SCC File No: 35298

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

BETWEEN:

KEVIN FEARON

APPELLANT
(Appellant)

- and –

HER MAJESTY THE QUEEN

RESPONDENT
(Respondent)

- and -

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PART I - OVERVIEW and STATEMENT OF FACTS

OVERVIEW

1. The Criminal Lawyers' Association of Ontario ("CLA") intervenes in this appeal to urge this Honourable Court, on a broader policy perspective, to disallow warrantless searches of any personal digital device incident to arrest (except in very limited emergency situations involving physical safety of an officer or other person) and to require that all digital device searches be with a warrant that is responsive to the nature of the information sought, which in the case of text messages is a Part VI authorization.

2. Canadians use their cell phones not only to communicate with each other through various mediums, but also, for example, to plan their travel route, track their medical and financial information, share photos with friends, and to monitor family planning initiatives.[1] The significance of cell phone technology to our day-to-day lives was simply unfathomable when the SITA doctrine was first developed, and it is for this reason the two have not been easy to reconcile. Like *Vu*,[2] this case is about adapting a traditional legal framework – developed before a particular technology became widespread – to modern times.

3. The SITA power should not be extended to allow ready, routine access to the advanced mobile devices of detainees. Extending such a power to the police would do great violence to the values protected by s. 8 of the *Charter*, and directly undermine this Court's recognition, in cases such as *Vu* and *Telus*[3], of the unique privacy interests attached to the kinds of information routinely found in advanced mobile devices.

4. The proliferation of personal digital devices is a socially valuable development. Personal digital devices serve the public good. These devices create new and more frequent opportunities for greater interpersonal contact and communication with family and others, make commerce easier, and make greater financial organization of one's life achievable. Personal digital devices have also allowed the recording of historical events and tragedies

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1 Scott Hutchison and Brennagh Smith, "Search Incident to Arrest in the Mobile Age." (2011), a paper prepared for Osgoode Professional Development's Search and Seizure Law in Canada, at p. 3 [Book of Authorities ("BA") Tab 8].
2 *R. v. Vu*, 2013 SCC 60, 365 D.L.R. (4th) 601 ["*Vu*"].
3 *R v. TELUS Communications Co*., 2013 SCC 16, [2013] 2 S.C.R. 3 ["*Telus*"].

as they take place, and videos from such devices have become an important aspect of solving crimes and exposing police brutality. The personal digital device revolution has tremendous social value and should be encouraged and supported. Digital devices should not be allowed to become privacy traps which a citizen unwittingly fills with private information, only so that thereafter it remains available to be emptied at the unilateral instance of the police.[4]

5. The CLA adopts the Canadian Civil Liberties Association's ("CCLA") submissions that a warrant is required to search the contents of a cell phone given the unique privacy interests associated with these devices. We also adopt the CCLA's submissions (and that of the Crown Appellant) that the "cursory search" standard developed in *Polius* is unworkable in a practical sense. The Criminal Lawyers' Association's ("CLA") goes further and submits that:

(1) *the seizure of a cell phone should be allowed incident to arrest only when there exists reasonable and probable grounds that the device will afford evidence of a crime*. As the case law to date has demonstrated, the lower 'reasonable basis' standard and *Caslake* framework have granted the police too much leeway to routinely seize a digital device incident to arrest; and,

(2) *a wiretap authorization is required when the search pertains to text messages stored on a phone.* Following this Court's reasoning in *Telus*, a warrant under Part VI of the *Code*[5] should be required where the police seek to search or review the text messages stored on a detainee's cell phone.

FACTS

6. The CLA takes no position on the facts.

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4 This paragraph is largely extracted from the factum filed on behalf of Mr. Yu in the Court of Appeal for Ontario, prepared by Alan D. Gold and Melanie Webb; *R. v. Liew and Yu*, 2012 ONSC 1826.
5 *Criminal Code*, R.S.C. 1985, c. C-46.

PART II – STATEMENT OF ISSUES

7. The CLA will address the following issues in this appeal: (1) when seizure of a digital device, as distinct from a search, should be allowed incident to arrest; and (2) whether a wiretap authorization should be required when the search pertains to text messages stored on the digital device.

PART III - STATEMENT OF ARGUMENT

Search Versus Seizure

8. While the focus of the parties' submissions have been on the search of the cell phone, it is also imperative to place limits on when a mobile device can be seized incident to arrest. The seizure of a digital device, itself, is highly intrusive in terms of privacy expectations. Practically speaking, seizure will often result in a lengthy loss of property. Seizure, of course, also restricts a detainees use of their device. This could mean an instant loss of contacts or personal documents and photos stored electronically on the phone. There is a privacy interest in maintaining control over such information that itself must be balanced against the state's law enforcement objections. A *de facto* right to seize does not adequately take these important privacy interests into account.

9. To protect arrestees from the significant infringement of their privacy rights associated with seizure, the CLA proposes that a digital device should only be seized incident to arrest where there are reasonable and probable grounds to believe that the device is likely to yield evidence that can be used at trial *or* subject to a very limited emergency exception in relation to physical safety.

10. The traditional *Caslake* framework outlines three permissible purposes for SITA: (1) ensuring the safety of the police and public, (2) the protection of evidence from destruction, and (3) the discovery of evidence which can be used at the arrestee's trial. It also requires only a 'reasonable basis' for the search, a standard which is lower than the reasonable and probable grounds standard proposed here.[6]

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6 *R .v. Caslake*, [1998] 1 S.C.R. 51 at p. 64 ["*Caslake*"].

11. However, to date, the prevention of the destruction of evidence has been used as a routine justification for the seizure of digital devices incident to arrest.[7] Indeed, it is difficult to imagine a scenario where this goal cannot be advanced as a justification for seizing, for example a smart phone, on the 'reasonable basis' standard. It is easy enough for the police to suggest that once an individual is released with their cell phone, they will have ample opportunity to destroy any relevant evidence it may contain.

12. Yet the *Caslake* framework was not meant to elevate satisfying any one of the SITA law enforcement goals to the level of an inflexible trump card. This Court has acknowledged that the SITA power was not meant to give the police a licence to conduct any and all searches which might advance those legitimate goals.[8] Given the very significant privacy interests at stake, a heightened and focused standard is required to justify the seizure of a cell phone incident to arrest.[9]

13. The factual background in the present case illustrates how easily the seizure of a cell phone can be justified under the *Caslake* formula. It should not be sufficient for a police officer to baldly assert that an accused person may have called a co-accused or taken pictures of the crime in order to justify the seizure of a cell phone. This can be said in virtually any case.[10] Such contentions are an obvious result of how widely-used personal digital devices are in the modern world.

14. There is little in the facts of this case that can readily distinguish it from any other case of arrest. If seizure is permitted in this case, it will be tough to argue that it cannot be properly done in the vast majority of arrests.[11] Effectively, this leaves no room for recognition of the imperative privacy interests at stake at the point of seizure. The CLA

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7 See i.e. *R. v. Hiscoe*, 2013 NSCA 48 at para. 38, which notes the need to secure evidence as a rationale for seizing the cell phone.
8 *R v. Golub*, (1997) 34 O.R. (3d) 743 ["*Golub*"] at para. 27 citing *Cloutier v. Langlois*, [1990] 1 S.C.R. 158 at p. 276.
9 For another example of when this court has modified the SITA framework to impose a heightened standard, see *R. v. Golden*, 2001 SCC 83, [2001] S.C.R. 679 (requiring reasonable and probable grounds for strip searches incident to arrest). See also *R. v. Stillman*, [1997] 1 S.C.R. 607.
10 See i.e. *R. v. Knox*, 2013 ONCJ 484, [2013] O.J. No. 4269 (QL) ["*Knox*"] at para. 27 where the reasoning given for reviewing a text message on a detainee's phone was the officer's belief that generally cell phones are the tool of the drug trade [BA Tab 4].
11 *R. v. Giles*, 2007 BCSC 1147, [2007] B.C.J. No. 2918 (QL).

respectfully submits that such a low standard is incompatible with the high expectation of privacy associated with advanced mobile devices.

Intercepted Communications

15. Mobile digital device technology has changed not just where we store information, but how we transmit and receive it. Text-messaging and application-based chats have entirely re-written how we conceptualize and conduct conversations, which no longer have clear-cut start and end times, and can take place in layers through multiple modes of communication simultaneously. Given this fluidity, and the fact that text-based communication is, by its very nature, self-recording, it is the CLA's position that the law governing Part VI authorizations must evolve to apply to all police acquisitions of text messages. The alternative is a circumventing of the specific safeguards Parliament sought to attach to the state's interception of private communications.

16. Within digital devices there are zones of privacy. The kinds of information recorded by digital devices, and the manner in which that information is recorded, require specific consideration in ascertaining how the rights of Canadians can best be protected from undue state intrusion.

17. In *R. v. Duarte* [12] this Honourable Court held that the *Charter* could not tolerate the warrantless surreptitious recording of a private communication because private communications in their casual, unrestricted nature should not be subject to permanent availability and access by the police. A continuing invasion of privacy on that scale could only be countenanced by prior judicial authorization. Further, the permanent nature of the recording itself added a qualitative component to the privacy concerns associated with capturing private communications such that they were properly subject to Part VI authorization.

18. In *Telus,*[13] the plurality of this Court held that the police must obtain a wiretap warrant under Part VI of the Code to obtain the prospective production of future text messages

12 [1990] 1 S.C.R. 30.
13 *Telus, supra* note 3.

from Telus' computer database. It is the CLA's position that the reasoning in *Telus* supports that the retrieval of text messages from an electronic device will always constitute an "interception" of private communications within the meaning of Part VI of the *Code*.

19. The decision in *Telus* turned on the interpretation of "intercept" and "private communications" as set out in the Part VI. The key definition is that of the verb, "intercept". It is defined in s. 183 as follows:

> "Intercept" includes listen to, record or acquire a communication or acquire the substance, meaning or purport thereof.

20. "[P]rivate communication" is defined in s. 183 as:

> ... any oral communication, or any telecommunication, that is made by an originator who is in Canada or is intended by the originator to be received by a person who is in Canada and that is made under circumstances in which it is reasonable for the originator to expect that it will not be intercepted by any person other than the person intended by the originator to receive it, and includes any radio-based telephone communication that is treated electronically or otherwise for the purpose of preventing intelligible reception by any person other than the person intended by the originator to receive it.

21. In *Telus*, the plurality was careful to note that the interpretation of "intercept" should not be dictated by the technology used to transmit the communications, but rather by what was intended to be protected under Part VI and the rights enshrined in s. 8 of the *Charter*.[14] Consequently, the interpretation of "intercept a private communication" must focus on whether there has been an acquisition of informational content, bearing in mind the individual's expectation of privacy at the time the communication was made.[15]

22. On this reasoning, it should not matter whether the texts are acquired from the cell phone itself or surreptitiously from Telus' computer databases. From the individual's perspective, the expectation of privacy in the text has nothing to do with how the police eventually go about intercepting it. The text is expected to be private at the time it is sent

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14 *Ibid*., at para. 4.
15 *Ibid*., at para. 36.

regardless of the method used by the police to acquire its contents. Once acquired, the texts provide the police with a transcript of private communications taking place between two or more individuals.

23. In coming to the conclusion that the texts in *Telus* were intercepted, Justice Abella for the plurality determined that the interception does not need to be simultaneous or contemporaneous with the making of the communication itself. As stated:

> It is true that unlike traditional voice communication, a text message may or may not be delivered to its intended recipient at the time it is created. Receipt of the text message depends on whether the phone is turned on, whether it is in range of a cell tower, and whether the user has accessed the message… A narrow or technical definition of "**intercept**" that requires the act of interception to occur simultaneously with the making of the communication itself is therefore unhelpful in addressing new, text-based electronic communications.[16]

24. As such, it is irrelevant whether the text was already received by the recipient at the time of its interception. As there is no fixed end to a text messaging conversation, police acquisition of the text-based transcript at any point constitutes "intercept".

25. The CLA's submission is supported by the lower court decision *R. v. Croft*.[17] In *Croft*, Justice Burrows of the Alberta Court of Queen's Bench considered whether production orders directing Telus and other service providers to provide an RCMP officer with all incoming and outgoing text messages for certain cellular phones were valid. The production orders were for a set period of time that ended before the date of the order. Therefore, unlike *Telus, Croft* considered the authorization required to obtain what might be characterized as 'historic' text messages from Telus' computer database.

26. The accused argued that the acquisition of the text messages by the police through this means was a violation of s. 8 of the *Charter*, since the police's actions constituted the interception of private communications pursuant to Part VI. Justice Burrows agreed, holding that the reasons articulated by this Court in *Telus* applied equally to historic text

16 *Ibid.*, at para. 34.
17 2013 ABQB 640, 304 C.C.C. (3d) 279 ["*Croft*"] [BA Tab 2].

messages on Telus' servers as they did to prospective messages.[18] There was simply no requirement that the interception occur simultaneously with the conversation.

27. This reasoning begs to question whether text message conversations can even be conceptualized as 'historic' in the traditional sense. Unlike traditional voice communications, text conversations are not static. They are fluid and ongoing. They occur in bursts over a broader timeframe, at times with significant lags in between responses. Text messaging capabilities and logs provide an unprecedented record/transcript of a person's private communications over a potentially unlimited period of time and with a vast array of professional and personal contacts.

28. Further, it is important to bear in mind that a digital device may continue to receive private communications even after it is seized. This was the case, for example, in *R. v. Knox*.[19] Knox was charged with trafficking based on a text he sent to someone who, unknown to him, was in police custody at the time. The officer answered the text impersonating the intended recipient. He set up a time to meet Knox to purchase cocaine from him. While the trial judge found Knox had a reasonable expectation of privacy in the content of the message, he held the review of the texts was valid because the phone was validly seized incident to the recipient's arrest. No heed was paid to the fact that the conversation was clearly ongoing at the time the recipient's phone was seized. The texts were 'future' messages, and yet a wiretap warrant was never sought.[20]

29. The purpose of the *Code* provisions concerning wiretap authorizations is to limit the use of technology to invade private communications.[21] Allowing police officers to examine text messaging history of an accused person is tantamount to giving them permission to obtain a permanent recording of that person's private conversations with an indefinite number of people, over an indefinite period of time, all the while circumventing the Code's regulation of such activity.

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18 *Ibid*., at para. 51.
19 *Knox*, supra note 10 [BA Tab 4].
20 For other lower court decisions which decline to apply *Telus* in the SITA context, see *R. v. Arthur*, 2013 BCSC 770, [2013] B.C.J. No. 885 [BA Tab 1] and *R v. Larose*, 2013 SKQB 226, [2013] S.J. No. 384 [BA Tab 5].
21 *Telus*, *supra* note 3 at para. 24.

30. In *Telus*, the majority of this Court noted that the general warrant provisions were not meant to supplant or circumvent the more onerous warrant requirements otherwise found in the Code.[22] This same concern is amplified when it comes to the SITA power, which leaves even less room for judicial oversight than the general warrant at issue in *Telus*.

31. The electronic surveillance of private communications has for at least four decades been recognized as raising uniquely important privacy concerns, ones that are specifically addressed in Part VI of the *Code*. For example, prior to starting any electronic surveillance, the police are compelled to seek a warrant from the court. Each of these is recorded and filed with the Minister of Public Safety who, in turn, is required by the *Criminal Code* to provide Parliament with statistics annually in the interest of public transparency. By examining the total number of court authorizations issued per year over time, it can be seen that the number of court authorizations granted for electronic surveillance has steadily declined since reporting began in 1974. However, researchers studying this trend warn that the reporting requirements are concealing a much more concerning trend, namely that electronic recordings of private communications are being routinely obtained outside the parameters of Part VI of the *Code.*[23]

32. Text messaging is competing with telephone calls for primacy in the modern world of interpersonal modes of communication. Permitting access to text messaging on any basis short of a Part VI authorization serves to eviscerate the *Code* provisions designed to protect against routine and unmonitored electronic surveillance of private communications.

Conclusion

33. In order to search any electronic device[24] seized pursuant to an arrest, a warrant is required. Requiring judicial pre-authorization will limit the depth and scope of these

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22 *Telus, supra* note 3, per Abella J. at para 19; per Moldaver J. at para. 91.

23 Nicholas Koutros and Julien Demers, "Big Brother's Shadow: Decline in Reported Use of Electronic Surveillance by Canadian Federal Law Enforcement." Electronic copy available at: <http://ssrn.com/abstract=2220740> [BA Tab 8]

24 That is, a device that could potentially store personal information including a cell phone, laptop computer, tablet computer, or storage device such as a USB key or external hard drive.

searches.[25] A judicial officer could impose conditions for the device search thereby giving the police the appropriate amount of access to the device while still protecting the individual's privacy interests. The search of a device can be limited or compartmentalized to those areas which are deemed to be of potential relevance to the investigation.

34. In addition, there must be some limits imposed on seizure of such devices. Requiring reasonable and probable grounds that a phone is likely to yield evidence that can be used at trial strikes a fair balance between the heightened privacy interests intrinsic to digital devices and the state's legitimate law enforcement goals.

35. Lastly, police acquisition of text message communications will always constitute an "interception" of private communications within the meaning of Part VI of the *Code*. The law must recognize that text messaging technology has fundamentally changed our means of a carrying out a conversation before wiretap authorization becomes obsolete.

PART IV & V - SUBMISSIONS ON COST AND ORDER REQUESTED

36. The Criminal Lawyers Association seeks no order in connection with this appeal. The CLA is a non-profit organization with limited resources. Its counsel act *pro bono publico*. The CLA does not seek costs against any party, and asks that no costs be ordered against it.

37. The CLA requests the right to present oral argument at the hearing of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

March 30, 2014

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Jennifer Micallef
Kristen Allen

25 Hutchinson, *supra* note 1 at page 10.

PART VI – TABLE OF AUTHORITIES

	Case	**Paragraph #**
	Cloutier v. Langlois, [1990] 1 S.C.R. 158 [Appellant's Book of Authorities ("ABA") Tab 1]	**12**
1.	*R. v. Arthur*, 2013 BCSC 770, [2013] B.C.J. No. 885	**28**
	R. v. Caslake, [1998] 1 S.C.R. 51 [ABA Tab 4]	**5, 10, 12, 13**
2.	*R. v. Croft*, 2013 ABQB 640, 304 C.C.C. (3d) 279	**25, 26**
	R. v. Duarte, [1990] 1 S.C.R. 30	**17**
	R. v. Giles, 2007 BCSC 1147, [2007] B.C.J. No. 2918 (QL) [ABA Tab 5]	**14**
	R. v. Golden, 2001 SCC 83, [2001] S.C.R. 679 [ABA Tab 6]	**12**
	R. v. Golub, (1997) 34 O.R. (3d) 743	**12**
3.	*R. v. Grant*, [1993] S.C.J. No. 98	/
	R. v. Hiscoe, 2013 NSCA 48 [ABA Tab 9]	**11**
4.	*R. v. Knox*, 2013 ONCJ 484, [2013] O.J. No. 4269 (QL)	**28**
5.	*R. v. Larose*, 2013 SKQB 226, [2013] S.J. No. 384	**28**
	R. v. Liew and Yu, 2012 ONSC 1826 [ABA Tab 11]	**4**
6.	*R. v. Silveira*, [1995] S.C.J. No. 38	/
	R. v. Stillman, [1997] 1 S.C.R. 607 [ABA Tab 20]	**12**
	R. v. TELUS Communications Co., 2013 SCC 16, [2013] S.C.R. 3 [ABA Tab 21]	**3, 5, 18-30**
	R. v. Vu, 2013 SCC 60, 365 D.L.R. (4^{th}) 601 [ABA Tab 22]	**2, 3**

	Secondary Source	**Paragraph #**
7.	Scott Hutchinson and Brennagh Smith, "Search Incident to Arrest in the Mobile Age." (2011) a paper prepared for Osgoode Professional Development's Search and Seizure Law in Canada	**2, 33**
8.	Nicholas Koutros and Julien Demers, "Big Brother's Shadow: Decline in Reported Use of Electronic Surveillance by Canadian Federal Law Enforcement." Electronic copy available at: <http://ssrn.com/abstract=2220740>	**32**

PART VII – STATUES RELIED ON

Criminal Code, R.S.C. 1985 c. C-46

PART VI INVASION OF PRIVACY
DEFINITIONS

Definitions

183. In this Part,

…

"intercept"
« intercepter »

"intercept" includes listen to, record or acquire a communication or acquire the substance, meaning or purport thereof;

…

"private communication"
« communication privée »

"private communication" means any oral communication, or any telecommunication, that is made by an originator who is in Canada or is intended by the originator to be received by a person who is in Canada and that is made under circumstances in which it is reasonable for the originator to expect that it will not be intercepted by any person other than the person intended by the originator to receive it, and includes any radio-based telephone communication that is treated electronically or otherwise for the purpose of preventing intelligible reception by any person other than the person intended by the originator to receive it