SCC Court 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)

MEMORANDUM OF ARGUMENT
OF SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY AND PUBLIC INTEREST CLINIC
(Motion for leave to intervene)

Pursuant to Rules 47 and 55 of the Rules of the Supreme Court of Canada

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PART I – FACTS

A. OVERVIEW

1. The Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic ("CIPPIC") seeks an Order granting it leave to intervene in this appeal.

2. This appeal will address issues of great importance relating to the need to secure privacy rights in mobile devices when a search is conducted incident to arrest. Mobile devices, ranging from the most basic cellular phones, to feature phones such as that at issue in the present appeal, to increasingly common 'smart' phones, are rapidly becoming embedded in our daily lives. The capabilities of these phones – which include text based communications, digital photography, data storage, and an increasingly diverse range of computing and connectivity capacities – have

transformed these devices into a commonly employed means for recording and communicating a almost all elements of our activities. A heightened privacy interest attaches to the data in such devices, and the expansive common law power to search incident to arrest, if applied to such devices, fails to account for this heightened privacy interest in a proportionate manner.

3. If successful in its motion for leave to intervene, CIPPIC will assist the Court in its consideration of the important issues before it by offering useful submissions different from those of the other parties.

4. In providing its useful and different submissions, CIPPIC will draw on the unique knowledge and expertise it has developed through its specialized activities in this area of law and policy. CIPPIC's experience in Internet privacy policy in general has included participation in legislative, academic, judicial, quasi-judicial, and client-centered processes. It has also been an active participant in international policy-making processes relating to privacy and communications technology.

B. CIPPIC

5. CIPPIC is a legal clinic based at the University of Ottawa's Centre for Law, Technology and Society. Its core mandate is to advocate in the public interest where the law intersects with new technologies in ways that may detrimentally impact on the public. CIPPIC is Canada's sole legal clinic dedicated entirely to internet policy and public interest law. Internet policy issues impact on most aspects of CIPPIC's advocacy and public outreach activities. CIPPIC has intervened in the courts, testified before Committees of the House of Commons and Senate, participated in numerous quasi-judicial fora, helped shape Internet policy at the International level through participation in various Internet governance processes and produced numerous publications and public outreach documents on law and technology issues.

Affidavit of David A. Fewer, sworn on December 16, 2013, Motion Record, Tab 2

6. This Hounourable Court has previously recognized CIPPIC's capacity to assist the Court on questions relating to the privacy interests at stake in this appeal by granting CIPPIC leave to intervene in a number of appeals where informational and communications privacy were at issue. These have included *R.* v. *Chehil*, 2013 SCC 49, *R.* v. *MacKenzie*, 2013 SCC 50 (parameters of the reasonable suspicion standard in the context of a common law power to search through the use of a drug detection dog), *R.* v. *TELUS Communications Co.*, 2013 SCC 16 (the application of privacy protections to advanced communications delivery mechanisms for SMS text messaging), and *A.B.* v. *Bragg Communications*, 2012 SCC 46 (the need to provide for a measure of anonymity in judicial proceedings in light of the heightened privacy threat posed by online publication of judicial decisions).

Fewer Affidavit, Tab 2

PART II – STATEMENT OF QUESTIONS AT ISSUE

7. The only issue before the Court in this motion is whether CIPPIC should be granted leave to intervene in this matter of important public interest.

PART III – ARGUMENT

8. An applicant seeking leave to intervene before this Court under section 55 of the *Rules of the Supreme Court of Canada* must address two issues, as established in case law and codified in section 57(2):

(a) whether the applicant has an interest in the issues raised by the parties to the appeal; and

(b) whether the applicant's submissions will be useful to the Court and different from those of the other parties.

***Reference re Workers' Compensation Act*, 1983 (Nfld.), [1989] 2 S.C.R. 335 (SCC) at para. 8; *R.* v. *Finta*, [1993] 1 S.C.R. 1138 (SCC) at para. 5; *Rules of the Supreme Court of Canada*, SOR/2002-156, ss. 55, 57(2)**

A. CIPPIC'S INTEREST IN THIS APPEAL

9. CIPPIC's interest in this appeal flows directly from its mandate to participate in internet policy debates and to advocate for the public interest where new technologies intersect with legal/policy development. Privacy has long been a core pillar of that mandate, particularly with respect to the privacy in communications infrastructure and the role of telecommunications service providers in defining shifting privacy expectations. The issues raised in this Appeal implicate these aspects of CIPPIC's work and mandate directly.

B. USEFUL AND DIFFERENT SUBMISSIONS

10. The "useful and different submission" criteria is satisfied by an applicant who has a history of involvement in the issue, giving the applicant expertise that can shed fresh light or provide new information on the matter.

***Reference re Workers' Compensation Act,* 1983 (Nfld.), [1989] 2 S.C.R. 335 (SCC), at para. 12**

11. CIPPIC's submissions will be useful because CIPPIC brings to these proceedings the experience of a legal clinic that has worked with various stakeholders on all sides of competing interests in privacy and freedom of expression online. CIPPIC can offer the Court a useful and balanced perspective on the wider issues raised in this Appeal.

Fewer Affidavit, Motion Record, Tab 2

12. CIPPIC's submissions will be different from those of the current parties, as they will be informed by its rich experience across the broad spectrum of law and policy related to online privacy as well as by its specific expertise on the role of Internet intermediaries.

13. Additionally, CIPPIC's proposed submissions do not raise any concerns that have traditionally led this Honourable Court to refuse intervention. CIPPIC does not intend to expand the issues under appeal beyond those raised by the existing parties.

***Reference re Workers' Compensation Act*, 1983 (Nfld.), [1989] 2 S.C.R. 335 (SCC), at para. 12**

C. CIPPIC'S PROPOSED SUBMISSIONS

14. If granted leave to intervene, CIPPIC will argue that the common law power to search incident to arrest does not extend to searches of mobile phones and devices. The common law power in question represents a significant departure from the standard protection offered by section 8 of the *Charter*. While it retains the need for reasonable belief that an offence has occurred, it discards other central hallmarks of the right to be free from unreasonable search and seizure enshrined in section 8: the need for prior judicial authorization as well as the need for law enforcement to have reasonable belief that the invasion of privacy in question will yield evidence of that offence.

15. While, over time, the common law power has extended to include searches of receptacles in the possession of an individual at the time of arrest, the heightened privacy interest in mobile phones as well as their incorporation into all aspects of life demands a higher standard of protection. The increasingly diverse and pervasive use of these devices contributes not only to a heightened privacy interest, but also provides insurmountable challenges to any attempts to limit searches of such devices to what is 'reasonably' tied to a particular offence. Even the most cursory of searches of such devices can easily become an arbitrary fishing expedition impacting on sensitive and private information. Further, absent exigent circumstances, there is no justification beyond convenience for permitting cursory searches of such devices – in these instances, the owner of the device is under arrest and the device can be seized and held until a warrant is issued. As such, there appears to be limited justification for the invasion of privacy that results from permitting even cursory searches of mobile devices incident to arrest.

16. **Heightened Privacy Interest.** The heightened privacy interest in private communications pre-dates the *Charter*, and is encoded in Part VI of our *Criminal Code*, which prohibits the

unauthorized interception of private communications. This privacy interest, particularly as it pertains to text messaging, is directly impacted by even the most cursory search of a mobile phone incident to arrest. As noted Justice Abella noted in her concurring judgement in *R. v. TELUS Communications Co.*, "text messaging has become an increasingly popular form of communication...bear[ing] several hallmarks of traditional voice communication." 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. The basic SMS platform is also increasingly being leveraged for a wide array of other uses such as mobile account service information, general advertising and grassroots messaging campaigns:

> **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 organisations. 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. Governments and NGOs actively use SMS for citizen notifications and engagement, news and weather updates, emergency alerts, healthcare and business support services, and to bridge back to websites.

OECD & ITU, *M-Government: Mobile Technologies for Responsive Governments and Connected Societies*, 2011, Chapter 5, p. 82; *R. v. TELUS Communications Co.*, 2013 SCC 16, per Abella J.A., concurring

17. Moreover, basic mobile phones have all but been replaced by feature phones – phones equipped with cameras, increased storage capacity for detailed and non-ephemeral call logs and contact books, and limited computing capabilities. The advent and prevalence of feature phones has significantly enriched the amount and nature of data stored on mobile phones. A camera-enabled phone is not only a travelling photo album, but also an omni-present camera increasingly used to capture a variety of personal and social situations. In addition, the detailed contact books and call logs that can be retained on a feature phone can also be highly revealing of individual political, religious or other preferences.

18. Feature phones are in the process of being rapidly supplanted by smart phones. Smart phones offer advanced computing capacities, sophisticated operating systems and application

ecosystems, and mobile Internet connectivity. They are designed to facilitate diverse computing tasks ranging from email exchanges, to Internet browsing, to a range of application-based social, leisure and productivity activities. In addition, as digital networks move towards cloud storage and computing models, a range of applications designed to make data access and use a ‘cross-platform’ experience. These blur the line between home computers and mobile devices as the smart phone is transformed into an effective access point for the

19. Accompanying the detailed data generated and typically retained by the various digital interactions that occur on smartphones is a diversity of equally sensitive ancillary data including pervasive location tracking, comprehensive individual social networks, and a complete record of ‘when’ activities on the device occurred.

20. Collectively, the data on a smartphone comprises a highly complete and potentially intrusive glimpse into the life of its owner. However, even a cursory examination of a basic mobile phone will implicate a heightened privacy interest. The types of data included on basic, feature and smart phones are increasingly recognized by courts in Canada and abroad as ‘sensitive’ and implicating heightened privacy concerns. Further, courts have recognized that the difference between a basic, feature and ‘smart’ phone is not easily ascertainable. Such assessments incident to arrest will become increasingly difficult as smart phone computing and connectivity capacity becomes increasingly cheaper and more accessible to the general public, meaning that a rule based on the computing capacity of a given phone is not sustainable.

21. **Nature and ubiquitous use of mobile phones.** The nature of the data found on mobile phones creates practical difficulties similar to those found in searches of computer data and private communications generally. By collecting vast and diverse amounts of data in one easily searchable location, mobile phones invite fishing expeditions. Once an officer obtains access to a mobile device, it becomes difficult to segment access to what might be considered reasonably

tied to the objective that authorized the search incident to arrest. Attempts to limit examinations of mobile devices to a ‘cursory’ search are unsustainable given the ease and speed with which an invasive and comprehensive examination of the contents of a given device can occur.

22. So basic an objective as an attempt to identify the true owner of an allegedly stolen mobile device found incident to arrest can potentially implicate the full range of data ‘on the phone’, including pictures, videos, text messages, call logs, contact lists, emails, GPS location data or even cloud-based documents. This is exacerbated by the increasingly ubiquitous use of mobile phones in all aspects of life – a social reality that suggests the content of any given phone may be implicated in most offences as it would be ‘reasonable’ that evidence of any offence ranging from a traffic violation (GPS location data) to drug offences (text messages, contact lists, call logs, emails) to, as in the case at bar, any robbery can implicate a range of data. A rule permitting searches of mobile devices incident to arrest is therefore likely to implicate a wide range of data.

23. **Lack of necessity and proportionality.** The rationale for the common law power to search incident to arrest is that the proper balance between the legitimate interests of law enforcement and the privacy rights of individuals. In *R. v. Caslake*, this balance was explained as such: “The authority for the search does not arise as a result of a reduced expectation of privacy of the arrested individual. Rather, it arises out of a need for the law enforcement authorities to gain control of things or information which outweighs the individual's interest in privacy.” As also noted in *Caslake*, it remains “the court’s responsibility to set boundaries which allow the state to pursue its legitimate interests, while vigorously protecting individual’s right to privacy.”

***R. v. Caslake*, [1998] 1 S.C.R. 51, paras. 15, 17**

24. In its first affirmation of the common law rule in *Cloutier v. Langlois*, this Honourable Court held with respect to a pat down search incident to arrest, that the minimal intrusion entailed in such a search is “necessary to ensure that criminal justice is properly administered”

and that there "exists no less intrusive means of attaining" the implicated objectives of law enforcement.

***Cloutier v. Langlois*, [1990] 1 S.C.R. 158, paras. 58-59**

25. However, as a number of courts in Canada and in other jurisdictions have recognized, absent exigent circumstances there is no need to search a mobile device incident to arrest. Employing the common law rule in order to seize such a device is sufficient action to secure the data contained therein along with any potential evidence this data might yield. Hence, the only rationale for an immediate search of the device incident to arrest is one of convenience.

26. If granted leave to intervene, CIPPIC will argue that the 'convenience' justification is simply not proportionate to the important privacy interests implicated in mobile devices. CIPPIC will further argue that other jurisdictions are taken steps to limit the scope of the power to search incident to arrest, particularly with respect to mobile devices.

PART IV – COSTS

23. CIPPIC will not seek costs in this matter and asks that costs not be awarded against it in this motion or in the appeal if leave to intervene is granted.

PART V – ORDER SOUGHT

24. CIPPIC respectfully requests an Order from this Honourable Court:

(i) granting CIPPIC leave to intervene in this appeal;

(ii) permitting CIPPIC to file a factum of no greater length than 20 pages;

(iii) permitting CIPPIC to present oral argument at the hearing of this appeal; and

(iv) such further or other Order as deemed appropriate.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 17h day of December, 2013.

Tamir Israel

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PART VI – TABLE OF AUTHORITIES

Authority		Reference in Argument
	Cases	***Tab***
1	*Cloutier v. Langlois*, [1990] 1 S.C.R. 158	24
2	*Reference re Workers' Compensation Act, 1983 (Nfld.)*, [1989] 2 S.C.R. 335	8, 10, 13
3	*R. v. Caslake*, [1998] 1 S.C.R. 51, paras. 15, 17	23
4	*R. v. Finta*, [1993] 1 S.C.R. 1138	8
5	*R. v. TELUS Communications Co.*, 2013 SCC 16,	16
	Academic	
6	OECD & ITU, M-Government: Mobile Technologies for Responsive Governments and Connected Societies, 2011, Chapter 5, p. 82;	16
	Legislation	
7	*Rules of the Supreme Court of Canada*, SOR/2002-156	8