SCC File No. 37518

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

BETWEEN:

SEAN PATRICK MILLS

Appellant

- AND -

HER MAJESTY THE QUEEN

Respondent

- AND -

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Interveners

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I. OVERVIEW AND STATEMENT OF FACTS

1. When an undercover officer exchanges text messages with an investigative target — knowing that the communication will necessarily create a record — the officer is intercepting (*i.e.,* acquiring) a private communication even though the officer him/herself is a participant. Were it an oral rather than text communication that the officer was recording, the law would be clear (based on *R. v. Duarte*): the officer would have to obtain a one-party consent authorization under s. 184.2 in Part VI of the *Criminal Code* (traditionally applied to wiretapping). This is required by both statute and s. 8 of the *Charter*.

2. In this case, the Court should hold that the officer similarly requires judicial authorization before creating and recording a private *text* communication. This is the logical next step after the Court's two previous decisions on text messages: *R. v. TELUS Communications Co.* (finding that text messages are "private communications" under Part VI); and *R. v. Marakah* (finding that both parties to a text conversation have a reasonable expectation of privacy under s. 8 of the *Charter*).

3. Applying Part VI in these circumstances will preserve the delicate balance that Part VI sought to achieve when it was enacted. Part VI contains a complete code dealing with the interception of "private communications". There are provisions requiring prior judicial authorization and provisions relieving police of this requirement in exigent circumstances. Parliament has turned its mind to the proper balance between law enforcement interests and privacy rights in the private communications context. That balance should be respected, both for oral and text communications.

4. If Part VI is not applied to the practice of undercover officers texting with investigative targets, police would be free to engage in communications surveillance of Canadians through text conversations without judicial oversight. They could impersonate an internet therapy provider to learn of a person's addictions or an online dating service to discover a individual's sexual preferences — all for weeks or months on end. This is precisely the sort of lengthy, open-ended, and invasive communications surveillance that Part VI was designed to regulate.

5. Accordingly, the Criminal Lawyers' Association ("CLA") intervenes in this appeal to urge this Court to overturn the decision of the court below and to hold instead that undercover officers must obtain prior judicial authorization before texting with investigative targets. Should they fail

to so, they would violate not only Part VI of the *Code*, but also s. 8 of the *Charter*. The accused may then be entitled to the remedy of exclusion of evidence under s. 24(2).

6. The CLA makes no submissions on the facts of this appeal.

II. POSITION ON QUESTIONS IN ISSUE

7. With respect to the issues framed by the Appellant: (i) individuals in the Appellant's circumstances have a reasonable expectation of privacy in their text communications; and (ii) the warrantless seizure of text communications breaches s. 8 of the *Charter*. The CLA takes no position on the remedy to which the Appellant is entitled, but submits that s. 24(2) is generally available to remedy such breaches through the exclusion of the recording of the text conversation as well as the officer's testimony about the conversation.

III. STATEMENT OF ARGUMENT

A. Person-to-person text communications are private communications under Part VI of the *Criminal Code* and engage the protections of s. 8 of the *Charter*

8. This Court first considered the applicability of Part VI of the *Criminal Code* to text communications in *R. v. TELUS Communications Co.*[1] In that case, seven members of the Court issued three separate opinions. Each opinion, however, agreed that SMS text messages are "private communications" within the meaning of Part VI.[2] As Abella J. pointed out in her plurality opinion, "text messaging bears several hallmarks of traditional voice communication: it is intended to be conversational, transmission is generally instantaneous, and there is an expectation of privacy in the communication."[3] Text messaging is, in essence, "an electronic conversation".[4] Therefore, it should be protected by Part VI.

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[1] *R. v. TELUS Communications Co.*, 2013 SCC 16.

[2] *TELUS*, *supra* at para. 12, per Abella J., at para. 67, per Moldaver J., and at para. 135, per Cromwell J. (S.C.C.).

[3] *TELUS*, *supra* at para. 1 per Abella J. (S.C.C.).

[4] *TELUS*, *supra* at para. 5 per Abella J. (S.C.C.).

9. More recently, the Court echoed this reasoning in *R. v. Marakah.*[5] For the majority, McLachlin C.J. (as she then was) wrote that "it is difficult to think of a type of conversation or communication that is capable of promising more privacy than text messaging."[6] People do not have to be in the same space to text message (and almost never are) and therefore do not run the risk of being seen together. Moreover, unlike phone conversations, text messaging allows people to communicate with others in complete privacy even while "in plain sight".[7] No one has any idea who we are conversing with (or if we are conversing at all) when we sit in the corner of a room and tap away on our phones. As McLachlin C.J. put it colourfully in her majority opinion:

> ….A wife has no way of knowing that, when her husband appears to be catching up on emails, he is in fact conversing by text message with a paramour. A father does not know whom or what his daughter is texting at the dinner table. Electronic 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, and to enjoy portable privacy in doing so.[8]

10. This reasoning had constitutional implications in *Marakah.* Unlike *TELUS,* which was strictly a statutory interpretation case under Part VI, *Marakah* raised the question of whether individuals have a reasonable expectation of privacy in their text messages (even after sending them) under s. 8 of the *Charter.* The majority answered "yes".[9]

11. To be fair, McLachlin C.J. was careful to state at the beginning of her opinion that the exchange of electronic messages will not *always* attract a reasonable expectation of privacy.[10] Attention must be paid, however, to the end of the opinion where McLachlin C.J. clarified this caveat with a few examples:

> …This is not to say, however, that every communication occurring through an electronic medium will attract a reasonable expectation of privacy and hence grant an accused standing to make arguments regarding s. 8 protection. This case does not concern, for example, ***messages posted on social media, conversations***

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[5] *R. v. Marakah*, 2017 SCC 59.

[6] *Marakah*, *supra*, at para. 35 (S.C.C.).

[7] *Marakah*, *supra*, at para. 36 (S.C.C.).

[8] *Marakah*, *supra*, at para. 36 (S.C.C.).

[9] *Marakah*, *supra* at para. 88 (S.C.C.).

[10] *Marakah*, *supra* at para. 5 (S.C.C.).

> ***occurring in crowded Internet chat rooms, or comments posted on online message boards***.[11] [emphasis added]

12. In other words, where electronic communications are being exchanged in the electronic equivalent of the public square (*e.g.*, a Twitter post, a message on a Facebook "wall" as opposed to Facebook "messenger"), there may be no reasonable expectation of privacy. But person-to-person text communications should generally attract a reasonable expectation of privacy in the post-*Marakah* world. The reasoning that led McLachlin C.J. to this conclusion in *Marakah*[12] would apply equally to any person-to-person text communication.

13. In *Marakah,* McLachlin C.J. explicitly stated that her analysis would apply not just to SMS text messages, but to other types of person-to-person electronic communication applications such as Apple iMessage, Google Hangouts, and BlackBerry Messenger.[13] This is consistent with Abella J.'s conclusion in *TELUS* that "[t]echnical differences inherent in new technology should not determine the scope of protection afforded to private communications."[14]

14. It follows that the Court's reasoning in *TELUS* and *Marakah* should apply equally to the text communications exchanged in this case: Facebook messenger and emails.[15] Both modalities are person-to-person, text-based, electronic communications that are functionally equivalent to SMS text messages. Email, Facebook messenger and other text-based communication platforms are typically found on the same device: an individual's smartphone. They are often used interchangeably and fluidly — a conversation that begins as an email may continue via text message or Facebook messenger. And they are person-to-person communications that are visible only to the parties to the conversation. For many people, the decision to send a message by SMS text message rather than email or Facebook messenger depends on nothing more than which "app" they happen to click on first when they unlock their smartphone.

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[11] *Marakah*, *supra* at para. 55 (S.C.C.).

[12] *Marakah*, *supra* at para. 54 (S.C.C.).

[13] *Marakah*, *supra* at para. 18 (S.C.C.).

[14] *TELUS*, *supra* at para. 5 (S.C.C.).

[15] For lower court cases finding that emails are "private communications", see *R. v. Bahr*, 2006 ABPC 360 at para. 34 (Prov. Ct.); *R. v. Weir*, 1998 ABQB 56 at para. 119, aff'd 2001 ABCA 181; *R. v. Yahoo! Canada Co.*, 2004 CanLII 34799 (ONSC).

15. In the court below, Welsh J.A. held that the Appellant did *not* have a reasonable expectation of privacy in his emails and Facebook messenger communications. Welsh J.A. did not, however, have the benefit of this Court's decision in *Marakah*. Thus, she relied on a line of reasoning that this Court has since rejected. Welsh J.A. held that the Appellant "must have known that he lost control over any expectation of confidentiality that he appears to have hoped would be exercised by the recipient of the messages".[16] But as McLachlin C.J. subsequently held in *Marakah*, "the risk that [the recipient] could have disclosed the text messages does not negate [the sender's] control over the information contained therein."[17] To say that it does is to re-introduce the "assumption of risk" analysis that this Court has repeatedly rejected — first in *Duarte*,[18] then in *Wong*,[19] then in *Cole*,[20] and most recently in *Marakah*.[21] We do not abandon our right to privacy simply by engaging in activities that risk disclosure of our private information to others. As this Court held in *Duarte*, the risk that a confidant will disclose private communications is vastly different than the risk that the state will have unfettered access to covertly intercept and record these communications.[22] Section 8 of the *Charter* protects against the latter while allowing the former. Privacy does not demand solitude.

16. The only fact that separates the text communications in this case from those in *Marakah* is the fact that the Appellant had never physically met the undercover officer with whom he was communicating. In that sense, the recipient of the text messages was a "stranger". This should not, however, negate the reasonable expectation of privacy that the Appellant had in those communications — whether under Part VI or s. 8 of the *Charter*. One can imagine any number of intensely private electronic conversations that individuals have with those whom they have never met in person. This happens every day with online dating. It happens when Canadians seek medical advice from an online doctor.[23] It happens every time a prospective client sends an email

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[16] *R. v. Mills*, 2017 NLCA 12 at para. 23.

[17] *Marakah*, *supra* at para. 45 (S.C.C.).

[18] *R. v. Duarte*, [1990] 1 S.C.R. 30 at paras. 47-48.

[19] *R. v. Wong*, [1990] 3 S.C.R. 36 at para. 45.

[20] *R. v. Cole*, 2012 SCC 53 at para. 76.

[21] *Marakah*, *supra* at para. 40 (S.C.C.).

[22] *Duarte*, *supra* at para. 30 (S.C.C.).

[23] CBC News, "Online doctor consultations take off in Canada", July 12, 2017 (online).

to a lawyer seeking legal assistance. It would be strange if these electronic communications did not attract a reasonable expectation of privacy simply because the parties had never met in person.

17. As Prof. Steven Penney notes, the notion that people cannot reasonably expect privacy in communicating with strangers is hard to reconcile with this Court's s. 8 jurisprudence.[24] In *Wong*, the Court held that strangers who meet in hotel rooms (in that case to gamble) do not "tacitly consent to allowing agents of the state unfettered discretion to make a permanent electronic recording of the proceedings."[25] More recently, in *R. v. Spencer*, a unanimous Court held that s. 8 of the *Charter* protects the right of internet users to a degree of anonymity in their online activities.[26] If people can have a reasonable expectation of privacy when congregating with strangers in a hotel room and while using the internet anonymously, then the same should be true when they send text communications to another person "without certain knowledge of the recipient's true identity or purpose."[27]

B. An undercover officer who exchanges private communications with an individual is conducting an "interception" and requires authorization under s. 184.2 of the *Code*

18. Once it is accepted that a text communication is a "private communication" under Part VI, it follows that an undercover officer who acquires that communication by being a participant to it and thereby creating a record of the text conversation is conducting an "interception". [28] In order for the interception to be lawful, the officer must obtain judicial authorization under s. 184.2 of

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[24] Penney, Steven, Consent Searches for Electronic Text Communications: Escaping the Zero-Sum Trap (May 8, 2018) at p. 26. Available at SSRN: <https://ssrn.com/abstract=>.

[25] *Wong*, *supra* at para. 22 (S.C.C.). Penney, *supra* at pp. 25-26.

[26] *R. v. Spencer*, 2014 SCC 43 at para. 48.

[27] Penney, *supra* at p. 26. See also footnote 118: "I was unable to find any cases where a court found that a surreptitious interception or recording of an ***oral*** conversation was not a 'private communication' because the consenting party was insufficiently known to the target." [emphasis added]

[28] "Intercept" is defined broadly in s. 183 to include "listen to, record or acquire a communication or acquire the substance, meaning or purport thereof".

the *Criminal Code.* Failure of police to do so will not only result in a breach of Part VI of the *Code,* but also a breach of s. 8 of the *Charter.*

19. A number of lower courts have gone the other way on this question. Many of them, however, relied on the now-discredited reasoning that individuals do not have a reasonable expectation of privacy in text messages they have sent to another person.[29] These cases have little currency in the post-*Marakah* world.[30]

20. Other cases have relied on the reasoning that there is no "interception" unless police access the message *before* it is copied onto a recipient's device.[31] That is, they hold that in order for the state to "intercept" a communication within the meaning of Part VI of the *Code,* the state must capture the communication while it is "in transit." No such requirement, however, can be found in the text of Part VI. Nor can this rigid definition of "intercept" be squared with this Court's jurisprudence relating to participant surveillance.

21. The leading case on participant surveillance is *Duarte*. In *Duarte*, this Court held that police must obtain judicial authorization in order to intercept a private communication — even where one of the parties to the communication is a state agent (*e.g.,* an undercover officer) who consents to the interception.[32] In response to *Duarte,* Parliament enacted s. 184.2, which imposes a warrant requirement for one-party consent interceptions where the consenting party is a state agent. In other words, before an undercover officer can record an oral communication that s/he is having with an investigative target, s/he must obtain judicial authorization under s. 184.2 — even though s/he would be acquiring the communication simultaneously with its receipt and not while it is "in transit". If that is true of *oral* communications, then it should equally be true of *text* communications. In both cases, "the senders who think they are conversing exclusively with

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[29] *R. v. Allen,* [2017] O.J. No. 4239 at para. 46 (S.C.J.); *R. v. Ghotra*, [2015] O.J. No. 7253 at paras. 124-125, 129 (S.C.J.); *R. v. Merritt*, 2017 ONSC 1648 at para. 46; *R. v. Thompson,* [2013] O.J. No. 6302 at para. 43 (S.C.J.). See *contra, R. v. Kwok,* [2008] O.J. No. 2414 at paras. 19, 22 (Ont. C.J.).

[30] Penney, *supra* at p. 29.

[31] *Blais c. R.*, 2017 QCCA 1774 at paras. 19-21; *R. v. Pelucco*, 2015 BCCA 370 at para. 33; *R. v. Beairsto*, 2018 ABCA 118 at para. 25.

[32] *Duarte*, *supra* at para. 28 (S.C.C.).

specific, intended recipients are in fact conversing with state agents."[33] That is the mischief at which the judicial authorization requirement in *Duarte* (and s. 184.2) is aimed.

22. To conclude otherwise is to leave largely unchecked the police power to conduct communications surveillance through text messaging with investigative targets. There would be no statutory or s. 8 *Charter* oversight over this investigative technique. Police would be free to pose as online dating partners to learn of a person's sexual preferences, online pharmacists to obtain information about an individual's medications, and online travel agents to discover a target's travel plans — all for weeks or months on end. As Prof. Penney notes, this is precisely the sort of "long-term, open-ended, real-time communications surveillance that Part VI was designed to regulate".[34] The cost of excluding this type of activity from the protective scope of Part VI is enormous.

23. By contrast, the cost of applying Part VI to this type of investigative activity is minimal. This requirement would not unduly hamper the ability of police to combat crime for at least two reasons.[35] First, the requirements for one-party consent authorizations under s. 184.2 are less onerous than the requirements for "third-party" wiretap authorizations under ss. 185-186. The latter requires police to show "investigative necessity" (s. 186(1)(b)); the former does not.

24. Second, Part VI contains a number of provisions allowing for the relaxation of the stringent safeguards that apply to electronic state surveillance in the appropriate circumstances. For example, s. 184.1 relieves police of the need for judicial authorization where there is one party consent and where the intercepting state agent "believes on reasonable grounds that there is a risk of bodily harm to the person who consented". Similarly, s. 184.4 relieves police of the need for judicial authorization where an interception is "immediately necessary to prevent an offence that would cause serious harm to any person or to property". Parliament has turned its mind to the circumstances in which the need for swift police action outweighs the privacy interest in requiring judicial authorization. Applying Part VI to the circumstances of this case will best preserve this delicate balance in the age of electronic conversations.

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[33] Penney, *supra* at p. 31.

[34] Penney, *supra* at p. 34.

[35] Penney, *supra* at p. 35.

C. Failure to comply with s. 184.2 of the *Code* may result in the remedy of exclusion of evidence under s. 24(2)

25. Because individuals have a reasonable expectation of privacy in their sent text messages, an unlawful interception of these messages would result not only in a breach of Part VI of the *Code,* but also a violation of s. 8 of the *Charter*.[36] It follows that an unlawful interception of text messages may give rise to the remedy of exclusion of evidence under s. 24(2) of the *Charter.* This raises the additional question of whether, if the undercover officer's recording of the text messages is excluded, the officer may nevertheless testify about the communication and refresh his/her memory by reviewing the excluded recording. In *R. v. Fliss,* this Court answered "yes".[37] However, *Fliss* should not be read to impose an inflexible rule.

26. In *R. v. Mohamud,* Pomerance J. distinguished *Fliss* by pointing out that the undercover operation and recording of the conversation in that case were predominantly independent operations.[38] In *Fliss,* the undercover officer had engaged in many interactions with the accused that were not recorded. As such, the scope of the officer's *viva voce* testimony could have expanded beyond the specific conversation that was recorded. But where the recorded conversation and the undercover officer's testimony are coterminous, the argument that the court may exclude both the recording and the officer's testimony is compelling.[39] In *Mohamud,* for instance, the undercover officer had unlawfully intercepted his conversations with the accused in a holding cell. At trial, the Crown sought to admit the statements made by the accused through the testimony of the undercover officer. Pomerance J. excluded the officer's testimony. She did so on the basis that both the recording of the conversation *and* the officer's subsequent testimony were "obtained in a manner" that infringed s. 8 of the *Charter.*

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[36] In order for a search or seizure to be reasonable, it must meet three requirements: (i) it must be lawful; (ii) the law itself must be reasonable; and (iii) the search or seizure must be executed in a reasonable manner*:* *R. v. Collins*, [1987] 1 S.C.R. 265, at para. 23.

[37] *R. v. Fliss*, 2002 SCC 16 at para. 13.

[38] *R. v. Mohamud*, 2010 ONSC 6264 at paras. 65-67.

[39] *Mohamud*, *supra* at para. 69 (Ont. S.C.J.).

27. This analysis is consistent with the courts' generous approach to the "obtained in a manner" threshold in s. 24(2) more generally. The Ontario Court of Appeal recently summarized this jurisprudence in *R. v. Pino.*[40] Section 24(2) provides that evidence is excludable when it is "obtained in a manner" that infringed the *Charter.* In determining whether this threshold is met, the courts should consider the entire "chain of events" between the accused and the police, bearing in mind that the requisite connection between the breach and the impugned evidence may be causal, temporal, or contextual, or any combination of the three — it simply cannot be too remote.[41] Applying this standard, it seems clear that an undercover officer's testimony about a recorded text conversation can be viewed as having been "obtained in a manner" that infringed the *Charter* where the recording itself is the source of the breach. Therefore, both the testimony and the recording are potentially excludable.

28. In *Fliss* itself, this Court warned of the danger of police "deliberately by-pass[ing] the need to obtain a judicial authorization…to record a conversation, on the basis that although they could not use the tape at trial, they could always use the transcript [refreshing the police witness' memory]."[42] An overly narrow approach to exclusion under s. 24(2) would allow for this possibility and open the door to police circumventing the important privacy protections of s. 8. The Court should be careful to guard against this danger in its discussion on remedies.

IV. SUBMISSIONS ON COSTS

29. The CLA makes no submissions regarding costs.

V. ORDER REQUESTED

30. The CLA makes no submissions on the ultimate order to be made.

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

PER:

Gerald Chan
Counsel for the CLA

Annamaria Enenajor
Counsel for the CLA

[40] *R. v. Pino*, 2016 ONCA 389.

[41] *Pino*, *supra* at para. 72 (Ont. C.A.).

[42] *Fliss*, *supra* at para. 13 (S.C.C.).

VI. TABLE OF AUTHORITIES

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