Court File No. 40360

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N:

YORK REGION DISTRICT SCHOOL BOARD

Respondent

AND:

ELEMENTARY TEACHERS' FEDERATION OF ONTARIO

Appellant

AND:

ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF QUEBEC, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, BRITISH COLUMBIA TEACHERS' FEDERATION, CENTRE FOR FREE EXPRESSION, ONTARIO COLLEGE OF TEACHERS, POWER WORKERS' UNION AND SOCIETY OF UNITED PROFESSIONALS, NATIONAL POLICE FEDERATION, ONTARIO PRINCIPALS' COUNCIL, CANADIAN ASSOCIATION OF COUNSEL TO EMPLOYERS, EGALE CANADA, DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS, CANADIAN CIVIL LIBERTIES ASSOCIATION, CENTRALE DES SYNDICATS DU QUÉBEC, QUEEN'S PRISON LAW CLINIC

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FACTUM OF THE INTERVENER, THE CCLA

PART I – OVERVIEW

1. From *Hunter v. Southam*[1] and *R. v. Wong*[2] in the late-80s/early-90s through to *R. v. Marakah*[3] in 2017, this Court has consistently emphasized that the s. 8 *Charter* analysis must be content neutral. The question of whether there is a reasonable expectation of privacy must be approached in a "broad and neutral" way—*e.g.*, asking whether there is a reasonable expectation of privacy in the activities of a hotel room or in text communications generally—without delving into the specific activities or conversations of the *Charter* claimant in a given case. This approach is critical to ensure that state actors, whether they be the police or a government employer, know whether they must comply with the requirements of s. 8 *before* they act. If the applicability of s. 8 were to depend on the specifics of what the state finds after it acts (*e.g.*, illegal gambling in a hotel room as in *Wong*, firearms trafficking in text messages as in *Marakah*, or grievances expressed through a shared log as in this case), *ex post facto* justification would become the norm. That is not how s. 8 of the *Charter* was intended to function.

2. In this case, the principle of content neutrality has two ramifications. First, it means that the Court of Appeal for Ontario was right to hold that what matters is the *potential* for the state action to reveal information touching on the claimant's biographical core; not whether the state action *in fact* uncovers information touching on the claimant's biographical core.

3. Second, the principle of content neutrality means that the subject matter of the search must be defined in a categorical way. The category at issue in this appeal (*i.e.*, the class of information targeted) is "private communications"—a category that attracts a high degree of protection under s. 8 because of its potential to reveal the innermost thoughts and emotions of the participants.

4. As technology develops, Canadians will seek out new and different ways of communicating: from traditional phone calls to text messaging apps to a log accessible through a cloud-based service (*e.g.*, Gmail, OneDrive, etc.). To ensure that s. 8 continues to provide

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[1] *Hunter v Southam*, [1984] 2 SCR 145.
[2] *R v Wong*, [1990] 3 SCR 36.
[3] *R v Marakah*, 2017 SCC 59.

meaningful protection as social and technological circumstances change, the Court should take a broad and purposive view of what constitutes a "private communication" under s. 8.

PART II – QUESTIONS IN ISSUE

5. The CCLA intervenes on the question raised by the Appellant of whether the Court of Appeal erred in its analysis of the content and scope of the Grievors' s. 8 rights in the workplace. The CCLA does not take a position on the outcome of the appeal, but it submits that the s. 8 analysis must remain content neutral and that a broad and purposive approach should be taken to characterizing the subject matter of the search as private communications.

PART III - ARGUMENT

A. The Section 8 Analysis Must Remain Content Neutral

6. This appeal raises the concern of content neutrality because of the way in which some of the decisions below examined the teachers' privacy interest in the log they created to discuss their colleagues, and the submissions made by the Appellant, York Region District School Board, to defend the principal's search of that log. Drawing on the arbitrator's decision and that of the majority of the Divisional Court, the Appellant argues that the principal's search did not engage a reasonable expectation of privacy under s. 8 of the *Charter* because it revealed information that lay far from the teachers' "biographical core." This focus on the fruits of the search is incompatible with the principle of content neutrality that is well-entrenched in this Court's s. 8 jurisprudence.

7. To provide meaningful protection against unreasonable state intrusions, the s. 8 analysis must remain content neutral. The Court of Appeal correctly held that the relevant factor in assessing the totality of the circumstances is the potential of the putative search to reveal information going to the person's biographical core, and not whether the fruits of the search are, in fact, deeply personal. The Appellant's submission that the actual contents of the Grievors' log were relevant in assessing whether they had a reasonable expectation of privacy in the log is inconsistent with the s. 8 jurisprudence and misreads this Court's treatment of the biographical core concept. While the rationale underlying the content neutral approach arose in the criminal context, it applies with equal force to other state actors in non-criminal contexts.

i. Content neutrality is well-entrenched in this Court's s. 8 jurisprudence

8. In *Hunter v. Southam*, this Court explicitly rejected an approach to s. 8 rights that would allow for *ex post facto* reasoning to justify state intrusions. Instead, our s. 8 jurisprudence has embraced a system of prior authorization, where the state must assess whether a reasonable expectation of privacy exists *before* it proceeds with the investigative steps it is considering—not after.[4] This is because s. 8's purpose is fundamentally preventive. It seeks to prevent unreasonable searches before they occur, and not merely to provide a remedy after the fact.[5] To do so effectively, s. 8 must be structured in such a way that requires the state actor to turn its mind to whether a s. 8 right is engaged; and if so, whether it is "reasonable" to conduct the search or seizure in the circumstances within the meaning of s. 8.[6]

9. In *R. v. Wong*, this Court expanded on the meaning of a content neutral approach to s. 8. The police had installed video surveillance in a hotel room to investigate illegal gambling. The majority held that a person's reasonable expectation of privacy cannot depend on whether they are found to have been engaging in illegal activities. Such *ex post facto* reasoning would "inevitably" lead to a "system of subsequent validation for searches," which would be contrary to the approach adopted in *Hunter v. Southam*.[7] Instead, the majority held that "the question must be framed in broad and neutral terms"—to ask "whether…persons who retire to a hotel room and close the door behind them have a reasonable expectation of privacy", without regard to the illegal activity that the police ultimately discover is occurring behind the hotel room doors.[8]

10. This Court reinforced the principle of content neutrality more recently in *R. v. Marakah*. In his dissenting opinion, Moldaver J. raised the concern that recognizing a reasonable expectation of privacy in text messages might allow sexual predators or abusive partners to send text messages to their victims with s. 8 protection. McLachlin C.J., however, rejected that approach on behalf of

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[4] *Hunter v Southam*, [1984] 2 SCR 145, at p 160.
[5] *Hunter v Southam*, [1984] 2 SCR 145, at p 160; *R v Kang-Brown*, 2008 SCC 18, at para 138.
[6] See *R v Caslake*, [1998] 1 SCR 51, at para 27.
[7] *R v Wong*, [1990] 3 SCR 36, at pp 49-50.
[8] *R v Wong*, [1990] 3 SCR 36, at pp 49-50.

the majority. As she explained, "the fruits of a search cannot be used to justify an unreasonable privacy violation."[9] The s. 8 analysis "must be content neutral" if it is to be meaningful.[10]

11. This Court's subsequent decision in *R. v. Mills*[11] can and should be read in a way that upholds this longstanding s. 8 principle. In that case, a plurality of the Court found that the accused did not have a reasonable expectation of privacy in his communications with a child stranger online. The plurality was able to consider the relationship between the participants, it explained, only because the police knew of this relationship *prior to* obtaining the communications. The police were aware of the relationship in advance because they created the online identity for the fictitious child.[12] Moreover, while the plurality based its reasoning on the relationship between the parties to the communication, it did not rely on the contents of the communications exchanged.

12. Most recently, in *R. v. J.J.*, this Court reiterated that the content neutral approach applies under s. 8 of the *Charter*. *J.J.* did not deal with s. 8 but with the interpretation of "records" in s. 278.1 of the *Criminal Code* for the purpose of determining when the defence has to get prior judicial approval before cross-examining a sexual assault complainant. In this context, the Court distinguished between s. 278.1 (where the contents of the putative records are relevant) and s. 8 of the *Charter* (where content neutrality governs).[13] The Court further distinguished between the *contents* of private communications and their *context* (*e.g.*, the relationship of the parties to the communication).[14] This distinction in *J.J.* provides support for a reading of *Mills* that is reconcilable with the principle of content neutrality: in limited circumstances, such as where the relationship is known to the state in advance, the courts may consider relationship as a factor relevant to whether there is a reasonable expectation of privacy. But relationship is simply part of the context. It is a different matter altogether to consider the contents of the communications to determine whether they attract s. 8 protection. The latter offends the principle of content neutrality.

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[9] *R v Marakah*, 2017 SCC 59, at para 48.
[10] *R v Marakah*, 2017 SCC 59, at para 48.
[11] *R v Mills*, 2019 SCC 22.
[12] *R v Mills*, 2019 SCC 22, at paras 24-31.
[13] *R v JJ*, 2022 SCC 28, at para 48.
[14] *R v JJ*, 2022 SCC 28, at para 59.

ii. Content neutrality requires consideration of the potential for information to be revealed about our biographical core

13. Content neutrality should apply in the administrative or regulatory context just as it does in the criminal context. In criminal cases like *Wong* and *Marakah*, content neutrality operated to prevent the Court from considering the criminal nature of the activities as part of the s. 8 analysis. It should be equally impermissible for the courts to consider whether the information revealed in fact lies near or within an individual's "biographical core." This sort of *ex post facto* analysis is more likely to arise in an administrative/regulatory context where there is no concern of criminality, but it is equally inconsistent with the notion of content neutrality.

14. It is true that this Court has repeatedly said that s. 8 of the *Charter* protects a "biographical core" of our personal information. That does not mean, however, that the courts should ask whether the information revealed *in fact* touches on an individual's biographical core when determining the existence of a reasonable expectation of privacy. What matters is the *potential* for such information to be discovered by the state activity in question. Approached in that way, the courts can determine whether a particular state action constitutes a "search" under s. 8 without examining the contents of the information actually discovered.

15. Private communications offer a helpful example with which to illustrate the point. If two individuals take steps to have a personal conversation, it is reasonable for them to expect that state actors—whether they be police officers or school board officials—will not have unfettered access to their private communications. This is true whether they are speaking about something as mundane as what they had for breakfast or as intimate as their sexual experiences. Just as an individual would not cease to have a reasonable expectation of privacy in their home just because the police entered when they were doing something as quotidian as folding laundry, so too an individual should not lose a reasonable expectation of privacy in their communications just because they are discussing something that lies far from their biographical core. If they conduct their conversation in a manner that is private, s. 8 of the *Charter* should respect that privacy.

16. Contrary to the Appellant's submission, this Court's cases have never made it a prerequisite to the application of s. 8 that the information in question must actually go to a person's biographical core. In *R. v. A.M.*, the Court specifically recognized that while the concept of "biographical core

information" may be a "useful analytical tool," these categories are not conclusive in the s. 8 analysis and "[n]ot all information that fails to meet the "biographical core of personal information" test is thereby open to the police."[15] The Court went on to note that people's communications can still be "private" whether or not they include biographical core information. Instead, "[t]he privacy of such communications is accepted because they are reasonably intended by their maker to be private."[16]

17. Similarly, in both *R. v. Plant*[17] and *R. v. Gomboc*,[18] this Court properly focused on the potential of the subject matter at issue (electricity consumption data) to reveal information going to a person's biographical core. *Plant* and *Gomboc* considered the technology's capacity to reveal information about the activities and lifestyle about the occupants of a residence, and not what the data actually revealed about the particular appellants before them or the fact that it was indicative of criminality (*i.e.*, that they likely had marijuana grow operations inside their residences).[19]

18. If the scope of s. 8 were limited in the way proposed by the Appellant, individuals would be required to surrender all but the narrowest set of "intimate details" about themselves to the state's unfettered inspection. They would have to live with the risk that whenever they converse in private about subjects that are not sufficiently "intimate" or "personal," the state could be listening in or reading along. This Court in *R. v. Duarte* firmly rejected this risk as intolerable.[20] When the state inserts itself into our private conversations, those intrusions are insidious regardless of whether those conversations relate to "intimate details of the lifestyle and personal choices" of the participants. They diminish our ability to both *feel* secure and *be* secure in the private spaces we carve out for ourselves.

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[15] *R v AM*, 2008 SCC 19; see also *R v Orlandis-Habsburgo*, 2017 ONCA 649, at para 79; *R v Chehil*, 2009 NSCA 111, at para 12, aff'd 2013 SCC 49.
[16] *R v AM*, 2008 SCC 19, at para 68.
[17] *R v Plant*, [1993] 3 SCR 281.
[18] *R v Gomboc*, 2010 SCC 55.
[19] Further, *Plant* does not stand for the proposition that biographical core information *only* includes "intimate details of the lifestyle and personal choices of the individual". This is merely one type of biographical core information: *R v Tessling*, 2004 SCC 67, at para 26.
[20] *R v Duarte*, [1990] 1 SCR 30, at p 44.

19. This intrusion strikes at the heart of informational privacy. Informational privacy is rooted not in the idea that only some information is so personal that it is "worthy" of being kept private from the state, but instead in the dignity, integrity, and autonomy of the individual—the idea that "all information about a person is in a fundamental way his own, for him to communicate or retain for himself as he sees fit."[21]

iii. Content neutrality facilitates state compliance with s. 8 of the Charter

20. In addition to the principled reasons for preserving content neutrality, there are also significant practical reasons for doing so. An approach to s. 8 that weighs how intimate and revealing the fruits of the search are would create a serious workability problem. When state actors such as police are contemplating investigative steps, they cannot know what those steps will or will not reveal. Instead, they must determine whether a reasonable expectation exists (and whether prior authorization or some other justification is required) based on factors that are discernible to them at that point in time.

21. Adding factors to the totality of the circumstances test that are unknowable to the state *a priori* would add unacceptable uncertainty to the analysis and frustrate the ability of government actors to comply with their constitutional obligations. State actors would be compelled to guess at not only what sorts of information their investigative steps could reveal, but *exactly* what they will find, down to what topics will be engaged, how detailed the information will be, and how revealing they will be about the specific person.

22. In contrast, when the totality of the circumstances is considered in a content neutral way, state actors can look to past jurisprudence, common sense and human experience, and other objective factors to guide their assessment of whether the investigative steps they are considering tend to reveal information going to a person's biographical core. For example, *Marakah* emphasizes that text messages have an immense potential to reveal personal biographical information; this signals to state actors contemplating a search of those messages that they will generally attract a reasonable expectation of privacy.[22] This creates a more predictable

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[21] *R v Dyment*, [1988] 2 SCR 417, at para 22.
[22] See *R v Marakah*, 2017 SCC 59, at paras 32-37.

environment in which state actors can carry out their investigative functions, which in turn leads to more consistent protection of rights.

23. Predictability is a virtue not only for police, but also for state actors in administrative and regulatory environments. School board officials may not need to obtain prior *judicial* authorization for searches that engage a reasonable expectation of privacy, but they will still need to comply with the standard of "reasonableness" under s. 8 as that concept is adapted to their environment. Once a reasonable expectation of privacy exists, they must know that they cannot gain unfettered access to the information they seek. Thus, it is critical for such state actors to understand where the lines are drawn in advance. This can only be achieved with a content neutral approach.

24. Any departure from content neutrality will not only make it more difficult for state actors to comply with the requirements of s. 8, but it will also incentivize the kind of after-the-fact justifications that this Court has long rejected as being inconsistent with the notion of being genuinely *secure* against unreasonable search and seizure.[23] State actors, be they the police or school board officials, have a professional obligation to uncover information. If they are told that the fruits of their investigation will have a bearing on whether their investigative steps were constitutional to begin with, they may push the boundaries of what they can do without constitutional oversight. And once they have uncovered highly personal information, it may be too late. Privacy, once invaded, can seldom be regained.[24]

B. Private Communications Deserve Robust Protection Under Section 8

25. As a class of information, private communications have been uniquely protected in search and seizure law. By way of example, Part VI of the *Criminal Code* creates heightened requirements for police when they seek to intercept "private communications." This has been applied not only to traditional wiretaps but to the compelled production of text messages from a telecommunications provider on a prospective basis.[25] This Court's s. 8 jurisprudence has been similarly protective. In *Duarte*, this Court adopted Douglas J.'s description of wiretaps as "the

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[23] See *Hunter v Southam*, [1984] 2 SCR 145, at p 160; *R v Wong*, [1990] 3 SCR 36, at pp 49-50; *R v Marakah*, 2017 SCC 59, at para 48; *R v Patrick*, 2009 SCC 17, at para 32.
[24] *R v O'Connor*, [1995] 4 SCR 411, at para 119.
[25] *R v TELUS Communications*, 2013 SCC 16, at para 45.

greatest leveler of human privacy ever known".[26] Over 25 years later in *Marakah*, this Court held that individuals have a reasonable expectation of privacy in their text communications even where they are seized from another person's device. As McLachlin C.J. explained, "[e]lectronic conversations can allow people to communicate details about their activities, their relationships, and even their identities that they would never reveal to the world at large".[27]

26. Affording robust protection to private communications is consistent with our fundamental conception of informational privacy. The ability to choose to divulge information about ourselves, to specific people or for a specific purpose, is integral to the notion of informational self-determination that underlies the s. 8 guarantee.[28] As the s. 8 case law has made clear, individuals are *not* expected to simply bear the risk that by sharing information about themselves with another person, this information could find its way to the state.[29]

27. There is virtually no limit on what individuals can reveal about themselves in their private communications. They may choose to confide deeply personal information in other people, like a health condition they are suffering from or marital troubles they are experiencing. These deeply personal exchanges may sometimes be interspersed with more mundane and impersonal exchanges. If individuals are to genuinely feel secure in their ability to share personal information with others, they must be able to retreat into communicative spaces that are *actually* private from the state, regardless of what information they ultimately choose to divulge.

28. What constitutes a "private communication" for the purposes of the reasonable expectation of privacy analysis should be construed broadly and purposively. Analogy to existing methods such as email and texting can be useful in some circumstances, but it is important for s. 8 to remain sufficiently flexible to "keep pace with technological developments,"[30] including new methods of communication that may be dissimilar to traditional mediums. The focus is properly on the communicative potential of the medium (including, but not limited to, what it is designed to be

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[26] *R v Duarte*, [1990] 1 SCR 30, at p 44, quoting from Douglas J.'s dissenting opinion in *United States v White*, 401 US 745 (1971).
[27] *R v Marakah*, 2017 SCC 59, at para 36.
[28] *R v Jones*, 2017 SCC 60; see also *R v Dyment*, [1988] 2 SCR 417, at para 22.
[29] *R v Duarte*, [1990] 1 SCR 30, at p 47.
[30] *R v Wong*, [1990] 3 SCR 36, at p 44; see also *R v TELUS Communications*, 2013 SCC 16, at para 5.

used for) and not on the underlying technology through which the communication is effected.[31] Technical differences underlying the medium (such as how the data is transmitted or stored) should not be used to circumscribe the scope of protection the communications receive, especially when they have no impact on how users actually interact with the medium.[32]

29. A Google Document (as is at issue here) may be distinct from other communicative mediums in that it consists of a "single" document stored in the cloud, rather than a series of discrete messages that are visibly exchanged back and forth (as with emails, text messages, or letters). However, even though it does not take the same format as other communicative mediums, it has a significant and intentional communicative *potential*, and it is on this potential that the s. 8 analysis should focus. The ability of multiple users to edit the document and have those changes appear instantaneously to other users allows for the kind of rapid-fire exchange of messages that the majority found were characteristic of text messages in *Marakah*. Users can send the document to specific people, allowing them to view and/or edit it, while restricting its accessibility to others. This communicative potential, and the capacity to restrict access, together suggest that a very high privacy interest should attach.

PART IV – SUBMISSIONS RESPECTING COSTS

30. The CCLA does not seek costs and asks that no costs be awarded against it.

PART V – ORDER REQUESTED

31. The CCLA takes no position on the order to be made.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, THIS 8TH DAY OF SEPTEMBER, 2023

Gerald Chan / Olivia Eng
Stockwoods LLP

[31] *R v Marakah*, 2017 SCC 59, at para 19.
[32] *R v TELUS Communications*, 2013 SCC 16, at para 5.

TABLE OF AUTHORITIES

R v Plant, [1993] 3 SCR 281	17
R v TELUS Communications, 2013 SCC 16	25, 28
R v Tessling, 2004 SCC 67	17
R v Wong, [1990] 3 SCR 36	1, 9, 24, 28
United States v White, 401 US 745 (1971)	25

LEGISLATION	**Cited in paras.**
Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11, s 8 *Charte canadienne des droits et libertés*, partie I de la Loi constitutionnelle de 1982, constituant l'annexe B de la Loi de 1982 sur le Canada (R-U), 1982, c 11, art 8	1-29