Top court ruling upholds privacy of e-mail, texts

[KIRK MAKIN](http://www.theglobeandmail.com/authors/kirk-makin) - JUSTICE REPORTER

The Globe and Mail

Published Wednesday, Mar. 27 2013, 6:44 AM EDT

Last updated Wednesday, Mar. 27 2013, 8:16 PM EDT

The Supreme Court of Canada has moved decisively to prevent police from snooping into e-mail, text messages and future forms of communication as yet undreamed of.

Citing the rapid development of unforeseen technologies, the court majority sought Wednesday to forestall an Orwellian world in which police can easily tap into private exchanges between individuals.

 “Technical differences inherent in new technology should not determine the scope of protection afforded to private communications,” said Justice Rosalie Abella, one of the judges in a 5-2 majority.

The decision invalidated a general warrant obtained by a rural Ontario police force during a 2010 investigation. The warrant had compelled an Internet provider – Telus Communications Co. – to turn over a vast number of stored text messages, as well as future texting exchanges involving three individuals.

The Supreme Court majority concluded that police should have been obliged to obtain a judicial wiretap authorization – a far more arduous hurdle that few investigations are able to clear.

Scott Hutchison, a lawyer who argued the case for Telus, praised the court for bolstering privacy of communications in an era where technology is constantly breaking into new terrain.

“The court is saying that the fact a communication takes a particular form cannot deprive it of its private nature,” Mr. Hutchison said. “They are saying that it should be entitled to the kind of elevated protection we normally assign to other media of communication.”

Mr. Hutchison said the general warrant in the Telus case treated text messages as being no more important than the sort of handwritten note a school teacher might grab from the hands of mischievous student.

He said there is no logical reason why they would deserve any less protection than do the confidentiality of telephone calls.

“The ability to communicate, without any concerns that the state is going to be able to stick its nose in there willy-nilly, is essential to the formation of a free and democratic society,” Mr. Hutchison said. “The hallmark of totalitarian regimes is surveillance.”

“What the Supreme Court did today was say that we are not going to allow ourselves to start sliding down a slippery slope by taking too narrow a view.”

Prosecutors in the case argued that, since the wiretap provision in the Criminal Code was not written with text messages in mind, police needed nothing more than a general warrant to gain access from Telus to a trove of past and future text messages.

In contrast to general warrants, which are relatively simple to obtain, wiretap authorizations are available only for investigations of specially designated, serious crimes. In addition, police must first convince a judge that all other reasonable investigative techniques have been tried and have failed.

The two dissenting judges – Justice Thomas Cromwell and Chief Justice Beverley McLachlin – agreed with the Crown that the form a communication takes was considered by Parliament when it enacted warrant provisions.

But Justice Abella, writing on behalf of Justice Morris Fish and Justice Louis LeBel, noted that the only practical difference between text messaging and traditional voice communications is the transmission process itself.

While text messages can remain in written form for a period of days and phone messages cannot, she said, this distinction should not rob them of their confidential nature.

“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,” Justice Abella said.

Another judge in the majority – Justice Michael Moldaver – said that general warrants were never intended to be a fallback position for police.

Frank Addario, a veteran criminal lawyer, said the Telus judgment is one of a series of electronic-search cases currently in the courts owing to the fact that Parliament has failed to modernize criminal investigative powers.

“Judges are being asked to invent solutions on the fly,” Mr. Addario said. “It’s up to Parliament to decide how it wants crime solved.”