SCC Court File No.: 37518

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR THE PROVINCE OF NEWFOUNDLAND AND LABRADOR)

BETWEEN:

SEAN PATRICK MILLS

Appellant

- AND –

HER MAJESTY THE QUEEN

Respondent

- AND -

DIRECTEUR DES POURSUITES CRIMINELLES ET PÉNALES DU QUÉBEC, ATTORNEY GENERAL OF ONTARIO, SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY & PUBLIC INTEREST CLINIC, CANADIAN CIVIL LIBERTIES ASSOCIATION, CRIMINAL LAWYERS' ASSOCIATION, CANADIAN ASSOCIATION OF CHIEFS OF POLICE, ATTORNEY GENERAL OF ALBERTA, ATTORNEY GENERAL OF BRITISH COLUMBIA, DIRECTOR OF PUBLIC PROSECUTIONS

Interveners

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(pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW

1. The question whether a claimant has a reasonable expectation of privacy in an electronic conversation impacts more than just standing before the Court; it is a much more fundamental question regarding whether Canadians can expect a zone of privacy for one-to-one digitally-mediated conversations. As Doherty J.A. recently put it: "A finding that a claimant has a reasonable expectation of privacy is not only a description of a specific constellation of factual considerations, but is also a declaration of societal aspirations and values."[1]

2. A zone of privacy for electronic conversations, whether conducted via text message or other means, is essential to the functioning of a free and democratic society. The state should not be permitted to take advantage of the anonymity offered by electronic communications and the digital world in order to surreptitiously record conversations with people at its sole discretion.

3. The Canadian Civil Liberties Association urges the Court to re-affirm the normative and technologically-neutral approach it took to privacy in *R. v. Marakah*.[2] Requiring a person to definitively identify their interlocutor before they are entitled to privacy in an electronic conversation effectively re-introduces a risk analysis approach to s. 8 of the *Charter*. Such an approach has been consistently rejected by this Court and should again be rejected in this case. Relationships formed online are no less worthy of privacy protection than those formed in physical space, and in both cases, even individuals who choose not to self-identify still deserve to hold conversations free of intrusion by the state.

4. The Court should also clarify that law-enforcement aspirations are not relevant to the reasonable expectation of privacy analysis. These interests should only be taken into account when determining if the search was authorized by law or whether evidence should be excluded as the result of a breach of *Charter* rights.

5. The CCLA takes no position on the facts.

PART II – CCLA POSITION ON QUESTIONS ON APPEAL

6. The CCLA submits:

(1) People have a reasonable expectation of privacy in one-to-one electronic communications, regardless of the technological medium used to facilitate the

[1] *R. v. Orlandis-Habsburgo,* 2017 ONCA 649, at para. 41.
[2] *R. v. Marakah,* 2017 SCC 59, [2017] 2 SCR 608.

conversation. The reasonable expectation of privacy analysis under s. 8 must be technologically-neutral. The focus is on the nature of the communications, not on the medium in which it takes place;

(2) A person does not have to confirm the identity of their interlocutor in order to have a reasonable expectation of privacy in their conversation. Such a requirement would be inconsistent with Canadian values of privacy in the digital age because it would undermine a person's ability to choose what information they share, and with whom they share that information. It would also re-introduce the risk analysis rejected by this Court in *Duarte*;

(3) Law-enforcement goals are not relevant at the standing stage of the s. 8 analysis.

PART III – STATEMENT OF ARGUMENT

A. Protecting a zone of privacy for electronic communications is essential

a. The right to privacy includes the right to be left alone by the state

7. Privacy encompasses both the "right to be left alone by other people" and the "right to be left alone by the state."[3] People should be free to express themselves and form relationships without the prying eye of the public or the fear of state intrusion. As argued by Professor Austin, the protection of a private space in which to be "distinct individuals" and to have an "authentic inner life and intimate relationships" is essential to the conception of privacy.[4] Professor Stewart also emphasizes the need to protect private spaces:

> To be free to think and to form beliefs and opinions requires not just public spaces for expression and debate but also private spaces for thought and contemplation, for reading controversial and uncontroversial material alike, for exploring with friends and colleagues ideas that may later be qualified or rejected.[5]

8. The reasons for protecting private spaces apply equally to Canadians' physical and digital lives. Digital devices and electronic communications provide a myriad of ways for self-fulfillment and expression. They allow people to reach beyond their immediate surroundings and form relationships and communities with others around the world. They enable self-expression and debate. Protecting a zone of privacy for people to communicate through

[3] *R. v. Jones*, 2017 SCC 60, [2017] 2 S.C.R. 696 at para. 39; *Orlandis-Habsburgo*, at para. 42.
[4] L. Austin, "Privacy and the Question of Technology" (2003), 22 Law & Phil. 119, at pp. 146-47 ["Privacy and the Question of Technology"].
[5] H. Stewart, "Normative Foundations for Reasonable Expectations of Privacy" (2001) 54 S.C.L.R. 335, at p. 345 ["Normative Foundations"].

electronic means enables individuals to make meaningful choices about their participation in society: "A private inner life is essential to the autonomous individual that forms the basis of a free and democratic society as envisioned by the *Charter*."[6]

b. The normative approach to determining s. 8 claims

9. The Supreme Court has consistently affirmed that the reasonable expectation of privacy standard is normative, rather than descriptive.[7] A normative approach to privacy ensures that the focus of the court's inquiry is on values as opposed to technical mechanisms.

10. The normative approach to privacy is focussed on whether Canadian values permit an intrusion on privacy without complying with the reasonableness standard in s. 8 of the *Charter*.[8] If the state conduct in question undermines Canadian privacy values, the state must meet a burden of constitutionally justifying its conduct.[9] Professor Stewart describes the inquiry this way:

> [T]he ultimate normative question is whether, in light of the impact of an investigative technique on privacy interests, it is right that the state should be able to use that technique without any legal authorization or judicial supervision. Does our conception of the proper relationship between the investigative branches of the state and the individual permit this technique without specific legal authorization?[10]

11. The normative question at issue in this case and others like it is: Can an agent of the state surreptitiously engage in and record conversations with people online without legal authorization or judicial supervision?

12. The CCLA submits that the answer to that question is no. The privacy interest that people have in their electronic communications is too high to allow agents of the state unfettered discretion to engage in and record such conversations with any member of the public.

B. *Marakah* provides a robust framework for deciding this case

13. The normative question at issue in this case should be answered by applying the framework articulated in *Marakah*: (1) What was the subject matter of the alleged search? (2) Did the claimant have a direct interest in the subject matter? (3) Did the claimant have a

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[6] *R. v. Fearon*, 2014 SCC 77, [2014] S.C.R. 621, *per* Karakatsanis J. (in dissent but not on this point) at para. 115.
[7] *R. v. Tessling,* [2004] 3 S.C.R. 432, 2004 SCC 67, at para. 42; *R. v. Spencer*, 2014 SCC 43, [2014] 2 S.C.R. 212, at para. 18; *R. v. Patrick*, 2009 SCC 17, [2009] 1 S.C.R. 579, at para. 14; *R. v. Gomboc*, 2010 SCC 55, [2010] 3 S.C.R. 211, at para. 34.
[8] *R. v. Orlandis-Habsburgo*, at para. 42.
[9] *R. v. Ward,* 2012 ONCA 660, at para. 82.
[10] "Normative Foundations", at p. 342.

subjective expectation of privacy in the subject matter? (4) If so, was the claimant's subjective expectation of privacy objectively reasonable?[11] The *Marakah* framework is technologically-neutral and applies broadly to all claims in which a person is claiming a reasonable expectation of privacy in communications that have been seized by the state.[12]

a. The normative approach to privacy requires a technologically-neutral approach

14. Person-to-person communication tools all use different ways of transmitting, storing, and displaying electronic messages. New mediums for electronic conversation are continuously being developed. A normative approach to privacy is resistant to these technical differences and must focus on the real question: does the claimant have a reasonable expectation of privacy in the electronic conversation at issue? As stated by Abella J. in *TELUS,* "[t]echnical differences inherent in new technology should not determine the scope of protection afforded to private communications."[13]

15. Applying a technologically-neutral approach in *Marakah* led the Court to conclude that the subject matter of the search was the electronic conversation itself and that the claimant had a reasonable expectation of privacy in the subject matter of the search.[14] Framing the subject matter of the search to identify what the police are really after – the electronic conversation – is an essential first step in the s. 8 analysis.

16. The same approach also impacts the question of whether a claimant has an objectively reasonable expectation of privacy. The key holding in *Marakah* that the claimant's text message conversations attracted an *objectively* reasonable expectation of privacy applies equally to cases in which the claimant uses a different medium for person-to-person electronic conversation. The specific technical means by which a conversation is carried out is not relevant to determining whether a person's expectation of privacy in that conversation is an objectively reasonable one. While Chief Justice McLachlin stated that whether a text message conversation will attract a reasonable expectation of privacy is fact-specific and determined on a case-by-case basis, this comment must be understood in context.[15]

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[11] *Marakah*, at para. 11.
[12] *Marakah*, at para. 19.
[13] *R. v. TELUS Communications Co.*, 2013 SCC 16, [2013] 2 S.C.R. 3, at para. 5. See also *R. v. Wong*, [1990] 3 S.C.R. 36, at p. 44.
[14] *Marakah,* at para. 20.
[15] *Marakah*, at para. 5.

17. First, whether a claimant has a reasonable expectation of privacy is assessed in the totality of the circumstances.[16] Second, this totality of the circumstances must include Chief Justice McLachlin's distinction in *Marakah* between private person-to-person electronic communication and participating in more public forums using electronic means. The Chief Justice gave examples of electronic messages that might not attract a reasonable expectation of privacy: "for example, messages posted on social media, conversations occurring in crowded internet chat rooms, or comments posted on online messages boards."[17] In other words, participating in a public forum online may not attract an objectively reasonable expectation of privacy.

18. However, engaging in an electronic conversation with another person *does* attract an objectively reasonable expectation of privacy. There is no principled reason to distinguish the holding in *Marakah* that text message conversations attract a reasonable expectation of privacy on the basis that an electronic conversation took place over a different medium. Accordingly, *Marakah* provides a framework for assessing s. 8 standing claims in all cases involving electronic conversations or communications, not just text messages. The focus of the inquiry is on the private nature of the communication, not on the particular medium used to facilitate that communication.

19. As has been repeatedly recognized by this court, the focus of the s. 8 inquiry is not on the actual contents of the electronic messages seized by the police but on the *potential* for an electronic conversation to reveal personal or biographical information.[18] As held by Chief Justice McLachlin, "it is difficult to think of a type of conversation or communication that is capable of promising more privacy than text messaging."[19] The same is true of other mediums for person-to-person electronic conversations.

b. The reasonable expectation of privacy analysis is multi-factorial

20. Courts have identified numerous factors for determining whether an objectively reasonable expectation of privacy exists in different circumstances.[20] In *Marakah*, this Court

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[16] *Marakah,* at paras. 10-11*; R. v. Cole,* 2012 SCC 53, [2012] 3 S.C.R. 34*,* at para. 39, *Spencer*, at paras. 16-18*; Patrick*, at para. 26; *Tessling,* at para. 19.
[17] *Marakah,* at para. 55.
[18] *Marakah,* at para. 32; *Patrick*, at para. 32; *Wong*, at p. 50; *Cole*, at para. 47; *Tessling*, at para. 25.
[19] *Marakah*, at para. 34.
[20] *Cole*, at para. 45; *Tessling*, at para. 32; *R. v. Edwards,* [1996] 1 S.C.R. 128, at para. 45; *Marakah*, at para. 24.

focussed on three: the place where the search occurred; the private nature of the information; and control over the subject matter.[21]

21. The private nature of the information is particularly important in cases in which the subject matter of the search concerns informational privacy. As stated by Sopinka J., s. 8 of the *Charter* protects 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."[22] The degree to which the information sought by the state tends to reveal personal information guides the normative analysis: "the more personal and confidential the information, the more willing reasonable and informed Canadians will be to recognize the existence of a constitutionally protected privacy interest."[23]

22. The holdings in *Marakah* about the personal nature of text messaging should apply equally to all mediums of one-to-one electronic conversation. Just like text messages, many other electronic communication tools such as e-mail, Google Hangouts, Facebook Messenger, or WhatsApp are designed to facilitate one-on-one private conversations. The information sent over these platforms is intended to be received only by the people to whom the messages are sent. People may be inclined to discuss highly private matters using these platforms *because* the platforms are understood to be private.[24] Indeed, just like text messages, "[t]here is no more discreet form of correspondence" than electronic messaging platforms.[25] As in *Marakah*, it is reasonable for people to expect that such interactions, regardless of the electronic medium used to send those interactions, will remain private.

23. Control "is not dispositive, but only one factor to be considered in the totality of the circumstances" when assessing reasonable expectations of privacy in an electronic conversation.[26] As per *Marakah*, "[a]n individual does not lose control over information for the purposes of s. 8 of the *Charter* simply because another individual possesses it or can access it."

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[21] *Marakah,* at para. 24.
[22] *R. v. Plant*, [1993] 3 S.C.R. 281, at p. 293.
[23] *Cole*, at para. 45.
[24] *Marakah*, at para. 34.
[25] *Marakah* at para. 35.
[26] *Marakah*, at para. 44.

c. A reasonable expectation of privacy is not dependent on confirming the identity of co-conversationalists

24. The focus of the reasonable expectation of privacy analysis must remain on the subject matter: the electronic conversation itself. The risk that a party to that conversation will share that conversation with the state, or is in fact an agent of the state, changes nothing about the private nature of the conversation itself and the reasonable expectation that it will remain private. This holds true whether or not such an individual knows with complete certainty the identity of a communicant on the other end of a digital communication.

25. A focus on whether there is a risk that the information could be shared with the state ignores the normative focus of the s. 8 inquiry: whether the state should be allowed to seize information without constitutional scrutiny. As stated by La Forest J. in *Duarte*:

> [T]he question whether to regulate participant surveillance cannot logically be made to turn on the expectations of individuals as to whether their interlocutor will betray their confidence. No justification for the arbitrary exercise of state power can be made to rest on the simple fact that persons often prove to be poor judges of whom to trust when divulging confidences or on the fact that the risk of divulgation is a given in the decision to speak to another human being.[27]

26. Despite this Court's admonitions, the Newfoundland and Labrador Court of Appeal adopted the risk analysis in this case: the court held that a person does not have a reasonable expectation of privacy because it was risky to communicate with a person whose identity he or she cannot confirm over electronic social media.[28]

27. As held in *Marakah*, the arbitrary exercise of state power cannot rest on the risk that a participant will share that information with the state: "the risk that a recipient could disclose an electronic conversation does not negate a reasonable expectation of privacy in an electronic conversation."[29] Similarly, the risk that a recipient is not who they say they are also does not negate a reasonable expectation of privacy. A person is not required to confirm or attempt to confirm the identity of a communicant in order to have a private conversation with them. To hold otherwise ignores the realities of our digital world.

28. Relationships online are no less worthy of privacy protection than relationships formed at the grocery store or the local pub, regardless of whether the parties to the communication choose to share their real identities. Electronic communication tools are used to communicate beyond a person's immediate surroundings with people from around the world. Requiring a

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[27] *R. v. Duarte*, [1990] 1 S.C.R. 30, at p. 49.
[28] *R. v Mills*, 2017 NLCA 12, at para. 23.
[29] *Marakah*, at para. 40.

person to confirm a co-conversationalist's identity in the "real world" – and, by logical extension, to disclose their own identity – in order to expect privacy in a conversation would ignore the rapid technological change taking place in society and would introduce new and troubling identity-verification requirements for electronic conversations that exceed those in the pre-digital age. Such an approach to privacy would ignore the reality of how Canadians use the Internet and electronic communications. A zone of privacy to engage in social activities through electronic means is essential to the fulfillment of a private inner life, and engaged social participation.

29. The reasonable expectation of privacy analysis does not change because one of the participants to the conversation is an agent of the state. The risk that a communicant will share a person's confidences *with the state* does not justify unregulated state access to our conversations; the risk that a communicant *is an agent of the state* cannot justify the same. Adopting such an approach would be directly contrary to this Court's conclusion in *Duarte*:

> Our perception that we are protected against arbitrary interceptions of private communications ceases to have any real basis once it is accepted that the state is free to record private communications, without constraint, provided only that it has secured the agreement of one of the parties to the communication. Since we can never know if our listener is an informer, and since, if he proves to be one, we are to be taken to be tacitly consenting to the risk that the state may be listening to and recording our conversations, we should be prepared to run this risk every time we speak.[30] [Emphasis added.]

30. The ability to maintain some degree of anonymity is integral to ensuring privacy.[31] The value of anonymity extends beyond anonymous browsing and includes the ability to converse, debate, and explore ideas with others. The possibility of unknowingly communicating with an agent of the state, absent judicial authorization, seriously erodes a person's ability to live an authentic, private life. As articulated by Professor Austin, this "loss of privacy occurs because we feel the pressure to conform to public norms."[32] The wrong is not "had we known we would have acted differently. For acting differently in such a case would mean acting publicly, which itself involves a loss of privacy."[33] As La Forest J. states: "we must always be alert to the fact that modern methods of electronic surveillance have the potential, if uncontrolled, to annihilate privacy."[34]

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[30] *Duarte*, at p. 47.
[31] *R. v. Spencer*, at para. 42; *Ward*, at para. 71.
[32] "Privacy and the Question of Technology", at pp. 146-47.
[33] "Privacy and the Question of Technology", at pp. 146-47.
[34] *R. v. Wong*, at p. 47.

31. Such a loss of privacy is antithetical to Canadian values. Individuals must be free to choose what information they share, and with whom they share that information.[35] Requiring an individual to share their identity, and confirm the identity of their communicant, would place them in a Catch-22 situation. In order to maintain a reasonable expectation of privacy, they would need to share and demand information that they may want to remain private. Such a situation would require Canadians to become "digital recluses in order to maintain some semblance of privacy in their lives."[36] That approach is unjustifiable given this Court's conclusions in *Duarte*, *Marakah* and *Jones*.

32. Holding that there is a reasonable expectation of privacy in an electronic conversation in any given case is not the end of the inquiry. The normative question underlying the reasonable expectation of privacy is whether "the personal privacy claim advanced … must … be recognized as beyond state intrusion absent constitutional justification if Canadian society is to remain a free, democratic and open society."[37]

33. It is always open for the state to justify its conduct by demonstrating that a search and seizure was not unreasonable, or by arguing that evidence obtained should be admitted under s. 24(2) of the *Charter*. As held in *Marakah*, "[s]tanding is merely the opportunity to argue one's case."[38] While concluding that standing exists in any particular case does not decide that case, it also serves as "a declaration of societal aspirations and values" more broadly.[39] It sends a crucial message to Canadians that they can expect a zone of privacy over their electronic conversations.

C. Practical law-enforcement concerns should not impact whether a reasonable expectation of privacy exists

34. Law enforcement uses many techniques to combat crime in the digital world. Concluding that an individual can have a reasonable expectation of privacy in electronic conversations with undercover police officers will undoubtedly impact the use of some of these law-enforcement techniques. Lawful authority for searching and seizing such communications would need to be obtained.

35. But these practical concerns do not impact the reasonable expectation of privacy stage of the analysis. The focus of the expectation of privacy stage of the analysis is on the societal

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[35] *Fearon*, at para. 114.
[36] *Jones*, at para. 45.
[37] *Ward*, at para. 87.
[38] *Marakah*, at para. 51.
[39] *Orlandis-Habsburgo*, at para. 41.

values that are furthered by the protection of privacy. While this Court has referred to the s. 8 analysis as "striking the balance" between the public's interest in being left alone and the government's interest in law enforcement, this balance is not struck within the analysis of whether a person has standing to bring a s. 8 claim.[40] As held by Doherty J.A. in *R. v. Orlandis-Habsburgo*:

> I make one last point about the normative nature of the reasonable expectation of privacy inquiry. The societal values furthered by personal privacy are central to the inquiry. However, other values may also have an impact on that inquiry. I am not referring here to state interests such as law enforcement. Those interests are taken into account in the reasonableness assessment which follows a determination that a reasonable expectation of privacy exists.[41]

36. The law enforcement interests in police investigations using the Internet and electronic communications thus belong in latter stages of the s. 8 analytical framework. These investigative techniques may be reasonable if they have prior judicial authorization or if Parliament creates police powers specifically enabling them. But the fact that the police seek to use these investigative techniques cannot overwhelm the analysis of whether there is a reasonable expectation of privacy in electronic conversations.

PART IV – SUBMISSIONS ON COSTS

37. The CCLA does not seek costs and asks that none be awarded against it.

PART V – NATURE OF THE ORDER REQUESTED

38. The CCLA makes no submissions on the ultimate order to be made.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10th day of May, 2018.

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Frank Addario/James Foy

[40] *Hunter v. Southam Inc.,* [1984] 2 S.C.R. 145, at pp. 159-60; *Tessling*, at paras. 17-18.
[41] *Orlandis-Habsburgo*, at para. 47.

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