SCC Court File No.: 37118

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

B E T W E E N:

NOUR MARAKAH

APPELLANT

- and -

HER MAJESTY THE QUEEN

RESPONDENT

- and -

ATTORNEY GENERAL OF ALBERTA, ATTORNEY GENERAL OF BRITISH COLUMBIA, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, CANADIAN CIVIL LIBERTIES ASSOCIATION, CRIMINAL LAWYERS' ASSOCIATION OF ONTARIO, DIRECTOR OF PUBLIC PROSECUTIONS, AND SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY AND PUBLIC INTEREST CLINIC

INTERVENERS

FACTUM OF THE INTERVENER, SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY AND PUBLIC INTEREST CLINIC

Presser Barristers
116 Simcoe Street, Suite 116
Toronto, Ontario, M5H 4E2

Jill R Presser

Tel: (416) 586-0330
Fax: (416) 596-2597
Email: presser@presserlaw.ca

Counsel for the Intervener

Samuelson-Glushko Canadian Internet Policy & Public Interest Clinic (CIPPIC)
University of Ottawa, Faculty of Law, CML
FTX102, 57 Louis Pasteur Street
Ottawa, Ontario, K1N 6N5

Tamir Israel

Tel: (613) 562-5800 x 2914
Fax: (613) 562-5417
Email: tisrael@cippic.ca

Agent for the Intervener

Samuelson-Glushko Canadian Internet Policy & Public Interest Clinic (CIPPIC)
University of Ottawa, Faculty of Law, CML
FTX102, 57 Louis Pasteur Street
Ottawa, Ontario, K1N 6N5

Tamir Israel

Tel: (613) 562-5800 x 2914
Fax: (613) 562-5417
Email: tisrael@cippic.ca

Counsel for the Intervener

TO: **THE REGISTRAR**

COPY TO:

Cooper, Sandler, Shime & Bergman LLP
Suite 1900, 439 University Avenue
Toronto, ON, M5G 1Y8

Mark J. Sandler
Wayne A. Cunningham

Tel: (416) 585-1716
Fax: (416) 408-2372
Email: msandler@criminal-lawyers.ca

Counsel for the Appellant, Nour Marakah

Supreme Advocacy LLP
340 Gilmour St, Suite 100
Ottawa, ON, K2P 0R3

Eugene Meehan, Q.C.

Tel: (613) 695-8855
Fax: (613) 695-8580
Email: emeehan@supremeadvocacy.ca

Agent for the Appellant, Nour Marakah

AND TO:

Attorney General of Ontario
720 Bay Street, 10th Floor
Toronto, ON, M7A 2S9

Randy Schwartz

Tel: (416) 326-4586
Fax: (416) 326-4656
Email: Randy.Schwartz@ontario.ca

Counsel for the Respondent, Her Majesty Queen

Burke-Robertson
441 MacLaren Street, Suite 200
Ottawa, ON, K2P 2H3

Robert E. Houston, Q.C.

Tel: (613) 236-9665
Fax: (613) 235-4430
Email: rhouston@burkerobertson.com

Agent for the Respondent, Her Majesty the Queen

AND TO:

Attorney General of British Columbia
3rd Floor, 940 Blanshard Street
Victoria, BC, V8W 3E6

Daniel M. Scanlan

Tel: (250) 387-0284
Fax: (250) 387-4262

Counsel for the Intervener, Attorney General of British Columbia

Burke-Robertson
441 MacLaren Street, Suite 200
Ottawa, ON, K2P 2H3

Robert E. Houston, Q.C.

Tel: (613) 236-9665
Fax: (613) 235-4430
Email: rhouston@burkerobertson.com

Agent for the Intervener, Attorney General of British Columbia

AND TO:

Ursel Phillips Fellows Hopkinson LLP
555 Richmond Street West, Suite 1200

Supreme Advocacy LLP
340 Gilmour St, Suite 100

	Toronto, ON, M5V 3B1	Ottawa, ON, K2P 0R3
	Susan M. Chapman Naomi Greckol-Herlich	Marie-France Major
	Tel: (416) 969-3061 Fax: (416) 968-0325 Email: schapman@upfhlaw.ca	Tel: (613) 695-8855 Fax: (613) 695-8580 Email: mfmajor@supremeadvocacy.ca
	Counsel for the Intervener, Criminal Lawyers' Association of Ontario	**Agent for the Intervener, Criminal Lawyers' Association of Ontario**
AND TO:	**Attorney General of Alberta** 3rd Floor, 9833-109 Street Edmonton, AB, T5K 2E8	**Gowling WLG (Canada) LLP** 160 Elgin Street, Suite 2600 Ottawa, ON, K1P 1C3
	Maureen McGuire	D. Lynne Watt
	Tel: (780) 422-5402 Fax: (780) 422-1106 Email: maureen.mcguire@gov.ab.ca	Tel: (613) 786-8695 Fax: (613) 788-3509 Email: lynne.watt@gowlingwlg.com
	Counsel for the Intervener, Attorney General of Alberta	**Agent for the Intervener, Attorney General of Alberta**
AND TO:	**Stockwoods LLP** Toronto-Dominion Centre 77 King Street West, Suite 4130 Toronto, ON, M5K 1H1	**Power Law** 130 Albert Street, Suite 1103 Ottawa, ON, K1P 5G4
	Nader R. Hasan Gerald Chan	David Taylor
	Tel: (416) 593-7200 Fax: (416) 593-9345 Email: naderh@stockwoods.ca	Tel: (613) 702-5563 Fax: (613) 702-5563 Email: dtaylor@powerlaw.ca
	Counsel for the Intervener, British Columbia Civil Liberties Association	**Agent for the Intervener, British Columbia Civil Liberties Association**
AND TO:	**Public Prosecution Service of Canada** 130 King Street West Suite 3400, Box 36 Toronto, ON, M5X 1K6	**Director of Public Prosecutions of Canada** 160 Elgin Street, 12th Floor Ottawa, ON, K1A 0H8
	Nicholas E. Devlin	François Lacasse
	Tel: (416) 952-6213 Fax: (416) 952-2116 Email: nick.devlin@ppsc-sppc.gc.ca	Tel: (613) 957-4770 Fax: (613) 941-7865 Email: francois.lacasse@ppsc-sppc.gc.ca

	Counsel for the Intervener, Director of Public Prosecutions	**Agent for the Intervener, Director of Public Prosecutions**
AND TO:	**McCarthy Tétrault LLP** Toronto Dominion Bank Tower Box 48, Suite 5300 Toronto, ON, M5K 1E6	**Conway Baxter Wilson LLP** 400-411 Roosevelt Avenue Ottawa, ON, K2A 3X9
	Christine Lonsdale Charlotte-Anne Malischewski	Colin S. Baxter
	Tel: (416) 601-8019 Fax: (416) 868-0673 Email: clonsdale@mccarthy.ca	Tel: (613) 780-2012 Fax: (613) 688-0271 Email: cbaxter@conway.pro
	Counsel for the Intervener, Canadian Civil Liberties Association	**Agent for the Intervener, Canadian Civil Liberties Association**

TABLE OF CONTENTS

Page

PART I – OVERVIEW

1. We are at a determinative moment for Canadians' right to privacy. Breakthroughs in computing and communication technology have dramatically changed how we live our day-to-day lives. This appeal raises issues of great importance relating to the need to ensure that privacy protections are not outstripped by technical evolutions in communications. Specifically at issue is whether senders of text messages have a reasonable expectation of privacy in the messages they send, even once those messages are under the control of recipients. This issue has serious implications for the privacy of text messages and other forms of online and digital information exchanges. Text-based digital forms of communication have become incredibly wide-spread, now often supplanting other forms of communication. For most people, text-based communication has become a practical necessity, both professionally and socially. It is the nature of such communications that, once sent, they exist in multiple places controlled by multiple entities (for example, an email will exist on hard drives controlled by the sender, the receiver, and the email service provider). If a reasonable expectation of privacy in digital information is dependent on retaining physical control over electronic messages or information (like the recipient's smart phone, or the email server), this would greatly undermine privacy protection in online and digital communications.

2. More than two decades ago, in *R. v. Wong*, LaForest J. recognized that "the broad and general right to be secure from unreasonable search and seizure guaranteed by s. 8 [of the *Charter*] is meant to keep pace with technological development."[1] This Honourable Court must now give effect to this crucial principle.

3. A normative interpretation suggests that there is a reasonable expectation of privacy in text messages even when they are no longer exclusively under the sender's control. Canadians' lived experience with text messages, and the social and legal norms surrounding such communications, suggest that there is, indeed, an objectively reasonable expectation of privacy in them. In fact, defined normatively, text messages, and communications more broadly, attract a high expectation of privacy.

4. CIPPIC respectfully takes the position that, in the instant appeal, the majority of the Court of Appeal erred in deciding that there is no reasonable expectation of privacy in text messages in the

[1] *R v Wong*, [1990] 3 SCR 36, at p 44; See also *R v Tessling*, 2004 SCC 67 at paras 54-55.

hands of the recipient. Instead, CIPPIC submits that text messages, and communications more broadly, attract a high expectation of privacy. Its main submissions on point are: (1) that a normative approach, as opposed to a descriptive approach, must be employed and would result in recognition of a reasonable expectation of privacy in text messages, even in the hands of the recipient; (2) that the control-focused assessment of reasonable privacy expectations, or "risk-analysis," employed by the majority of the Court of Appeal is inconsistent with privacy expectations in modern text-based and other digital communications, and would result in arbitrary and unpredictable results on questions of privacy. The Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic (CIPPIC) accepts the facts as summarized in the parties' facta.

PART II – POSITION ON APPELLANTS' QUESTIONS

5. The Intervener respectfully submits that the Courts below erred in underestimating the high expectations of privacy that individuals retain in text-based communications sent to other individuals.

PART III – STATEMENT OF ARGUMENT

A. Assessing privacy expectations must be a normative exercise

6. This Court has repeatedly recognized that the reasonable expectation of privacy standard is normative, not descriptive or empirical. The normative inquiry into the reasonableness of privacy expectations in a specific context is premised on questions "framed in broad and neutral terms."[2] This means that the assessment of reasonableness is "laden with value judgments which are made 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."[3] The normative approach is flexible, values-driven, and purposive. It is informed by the values underpinning s. 8 of the *Charter*:

> This court has long emphasized the need for a purposive approach to s.8 that emphasizes the protection of privacy as a prerequisite to individual security, self-fulfillment and autonomy as well as the maintenance of a thriving democratic society.[4]

Fundamentally, this requires asking what individuals *should* be able to expect in a free and democratic society, not what they currently *do* expect, as a question of fact.[5]

---

[2] *Wong*, *supra*; *R v Buhay*, 2003 SCC 30; *R v M(A),* 2008 SCC 19.
[3] *R v Patrick*, 2009 SCC 17, para 14; *R v Spencer,* 2014 SCC 43, para 18; *R v Tessling, supra*, para 42.
[4] *Spencer, supra*, at para 15.
[5] Helen Nissenbaum, "Privacy in Context: Technology, Policy and the Integrity of Social Life" (Stanford University

7. Through its flexible and values-driven approach, the normative analysis is increasingly important in the context of rapidly evolving communications technologies.[6] Without the purposive flexibility inherent in the normative approach, privacy may easily be overwhelmed by the rigid application of historic rules to modern state surveillance capabilities and communications delivery. Also, modern communications are often intermediated through several entities as part of the data transmission process. Each of these many intermediaries may exert control over communications, limiting the degree of privacy individuals can empirically expect, with far reaching consequences for privacy if it is defined descriptively rather than normatively.

8. The normative approach retains its flexibility and ability to evolve by focusing analysis on the 'totality of the circumstances.' Reasonable expectation of privacy is to be determined contextually[7] with reference to four factors: (1) the subject matter of the alleged search; (2) the claimant's interest in the subject matter of the search; (3) the claimant's subjective expectation of privacy; and (4) whether the subjective expectation is objectively reasonable, having regard to the totality of the circumstances and the normative approach.[8]

B. Normative analysis recognizes privacy in text-based communications

(i) Identifying the subject matter of the search: text-based communications broadly

9. The subject matter defining the privacy expectation in this case is SMS communications or text messages. Identifying the subject matter normatively requires a broad and purposive approach. CIPPIC submits that electronic communications in general and text messages in particular will tend to reveal intimate details about participants to the 'conversation.' While not every text message will be so revealing, many will.[9] Focusing on the mundane nature of the specific messages captured by the search at issue, while ignoring the deeply private nature of electronic communications in general, demonstrates a reductionist approach to the subject matter analysis.[10]

Press, 2010), pp 233-4.
[6] *Wong, supra*, p. 44
[7] *Tessling, supra*, at para. 31
[8] *Spencer, supra*, at para. 18
[9] *R v Rogers Communications*, 2016 ONSC 70, para. 20
[10] The majority of the Court of Appeal in the instant case (*R v Marakah*, 2016 ONCA 542 [Marakah, ONCA]), para 63, held: "we are not dealing with deeply personal, intimate details going to the appellant's biographical core. Here, we are talking about text messages . . . that reveal no more than what the messages contained – discussions regarding the trafficking of firearms." With respect, this flies in the face of the holding in *Spencer, supra* at paras 25-26 and 31

Adopting such a reductionist approach obscures the relevant context, namely the broader social value of electronic communications in general and of the text messaging activity at issue here. The broader purposive approach adopted by this Honourable Court in *Spencer*, is an approach that links the particular subject matter at issue to the larger context. That approach favours general recognition of electronic communications and text messages as deeply private subject matter, because these will tend to reveal intimate details relating to the conversants.[11]

(ii) Nature of the potentially compromised privacy interest: deeply private communications

10. Identifying the compromised privacy interest does not "depend on whether, in the particular case, privacy shelters legal or illegal activity. The analysis turns on the privacy of the area or the thing being searched and the impact of the search on its target, not the legal or illegal nature of the items sought."[12] While the record in this case only factually involves criminal communications, the appropriate context for consideration of the claimant's interest in the subject matter of the search is not "discussions regarding the trafficking of firearms."[13] The appropriate context, normatively construed, is whether individuals can expect privacy in text messaging.

11. Further, the normative approach requires a contextualized consideration of privacy as secrecy, control, and anonymity.[14] The concept of privacy as control is especially relevant in this appeal, given the technological reality that confidentiality and control over digital text-based messages is necessarily ceded to the recipient and also to multiple intermediaries (for example, the telecommunications provider) to facilitate delivery. As a result, the normative approach requires that control and secrecy must be considered in a layered and contextual way, rather than in an 'all or nothing' manner.[15] Ceding control of information to another individual,[16] company,[17] or the

---

that the subject matter of the search comprehends not only the information sought, but also what that information may further reveal: "[I]n characterizing the subject matter of the alleged search, it is important to look beyond the "mundane" subscriber information such as name and address. The potential of that information to reveal intimate details of the lifestyle and personal choices of the individual must also be considered."

[11] *R v Duarte,* [1990] 1 SCR 30.

[12] *Spencer, supra*, para 36; *Wong, supra*

[13] *Marakah ONCA*, *supra*, para. 63

[14] *Spencer, supra*, paras 36 - 51

[15] *R v Quesnelle*, 2014 SCC 46, paras. 37–44 : "It bears repeating that privacy is not an all or nothing concept; rather, "[p]rivacy interests in modern society include the reasonable expectation that private information will remain confidential to the persons to whom and restricted to the purposes for which it was divulged" .... Consequently, the fact that information about a person has been disclosed to a third party does not destroy that person's privacy interests. Because the contents of occurrence reports will be disclosed under *certain* circumstances does not mean

state,[18] for one purpose is not the same as ceding control of that information for all other purposes. In particular, ceding control of communications such as text messages to another individual is not synonymous with ceding control of that information to the state.[19]

12. CIPPIC takes the position that the majority of the Court of Appeal erred in deciding that the Appellant did not have a reasonable expectation of privacy in his messages in the co-accused's phone, largely because the Appellant could not control what the co-accused did with that phone or the messages on it.[20] With respect, this holding is contrary to the weight of Canadian jurisprudence, and flies in the face of how text-based communication is conceived of in contemporary society.

13. The majority's focus on the sender's loss of control employs the risk analysis that this Court rejected in *R v Duarte*, at paras. 21-2:

> The rationale for regulating the power of the state to record communications that their originator expects will not be intercepted by anyone other than the person intended by the originator to receive it ... has nothing to do with protecting individuals from the threat that their interlocutors will divulge communications that are meant to be private. No set of laws could immunize us from that risk. Rather, the regulation of electronic surveillance protects us from a risk of a different order, i.e. not the risk that someone will repeat our words but the much more insidious danger inherent in allowing the state, in its unfettered discretion, to record and transmit our words.
>
> The reason for this protection is the realization that if the state were free, at its sole discretion, to make permanent electronic recordings of our private communications, there would be no meaningful residuum to our right to live our lives free from surveillance. The very efficacy of electronic surveillance is such that it has the potential ... to annihilate any expectation that our communications will remain private. A society which exposed us, at the whim of the state, to the risk of having a permanent electronic recording made of our words every time we opened our mouths might be superbly equipped to fight crime, but would be one in which privacy no longer had any meaning.[21]

14. The *Marakah* majority distinguished the privacy issues here from those at play in *Duarte*. They held

---

that there is not a reasonable expectation of privacy in those records." Helen Nissenbaum, "Privacy in Context: Technology, Policy and the Integrity of Social Life" (2010) Stanford University Press, pp 233-4.

[16] *Duarte*, *supra*, paras 30 - 32

[17] *Spencer, supra*, stands for the proposition that subscriber information fully under the control of the ISP remains highly private in light of anonymous online browsing of the subscriber.

[18] *R v Quesnelle*, 2014 SCC 46, paras 37 – 44, ("Because the contents of occurrence reports will be disclosed [by the state] under certain circumstances does not mean that there is not a reasonable expectation of privacy in those records.").

[19] *Duarte*, *supra*.

[20] *Marakah*, *ONCA*, *supra*, paras 63-4

[21] *Duarte*, *supra*.

that the issue in *Duarte* was the surreptitious creation of recordings by law enforcement where none otherwise existed. By contrast, text messages themselves already exist as a record of a communication.[22] The majority held that in choosing to communicate by text message, the Appellant used a medium that "necessarily creates a permanent record over which he had no control,"[23] which led to a diminished reasonable expectation of privacy. By focussing its analysis on the creation of the record of the communication, rather than on the nature of the communication itself, the *Marakah* majority missed what is essential to the expectation of privacy. It is the individual's expectation that agents of the State will not read/see/hear their communication that is determinative of privacy. Whether the State creates or merely seizes an existing communication is a detail that responds to the modality of the communication, but not to its essence.

15. Moreover, the majority's view that individuals can "choose" not to engage in text-based communication if they want privacy is, with respect, not reflective of the reality of communicating in contemporary society. In order to meaningfully participate in *our world*, one must in fact engage in text-based communication. The "choice" between a horse-drawn carriage and a car is no real choice after Henry Ford popularly priced the Model T.[24] Similarly, the "choice" to opt out of texting to maintain privacy is not a real choice for the vast majority of Canadians in 2017. Additionally, if the vast majority of society engages in, and expects others to engage in, text-based communications, a standard that eliminates privacy interests on the basis that one in fact engages in text-based communications cannot be a normatively appropriate one.

16. Another key issue in its assessment of privacy as control is that the majority of the Court below imagines communication primarily from a proprietary or territorial perspective, focusing on where the private communication is located or stored. The majority sees communication narrowly as an act of depositing items in someone else's property (like a drawer), thereby relinquishing control over the communication. Because Mr. Marakah had no access to, or control over, the co-accused's phone, the majority held that he could not have a reasonable expectation of privacy in

[22] *Marakah*, *ONCA*, *supra*, paras 80-82
[23] *Marakah*, *ONCA*, *supra,* para. 82
[24] An analogy may be helpfully drawn here to Iacobucci's comments in his majority decision in *R v White*, [1999] 2 SCR 417 at para 55, describing driving a motor vehicle as activity that is "not freely undertaken in precisely the same way as one is free to participate in a regulated industry such as the commercial fishery" but as something that is "often a necessity of life."

its contents. However, this Court has eschewed property-focused approaches to its analysis of privacy, holding in *Hunter v Southam* that section 8 protects "people, not places."[25] This Court moved further from a property-based analysis of privacy in considering contemporary forms of communication in *R v Vu*,[26] *R v Morelli*,[27] *R v Cole*,[28] and *R v Fearon.*[29]

17. In *Vu*, for example, the Court decided that traditional search warrants of physical places are insufficient to encompass searches of computers because "[t]he privacy interests implicated by computer searches are markedly different from those at stake in searches of receptacles such as cupboards and filing cabinets."[30] Similarly, in *Cole*, the Supreme Court found the accused's employer's ownership and ultimately control of the laptop on which he had deposited personal information was not determinative of the question of privacy. The crucial holding arising from this jurisprudence is that digital information about individuals transcends the boundaries of physical space or physical objects. One does not need to own the storage box to have a privacy interest in the information inside. This is especially true of digital communication where the medium used necessarily creates copies of the same information in different places, without touching the essential character of the content of the communication. It is unhelpful to focus exclusively on the storage space and who controls it.

18. By focussing on ownership and control of property in physical space, the majority in this case in effect set a general default presumption that text-based communication does not attract a reasonable expectation of privacy. This is because, in the vast majority of text-based communications, the receiver of the communication will retain a written record not accessible to, or controllable by, the sender. A purely control-focused approach to reasonable expectation of privacy, as employed by the Marakah majority, suggests that we can only use technology to exchange information with each other by sacrificing our privacy.

19. With respect, this cannot be correct. The mass adoption of modern communication tools should not destroy the aspirational paradigm long subscribed to by Canadian courts: individuals have a

[25] *Hunter v Southam, supra*, p 159.
[26] *R v Vu*, 2013 SCC 60.
[27] *R v Morelli*, 2010 SCC 8.
[28] *R v Cole*, 2012 SCC 53.
[29] *R v Fearon*, 2014 SCC 77.
[30] *Vu, supra*, at paras 24, 40–45.

right to self-determine with whom they share information about themselves. Even in our digital age, there needs to be room for individuals to live, operate, and communicate privately. The loss of 'control' vis-à-vis text recipients does not diminish the high level of privacy engaged in text-based forms of digital communication.

(iii) Expectations of privacy in text-based digital messages are objectively reasonable

20. The normative approach to determining reasonable expectations of privacy requires the court to focus on contemporary social norms surrounding text-based communications and the relationships, intentions, and expectations of the parties who are communicating. In this case, text-based digital communications (SMS, email) have been very widely adopted and their use is widespread.[31] In fact, voice-based communications are being supplanted in prominence by text-based conversations that convey at least the same level of information. There is growing recognition that for many, especially the young, texting has replaced traditional voice communications in many instances.[32] This trend was recognized by Justice Abella in *R. v. Telus*: "text messaging has become an increasingly popular form of communication . . . bear[ing] several hallmarks of traditional voice communication."[33] Indeed, text messaging has become an embedded part of our daily lives. This embeddedness transforms text messaging into a 'running conversation' that captures most aspects of our daily activities:[34]

> SMS – with its relative simplicity and ease of use, SMS continues to grow in popularity, especially with people aged 15 to 25 and for NGOs and grassroots organizations. Bypassing email and Instant messaging, text messaging has become an integral part of daily lives across the world. Many communication applications have embedded direct-to-SMS functionality.[35]

21. The nature of most text-based communications is itself indicative of contemporary social norms and

---

[31] As early as 2005, 80 per cent of Canadian children in grade nine and older said that they used instant messaging every day, and 80 – 83 per cent of girls and 54 – 61 per cent of boys said instant messaging was their preferred online activity. See Valerie Steeves, "Young Canadians in a Wired World, Phase II: Trends and Recommendations" (Ottawa: MediaSmarts, 2005), 7 <http://mediasmarts.ca/sites/mediasmarts/files/pdfs/publication-reoirt/full/YCWWII-trends-recomm.pdf>

[32] See, for example, Jeffrey Kluger, "We Never Talk Any More: The Problem With Text Messaging", August 21, 2012, CNN.com, <http://www.cnn.com/2012/08/31/tech/mobile/problem-text-messaging-oms/>.

[33] *R v Telus Communications Co*, 2013 SCC 16, per Abella J, concurring.

[34] D. Gilbert, I. Kerr & J. McGill, "The Medium is the Message: Personal Privacy and the Forced Marriage of Police and Telecommunications Providers," (2007) 51(4) Crim LQ 469.

[35] OECD & ITU, M-Government, "Mobile Technologies for Responsive Governments and Connected Societies, 2011", Chapter 5, p 82; Canadian Bar Association, "Submission on Lawful Access – Consultation Document," December 2002, pp 3-4.

expectations surrounding privacy. Most text messages are short. The language used is typically informal, often consisting of slang and other shorthand texting expressions including abbreviations, acronyms, emojis, gifs, etc. There is a form of texting vernacular, an informal patois, that makes clear that texted communications are generally not intended to be shared in the public sphere. Instead, text messages are private conversations between the sender and the receiver.

22. Examining the lived experience of Canadians with text-based communication, and current social norms, properly leads to the conclusion that there is an objectively reasonable expectation of privacy in such communications. This was correctly recognized by the British Columbia Court of Appeal in *R. v. Pellucco* and *R. v. Craig*:[36]

> . . . text messaging has much in common with telephone conversations. It is typically carried out between two individuals. While a written record of the text conversation is produced, it is not usual for the conversation to be printed or archived, or forwarded to others. In ordinary circumstances, the sender and recipient expect the record to be transitory, and not to be shared.
>
> While there will be situations in which the content of the text message or the situation negative these ordinary expectations, it seems to me that **the social norm is to expect that text messages remain private communications between the sender and recipient** [emphasis added].

23. With respect, the majority of the Court of Appeal erred in this case in holding, at para 71, that there is "a lack of empirical evidence to support a conclusion that senders of text messages have a presumptively reasonable expectation, from an objective standpoint, that their text messages will remain private in the hands of the recipient." To so hold is to adopt a descriptive rather than a normative approach to defining the private sphere. In deciding whether an expectation of privacy is objectively reasonable, judges are not called upon to conduct or consider large-scale opinion research or hear expert opinion on point. Instead they are called upon to perform the task of considering, normatively, what the scope of the private sphere should be over the long-term, given the recognized importance of a robust concept of privacy to individual self-expression, democracy, and freedom.[37] The normative inquiry asks the judge to examine not only what is, but what ought to be. Professor Nissenbaum described this judicial function as follows:

> As with other 'reasonable person' doctrines, it has a built-in but not immediately obvious normative requirement because it calls on judges and other decision makers to determine,

[36] *R v Pelucco*, 2015 BCCA 370, paras 64, 65; *R v Craig*, 2016 BCCA 154, paras 117-121
[37] *Hunter v Southam Inc*, [1984] 2 SCR 145; *R v Duarte*, [1990] 1 SCR 30; *R v Wong,* [1990] 3 SCR 36

> factually, not only that there is an expectation but that it is a reasonable one. Because we do not imagine that judges and decision makers will quickly conduct large-scale surveys or observations to determine what is reasonable in each particular case of decision before them, we assume they apply wisdom and discretion to *define* what is reasonable. ... A judge may establish that an expectation in relation to a certain activity or practice is reasonable by pointing out that the activity in question is commonplace.
>
> ... To say that an expectation of privacy is reasonable in the practice is commonplace, of course, is to hide at least two of the determinations, requiring wisdom and discretion, that judges (or other decision makers) must make. One is normative, for surely no matter how common certain actions or practices are, one should be able to depend on judges not to blindly sanction them if they are morally or legally questionable. ... It is on the second of the two that I wish to focus: judges must make the determination that the actions or practices in question are analogous or similar enough to previous actions or practices for these predecessors to inform their assessments of reasonable expectation. ... To determine that an action under consideration violated a person's reasonable expectation of privacy, a judge must be satisfied that the action is similar enough to, or of the same type as, or analogous to, other actions that society deems a violation of privacy.[38]

24. Employing Professor Nissenbaum's approach, CIPPIC submits that there is a reasonable expectation of privacy in text-based communications because they are commonplace; analogous to voice conversations on the telephone, an activity already recognized as attracting a high expectation of privacy as recognized by this Honourable Court in *TELUS*; and not morally or legally questionable. Text-based communications attract a reasonable expectation of privacy regardless of where the digital message happens to be located at the time of the search. Communication in our digital era should be considered an activity, not an artifact. From the moment we hit send, our communication exists in at least two or three places at the same time. The modalities of digital communication do not change the inherently private nature of the activity of communication between two people.

PART IV – COSTS

25. The intervener will not seek costs and asks that no costs be awarded against it.

PART V – ORDER SOUGHT

26. The intervener respectfully requests that its submissions be considered in resolving this appeal, and that it be granted the right to present oral arguments at the hearing of this matter.

---

[38] Helen Nissenbaum, "Privacy in Context: Technology, Policy and the Integrity of Social Life" (2010) Stanford University Press, pp. 233-4

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 26h day of February, 2017

for Jan Israel

Jill R Presser

Presser Barristers
116 Simcoe Street, Suite 116
Toronto, Ontario, M5H 4E2

Tel: (416)586-0330
Fax: (416) 596-2597
Email: presser@presserlaw.ca

Jan Israel

Tamir Israel

Samuelson Glushko Canadian Internet Policy and Public Interest Clinic (CIPPIC)
University of Ottawa, Faculty of Law, CML
FTX 102, 57 Louis Pasteur Street
Ottawa, ON, K1N 6N5

Tel: (613) 562-5800 ext 2914
Fax: (613) 562-5417
Email: tisrael@cippic.ca

Counsel for the Intervener, Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic (CIPPIC)

PART VI – TABLE OF AUTHORITIES

	Authority	Reference in Factum
	Cases	
1	*Hunter v Southam Inc*, [1984] 2 SCR 145	16, 23
2	*R v Buhay*, [2003] 1 SCR 631, 2003 SCC 30	6
3	*R v Cole*, [2012] 3 SCR 34, 2012 SCC 53	16
4	*R v Craig*, 2016 BCCA 154	22
5	*R v Duarte*, [1990] 1 SCR 30	9, 11, 13, 23
6	*R v Fearon*, [2014] 3 SCR 621, 2014 SCC 77	16
7	*R v M(A),* [2008] 1 SCR 569, 2008 SCC 19	6
8	*R v Marakah*, 2016 ONCA 542	9-10, 12, 14, 23
9	*R v Morelli*, [2010] 1 SCR 253, 2010 SCC 8	16
10	*R v Patrick*, [2009] 1 SCR 579, 2009 SCC 17	6
11	*R v Pelucco*, 2015 BCCA 370	22
12	*R v Quesnelle*, [2014] 2 SCR 390, 2014 SCC 46	11, 23
13	*R v Rogers Communications*, 2016 ONSC 70	9
14	*R v Spencer*, [2014] 2 SCR 212, 2014 SCC 43	6, 8-11
15	*R v Tessling*, [2004] 3 SCR 432, 2004 SCC 67	2, 6, 8
16	*R v TELUS Communications Co*, [2013] 2 SCR 3, 2013 SCC 16	20
17	*R v Vu*, [2013] 3 SCR 657, 2013 SCC 60	16-17
18	*R v White*, [1999] 2 SCR 417	15
19	*R v Wong*, [1990] 3 SCR 36	2, 6-7, 10, 23
	Academic	
20	Canadian Bar Association, "Submission on Lawful Access – Consultation Document," December 2002, <http://www.cba.org/CMSPages/GetFile.aspx?guid=59720fc6-37fe-4f46-8380-32b8fb8efe7b>	20
21	Daphne Gilbert, Ian R. Kerr & Jena McGill, "The Medium is the Message: Personal Privacy and the Forced Marriage of Police and Telecommunications	20

	Providers", (2007) 51(4) *Crim LQ* 469, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1302544>	
22	Jeffrey Kluger, "We Never Talk Any More: The Problem With Text Messaging", August 21, 2012, CNN.com, <http://www.cnn.com/2012/08/31/tech/mobile/problem-text-messaging-oms/>	20
23	Helen Nissenbaum, "Privacy in Context: Technology, Policy and the Integrity of Social Life" (2010) Stanford University Press	6, 23-24
24	OECD & ITU, M-Government, "Mobile Technologies for Responsive Governments and Connected Societies, 2011", <http://www.itu.int/pub/D-STR-GOV.M_GOV-2011 >, Chapter 5	20
25	Valerie Steeves, "Young Canadians in a Wired World, Phase II: Trends and Recommendations" (Ottawa: MediaSmarts, 2005), <http://mediasmarts.ca/sites/mediasmarts/files/pdfs/publication-reoirt/full/YCWWII-trends-recomm.pdf>	20