SCC File No. 40465

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

BETWEEN:

DWAYNE ALEXANDER CAMPBELL

Appellant

- and -

HIS MAJESTY THE KING

Respondent

- and -

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Interveners

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NATIONAL COUNCIL OF CANADIAN MUSLIMS
(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)

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PART I. OVERVIEW AND STATEMENT OF FACTS

1. Muslim Canadians are overpoliced and under-protected.[1] They are routinely subject to warrantless searches.[2] For many, these searches make illusory the privacy protections promised under section 8 of the *Charter* and its important role in living a life with dignity.[3]

2. Warrantless searches do not happen in a vacuum. They take place against the backdrop of Islamophobia. In November 2023, the Senate published a 79-page report on growing Islamophobia in Canada, outlining the need for "urgent" action.[4] Warrantless searches exacerbate this reality. Such searches seed distrust between law enforcement and Muslim Canadians, resulting in a vicious cycle. Because of warrantless searches, many Muslim Canadians are scared to go to the police for help. This, in turn, inhibits the ability of the police to address aspects of Islamophobia.[5]

3. While warrantless searches are lawful in the appropriate circumstances, the National Council for Canadian Muslims ("**NCCM**") intervenes to explain the impact of warrantless searches on Muslim communities, and to provide solutions to the Court on key doctrinal uncertainties related to section 8. In so doing, NCCM makes two submissions:

(a) Warrantless searches disproportionately impact Muslim Canadians; and,

(b) In order to clarify doctrinal uncertainties, the Court should affirm that: (i) "relationships" should not be used as a proxy to assess privacy claims; (ii) voluntary digital communication creates a "record"; and (iii) privacy is content neutral.

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[1] Kent Roach, "The Need to Better Understand the Over-Policing and Under-Protection of Muslims" in A. M. Emon, ed, *Systemic Islamophobia in Canada: A Research Agenda* (Toronto: University of Toronto Press, 2023) at 207, Book of Authorities ("**BOA**"), Tab 1 ["**Roach**"].

[2] Farrukh Hakeem, *Policing Muslim Communities Comparative International Context* (NY: Springer, 2012) at 30, BOA, Tab 2; Tabasum Akseer, "Understanding the Impact of Surveillance and Security Measures on Muslim Men in Canada" (2018): *Centre for International and Defence Policy* at 32 ["**Akseer**"].

[3] *R v Dyment*, [1988] 2 SCR 417 at para 17.

[4] Report of the Standing Senate Committee on Human Rights, *Combatting Hate: Islamophobia and its Impact on Muslims in Canada*, (2 November 2023) at 11 ["**Senate Report**"].

[5] Senate Report at 28-29.

PART II. POSITION ON THE QUESTIONS IN ISSUE

4. NCCM's submissions are set out above at paragraph 3.

PART III. STATEMENT OF ARGUMENT

A. Warrantless Searches Disproportionality Impact Muslim Communities

5. Muslim Canadians have been disproportionately subject to heightened police scrutiny post-9/11 and are more vulnerable to widespread warrantless searches than non-Muslim Canadians.[6] This reality is illustrated through cases such as Maher Arar[7] and the prosecution of John Nuttall and Amanda Korody.[8] In the wake of 9/11, there were numerous instances of law enforcement approaching Muslim Canadians without warrants and arresting them for interrogation.[9]

6. Twenty-two years later, Islamophobia persists. There are many recent examples of unsolicited visits by the CSIS or the RCMP to Muslim workplaces, homes, and student associations that stem from the discriminatory view that Muslims are "a suspect community requiring surveillance".[10] All of this is happening in the context of an increase in the number of reports of hate crimes targeting Muslims[11] and systemic discrimination against Muslim

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[6] Roach, BOA, Tab 1 at 212.
[7] Roach, BOA, Tab 1 at 208.
[8] Roach, BOA, Tab 1 at 212. In *R v Nuttall*, 2016 BCSC 1404, the Court found that the RCMP had "manufactured the crime" and "acted on the assumption that there were no limits to what was acceptable when investigating terrorism" when carrying out a sting operation on Nuttall and Korody. The Senate Report (at 47) observed that *Nuttall* was not "merely a single incident, but is indicative of a larger problem of surveillance and intimidation by national security agencies."
[9] Akseer at 32.
[10] Senate Report at 46.
[11] Akseer at 32.

Canadians.[12] As the Ontario Superior Court observed, "Islamophobia is a cancer in Canadian society…it has led to far too many acts of terrorism and violence against Muslim-Canadians".[13]

7. Over-policing has serious consequences. Muslim Canadians who have experienced more government surveillance report increased anxiety over future surveillance[14] and increased police activity has resulted in feelings of alienation.[15] There has been a "palpable chill" in the attendance of Muslim Canadians at community events and activities based on fears that they may unwittingly attract police scrutiny.[16] Muslim Canadians are more reluctant to discuss topics in person or over the phone and are more concerned than other Canadians about their speech online.[17] A recent Senate Report on combatting Islamophobia found that disproportionate surveillance of Muslim communities can lead to "justified paranoia, prolonged trauma-related anxiety and depressive symptoms".[18] The result is an internalization of distrust, worry, and a sense of being the "other".[19]

8. Ultimately, as the Senate Report concluded, Islamophobia is "a daily reality for many Muslims, that one in four Canadians do not trust Muslims, and that Canada leads the G7 in terms of targeted killings of Muslims motivated by Islamophobia".[20] Given this regrettable reality, this Court must ensure that warrantless searches do not apply in a manner that exacerbates the hardships already faced by marginalized communities, such as Muslim Canadians.

9. One way to address these challenges is to resolve some of the section 8 doctrinal uncertainties, which weigh heavily on Muslim Canadians. For them, a reasonable expectation of

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[12] For example, the Senate Report (at 10) concluded that "[t]oo often, individual acts of hatred are compounded by systemic Islamophobia, which persist – intentional or not – through laws, policies and practices in a range of areas, including national security, secularism, workplace discrimination and the federal correction system" [emphasis added].

[13] *Muslim Association of Canada v Attorney General of Canada*, 2023 ONSC 1923 at para 46.
[14] Akseer at 33.
[15] Akseer at 33.
[16] Akseer at 34.
[17] Akseer at 88.
[18] Senate Report at 22.
[19] Akseer at 34.
[20] Senate Report at 9 [emphasis added].

privacy is not a mere academic concern or a "right in the books". Rather, it is a much needed and often exercised right to ensure that they can live a fulfilling life.[21]

B. The Section 8 Framework for Digital Communications Needs Clarity

1. What's the Problem?

10. The protections afforded by section 8 are ever evolving to ensure that, as this Court has held, "we are ever protected against unauthorized intrusions upon our privacy by agents of the state, whatever technical form the means of invasion might take".[22] The process of incremental adaptation, however, has not always been smooth. While *Marakah* provided some certainty with respect to privacy protections involving text messages,[23] this Court's four sets of reasons in *Mills* created uncertainty.[24] The current state of section 8 jurisprudence has been described as "a confusing mess",[25] "ships passing in the night",[26] "inconsistent",[27] and "a thorny area of shifting parameters".[28] Even the Ontario Court of Appeal, in the decision below, alluded to doctrinal uncertainties in section 8 jurisprudence.[29]

11. As the intersection of privacy and technology evolve,[30] there are good reasons to retain flexibility in how a reasonable expectation of privacy is analyzed. However, the need for flexibility does not mean that key doctrinal aspects of the reasonable expectation of privacy framework should be unclear, conflicting, or change from case to case. The Court can and should settle these uncertainties as unpredictability, among other things, undermines the rule of law.

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[21] *R v Ahmad*, 2020 SCC 11 at para 38.
[22] *R v Wong*, [1990] 3 SCR 36 at 44 ["***Wong***"].
[23] *R v Marakah*, 2017 SCC 59 ["***Marakah***"].
[24] *R v Mills*, 2019 SCC 22 ["***Mills***"].
[25] Michelle Biddulph, "The Privacy Paradox: Marakah, Mills, and the Diminished Protections of Section 8" (2020) 43:5 Manitoba LJ 161 at 195 ["**Biddulph**"].
[26] Biddulph at 186.
[27] Chelsey Buggie, "Talking to Strangers: A Critical Analysis of the Supreme Court of Canada's Decision in R v Mills" (2021) 44:6 Manitoba LJ 108 ["**Buggie**"].
[28] Gerald Chan & Susan Magotiaux, *Digital Evidence* (Toronto: Emond, 2022), BOA, Tab 3 at 8.
[29] *R v Campbell*, 2022 ONCA 666 at para 69 ["***Campbell***"].
[30] Lee-Ann Conrod, "Smart Devices in Criminal Investigations" (2019) 24 Appeal 115 at 122.

12. Based on the issues raised in this appeal, this Court should provide three doctrinal clarifications: (1) "relationships" should not be used to assess privacy claims; (2) voluntary digital communication creates a "record"; and (3) privacy is content neutral.

2. Relationships Should Not be Used to Assess Privacy Claims

13. A relationship-based approach to the reasonable expectation of privacy analysis provides that some relationships are unworthy of section 8 protection based on "value judgments". Such an approach is foreign to section 8, was first articulated in *Mills* in 2019, and now appears to be taking root in other section 8 cases,[31] including this appeal. [32] This approach should be rejected.

14. The first reason for rejecting a relationship-based approach is that it invites courts to engage in an "unnecessary and unprincipled"[33] valuation of personal relationships, even though such a factor is irrelevant to section 8 considerations. A section 8 analysis "is not and never has been" premised on determining whether a relationship between two non-state actors is worthy of constitutional protection.[34] Yet by making declarations such as "adults cannot reasonably expect privacy online with children they do not know", a relationship-based approach invariably pushes the court to ask the wrong questions. There is no dispute that a section 8 privacy analysis has a normative aspect,[35] but the appropriate question to ask is "whether, in light of the impact of an investigative technique on privacy interests, it is right that the state should be able to use that technique without any legal authorization or judicial supervision".[36]

15. In answering this question, this Court previously did not and should not engage in *carte blanche* "value judgments" to scrutinize an accused's relationship. Rather, the "value judgment"

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[31] See *R v K.S. and A.S.A.*, 2022 ONSC 1241 at para 54: based on the reasoning in *Mills*, the Ontario Superior Court determined that the nature of a relationship between an alleged "male pimp" and his alleged female sex worker was not worthy of section 8 protection.

[32] *Campbell* at para 63.
[33] *Mills* at para 126.
[34] *Mills* at para 126.
[35] *R v Patrick*, 2009 SCC 17 at para 14 ["***Patrick***"].
[36] Hamish Stewart, "Normative Foundations for Reasonable Expectations of Privacy" (2011) 54:12 SCLR 335 at 342.

arises only insofar as the Court determines the objects of the section 8 inquiry itself. As Justice Martin explained (in dissent), "[t]hese objects are the privacy of the area or thing being searched and the potential impact of the search on the person being searched".[37] On that basis, this Court has previously made "value judgments" and assessed whether ordinary Canadians can expect privacy in their backpacks in school;[38] in their text message communications, be that in a search incident to arrest[39] or on a recipient's device;[40] in computers in their own home;[41] in a car that they do not own;[42] in the sleeping area of the cab of a truck;[43] in the flow of electricity into a residence;[44] and in the relative distribution of heat over the surface of their home.[45]

16. A relationship-centric approach places courts in the improper business of assessing relationships in which information is gathered and ultimately disclosed to the state in order to determine whether that particular relationship is worthy of *Charter* protection. The information itself and its importance to the person who is claiming privacy in it is largely irrelevant.[46]

17. The second reason this Court should reject a relationship-based approach is that courts are ill-equipped to make value judgments on relationships. Analyzing relationships in the manner proposed by a relationship-centric approach raises serious concerns that the Court will make assumptions and reinforce stereotypes about the utility of various relationships, including among marginalized groups.[47] Such an approach may amount to "judicial (dis)approbation of an accused's lifestyle",[48] as the Court takes the role of an arbiter to decide what is the "right" type of personal relationship that a person should have to merit privacy protection. Not only has the section 8

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[37] *Mills* at para 127, citing *Patrick* at para 32.
[38] *R v A.M.*, 2008 SCC 19.
[39] *R v Fearon*, 2014 SCC 77.
[40] *Marakah*.
[41] *R v Vu*, 2013 SCC 60 and *R v Reeves*, 2018 SCC 56 ["***Reeves***"].
[42] *R v Belnavis*, [1997] 3 SCR 341.
[43] *R v Nolet*, 2010 SCC 24.
[44] *R v Gomboc*, 2010 SCC 55.
[45] *R v Tessling*, 2004 SCC 67.
[46] Biddulph at 191.
[47] Buggie at 109.
[48] *Mills* at para 110.

analysis never done this before, but it may also cast suspicions on entire categories of human relationships and stigmatize them.

18. Finally, a relationship-based approach can have chilling effects. For example, in Justice Brown's articulation of a relationship that is not worthy of section 8 protection—adults communicating with children that they do not know—it is entirely possible that legitimate adult-children interactions may fall under this umbrella: for example, adults providing guidance to youth who are struggling with addictions, bullying, or their sexual identity.[49] If the relationship-based approach is allowed to continue, courts may declare that other relationships are unworthy of *Charter* protection, as the analysis will always involve a stranger to a relationship engaging in a subjective, normative evaluation of its utility.

19. Given how difficult it is to define relationships with exactness, the Court would be running the risk that those "unworthy" relationships would capture usual and important social interactions. The result is the Court making declarations of what kinds of relationships people should have. This could not only "chill" people's private and public engagements but also places the Court in a space that it is not meant to operate in – calling "balls" and "strikes" on people's social interactions.[50]

20. A relationship-centric approach shifts the analysis from a reasonable expectation of privacy to a *legitimate* expectation of privacy. The view that some relationships are *a priori* criminal and therefore "do not legitimately attract an expectation of privacy both assumes criminality where there may be none and assumes that there can be no reasonable privacy interests in illegal communications".[51] These assumptions have no place in a section 8 analysis.

3. Voluntary Digital Communication Creates a Record

21. This Court should affirm that it is objectively reasonable to expect that our conversations will remain private, even though they are often now "recorded" because we voluntarily use various digital means of communication.

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[49] Buggie at 131.
[50] Charles Fried, "Balls and Strikes" (2012) 61:4 Emory LJ 641 at 642.
[51] *Mills* at para 123.

22. The uncertainty in the law is this. In *Duarte*, the police equipped an apartment with audio equipment that recorded an informant and undercover officer discussing a cocaine transaction with the accused.[52] In that context, Justice La Forest wrote that "[a] conversation with an informer does not amount to a search and seizure within the meaning of the *Charter*. Surreptitious electronic interception and recording of a private communication does".[53] In a subsequent decision (*Fliss*), Justice Arbour said, "a conversation with an informer, or a police officer, is not a search and seizure. Only the recording of such conversation is".[54]

23. Now fast forward to *Mills.* One of the concurring decisions held that Facebook messages do not amount to a "recording" because the parties voluntarily write and send their thoughts.[55] There is nothing surreptitious about it. Importantly, there is nothing the state is doing to record the conversation. For the concurring judgment in *Mills*, if there is no recording made, then, among other things, there is no expectation of privacy and section 8 is not engaged. In the present case, the Court of Appeal expressly noted that it did not know the status of the law on this point.[56]

24. The above approach narrowly interprets the holding in *Duarte* and ignores the realities of digital communication. While *Duarte* was decided before the age of electronic communications, it would be unfortunate to use its protection of privacy to undermine privacy rights because participation in society has become electronic, where people voluntarily "record" themselves.[57] As this Court noted in *R v K.R.J.*, "[f]or many Canadians, membership in online communities is an integral component of citizenship and personhood".[58] To deny an individual privacy against the state on a formalistic understanding of a "record", and where such privacy would have been granted had the same conversation occurred in person, hollows out section 8 rights.

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[52] *R v Duarte*, [1990] 1 SCR 30 ["***Duarte***"].
[53] *Duarte* at 57 [emphasis added].
[54] *R v Fliss*, 2002 SCC 16 at para 12 ["***Fliss***"] [emphasis added].
[55] *Mills* at para 48.
[56] *Campbell* at para 69.
[57] Biddulph at 193.
[58] *R v K.R.J.*, 2016 SCC 31 at para 54.

25. Creating written, electronic records of one's private communications "is a virtual prerequisite to participation in society, and yet Canadians are not required to become digital recluses in order to maintain some semblance of privacy in their lives".[59] Despite the capacity of modern technology to record electronic communications, individuals still retain both subjective and objective expectations of privacy in those communications. The law should be attuned to the realities of digital communication and the mere creation of "records" by ordinary Canadians does not mean that the protections articulated in *Duarte* are unavailable.

4. Privacy is Content Neutral

26. The Court should reaffirm that a reasonable expectation of privacy analysis is content neutral and upholding or denying privacy protection based on the particular facts of a case does not require departing from content neutrality. The challenge arises with *Mills* and is crystallized in the Court of Appeal's decision in *Campbell*. One of the concurring judgments in *Mills* held that because the accused was communicating with a child who was a stranger, this was not the type of relationship deserving of privacy protection.[60] In the decision below, the Court of Appeal explained this reasoning as follows: "*Mills* carved out an exception in circumstances where the electronic communications themselves constitute a crime against the recipient".[61]

27. Historically, the fact that an individual was engaged in criminal behaviour did not affect the reasonable expectation of privacy analysis. This Court has consistently said that "[t]he 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".[62] Hence, a reasonable expectation of privacy analysis must be framed in "broad and neutral terms".[63]

28. "Carve outs" from content neutrality are doctrinally inconsistent and risk hollowing section 8. This Court has been grappling with applying privacy protections to technological advancements since the 1990s. From secret audio-video devices to text messages, this Court has consistently held

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[59] *Mills* at para 96.
[60] *Mills* at para 26.
[61] *Campbell* at para 62 [emphasis added].
[62] *R v Spencer*, 2014 SCC 43 at para 36 ["***Spencer***"].
[63] *Wong* at 50.

that for section 8 to be "meaningful",[64] the focus of the analysis must be on the thing being searched, not the illegality of its contents. Even when the Court was called upon to develop privacy law in the context of digital-based sexual crimes involving minors (like *Mills*), the Court uniformly applied a content neutral approach rather than manufacturing a carve out.[65]

29. A carve out to a content neutral approach is problematic because of the central role that content neutrality plays in section 8 protection. The significance of a content neutral analysis is that justifying a search based on the *illegal content* discovered during that search undermines the system of prior judicial authorization meant to prevent unjustified searches before they occur.[66]

PART IV. COSTS

30. NCCM seeks no costs and asks that no costs be awarded against it

PART V. ORDER SOUGHT

31. NCCM takes no position on the outcome of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

November 21, 2023

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[64] *Marakah* at para 48.
[65] *R v Cole*, 2012 SCC 53; *Spencer*; and *Reeves*.
[66] *Hunter et al v Southam Inc*, [1984] 2 SCR 145 at 160.

PART VI. TABLE OF AUTHORITIES

Jurisprudence	**Paragraph(s) Referenced in Factum**
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