SCC File No. 40465

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

B E T W E E N:

DWAYNE ALEXANDER CAMPBELL

APPELLANT

AND :

HIS MAJESTY THE KING

RESPONDENT

AND:

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

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PART I – OVERVIEW

1. The purpose of s. 8 of the *Charter* is to prevent unreasonable searches and seizures *before* they happen — not merely to provide *ex post* validation or condemnation of the State's violation of individual privacy.[1] As this Court has repeatedly held, this purpose can be achieved only if the inquiry into whether an individual has a reasonable expectation of privacy is "content neutral."[2]

2. Content neutrality is one of the pillars of s. 8. Without it, the right to be free from unreasonable search and seizure would become an empty right because the ends (the discovery of contraband) would in effect justify the means (the unlawful search). For the first 30 years of the *Charter*'s existence, this Court has vigorously upheld content neutrality in s. 8 cases, but this core element of s. 8 is now under threat.

3. The decisions below, as well as other recent jurisprudence, show that the intermediate courts of appeal and some trial courts have, with increasing regularity, failed to apply a content-neutral approach in the reasonable expectation of privacy analysis.

4. These courts are chipping away at content neutrality by suggesting that s. 8 does not protect activities or relationships that society does not value. This is problematic. An approach that considers whether the fruits of a search revealed illegal activities as part of the analysis into whether a *Charter* claimant's privacy rights are engaged is necessarily content-driven. Such an approach should be rejected outright — not only because it would undermine decades of this Court's prior jurisprudence mandating a content-neutral approach to s. 8 and would undermine s. 8's objective, but also because it would inject uncertainty into law enforcement's decision-making on when to obtain a warrant.

5. Law enforcement must have the tools to do their important work. But they can do their work without diluting the core protections of s. 8. A reasonable expectation of privacy does not

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[1] *Schreiber v Canada (Attorney General)*, [1998] 1 SCR 841, at para 43; S Penney, "Consent searches for electronic text communications: Escaping the Zero-Sum Trap", *Alberta Law Rev.* 56:1, at p. 14.

[2] *R v Wong*, [1990] 3 SCR 36 [***Wong***], at p 50; *R v Buhay*, 2003 SCC 30 [***Buhay***], at para 19; *R v Patrick*, 2009 SCC 17 [***Patrick***], at para 32; *R v Duarte*, [1990] 1 SCR 30 [***Duarte***], at p 51.

mean that the police cannot investigate; it simply means that they must investigate with appropriate judicial oversight.

PART II – QUESTIONS IN ISSUE

6. The CCLA intervenes on the question of whether the police violate an individual's s. 8 rights by using the cellphone of a recipient of their text messages to impersonate them and engage in an electronic conversation with them without a warrant. 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.

PART III – ARGUMENT

A. CONTENT NEUTRALITY IS A FUNDAMENTAL PART OF SECTION 8

7. The purpose of s. 8 is to prevent unreasonable searches before they occur, and not merely to provide a remedy after the fact. This "can only be accomplished by a system of prior authorization, not one of subsequent validation."[3] To be meaningful, this analysis must also be done "from the independent perspective of the reasonable and informed person who is concerned about the long-term consequences of government action for the protection of privacy."[4] The necessary corollary is that a warrantless search cannot be sanitized by after-the-fact discovery of inculpatory evidence. To be meaningful, the s. 8 analysis must be content neutral.[5]

8. A content-neutral approach ensures that a search's ends do not justify the means through which it was performed. It places the focus on the privacy interests implicated by the subject matter of the search and the impact of the search on its target — *not* on the nature of the items or communications ultimately recovered.[6] The fact that the content of information or evidence seized reveals criminality should not diminish the asserted privacy claim or disqualify it from constitutional protection. If such intrusions were permitted, "there would be no meaningful

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[3] *Hunter v Southam*, [1984] 2 SCR 145 [***Hunter***], at p 160.
[4] *Patrick*, at para 14; *R v Orlandis-Habsburgo*, 2017 ONCA 649 [***Orlandis-Habsburgo***], at para 42; *R v Tessling*, 2004 SCC 67 [***Tessling***], at para 42.
[5] *R v Marakah*, 2017 SCC 59 [***Marakah***], at para 48.
[6] *R v JJ*, 2022 SCC 28, at para 48, citing *R v Spencer*, 2014 SCC 43 [***Spencer***], at para 36; *Wong*, at p 40-50; *Hunter*, at pp 159-160; *R v AM*, 2008 SCC 19 [***AM***], at para 72; *Marakah*, at paras 19 and 48.

residuum to our right to live our lives free from surveillance."[7] It would "smother that spontaneity — reflected in frivolous, impetuous, sacrilegious and defiant discourse — that liberates daily life."[8] The content-neutral approach protects all members of our society from the dangers of unchecked state intrusions into individual privacy.

9. In the practical sense, state actors benefit from a clear delineation of the scope of s. 8, which can only be achieved through content neutrality. Any departure from content neutrality will make it more difficult for state actors to comply with the requirements of s. 8. It may also incentivize state actors to push the boundaries of what they can do without constitutional oversight. As this Court stated in *Stillman*, "[t]here must always be a reasonable control over police actions if a civilized and democratic society is to be maintained."[9] Without content neutrality, an illegal search based on a mere hunch or stereotypical thinking will be sanitized by the subsequent discovery of contraband. Such a result is antithetical to constitutional rule of law.

10. Content neutrality is not a new concept: it dates back to the 1990 cases *Duarte* and *Wong*. In *Duarte*, this Court rejected the Court of Appeal's finding that there is no difference, from a s. 8 privacy perspective, between evidence gained through the testimony of a participant to a conversation, and evidence gained through a surreptitious electronic recording of that conversation. As this Court explained, the law recognizes that even though we necessarily bear the risk that anyone with whom we speak may repeat our words, a free and democratic society does not impose on us the risk that the state will listen in on an make a permanent electronic record of our conversations. In so holding, it "placed considerable emphasis on the fact that the answer to the question whether persons who were the object of an electronic search had a reasonable expectation of privacy cannot be made to depend on whether or not those persons were engaged in illegal activities."[10]

11. In *Wong*, the police had installed a video camera without prior judicial authorization and monitored the activity in the hotel room registered to the appellant in the course of an investigation of a "floating" gaming house. They then conducted a raid and seized various items. The appellant argued that his s. 8 rights had been violated by the police, as he had a reasonable expectation of

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[7] *Duarte*, at pp 43-44.
[8] *Duarte*, at p 54, citing *United States v White*, 401 US 745 (1971).
[9] *R v Stillman*, [1997] 1 SCR 607 [***Stillman***], at para 91.
[10] *Wong*, at p 45, citing *Duarte*, at pp 51-52.

privacy in the hotel room. This Court agreed. In so doing, it stated that the question to be asked was *not* "whether persons who engage in illegal activity behind the locked door of a hotel room have a reasonable expectation of privacy" (a content-driven approach), but rather "whether in a society such as ours persons who retire to a hotel room and close the door behind them have a reasonable expectation of privacy" (a content-neutral approach).[11]

12. In subsequent cases, this Court has accepted that an individual can have a reasonable expectation of privacy in a home despite the presence of drugs;[12] in an office despite the existence of incriminating documents;[13] in a car despite the discovery of incriminating evidence[14] or drugs;[15] in a duffle bag found in a locker in a bus depot notwithstanding the presence of drugs;[16] in a backpack despite the presence of contraband;[17] and in subscriber information for an IP address linked to a computer used to access child pornography.[18]

13. More recently, in *Marakah*, this Court re-affirmed content neutrality in the context of electronic communications. There, the majority found that a *Charter* claimant can have a reasonable expectation of privacy in electronic communications that reside on a recipient's device, regardless of the content of those communications. In so finding, it expressly rejected the dissenting opinion's concerns that recognizing a reasonable expectation of privacy in text messages would allow sexual predators or abusive partners to send text messages to their victims with s. 8's protection. As the majority explained, it is well established that "the fruits of a search cannot be used to justify an unreasonable privacy violation."[19]

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[11] *Wong*, at p 50.
[12] *R v Evans*, [1996] 1 SCR 8, at para 42.
[13] *Thomson Newspapers Ltd. v Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 SCR 425, at pp 517-519.
[14] *R v Wise*, [1992] 1 SCR 527, at p 533.
[15] *R v Mellenthin*, [1992] 3 SCR 615.
[16] *Buhay*, at para 21.
[17] *AM*.
[18] *Spencer*, at para 36, citing *Patrick*, at para 32; see also *R v Ward*, 2012 ONCA 660, at para 88, citing *Wong*.
[19] *Marakah*, at para 48.

B. THE DANGEROUS JURISPRUDENTIAL TREND AWAY FROM CONTENT NEUTRALITY

14. A review of recent jurisprudence reveals that courts are chipping away at the margins of content neutrality in s. 8 by taking into consideration whether or not a *Charter* claimant was engaged in an activity or relationship that constitutes a crime or that society does not value.

15. In the present case, the Court of Appeal for Ontario stated that an exception exists to the holding in *Marakah* that individuals can retain a reasonable expectation of privacy over the contents of their electronic communications "in circumstances where the electronic communications themselves constitute a crime against the recipient."[20]

16. The Court of Appeal for Ontario's recent decision in *Lambert* echoed that idea. There, the Court suggested that an individual has no reasonable expectation of privacy in communications if those communications also constituted a criminal offence. This "same reasoning", the Court said, could arguably apply where electronic messages sent by a defendant to a victim are used as the means of committing the offence charged, such as the offence of threatening to cause death or bodily harm, or criminal harassment.[21]

17. Another example is *CT*. There, the defendant was charged with sexual offences against the complainant. The defendant was known to the complainant because of the intimate relationship he had with the complainant's mother. The defendant argued he had standing to raise s. 8 because the facts were distinguishable from those before this Court in *Mills*: the relationship between him and the complainant was a "quasi-parental" one, whereas in *Mills*, the defendant was speaking to a fictitious child who was a stranger to him and who was, in fact, an undercover police officer. The Court rejected the defendant's position. It said that even if the defendant was in a quasi-parental role *vis-à-vis* the complainant, the defendant was more akin to a "predator" because the communications between the defendant and complainant suggested "an exploitative relationship between a vulnerable person and an adult abusing his position as a person of authority".[22] Ultimately, the Court concluded that the defendant could not have an objectively reasonable

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[20] *R v Campbell*, 2022 ONCA 666, at para 62.
[21] *R v Lambert*, 2023 ONCA 689, at para 60.
[22] *R v CT*, 2023 ONSC 286 [***CT***], at paras 62-65.

expectation of privacy in the communications because a normative understanding of privacy considers society's vital interest in protecting children from online sexual exploitation.[23]

18. In *AK*, the defendants were charged with offences related to human trafficking. The Crown sought to adduce the contents of the complainant's phone as evidence. Relying on *Marakah*, the defendants argued that the evidence was obtained in violation of their s. 8 rights. The Court found that the defendants did not have a reasonable expectation of privacy in the complainant's phone due to the relationship between the parties, being an "alleged male pimp and human trafficker and his alleged female sex worker and slave."[24] This, the Court found, was not a relationship worthy of protection.

19. Finally, in *Patterson*, the Court found that the defendant did not have a reasonable expectation of privacy in text messages he sent to a child because he had no privacy interest in communications that constituted the *actus reus* of the offence of child luring. The Court stated that "[t]he constitutional rights which protect our privacy have never gone so far as to permit a defendant to claim privacy in respect of his own criminal offences."[25]

C. AN APPROACH TO SECTION 8 THAT IS NOT CONTENT-NEUTRAL MUST BE REJECTED

20. Granted, society has an interest in investigating and prosecuting such offences where the perpetrators use electronic messaging to communicate with, threaten, or harass a victim. But law enforcement can and should be required to get a warrant to investigate places, areas and information where individuals have a reasonable expectation of privacy. The courts will not improve law enforcement by watering down content neutrality in hard cases, as the police will be left guessing as to whether the offence they are investigating falls within that emerging list of offences where content neutrality can be forgotten. The better approach is to reaffirm content neutrality, and deal with warrantless searches as the presumptively unreasonable searches that they are. Section 24(2) of the *Charter* is robust enough to address any situation where the admission of the fruits of the unlawful search would not bring the administration of justice into disrepute.

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[23] *CT*, at paras 65 and 67.
[24] *R v KA and ASA*, 2022 ONSC 1241, at para 54.
[25] *R v Patterson*, 2018 ONSC 4467, at para 13.

(i) Illegality or Immorality Does Not Extinguish an Individual's Reasonable Expectation of Privacy

21. Considering whether electronic communications "constitute a crime against the recipient" in deciding whether s. 8 is engaged is necessarily a content-driven analysis. Take, for example, the following scenario: a whistle-blower walks into a police station and alleges that they have evidence of a widescale fraud in the e-mail messages on the computer they have brought to the station. This may be true, but the only way to determine whether the messages constitute a crime would be for the police to consider the content of the messages. The mere fact that the device may contain fruits of a crime is a reason to get a warrant — not to forego the warrant-seeking process. Nothing would prevent the police in this scenario from interviewing the witness, seeking a warrant, and then executing a warrant on that computer, but this Court ought to reject any watering down of s. 8 principles that would permit police to determine whether they can forego the warrant requirement just because the device may be an instrument of crime or may contain evidence of crime.

22. Allowing suspected illegality to extinguish an individual's reasonable expectation of privacy dilutes s. 8 rights and exposes *all* individuals to the risk of uncontrolled state surveillance.[26] It puts the public in an uncomfortable Catch-22 — only the factually innocent can enforce their privacy rights, but the innocent have no incentive to take on the police (and may even be unaware that their rights have been violated).

23. Relatedly, an approach that considers whether a *Charter* claimant has a reasonable expectation of privacy in communications exchanged in the context of a relationship that is, as the Court put it in *CT*, "akin to an exploitative relationship between a vulnerable person and an adult abusing his position as a person of authority"[27] is also *not* content neutral. In almost all cases, it will require the police officer or decision-maker to consider the content of the fruits of the search to determine whether they were exchanged in the context of an illegal relationship or a relationship that society does not value. Such an approach puts enormous discretion in the hands of the police.

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[26] H Stewart "Normative Foundations for Reasonable Expectations of Privacy." *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 54 (2011) [***Normative Foundations for Reasonable Expectations of Privacy***], at pp 341-347.
[27] *CT*, at para 65.

24. An approach that is not fully content neutral would empower the state to decide when to obtain a warrant based on what type of activities or relationships the search *might* reveal and the types of relationship and communication the police deem to be morally virtuous or repugnant. Injecting this level of uncertainty into the task of deciding when to obtain a warrant before commencing a search is unworkable and will turn peace officers into morality police: if the officer determines that the relationship between two people is not one society should value, then that officer is absolved from getting a warrant before intruding on their private communications. Nothing would deter officers from carrying out a warrantless search on a hunch or in the pursuit of finding something illegal or immoral.[28] And if the warrantless search does not uncover anything illegal or immoral, then nothing can meaningfully cure the s. 8 breach that has already occurred.

(ii) A Normative Approach to Section 8 is Content Neutral

25. Moreover, the approaches taken in the above-referenced cases show that courts are misconstruing the concept of normativity in the reasonable expectation of privacy analysis, by treating it as an invitation to make value judgments about whether the nature of the communication or the relationship between communicating parties is something that society values. This is not what normativity is or has been up until now.

26. In *Tessling*, this Court stated that "[e]xpectation of privacy is a normative rather than a descriptive standard."[29] Assessing the difference between a descriptive and a normative standard requires courts to shift their focus from the descriptive question of whether the *Charter* claimant has a reasonable expectation of privacy in (for example) the concealment of illegal activities in their home or on their phone, to the broad and neutral normative question of whether people generally have a privacy interest in their homes and their phones. As this Court put it in *Patrick* "[t]he question is not whether the appellant had a lifestyle which society values, but whether and at what point in the disposal process innocent citizens cease to have a reasonable expectation that the contents of their garbage will remain private."[30]

27. Framing the inquiry in a way that is *not* content neutral, i.e. by reference to illegal activities or activities that society does not value, "would all but eliminate the right to privacy through the

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[28] *Stillman*, at para 91.
[29] *Tessling*, at para 42.
[30] *Patrick*, at para 32.

adoption of a system of subsequent validation for searches."[31] This does not mean condoning criminal activities. All it means is that if a court holds that an individual has a privacy interest in a certain thing, the court is declaring that societal values will not accept that the state should be allowed to intrude upon individual privacy in the way that it did without first establishing compliance with the reasonableness standard in s. 8. This ensures that individuals are protected from unauthorized state intrusions into privacy. As Professor Stewart explains,

> The existence of a reasonable expectation of privacy in a place does not prevent that place from being searched; rather, it requires some lawful authority for the search. So a person carrying on an illegal activity in his home might well anticipate a search of his home, not because that activity is illegal, but because it is likely to generate publicly observable bits of evidence (the odour of marijuana, the papered-over windows) giving rise to reasonable grounds on which to obtain a search warrant.[32]

28. Using the concept of normativity as a justification for excluding from the scope of s. 8 the activities and relationships that society does not value is inconsistent with the approach in respect of other *Charter* rights, such as s. 2(b). The inquiry into whether a claimant's s. 2(b) right is engaged is content neutral.[33] That is why this Court has held, for example, that child pornography and hate speech fall within the ambit of the s. 2(b) guarantee (subject to being limited under s. 1).[34] Following the content-driven reasoning of some of the recent s. 8 cases would lead courts to the conclusion that since society has an interest in protecting vulnerable groups, hateful or untrue speech does not fall within ambit of s. 2(b). This approach would run contrary to the decades of established jurisprudence on s. 2(b) from this Court. It would also allow decision-makers to inject their own views of what speech should be protected on the basis of their understanding of societal values. This would prevent s. 2(b) from achieving its purpose of promoting the search for and attainment of truth, participation in social and political decision-making, and the opportunity for individual self-fulfillment through expression. The same is true when it comes to s. 8: without a right that protects all individual privacy, s. 8 would be an empty right.

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[31] *Orlandis-Habsburgo*, at para 45.
[32] *Normative Foundations for Reasonable Expectations of Privacy* at p 347.
[33] *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927, at p 968; *R v Keegstra*, [1990] 3 SCR 697 [***Keegstra***], at p 729; *R v Zundel*, [1992] 2 SCR 731, at pp 753-58.
[34] *R v Sharpe*, 2001 SCC 2, at p 48; *Keegstra*, at p 734.

(iii) *Mills* Did Not Endorse a Retreat From Content Neutrality

29. The cases that water down content neutrality improperly rely on Brown J.'s decision in *Mills*.[35] *Mills* does not endorse a retreat from content neutrality. In that case, Justice Brown found that Mr. Mills' reasonable expectation of privacy was negated by the *specific and unique facts* of that case: (i) the fact that Mr. Mills was communicating with someone who was a stranger and whom he believed was a child, (ii) the fact that the stranger who he believed to be a child was actually an undercover police officer, *and* (iii) the fact that the police had knowledge of the nature of the relationship between the communicants *in advance* as they were the ones posing as the child recipient, which meant that they knew that the relationship was fictitious. Justice Brown did not find that Mr. Mills' expectation of privacy in the electronic communications was unreasonable because they constituted the crime of child luring, or because the relationship between Mr. Mills and the recipient was one that society did not value.

30. Treating Brown J.'s decision in *Mills* as though it created a broad exception to *Marakah* for communications that constitute a crime, or for relationships that are illegal or inappropriate, is wrong and undermines s. 8. It would effectively mean that *Mills* is inconsistent with *Marakah* (given that the communications at issue in *Marakah* were about illegal and immoral activity).

31. This Court should reaffirm content neutrality and reject an approach to s. 8 that can expose all members of society to uncontrolled state intrusion.

PART IV – SUBMISSIONS RESPECTING COSTS

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

PART V – ORDER REQUESTED

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

ALL OF WHICH IS RESPECTFULLY SUBMITTED, THIS 21st DAY OF NOVEMBER, 2023

Nader R. Hasan / Alexandra Heine
Stockwoods LLP

[35] *R v Mills*, 2019 SCC 22.

PART VI - TABLE OF AUTHORITIES

CASE LAW	Cited in paras.
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LEGISLATION	Sections
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	2(b), 8, 24(2)
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	arts 2(b), 8, 24(2)