and attenuated reasonable expectation of privacy is still one that receives section 8 protection and requires a justification for state infringement.³³

²⁸ *Id.*, at paras. 41-42.

²⁹ *Id.*, at para. 42. See *R. v. Duarte*, [1990] S.C.J. No. 2, [1990] 1 S.C.R. 30 (S.C.C.). See also, Hamish Stewart, “The Normative Foundations for Reasonable Expectations of Privacy” (2011), 54 S.C.L.R. (2d) 335-355, at 335-36 (noting that despite this clear statement in *Duarte*, the Court has in effect engaged in risk analysis in its assessment of reasonable expectation of privacy subsequently; Lisa M. Austin, “Information Sharing and ‘Reasonable’ Ambiguities of Section 8 of the Charter”, (Special Issue, Spring 2007) 57 *Univ. of Toronto L.J.* 499, at 510 (making a similar point and describing the Court’s approach as an “what did you expect” approach to the assessment, which “tends to lapse into a descriptive rather than normative analysis”).

³⁰ *Reeves, id.*, at para. 44.

³¹ *Id.*

³² *Id.* at para. 45.

³³ *Id.*, at para. 47. See also, *R. v. Cole*, [2012] S.C.J. No. 53, 2012 SCC 53, at paras. 9, 58 (S.C.C.) (noting that a diminished expectation of privacy is still protected under s. 8); *R. v. Buhay*, [2003] S.C.J. No. 30, 2003 SCC 30 (S.C.C.) (same); *R. v. M.R.M.*, [1998] S.C.J. No. 83, [1998] 3 S.C.R. 393 (S.C.C.) (same).

The second way one could interpret the Crown's claim that Gravelle's consent rendered the conduct Charter compliant, Karakatsanis J. observed, was that — while Reeves *may have retained a reasonable expectation of privacy* — Gravelle had waived any section 8 protection on Reeves's behalf.³⁴ Where the first interpretation asked whether Reeves had a right in the first place in light of Gravelle's conduct, this second interpretation accepted that he did have a right but asserted that Gravelle had waived it. This too, Karakatsanis J. concluded, was unconvincing. The Court had concluded in *Cole* that a third party (in that case the accused's employer, who owned the computer at issue but did not have a reasonable expectation of privacy in it) could not waive the section 8 rights of the accused.³⁵ And the Crown's claim that the case could be distinguished from *Cole* did not hold up. From Reeves's perspective, Gravelle was no different than the third party in *Cole*:

... While Gravelle undoubtedly has constitutionally-protected privacy interests in the shared computer, this does not entitle her to relinquish Reeves' constitutional right to be left alone Waiver by one rights holder does not constitute waiver for all rights holders.³⁶

After all, allowing one rights holder to waive the right of another would be inconsistent with the Court's earlier insistence that one's consent to waive her own Charter right is only operative when informed and voluntary, to ensure the waiver is "an expression of [the rights holder's] free will."³⁷ If the waiver could come from Person B — whether Person B's own privacy right was at issue or not — it could not represent the expression of Person A's free will.

Justice Karakatsanis's first premise that we have a persisting reasonable expectation of privacy in shared subject matter notwithstanding the conduct of others who have a privacy right in that same subject matter is interesting and consequential in itself, and it is worthy of further comment. However, in this article, my focus is on the

³⁴ *Reeves, id.*, at para. 40.

³⁵ *R. v. Cole*, [2012] S.C.J. No. 53, 2012 SCC 53, at paras. 74-79 (S.C.C.). The principle of third party consent had been accepted in the United States — including for co-rights holders — but this was based on a risk-based approach to assessing the reasonable expectation of privacy. *Id.*, at paras. 75-76. See also, *United States v. Matlock*, 415 U.S. 164 (1974); *Illinois v. Rodriguez*, 497 U.S. 177 (1990). Accepting this approach here, would also be inconsistent with the Court's rejection of the risk-based approach to s. 8 in *R. v. Duarte*, [1990] S.C.J. No. 2, [1990] 1 S.C.R. 30 (S.C.C.). *Cole, id.*, at para. 75. See also *R. v. Reeves*, [2018] S.C.J. No. 56, 2018 SCC 56, at para. 50 (S.C.C.).

³⁶ *Reeves, id.*, at para. 52.

³⁷ *Id.*, at para. 52.

second premise: that we cannot waive the rights we share, a premise which could have significant implications for Charter rights beyond the context of section 8.

3. The Rights of Others

In the abstract, it seems self-evident that we cannot waive the Charter rights of another person; indeed, at every level of court that heard *Reeves*, the judges were unanimous on this point.³⁸ However, while formally accepting this premise, many of these same judges seemed uncomfortable with the implications that followed from it. In particular, they expressed concern for the status of Gravelle's own constitutional rights if she were not entitled to benefit from the waiver of them and thus no longer allowed to fully exercise them as she saw fit. If she were unable to consent to the State's conduct with respect to places and things concerning which she too possessed a right to privacy, then she could not act upon her protected rights in the manner she sought to. As Côté J. stressed in her concurring opinion, the majority's approach "would, in essence, subjugate her rights to his."³⁹

This concern was elevated, Côté J. observed, in the context of the entry to the shared home. A resident must be able to consent to the entry of third parties including the police, and "... [t]o hold otherwise would be to interfere with the consenting cohabitant's liberty and autonomy interests with respect to those spaces."⁴⁰ On this basis, Côté J. concluded that Gravelle's exercise of her right displaced Reeves's constitutional protection;⁴¹ Reeves's reasonable expectation of privacy in the home

³⁸ *Id.*, at para. 112 (Côté J., concurring); *R. v. Reeves*, [2017] O.J. No. 3038, 2017 ONCA 365, at para. 46 (Ont. C.A.); *R. v. Reeves*, [2015] O.J. No. 6750, 2015 ONCJ 724, at paras. 19-20 (Ont. C.J.).

³⁹ *Reeves, id.*, at para. 127 (Côté J., concurring).

⁴⁰ *Id.*, at para. 112 (Côté J., concurring). Justice Côté concluded on this basis that Reeves did not have a reasonable expectation of privacy, as his "reasonable expectation of privacy was not sufficiently capacious to afford constitutional protections against a cohabitant's decision to give the police access to common areas." *Id.* She did not, however, respond directly to the majority's observation that this may have diminished Reeves's reasonable expectation of privacy but could not extinguish it.

⁴¹ As she noted, this is the same conclusion that all provincial appellate courts that considered the issue of the constitutionality of a single resident's consent to police entry prior to *Reeves* had arrived at. *Id.*, at para. 117 (Côté J., concurring). See *R. v. Reeves*, [2017] O.J. No. 3038, 2017 ONCA 365, at para. 46 (Ont. C.A.); *R. v. Clarke*, [2017] B.C.J. No. 2647, 2017 BCCA 453 (B.C.C.A.); *R. v. R.M.J.T.*, [2014] M.J. No. 115, 2014 MBCA 36 (Man. C.A.); *R. v. Squires*, [2005] N.J. No. 253, 2005 NLCA 51 (Nfld. C.A.).

“was not sufficiently capacious to afford constitutional protection against a co-habitant’s decision to give the police access to common areas.”⁴² (Indeed, while this concern was particularly weighty in the context of the shared home, Côté J. felt it extended to the shared computer as well. Thus, she disagreed with the majority’s conclusion that Reeves had a reasonable expectation of privacy in the computer.⁴³)

Even Karakatsanis J., writing for the majority, recognized the significance of Gravelle’s rights. In deciding to leave for another day the issue of whether the entry of the police into a shared home on the basis of a co-habitant’s consent violated the section 8 rights of the other residents, she stressed the importance of the rights of the consenting co-habitant. As she observed, “if a resident cannot consent to police entry to a shared home without the consent of all the other residents, it could undermine the dignity and autonomy of that resident – especially for a victim of crime.”⁴⁴

And yet, it is not immediately clear that Karakatsanis J.’s explanation regarding Reeves’s reasonable expectation of privacy in the shared computer (*i.e.*, that it persisted despite Gravelle’s waiver) would not apply with equal measure to the home.⁴⁵ While the Court has recognized that we possess a heightened informational expectation of privacy in our computers because of the intimate information they reveal,⁴⁶ the Court

⁴² *Reeves, id.*, at para. 112 (Côté J., concurring). In addition to Côté J.’s primary concern with Gravelle’s own right and autonomy, she also concluded that Reeves could not have a reasonable expectation of privacy here because it would “substantially undermine effective law enforcement.” *Id.*, at para. 114 (Côté J., concurring). On this approach to analyzing the threshold privacy entitlement, see Lisa M. Austin, “Information Sharing and ‘Reasonable’ Ambiguities of Section 8 of the Charter” (Special Issue, Spring 2007) 57 *Univ. of Toronto L.J.* 499, at 510:

Because the language of ‘reasonable expectation of privacy’ is used to both describe the balancing exercise outlined in *Hunter*, as well as to determine the threshold question of whether something is a search or seizure, the courts often conflate these two distinct inquiries. When conflated, factors that relate to the state or societal interest in getting access to information can discount the privacy interest at stake.

⁴³ *Reeves, id.*, at para. 127 (Côté J., concurring).

⁴⁴ *Id.*, at para. 24. Notably, while framing this concern in the tenor of privacy rights, what ultimately seems to be behind this concern for Karakatsanis J. is the need to secure the protection of the victim co-habitant’s autonomy and dignity on a *horizontal* basis from the accused. See note 80 and accompanying text.

⁴⁵ As with the computer, consent by one resident may *diminish* a co-resident’s reasonable expectation of privacy in the home, but it would seem surprising to say it extinguishes it all together. On the ways in which entrance into the home might be justified on this basis, however, see Part V.

⁴⁶ See *R. v. Vu*, [2013] S.C.J. No. 60, 2013 SCC 60 (S.C.C.); *R. v. Morelli*, [2010] S.C.J. No. 8, 2010 SCC 8 (S.C.C.). However, as Côté observed, what was at issue in this case was seizure of the computer as opposed to a search of it. *R. v. Reeves*, [2018] S.C.J. No. 56, 2018 SCC 56, at paras. 123-125 (S.C.C.) (Côté J., concurring).

has also long recognized that we possess an elevated territorial expectation of privacy in the home.⁴⁷ As the Court observed in *Silveira*, “[t]here is no place on earth where persons can have a greater expectation of privacy than within their ‘dwelling-house’.”⁴⁸ Indeed, the very origin of section 8 derives from the common law’s protection of the home against physical entry by the state.⁴⁹ Thus it would seem, for the same reasons that Reeves’s reasonable expectation of privacy in the computer persisted despite Gravelle’s waiver, his reasonable expectation of privacy in the home should likewise endure.

On this basis, Reeves’s section 8 rights should prohibit the entry of the police into the home, unless he consented to their entry or the entry was justified as a reasonable search. And as Karakatsanis J. observed in the context of the computer, it would seem that Gravelle’s consent to the police entry would not be the relevant consent; as she stressed, “[w]aiver by one rights holder does not constitute waiver for all rights holders.”⁵⁰ Thus, while she refrained from analyzing the issue, it is unclear how Karakatsanis J. could approach the question of entry into the shared home in a different manner. And on this analysis, Gravelle’s right to privacy and her “dignity and autonomy”, with which Karakatsanis J. (and Côté J.) were concerned seem to fade into the background.

The challenge stressed by Côté J., and noted by Karakatsanis J., requires thinking about *why* we cannot waive the Charter rights of another. Despite the consensus among the judges that we cannot waive the rights of others, their analysis does not offer a thorough explanation or justification. The majority suggested that this premise follows from the fact that the case law requires that a primary rights holder’s own

⁴⁷ See, e.g., *R. v. Tessling*, [2004] S.C.J. No. 63, 2004 SCC 67, at para. 140 (S.C.C.) [hereinafter “*Tessling*”]; *R. v. Evans*, [1996] S.C.J. No. 1, [1996] 1 S.C.R. 8, at para. 42 (S.C.C.); *R. v. Gomboc*, [2010] S.C.J. No. 55, 2010 SCC 55, at para. 45 (S.C.C.) [hereinafter “*Gomboc*”]. This is a point that Karakatsanis J. acknowledges: *Reeves*, *id.*, at para. 24.

⁴⁸ *R. v. Silveira*, [1995] S.C.J. No. 38, [1995] 2 S.C.R. 297, at para. 140 (S.C.C.).

⁴⁹ See *Semayne’s Case* (1604), 77 E.R. 194 (U.K. K.B.); *Entick v. Carrington* (1765), 95 E.R. 807 (U.K. K.B.). See also, *Hunter v. Southam Inc.*, (*sub nom. Canada (Combines Investigation Acts, Director of Investigation and Research) v. Southam Inc.*) [1984] S.C.J. No. 36, [1984] 2 S.C.R. 145, at 157-58 (S.C.C.) (making the connection to these origins); *R. v. Dyment*, [1988] S.C.J. No. 82, [1988] 2 S.C.R. 417, at 426 (S.C.C.) (La Forest J., concurring) (discussing these common law cases, and suggesting that the contemporary protection of s. 8 should be derived by analogy to what the original protection of the home was meant to secure). Notably unlike in the cases of *Tessling*, *Gomboc*, and *Patrick*, the search at issue in *Reeves* involved the physical entry into the claimant’s home: the very thing that the protection underlying s. 8 was intended to protect. See *R. v. Gomboc*, [2010] S.C.J. No. 55, 2010 SCC 55, at paras. 49-50 (S.C.C.) (making this distinction).

⁵⁰ *R. v. Reeves*, [2018] S.C.J. No. 56, 2018 SCC 56, at para. 52 (S.C.C.).

waiver must be informed and freely given: if someone else consents then it will not be a free and informed waiver from the claimant. However, this analysis seems to beg the question rather than answer it.⁵¹ As a result, we are left with the question of precisely why we cannot consent to waive the rights of another, even when this restriction would limit the exercise of our own rights (including, our ability to waive our Charter rights).

III. WHY WE CANNOT WAIVE THE RIGHTS OF OTHERS

Despite agreement among the judges that one cannot waive the rights of others, it is worth interrogating this premise further. After all, recognizing Gravelle's ability to waive Reeves's Charter rights would offer a straightforward and clear solution to how we might adjudicate overlapping rights claims. Moreover, it would offer a solution that addresses the concerns Côté and Karakatsanis identified with respect to the status of Gravelle's own rights. So why is it that we cannot simply waive the constitutional rights of others? As I explain in this section, to understand why it would be so problematic to permit one person to waive the constitutional rights that protect another, we need to understand the relationship between state authority and constitutional rights.

The best account of what justifies the robust public authority of the state, especially in the context of criminal law,⁵² is that such authority is necessary to secure the equal autonomy and dignity of all members of society under the law.⁵³ Specifically, the authority of the state is

⁵¹ *Id.* Moreover, the original discussion in *Borden and Wills* justifying the conditions under which s. 8 can be waived is thin. See *R. v. Borden*, [1994] S.C.J. No. 82, [1994] 3 S.C.R. 145, at 160-62 (S.C.C.); *R. v. Wills*, [1992] O.J. No. 294, 7 O.R. (3d) 337 (Ont. C.A.).

⁵² On the particular challenge posed by criminal law: see Malcolm Thorburn, "Punishment and Public Authority" in Antje Du Bois-Pedain, Magnus Ulvang & Petter Asp, eds., *Criminal Law and the Authority of the State* (London: Hart, 2017) 7.

⁵³ The principle that we should structure political relations around the premise that we must secure our equal autonomy and dignity has centuries' old roots, and is evident in various forms across a wide swath of contemporary political, moral, and legal theory. See, e.g., Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Oxford University Press, 1999); T.R.S. Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism* (Oxford: Oxford University Press, 1994); T.R.S. Allan, *The Sovereignty of Law: Freedom, Constitution and Common Law* (Oxford: Oxford University Press, 2013); Jacob Weinrib, *Dimensions of Dignity: The Theory and Practice of Modern Constitutional Law* (Cambridge: Cambridge University Press, 2016); Anna Stilz, *Liberal Loyalty: Freedom, Obligation, and the State* (Princeton, NJ: Princeton University Press, 2009); Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Cambridge, MA: Harvard University Press, 2009).

necessary to secure the autonomy and dignity *between* each member of the community — what might be called *horizontal* autonomy. By creating a legal order, the state establishes the “basic rules according to which people shall organise their shared lives together in the jurisdiction.”⁵⁴ This is something we cannot do without the legal structure provided by the state setting out, adjudicating, and enforcing rules that apply to us all equally. We can contrast this structure of rule of law with rule by might, where the rules regarding how we treat each other are determined by each of us individually (such that we are subject to domination by powerful private persons).⁵⁵ The state’s ability to secure the rule of law creates the possibility of a condition of equal autonomy and dignity between each of us that we would lack without it.⁵⁶

However, securing equality under the rule of law creates a new problem: it entails establishing robust public authority that can *also* act in a way that is inconsistent with the very autonomy and dignity of persons it was meant to protect.⁵⁷ We create a new danger that the state will exercise its coercive power in a way that is inconsistent with its purpose of securing our equal status under the law. This might be described as the problem of *vertical* autonomy: the challenge of creating a vertical relationship between the state and citizen that is consistent with the autonomy and dignity of the individual. This is where constitutional rights come in: they serve as the enforceable limits on state power that can secure the autonomy and dignity of the individual on a vertical basis,

⁵⁴ Malcolm Thorburn, “Punishment and Public Authority” [hereinafter “Thorburn”] in Antje Du Bois-Pedain, Magnus Ulvang & Petter Asp, eds., *Criminal Law and the Authority of the State* (London: Hart, 2017), 7, at 9.

⁵⁵ Jacob Weinrib, *Dimensions of Dignity: The Theory and Practice of Modern Constitutional Law* (Cambridge: Cambridge University Press, 2016), at 56 (noting that without the state, we encounter the problem of unilateral conduct and “lawlessness, in which the independence of each is subject to the arbitrary choice of every other”); Thorburn, *id.*, at 28-30 (distinguishing this claim about law’s relationship to equality from claims of practical necessity of entering a state for the purposes of coordination proposed by Locke and Hobbes); Arthur Ripstein, *Force and Freedom: Kant’s Legal and Political Philosophy* (Cambridge, MA: Harvard University Press, 2009). The primary concern here is not simply that we are, in fact, subjected to powerful private persons, but that our rights are ultimately always at the whim of such others.

⁵⁶ Malcolm Thorburn, “Proportionality” in David Dyzenhaus & Malcolm Thorburn, eds., *Philosophical Foundations of Constitutional Law* (Oxford: Oxford University Press, 2016) 306, at 316. This is not to say that domination is removed by a system of law, or all legal systems in practice demonstrate this form. However, this premise offers the best account of what might justify public authority and the standard against which we can assess the merits of existing frameworks.

⁵⁷ Jacob Weinrib, *Dimensions of Dignity: The Theory and Practice of Modern Constitutional Law* (Cambridge: Cambridge University Press, 2016), at 59 [hereinafter “Weinrib”].

from the overreach of state power.⁵⁸ In this way, securing the equal autonomy and dignity of those within the state is both the justification for and the limit on state authority.

And section 8 is a prime example of this conception of the limits of state authority. As Rowe J. recently observed in his concurring opinion in *Jarvis*, section 8 is fundamentally about the relationship between state and citizen:

... Section 8 of the *Charter* limits the powers of the state vis-à-vis its citizens. It limits the investigative powers of the state, and maintains a check on the action of the police. The imbalance between the state and its citizens is fundamental. Protecting citizens from the abuse of authority by the state is the context that defines the interests to be safeguarded by the s. 8 ‘reasonable expectation of privacy’.⁵⁹

The purpose of the provision — securing vertical autonomy in light of the power imbalance between state and citizen — is central to its application.⁶⁰

Likewise, as La Forest J. stressed in *Dyment*, the protection of section 8 is fundamentally concerned with securing the autonomy and dignity of the individual from state overreach. This protection, he observed, is a constituent part of a legal and political order structured around the rights of the individual:

... Grounded in man’s physical and moral autonomy, privacy is essential for the well-being of the individual. For this reason alone, it is worthy of constitutional protection, but it also has profound significance for the public order. The restraints imposed on government to pry into the lives of the citizens go to the essence of a democratic state.⁶¹

⁵⁸ See, e.g., Weinrib, *id.*, at 152; Malcolm Thorburn, “Proportionality” in David Dyzenhaus & Malcolm Thorburn, eds., *Philosophical Foundations of Constitutional Law* (Oxford: Oxford University Press, 2016), 306, at 321-22.

⁵⁹ *R. v. Jarvis*, [2019] S.C.J. No. 10, 2019 SCC 10, at para. 99 (S.C.C.) (Rowe J., concurring) [hereinafter “*Jarvis*”].

⁶⁰ On this basis, Rowe J. concluded in *Jarvis*, the principles guiding its interpretation could not apply with equal force when interpreting ideas of privacy on a horizontal level between persons in the application of s. 162 of the *Criminal Code*, R.S.C. 1985, c. C-46: *Jarvis, id.*, at paras. 95, 101 (Rowe J., concurring). While the majority disagreed with Rowe J. on whether the principles guiding the interpretation of s. 8 are relevant in the context of s. 162. However, they did not disagree about this fundamental purpose of s. 8. See *Jarvis, id.*, at paras. 57-58.

⁶¹ *R. v. Dyment*, [1988] S.C.J. No. 82, [1988] 2 S.C.R. 417, at 427-28 (S.C.C.) (La Forest J., concurring). See also, Lisa Austin, “Privacy and the Question of Technology” (2003) 22 *Law & Phil.* 119, at 147 (discussing the relationship between privacy and the liberal conception of the self);

Indeed, "... [t]he ultimate justification for a constitutional guarantee of the right to privacy", he observed in *Thomson Newspapers* "is our belief, consistent with so many of our legal and political traditions, that it is for the individual to determine the manner in which he or she will order his or her private life."⁶²

Thus, when it comes to our protection under section 8 — as with other constitutional rights — the purpose of the right is to protect an individual from the state. While other people may have protection concerning the same subject matter (be it privacy in the context of section 8, a religious practice under section 2(a), or otherwise), the relevant relationship for assessing the nature and scope of the right is a vertical one between the state and citizen. This is precisely what Karakatsanis J. suggested in *Reeves* when she observed that, with respect to constitutional rights, anyone else (that is, anyone who is not the state or the claimant) is a third party in the sense of *Cole*.

This relationship between public authority and constitutional rights helps us see why it would be so problematic to permit one person to waive the constitutional rights of another. Public authority is meant to secure our autonomy and dignity from other private persons; and constitutional rights are meant to secure our autonomy and dignity from the resulting power of the public authority. To allow one person to waive the rights that protect another person from the state would put us right back where we started: having our rights and freedoms determined by the say-so of another person. Accepting that one person can waive the constitutional rights of another would undermine the very purpose of state authority, by allowing one person to determine what can be done with the person, property, or information of another.

IV. HOW DO WE DEAL WITH OVERLAPPING RIGHTS?

The above analysis offers some conceptual and normative clarity as to why one person cannot waive another's constitutional rights. However, if the issue in *Reeves* entails adjudicating rights in a context of two *overlapping* claims of a constitutional right — as the Crown,

Jeffrey H. Reiman, "Driving to the Panopticon: A Philosophical Exploration of the Risks of Privacy Posed by the Highway Technology of the Future" (2012) 11 Santa Clara High Tech L.J. 27, at 42 (same).

⁶² *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] S.C.J. No. 23, [1990] 1 S.C.R. 425, at 517 (S.C.C.).

Karakatsanis, and Côté suggest it does — the discussion in Part III ultimately seems unsatisfying. (I suggest in Part V that perhaps the Crown, Karakatsanis, and Côté’s approach is not the best way to understand what is at issue in *Reeves*; however, for the moment I consider how we might address the issue as they have framed it.) In the context of overlapping constitutional rights, such as those held by Reeves and Gravelle, it would seem (and Côté stresses) that the fact that we cannot waive the rights of another person prevents us from acting on our *own* rights as we see fit.⁶³ And while the prohibition of waiving someone else’s right might be justified by the need to secure the autonomy and dignity of the protected rights holder, as Karakatsanis and Côté JJ. suggest, Gravelle’s inability to effectively waive her own right to privacy likewise seems to undermine *her* autonomy and dignity.⁶⁴ The theory of state authority I discussed above explains why we cannot rely on one’s ability to waive the rights of another to solve this problem. However, as I discuss in this section, this same account of state authority also points to an alternative means of resolving the challenge of adjudicating claims of overlapping rights: through the framework of proportionality. Moreover,

⁶³ I assume for the moment that this is the case, as such a premise seems to underpin the positions of the Crown, Karakatsanis, and Côté JJ. To the extent that I accept that waiver of a right *might* be viewed as an exercise of that right, I am not claiming that possessing a right *necessarily* entails the ability to waive it. In other words, the statement that the ability to waive one’s right might be an exercise of that right is not a claim that every right must be waivable (and thus that no rights are inalienable). Thus, my argument does not subscribe to a will theory of rights, which are often critiqued for their inability to recognize that certain rights (such as the right not to be enslaved) are inalienable. See, e.g., H.L.A. Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* (Oxford: Clarendon Press, 1982), at 183 (delineating a will theory of rights, describing a rights holder as a “small scale sovereign” with respect to the right at issue); D.N. MacCormick, “Rights in Legislation” in PMS Hacker & Joseph Raz, eds., *Law, Morality and Society: Essays in Honour of HLA Hart* (Oxford: Oxford University Press, 1977) 189, at 197 (noting the inability of will theorists to account for inalienable rights). Instead, I am simply suggesting that for those rights (such as the right to be free from unreasonable search and seizure), which we have recognized *are* waivable, the decision to waive a right might plausibly be viewed as a form of exercising that right. See note 19 and accompanying text (discussing the recognition of the ability to waive s. 8 of the Charter). Nevertheless, I discuss further below precisely what we should view to be the consequences of one’s waiver of a constitutional right (*i.e.*, whether it necessitates that the state be able to *act upon* that waiver or not). See note 79 and accompanying text.

⁶⁴ *R. v. Reeves*, [2018] S.C.J. No. 56, 2018 SCC 56, at para. 24 (S.C.C.) (noting that not recognizing the constitutionality of police entrance on the invitation of one resident would “undermine the dignity and autonomy of that resident – especially for a victim of crime”); *Id.*, at para. 112 (Côté J., concurring) (noting, that we must allow a co-habitant’s consent to negate the reasonable expectation of privacy of other residents, and that “... [t]o hold otherwise would be to interfere with the consenting cohabitant’s liberty and autonomy interests with respect to those spaces”).

as I will argue, this is the same solution that the Charter itself would suggest.

The Crown in *Reeves* described Reeves's and Gravelle's privacy rights as "equal to and overlapping with" one another, suggesting a collective entitlement in a single subject matter.⁶⁵ However, as the analysis above demonstrates, the rights at stake in *Reeves* were in fact of a different normative structure. Instead of a collective entitlement, Reeves and Gravelle each held discrete rights in the same subject matter. And, at least as understood by Côté J., these rights should be considered *competing*, because the fulfilment of one seems to challenge the fulfilment of the other.

In contemplating how to resolve this conflict, it is worth returning to the idea of state authority discussed in Part III. Where the aim of securing our equal autonomy and dignity under the law is both the justification for and limit on state authority, there must be a means of addressing instances of conflict where securing the autonomy and dignity of one person is inconsistent with securing that of another.⁶⁶ And scholars such as Malcolm Thorburn and Jacob Weinrib have demonstrated that proportionality fulfils this role.⁶⁷ Proportionality, Thorburn, argues offers "a mechanism through which we can ensure any resolution of ... conflict [caused by the demands of such an account of state authority] is justifiable in terms of that same account of legitimate state action."⁶⁸ Proportionality allows us to consider whether a limitation of a right is based on a pressing and substantial objective — such as "public safety, order, health, or morals or the fundamental rights and freedoms of others"⁶⁹ — that are themselves required to secure respect for equal autonomy and dignity under the law.⁷⁰ It allows us to assess whether the proposed limitation on the right is rationally connected to that objective, and is minimally impairing — in other words, to assess whether there is

⁶⁵ *Id.*, at para. 18.

⁶⁶ Malcolm Thorburn, "Proportionality" [hereinafter "Thorburn, 'Proportionality'"] in David Dyzenhaus & Malcolm Thorburn, eds., *Philosophical Foundations of Constitutional Law* (Oxford: Oxford University Press, 2016), 306, at 321-22.

⁶⁷ Thorburn, "Proportionality", *id.*; Jacob Weinrib, *Dimensions of Dignity: The Theory and Practice of Modern Constitutional Law* (Cambridge: Cambridge University Press, 2016), at ch. 7.

⁶⁸ See Thorburn, "Proportionality", *id.*

⁶⁹ *R. v. Big M Drug Mart Ltd.*, [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295, at 337 (S.C.C.) (emphasis added). See also, *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103, at 136 (S.C.C.) [hereinafter "*Oakes*"]. This admittedly requires a narrower scope of pressing and substantial objectives currently recognized in Canadian law.

⁷⁰ Jacob Weinrib, *Dimensions of Dignity: The Theory and Practice of Modern Constitutional Law* (Cambridge: Cambridge University Press, 2016), at 222-23.

an “actuality” of a conflict caused by the aims of the framework of state authority.⁷¹ And where a true conflict is found, an assessment of proportionality *stricto sensu* should seek the outcome most consistent with the overarching aim of state authority to respect the autonomy and dignity under the law of all persons.⁷²

Under this account, the justifiable limitation on rights and the rights that are restricted by these limitations are both animated by the same principles that underlie state authority. As described by Dickson C.J.C. in *Oakes*, “... [t]he underlying values and principles of a free and democratic society are the *genesis* of the rights and freedoms guaranteed by the Charter and the *ultimate standard against* which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.”⁷³ Competing constitutional rights claims are one manifestation of this framework, where both the limit and the protected right reflect the animating and limiting aims of state authority.

And indeed, in the face of competing rights claims — including in the context of criminal law — the Court has turned to a framework of proportionality in more and less formal ways. For instance, in *R. v. N.S.*, when faced with the competing freedom of religion of the complainant and the fair trial rights of the accused, McLachlin C.J.C., writing for the majority, held that the “answer lies in a just and proportionate balance ... based on the particular case before the Court.”⁷⁴ Likewise, in *Mills*, when faced with balancing the privacy rights of complainants with the trial rights of the accused, Lamer C.J.C., writing in dissent, sought to balance these competing rights under section 1 of the Charter.⁷⁵ The majority in *Mills* also made an effort to balance the privacy rights of the complainant with the rights of the accused through a framework of right and justified limitation — though not through a formal proportionality assessment.⁷⁶

⁷¹ *Id.*, at 229.

⁷² *Id.*

⁷³ *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103, at 136 (S.C.C.) (emphasis added). See also Weinrib, *id.*, at 242 (discussing this quote in this context), and *id.*, at 229 (noting that “the yardstick against which these quantities are set is the ideal of public justice or human dignity under law, which, as we have seen, forms the basis of both constitutional rights and the purposes for which they can be justifiably limited”).

⁷⁴ [2012] S.C.J. No. 72, 2012 SCC 72, at para. 31 (S.C.C.).

⁷⁵ *R. v. Mills*, [1999] S.C.J. No. 68, [1999] 3 S.C.R. 668 (S.C.C.).

⁷⁶ *Id.* They suggested engaging in the balancing with the principles of fundamental justice themselves under s. 7.

The Court, when seeking to balance between competing Charter rights, has sought a proportionate balance between the two.⁷⁷

V. RETURNING TO *REEVES*

With this analysis in hand we can return to the decision in *Reeves*. In light of the discussion thus far, we can better understand the role that the consent of a co-rights holder (such as Gravelle) should play. Justices Côté and Karakatsanis suggested that we need to keep Gravelle’s own privacy rights in view — as well as her “autonomy and liberty” — when assessing Reeves’s section 8 rights. Justice Karakatsanis was wary of addressing the issue of the state’s entry into the shared house in light of the implications for Gravelle’s rights. Justice Côté agreed, and, in fact, held that we should interpret the scope of Reeves’s privacy right in a way that was responsive to Gravelle’s exercise of her own entitlement (effectively permitting Gravelle to waive Reeves’s right). We can now see why Côté J.’s proposed approach would be so problematic: it would allow one person to determine the parameters of a constitutional right held by another, and thus undermine the very purpose of state authority and constitutional rights.⁷⁸

Yet our discussion thus far also demonstrates that the rights of others should nevertheless have *some* role in the adjudication of a claimant’s constitutional rights. While the impact on the rights of others cannot define the scope of a right that we possess, this is exactly the sort of thing we should take into account in determining if a limitation of our right is justified. The constitutional rights of others should not inform how we interpret what rights we possess *vis-à-vis* the state; however, the rights of others might rightfully inform when and why the state is justified in infringing upon our rights. As I argued above, we can make this determination through the framework of proportionality. This is the approach to take when faced with two competing rights, and this may

⁷⁷ A similar logic is at play in the Court’s analysis in *Trinity Western University* in the context of administrative law: see *Law Society of British Columbia v. Trinity Western University*, [2018] S.C.J. No. 32, 2018 SCC 32 (S.C.C.).

⁷⁸ There is also a very different sort of concern that arises with consent searches, namely whether they are truly consensual. See, e.g., Roseanna Sommers & Vanessa K. Bohns, “The Voluntariness of Voluntary Consent: Consent Searches and the Psychology of Compliance”, 128:7 *Yale L.J.* 1962 (2019). Concerns of this sort seem to arise on the facts of *Reeves* as well: see *R. v. Reeves*, [2018] S.C.J. No. 56, 2018 SCC 56, at para. 46 (S.C.C.). Such practical problems are certainly important but are different in kind from those addressed in this article.

likewise be the proper approach when faced with “overlapping” rights of two or more claimants that manifest as competing rights such as the circumstance in *Reeves*.

However, there also might be a different way of thinking through the problem of *Reeves* itself. The Crown described the case as an instance of “overlapping” privacy rights, and Côté and Karakatsanis JJ., seem to accept this framing in their respective approaches to the case. The discussion thus far has taken this framework as our starting point, and has offered a suggestion of how we might approach such contexts if they truly are instances of overlapping or competing vertical (or constitutional) rights. However, through the analysis above, we can also see that there seems to be another way of looking at the problem altogether that is immanent in Moldaver J.’s concurring opinion. While not identifying it directly in these terms, Moldaver J. seems to view the issue raised by *Reeves* as not involving the relationship between Reeves’s and Gravelle’s respective vertical autonomy (to privacy from the state), but rather as concerning the relationship between Reeves’s *vertical* autonomy from the state and Gravelle’s (and others) *horizontal* autonomy from private persons. With the context of our discussion in Part III, this distinction now becomes clear. Implicit in Moldaver J.’s decision is the — arguably correct⁷⁹ — view that despite the suggestion of the Crown, Karakatsanis J., and Côté J., the case was perhaps not about *overlapping* rights at all.⁸⁰

⁷⁹ I accepted above that the waiver of a right might rightly be viewed as an exercise of that right. See note 63 and accompanying text. However, the waiver of an individual’s right to privacy does not necessarily mean that the state *must be able* to intrude upon the otherwise protected zone. Indeed, one could waive her right to privacy in a context where the state has no interest in intruding at all. The fact that the state fails to intrude upon this otherwise protected space does not mean that the individual has not effectively waived her right. The same could be true of a situation like *Reeves*, suggesting that despite the view of the Crown, Karakatsanis J., and Côté J., the case is perhaps better thought of, not as a context of overlapping vertical rights, but as a context of competing horizontal and vertical rights. In short whether we view the case as best understood as balancing two vertical rights or horizontal and vertical rights depends on how we think about the effect of a waiver of rights. While Moldaver J.’s reading of the situation seems *prima facie* to be the more apt one, I leave for another day a full defence of this position.

⁸⁰ In fact — while they treat the case as involving the balance between Reeves’s and Gravelle’s right to privacy — the premise that we should actually be concerned with the balance between Reeves’s vertical autonomy and the horizontal autonomy of persons also seems to be in the background behind Karakatsanis J.’s and Côté J.’s decisions. For instance, as discussed above, what Karakatsanis J. finds particularly challenging about the constitutionality of the invitation of the police into a joint home are the implications for *autonomy of victims of crime* if they cannot invite the police into the home. See *R. v. Reeves*, [2018] S.C.J. No. 56, 2018 SCC 56, at para. 24 (S.C.C.); see also *id.*, at para. 112 (Côté J., concurring). Unless we are concerned with securing the horizontal autonomy of persons from others, it is not clear why being a victim of crime would be relevant to

Justice Moldaver agreed with the majority that Reeves retained his reasonable expectation of privacy in the shared computer and that its seizure represented a violation of section 8. However, Moldaver J. worried about the majority's choice to refrain from commenting on the question of whether one resident can invite the police into a shared house. The determination of whether or not the police entrance upon such an invitation violated the section 8 rights of the other non-consenting residents was of such importance for Canadian law, and Canadian society, Moldaver J. indicated, that he felt compelled to "express some tentative views" on the matter.⁸¹

Unlike Côté J., he did not think we should approach the issue by concluding that Reeves no longer had a reasonable expectation of privacy in the home after Gravelle consented. Rather, Moldaver J. accepted (at least for the sake of his "tentative views") that Reeves *retained* a reasonable expectation of privacy in the home — even after Gravelle's waiver of her right — and thus Reeves retained a protected privacy right. Nevertheless, Moldaver J. suggested that the State's entrance into the joint home might be lawful as a justifiable restraint on Reeves's right — a search, but a *reasonable* search under section 8. As a reasonable search must be authorized by law,⁸² he proposed locating the authority of the State in the common law ancillary powers doctrine under *R. v. Waterfield*.⁸³

Applying *Waterfield* involves assessing whether (1) the police conduct was aimed at an important police duty (such as protecting life, preventing crime, or "keeping the peace"); (2) the interference with the individual's liberty was necessary to fulfil that duty; and (3) the interference was on balance proportional.⁸⁴ Where the conduct fulfils this standard it will be justified as a lawful exercise of police power under the common law, even in the absence of explicit legislative or judicial authority for the conduct. The structure of the *Waterfield* test, notably, mirrors the proportionality analysis under section 1 of the Charter: assessing rational connection, minimal impairment, and overall

this analysis as it has no affect on the nature of one's vertical right (to privacy) *vis-à-vis* the state. In any event, there remains, in a sense, a concern with competing rights that need to be balanced proportionately; they just are not the rights that first appeared to be at issue.

⁸¹ *Id.*, at paras. 71, 74-75 (Moldaver J., concurring).

⁸² See note 18 and accompanying text.

⁸³ [1963] 3 All E.R. 659 (Crt. Crim. App.) [hereinafter "*Waterfield*"].

⁸⁴ See *R. v. Reeves*, [2018] S.C.J. No. 56, 2018 SCC 56, at para. 78 (S.C.C.) (Moldaver J., concurring), citing *R. v. MacDonald*, [2014] S.C.J. No. 3, 2014 SCC 3, at paras. 34-37 (S.C.C.).

proportionality. On the basis of the *Waterfield* test, Moldaver J. concluded that in the context of an invitation by a co-habitant into a home, a representative of the State might be justified in entering a joint home despite the interference with the rights of the other inhabitants.

While Moldaver J. does refer to the privacy interests of co-habitants like Gravelle,⁸⁵ what ultimately justifies the infringement of a right under the *Waterfield* test is a “police duty” rather than the (vertical) constitutional rights of another. And if we read Moldaver J.’s analysis carefully, we can see how it is a concern with the way in which police duties secure the *horizontal* autonomy of a consenting co-habitant (like Gravelle) that informs his reasoning. Securing the horizontal rights of the consenting resident (and others) from other private persons seems closely connected to the specific police duties he identifies as relevant here (crime prevention, apprehending criminals, and assisting victims of crimes), especially the duty to support potential victims of crime.⁸⁶ Moreover, he defines the conduct in need of justification narrowly — asking when/if the police will be justified in “entering into a shared residence when invited to take a *witness statement in connection with a criminal investigation*”. It is in this specific context that Moldaver J. considers how we might account for the ability of a co-habitant to invite the State in.⁸⁷

⁸⁵ See, e.g., *R. v. Reeves*, [2018] S.C.J. No. 56, 2018 SCC 56, at paras. 82-84 (S.C.C.) (Moldaver J., concurring).

⁸⁶ *Id.*, at para. 79 (Moldaver J., concurring).

⁸⁷ *Id.* (Moldaver J., concurring) (emphasis added). Notably, in the background of Moldaver J.’s analysis seems to be a concern with the privacy rights of the consenting co-habitant. In assessing the necessity of the conduct, Moldaver J. considers the reasons why it might be essential to allow the state to enter on the consent of a single resident in ways that reflect a focus on the privacy rights and autonomy of that resident (e.g., that a witness or victim of crime “may well refuse to [talk to the police] outside the privacy of their homes” due to fear or other reasons; or may be unable to leave the home; or be too far from a police station): *Id.*, at paras. 82-84 (Moldaver J., concurring). This focus is likewise evident in his discussion of whether the importance of the police conduct is on balance proportionate with the interference with the accused’s own privacy rights in the home. In considering this aspect of the test, Moldaver J. outlines several factors that should constrain the proposed police power in a manner which aims to balance the accused’s privacy and the consenting resident’s privacy and autonomy. These include: (1) assessing whether interviewing the person in her home is necessary (*i.e.*, whether the resident prefers doing so); (2) limiting the entry to the purpose of taking a statement; (3) limiting entry to common areas of the home; (4) requiring that the consenting resident has “authority to consent” to entry (*i.e.*, possesses her own reasonable expectation of privacy in the space) and that her consent is informed and voluntary as necessary to waive her own s. 8 rights; and (5) the entry would be limited in duration as required for the statement. *Id.*, at para. 88 (S.C.C.) (Moldaver J., concurring). However, insofar as he justifies such entrance exclusively in the context of a police investigation, it is clear that what is at issue is the need to balance the vertical privacy rights of the accused with the ability of the legal system to secure the horizontal rights of others (including the consenting co-habitant).

Thus, despite the suggestion by the Crown, Côté, and Karakatsanis that the case of *Reeves* concerned overlapping (vertical) privacy rights, there is a reading of Moldaver J.'s reasons that suggests that we might view *Reeves* as a case about a different sort of competing rights: a balance between vertical and horizontal rights.⁸⁸ In either case, as Part IV suggests, the resolution remains the same: such conflicts ought to be resolved through a structure of proportionality.

And as the theory of proportionality described in Part IV would call for, Moldaver J.'s analysis seeks an outcome that resolves the conflict of rights in a manner that is most consistent with respect for the rights of all persons to equal autonomy and dignity. His proposed balance seeks to infringe the accused's privacy right only insofar as is necessary for the investigation (as Thorburn would put the point, "to further the course of justice, which is itself required in order to secure all other rights"⁸⁹) and to respect the autonomy of a co-resident in furthering the course of justice by providing a statement to the police.

It is worth noting that section 8 is peculiar in terms of the many ways in which we might engage in proportionality analysis to consider whether a limitation of the underlying right might be justified (in the case of balancing either horizontal *or* vertical rights). Proportionality analysis could of course take place at the level of section 1, as with any Charter right. In addition, as a consequence of history, section 8 has its own right and limitation structure. The right developed under the common law to permit "reasonable" searches and seizures, and thus in considering what counts as a reasonable limitation, the analysis takes place internal to section 8 itself.⁹⁰ Due to the existence of this internal threshold, violations of section 8 (unreasonable searches) are seldom saved under

⁸⁸ For another application of *Waterfield* where this balance between vertical and horizontal autonomy is more explicit, see *R. v. Godoy*, [1999] S.C.J. No. 85, [1999] 1 S.C.R. 311, at paras. 13-23 (S.C.C.) (discussing, in the context of a police entrance in response to a 911 call, how autonomy underpins *both* the privacy right of the accused and protection of the life and limb of potential victims under the law).

⁸⁹ Malcolm Thorburn, "Proportionality" in David Dyzenhaus & Malcolm Thorburn, eds., *Philosophical Foundations of Constitutional Law* (Oxford: Oxford University Press, 2016), 306, at 321.

⁹⁰ See Thorburn, "Proportionality", *id.*, at 321 (noting, proportionality reasoning "is precisely what was at stake in the common law reasoning that gave rise to the recognition of rights against unreasonable search and seizure, cruel and unusual punishment, excessive bail, and so on. Common law courts had to determine when it was necessary and proportionate for the state to interfere with an Englishman's privacy").

section 1 (as a *justified* limit on rights).⁹¹ And, indeed, scholars such as Austin have suggested that the section 8 reasonableness analysis should more directly and transparently engage with the proportionality factors of the *Oakes* test.⁹² Furthermore, as Moldaver J.'s concurring judgment in *Reeves* demonstrates, courts might also engage in a form proportionality analysis under the assessment of the *Waterfield* test. Finally, as cases like *R. v. N.S.* indicate, as discussed above, the Court has previously engaged in more holistic proportionality analysis in balancing between directly conflicting rights claims.⁹³

The existence of multiple platforms available for this balancing are, as mentioned above, effectively a historical accident; thus, the analysis I offer here is somewhat agnostic as to which should serve as the ideal site of the proportionality analysis. However, some of these tests may be a better fit than others.⁹⁴ What is important, I suggest, is that we should view "overlapping rights" claims as competing rights claims, and that competing rights claims (either between two vertical rights or between horizontal and vertical rights) are best adjudicated through a structure of proportionality. The rights of one person should not affect how we interpret the rights of others; they may, however, constitute reasons for justifiably limiting the rights of others.

VI. CONCLUSION

The Crown, Côté J., and Karakatsanis J. suggest that the case of *Reeves* raises a question of how we should adjudicate claims of overlapping Charter rights, where the manner that co-rights holders

⁹¹ See, e.g., *Hunter v. Southam Inc.*, (sub nom. *Canada (Combines Investigation Acts, Director of Investigation and Research) v. Southam Inc.*) [1984] S.C.J. No. 36, [1984] 2 S.C.R. 145, at 169-70 (S.C.C.); *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, [2002] S.C.J. No. 61, [2002] 3 S.C.R. 209, at para. 46 (S.C.C.); *Baron v. Canada*, [1993] S.C.J. No. 6, [1993] 1 S.C.R. 416, at 453 (S.C.C.).

⁹² Lisa Austin, "Information Sharing and 'Reasonable' Ambiguities of Section 8 of the Charter", (Special Issue, Spring 2007) 57 *Univ. of Toronto L.J.* 499, at 520.

⁹³ *R. v. N.S.*, [2012] S.C.J. No. 72, 2012 SCC 72 (S.C.C.). See also, note 74 and accompanying text.

⁹⁴ On the one hand, it could be argued that the *Waterfield* test's focus on police duties may give insufficient credence to the concern with the respect for the privacy rights of a consenting co-resident that Côté and Karakatsanis JJ. identified. However, on the other, it might be a better way of accounting for the horizontal rights of others (see notes 79-87 and accompanying text). A further consideration may be that assessing proportionality under s. 8 (versus s. 1) demands that the claimant prove that the state conduct is disproportionate, while s. 1 places the burden of proof on the state.

choose to exercise their rights pull in opposite directions. While such claims have been most common in the context of section 8,⁹⁵ the phenomenon is not limited to this right. As I noted at the outset, Charter rights protect a wide swath of conduct that we engage in in collaboration with others. And we could imagine a similar paradigm to that which has emerged in the context of section 8 playing out across these other areas of Charter protection, in which one party consents to state conduct that would otherwise violate the right, contrary to the choice of the other rights holders.⁹⁶

Returning to the examples with which I began, we could imagine, for instance, a situation where one author consented to state censorship imposed for national security reasons which her co-author resisted;⁹⁷ a resident of a municipal public housing unit consenting to restrictions against displaying religious paraphernalia on an apartment balcony that other members of the family did not accept;⁹⁸ and an accused who waives her right to a speedy trial where her co-accused does not.⁹⁹ As with *Reeves*, it may seem unclear how to approach the adjudication of claims arising out of these cases when we conceive of these rights as overlapping or collective entitlements. Can the state stand on the waiver of one rights holder when faced with a Charter challenge by the other? Or, alternatively, would it undermine the exercise of the right by the consenting party if we were to disregard the way they choose to exercise their right altogether?

In this article I have explained how we ought to approach such situations of overlapping rights (though I have also noted that, ultimately, *Reeves* itself might best be viewed as involving something different altogether — specifically, a conflict of vertical and horizontal rights). I have suggested that we should view such contexts not as overlapping

⁹⁵ See note 41 and accompanying text (surveying the provincial appellate courts that addressed similar situations under s. 8).

⁹⁶ On the ways in which waiver of a right may or may not represent an exercise of that right see note 63.

⁹⁷ One could imagine, for instance, that Charter implications might arise in a case like *Buzzanga and Durocher* if it were to arise today. *Cf Regina v. Buzzanga and Durocher*, [1979] O.J. No. 4345, 25 O.R. (2d) 705 (Ont. C.A.).

⁹⁸ *Cf Syndicat Northcrest v. Amselem*, [2004] S.C.J. No. 46, 2004 SCC 47 (S.C.C.) [hereinafter “*Amselem*”]. On the question of whether freedom of religion can be waived, see *Amselem, id.*, at paras. 92-93.

⁹⁹ *R. v. Gopte*, [2017] O.J. No. 4963, 2017 ONCA 728 (Ont. C.A.) (addressing the challenges of *R. v. Jordan*, [2016] S.C.J. No. 27, 2016 SCC 27 (S.C.C.), in the context of multiple party trials). An accused, could of course seek severance of the trial, but the conceptual question remains: see *Criminal Code*, R.S.C. 1985, c. C-46, s. 591.

rights, but as competing or conflicting rights. When recast in this light, this directs us to our ordinary method of mediating among competing constitutional rights: through proportionality. The precise method of adjudicating such cases might vary by context, as evidenced by the various approaches taken in *R. v. N.S.*, *Mills*, *Reeves*, and others. However, the basic idea remains the same: the exercise of the rights of others may act as a justifiable limitation on how we exercise our right, but they cannot affect the way that right is itself interpreted or applied. Moreover, as I have argued, this way of understanding the problem and approaching the solution fits with compelling accounts of what justifies the state's exercise of public authority and the role constitutional rights play in demarcating the limits of that authority.