COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *R. v. Pelucco,*
2015 BCCA 370

Date: 20150821
Docket: CA41331

Between:

Regina

Appellant

And

David Gabriel Pelucco

Respondent

Before: The Honourable Mr. Justice Groberman
The Honourable Mr. Justice Goepel
The Honourable Mr. Justice Savage

On appeal from: An order of the Supreme Court of British Columbia, dated October 18, 2013 (*Regina v. Pelucco*, Nanaimo Docket No. 72736-2)

Counsel for the Appellant:	W.P. Riley, Q.C.
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Place and Date of Hearing:	Vancouver, British Columbia May 4, 2015
Place and Date of Judgment:	Vancouver, British Columbia August 21, 2015

Written Reasons by:
The Honourable Mr. Justice Groberman

Concurred in by:
The Honourable Mr. Justice Savage

Dissenting Reasons by:
The Honourable Mr. Justice Goepel (Page 21, para. 74)

Summary:

The accused was arranging, through text messages, to sell one kilogram of cocaine to Mr. Guray, when the police arrested Mr. Guray and seized his cellphone. Pretending to be Mr. Guray, they arranged to meet the accused and then arrested him. They found drugs in his vehicle, and obtained a search warrant to search his residence, where more drugs were found. He was charged with three drug offences. At trial, he successfully applied to have all evidence excluded, contending that Mr. Guray had been unlawfully arrested, and that the search of the text messages on Mr. Guray's cellphone violated his own right to be secure against unreasonable search and seizure. The Crown appealed, arguing that because the accused had no control over Mr. Guray's cellphone, he had no reasonable expectation of privacy in the text messages from him that were recorded on it. Held: Appeal dismissed. The judge's finding that the accused had a reasonable expectation of privacy in the text messages he sent to Mr. Guray was well-founded. He made no error in holding that the accused's rights under s. 8 of the Charter were violated, and it was open to him to exclude the evidence under s. 24(2). Goepel J.A., dissenting, would have remitted the matter for a new trial, finding that the accused had no reasonable expectation of privacy in the recipient's copy of the text messages.

Reasons for Judgment of the Honourable Mr. Justice Groberman:

[1] This is a Crown appeal from Mr. Pelucco's acquittal on three drug charges.

[2] Mr. Pelucco arranged to sell one kilogram of cocaine, communicating with the intended purchaser, Manjit Guray, through text messages. Unbeknownst to Mr. Pelucco, Mr. Guray, was arrested during the course of the text conversation, and the police seized Mr. Guray's cellphone. They continued the text conversation with Mr. Pelucco, arranging to meet in a parking lot in Nanaimo, where they arrested him.

[3] Mr. Pelucco was charged with two counts of possession of a controlled substance for the purpose of trafficking under s. 5(2) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19: one in respect of cocaine found in the trunk of his car at the time of his arrest; and one in respect of heroin subsequently found during a search of his residence. He was also charged with one count of simple possession of methamphetamine under s. 4(1) of the *Act*, in respect of a flap of the drug found in the trunk of his car at the time of his arrest.

[4] At trial, Mr. Pelucco asserted that the police did not have lawful authority to seize Mr. Guray's cellphone. He acknowledged that he is not, as a matter of law, entitled to rely on a breach of another person's *Charter* rights in support of an application to exclude evidence. He argued, however, that the police violated his own right to be secure against unreasonable search and seizure when they read the text messages he sent to Mr. Guray. The judge agreed and concluded that there was no lawful basis for Mr. Pelucco's arrest. He excluded evidence obtained in the search of Mr. Pelucco's vehicle, which was incidental to the arrest. He also excluded evidence obtained in the search of Mr. Pelucco's residence, finding that it could not have been authorized without evidence of the text messages. In the result, there was no admissible inculpatory evidence and Mr. Pelucco was acquitted on all counts.

[5] On this appeal, the Crown argues that the judge erred in finding that Mr. Pelucco's rights were engaged by the search of Mr. Guray's cellphone. It seeks a new trial, contending that the judge erred in excluding evidence.

[6] I am of the view that the judge's finding that Mr. Pelucco's rights were violated when the police read his text messages on Mr. Guray's cellphone was well-founded, and would dismiss the appeal.

Background

[7] On the morning of November 12, 2010, Mr. Guray was driving a rental car northbound on the Trans-Canada highway between Ladysmith and Nanaimo on Vancouver Island. He was stopped by the police when they observed him driving erratically and exceeding the speed limit. In answer to their questions, he stated that he was heading to a restaurant in Nanaimo where he was to meet a person from whom he was going to purchase a car. He claimed that he was driving a rental vehicle because the vehicle that he normally drove was "at the shop" and because the rental vehicle was easier to drive in the snow.

[8] After checking police records of Mr. Guray, the police harboured suspicions against him for a number of reasons:

- Although he had no criminal convictions, there were entries suggesting he had been involved in drug activity and assaults, and that he had gang associations. Mr. Guray had a tattoo that said "outlaw". Although he denied that the tattoo reflected a gang affiliation, the police did not believe him;
- The police believed that the restaurant Mr. Guray purported to be going to was not open in the morning. Further, Mr. Guray was unable to provide the name of the person he was meeting, and could not explain how he would be able to identify the person;
- The police were cognizant of the fact that people often drive rental vehicles while engaging in criminal activities. Mr. Guray's explanation that he preferred to drive a rental vehicle in snow was curious, as there was no snow on the ground; and
- Mr. Guray appeared nervous and avoided eye contact.

[9] Over Mr. Guray's objections, one of the officers searched the vehicle's trunk, finding a backpack inside. The officer testified that when he opened the backpack, he detected an odour of cocaine (though no cocaine was present), and found $38,000 in cash. He immediately arrested Mr. Guray, and other officers conducted a search of the vehicle incidental to the arrest.

[10] In the course of that search, one officer located a cellphone in a cup holder between the front seats. He pressed the centre button on it, and the phone displayed a series of text messages that appeared to relate to a planned purchase of one kilogram of cocaine. Believing that Mr. Guray was in the process of communicating with a supplier, the officer continued the text message conversation, arranging to meet the supplier in a parking lot behind the Rugby Club in Nanaimo.

[11] When the police arrived at the parking lot, there were only two vehicles there. One was parked next to a building, and was unoccupied. The other was in the middle of the lot, and was occupied by a person holding a cellphone. The police arrested that individual, who was later identified as Mr. Pelucco. The police seized his cellphone, on which they found a record of the text conversation.

[12] The police searched Mr. Pelucco's vehicle and located a one-kilogram brick of cocaine in the trunk, together with a flap of methamphetamine and a plastic bag containing a small amount of crack cocaine.

[13] Largely on the strength of the text messages, which suggested that Mr. Pelucco possessed another kilogram of cocaine, the police obtained a warrant to search his residence. The residence belonged to Mr. Pelucco's parents, who occupied the main floor of the house, while Mr. Pelucco occupied the basement. The basement was set up as a self-sufficient living area, but was not a separate unit from the main part of the house.

[14] The search was conducted that evening, commencing about 9:30 p.m. and ending just before midnight. Mr. Pelucco's parents were home at the outset of the search, but the police told them to leave while the search was underway. Some items were seized from the basement, but what would appear to be the most important pieces of evidence – a bag containing 280 grams of heroin, a money counter, and a vacuum sealed bag containing $57,550 in cash – were found on the main floor.

[15] The search warrant did not specifically authorize the seizure of computers or cellphones, but the police seized four cellphones and a laptop computer. These do not appear to have been searched or tendered in evidence. The police also listened to messages on an answering machine, which did not contain any information relevant to the investigation.

The *Voir Dire* Rulings

[16] In the course of two *voir dires*, the judge dealt with a large number of issues; I will detail only those that are pertinent to this appeal.

[17] In the first *voir dire* (2013 BCSC 588) the judge was asked to determine whether Mr. Pelucco's rights had been violated when the police seized Mr. Guray's cellphone and read text messages that had originated from Mr. Pelucco.

[18] Mr. Pelucco argued that the sender of text messages has a reasonable expectation that the recipient will keep those messages private. Where copies of messages are illegally obtained by the police from the recipient's cellphone, he claimed, the police violate not only the rights of the recipient to be secure from unreasonable search and seizure, but also those of the sender.

[19] The Crown took a diametrically opposed view, arguing that, having relinquished all control over a message, its sender has no reasonable expectation of privacy in it. It argued that Mr. Pelucco lacked standing to raise a *Charter* argument, since the only person whose rights might have been violated was Mr. Guray.

[20] In analyzing the arguments, the judge used the framework referred to in *R. v. Edwards*, [1996] 1 S.C.R. 128:

> [45] A review of the recent decisions of this Court and those of the U.S. Supreme Court, which I find convincing and properly applicable to the situation presented in the case at bar, indicates that certain principles pertaining to the nature of the s. 8 right to be secure against unreasonable search or seizure can be derived. In my view, they may be summarized in the following manner:
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> 1. A claim for relief under s. 24(2) can only be made by the person whose *Charter* rights have been infringed. See *R. v. Rahey*, [1987] 1 S.C.R. 588, at p. 619.
> 2. Like all *Charter* rights, s. 8 is a personal right. It protects people and not places. See *Hunter* [*Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145].
> 3. The right to challenge the legality of a search depends upon the accused establishing that his personal rights to privacy have been violated. See *Pugliese* [*R. v. Pugliese* (1992), 71 C.C.C. (3d) 295].
> 4. As a general rule, two distinct inquiries must be made in relation to s. 8. First, has the accused a reasonable expectation of privacy. Second, if he has such an expectation, was the search by the police conducted reasonably. See *Rawlings* [*Rawlings v. Kentucky*, 448 U.S. 98 (1980)].
> 5. A reasonable expectation of privacy is to be determined on the basis of the totality of the circumstances. See *Colarusso* [*R. v. Colarusso*, [1994] 1 S.C.R. 20] at p. 54, and *Wong* [*R. v. Wong*, [1990] 3 S.C.R. 36] at p. 62.

> 6. The factors to be considered in assessing the totality of the circumstances may include, but are not restricted to, the following:
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> (i) presence at the time of the search;
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> (ii) possession or control of the property or place searched;
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> (iii) ownership of the property or place;
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> (iv) historical use of the property or item;
>
> (v) the ability to regulate access, including the right to admit or exclude others from the place;
>
> (vi) the existence of a subjective expectation of privacy; and
>
> (vii) the objective reasonableness of the expectation.
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> See *United States v. Gomez*, 16 F.3d 254 (8th Cir. 1994), at p. 256.
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> 7. If an accused person establishes a reasonable expectation of privacy, the inquiry must proceed to the second stage to determine whether the search was conducted in a reasonable manner.

[21] The judge commenced his reasoning by observing that text messages fall within the definition of "private communication" in s. 183 of the *Criminal Code*, R.S.C. 1985 c. C-46. On the question of whether Mr. Pelucco had a subjective expectation of privacy in the text messages once they had been received by Mr. Guray, the judge noted that Mr. Pelucco did not give evidence on the *voir dire*. Referring to *R. v. Siniscalchi*, 2010 BCCA 354, however, the judge noted that an expectation of privacy can sometimes be inferred from the circumstances, without the accused giving evidence.

[22] At para. 32, of the judgment, the judge concluded: "In the present case, I infer that Mr. Pelucco had a subjective belief that his text message conversations with Guray were private." He then went on to discuss whether that belief was objectively reasonable:

> [33] Guray's cell phone did not require the insertion of a password in order to open it and view its contents, nor was it otherwise locked to prevent access by persons other than Guray. The text messages sent by the accused to Guray are not of a "personal" or "biographical" nature. However, I think the subject matter of the text messages, which I find to be capable of referring to

> an intended drug transaction, support the inference that both the accused and Guray wanted to keep their conversation secret from all other persons. I also infer that the accused and Guray had no reason whatever to suspect that someone else might take one or other of their cell phones and read their text message conversations. I conclude that the accused's subjective expectation of privacy was objectively reasonable.

[23] The judge held that Mr. Pelucco's reasonable expectation of privacy was sufficient to found an argument based on s. 8 of the *Charter*. He next considered whether the search and seizure of Mr. Guray's cellphone was authorized by law, and found that it was not. The police, he found, did not have the right to search Mr. Guray's vehicle or backpack, and his arrest, which was based on evidence uncovered as a result of unlawful searches, was also unlawful. In the result, there was no basis for the search and seizure of his cellphone.

[24] The judge concluded, in the first *voir dire*, that absent the text messages retrieved from an unauthorized search of Mr. Guray's cellphone, the police lacked grounds to arrest Mr. Pelucco. The search of his vehicle, therefore, was also unlawful.

[25] A second *voir dire* (2013 BCSC 1909) dealt with the question of whether the warrant to search Mr. Pelucco's residence was valid, whether the search had been conducted reasonably, and whether evidence against Mr. Pelucco should be excluded.

[26] The judge found that once illegally obtained evidence was excised from the information to obtain the search warrant, there was no basis on which it could have been issued. He therefore found that the search of the residence violated Mr. Pelucco's rights under s. 8 of the *Charter*.

[27] For independent reasons, the judge also found that the search of the residence was, in part, conducted in an unreasonable manner. He referred to the exclusion of Mr. Pelucco's parents from the residence during the search, the fact that voice messages were improperly accessed, and the seizure of unauthorized items. While he considered these irregularities to be much less serious than the

unlawful search of Mr. Guray's cellphone, he did take them into account in deciding whether to exclude evidence under s. 24(2) of the *Charter*.

[28] Finally, the judge analyzed the matter under s. 24(2) of the *Charter*, and concluded that all relevant evidence against Mr. Pelucco should be excluded.

Positions of the Parties

[29] On this appeal, the Crown does not challenge the finding that the police lacked authority to read the text messages on Mr. Guray's cellphone. It also acknowledges that if Mr. Pelucco's arrest was unlawful, the acquittals must stand. It says, however, that the unauthorized search of Mr. Guray's cellphone did not make Mr. Pelucco's subsequent arrest unlawful, nor did it taint subsequent searches that uncovered inculpatory evidence.

[30] At the core of this appeal is the question of whether Mr. Pelucco's *Charter* rights were violated when text messages he sent to Mr. Guray were read by the police from Mr. Guray's cellphone.

[31] The Crown's position on this question is summarized at the outset of its factum:

> Invariably, the manner in which one chooses to communicate with others affects the degree of privacy one can reasonably expect in such communications. This is not an erosion of privacy rights, but a recognition that privacy depends on the manner in which individuals choose to conduct their affairs. On one hand, an individual who chooses to engage in private communication via a medium that leaves no record of what is said can reasonably expect that no one will surreptitiously record the communication. On the other hand, an individual who chooses to communicate using a medium that by its very nature creates a record of the communication has little or no control over what the recipient does with that record, and thus has no reasonable expectation of privacy in the record once it reaches the recipient. Although the sender may have a high degree of privacy in the communication process, he or she has little privacy in the recipient's record of the communication. The recipient may choose to delete the record, but might just as easily read it aloud to others, copy it, print it, forward it, or post it on a website.
>
> … Although Mr. Pelucco might reasonably have expected that no one would surreptitiously eavesdrop on the communications process, he could not have any reasonable expectation of privacy in the record retained on the recipient's

> device. Once his text messages were received on the recipient's phone, Mr. Pelucco had literally no control over them. The recipient could easily have chosen to read the texts aloud to someone else, copy, print, or forward them, or even post them on a website for the world to see.
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> [Emphasis in original.]

[32] The defence takes an equally categorical approach in favour of the opposite conclusion:

> There can be no doubt that text messages constitute "private communications" in the legal sense. The originator of a private communication maintains an ongoing privacy interest in that communication.

Framework for Analysis under Section 8 of the *Charter*

[33] It is clear that a text message, until it has been delivered to the recipient, is a "private communication" as that term is defined in s. 183 of the *Criminal Code*. Any interception of such a message must be authorized under Part VI of the *Code*: *R. v. TELUS Communications Co.*, 2013 SCC 16. As this Court recently held in *R. v. Belcourt*, 2015 BCCA 126 at paras. 45-50, however, once a text message has been delivered to a recipient, Part VI of the *Criminal Code* (including s. 183) ceases to apply to the message. In my view, the *Criminal Code* provisions are not of particular assistance in determining the question of whether Mr. Pelucco's *Charter* rights were violated.

[34] As the Crown observes, the recipient of a text message – not the sender – controls the degree to which the delivered message is kept private. The Crown contends that the inability of a sender to control dissemination of a message once it has been delivered is fatal to Mr. Pelucco's claim that his own *Charter* rights were violated.

[35] I am not convinced that control, alone, is determinative of the issue. The Supreme Court of Canada, in *Edwards*, listed seven factors to be considered in assessing the "totality of the circumstances" to determine whether a claimant's s. 8 rights have been violated: (i) presence at the time of the search; (ii) possession or control of the property or place searched; (iii) ownership of the property or place;

(iv) historical use of the property or item; (v) the ability to regulate access, including the right to admit or exclude others from the place; (vi) the existence of a subjective expectation of privacy; and (vii) the objective reasonableness of the expectation.

[36] The factors were further discussed in *R. v. Cole*, 2012 SCC 53, which organized the considerations on somewhat different lines:

> [40] The "totality of the circumstances" test is one of substance, not of form. Four lines of inquiry guide the application of the test: (1) an examination of the subject matter of the alleged search; (2) a determination as to whether the claimant had a direct interest in the subject matter; (3) an inquiry into whether the claimant had a subjective expectation of privacy in the subject matter; and (4) an assessment as to whether this subjective expectation of privacy was objectively reasonable, having regard to the totality of the circumstances (*Tessling* [*R. v. Tessling*, 2004 SCC 67], at para. 32; *Patrick* [*R. v. Patrick*, 2009 SCC 17], at para. 27).

[37] Although a good deal of argument in this case was addressed at differences in the way the considerations are expressed in *Edwards* and *Cole*, I am not persuaded that anything turns on those differences. As the Court noted at para. 25 of *Tessling*, "[p]rivacy is a protean concept, and the difficult issue is where the 'reasonableness' line should be drawn." Both *Edwards* and *Cole* provide helpful lists of factors to be considered in drawing that line, and the lists are not inconsistent with one another.

[38] While some of the factors set out in *Edwards* and *Cole* deal with control over the property or information that is being searched or seized, others do not. The case law demonstrates that in some cases, a reasonable expectation of privacy will exist even though the claimant has neither property rights in, nor control over, the property or information that is searched.

[39] In *Cole*, for example, the Supreme Court of Canada held that a teacher, who was provided with a laptop computer by his school, had a sufficient privacy interest in data that he generated on the computer to found a claim under s. 8. The Court acknowledged that the accused did not own the computer or the data, and did not have control over it. His reasonable expectation of privacy in the data, however, was sufficient that the police could not access it without first obtaining a warrant.

[40] Similarly, in *R. v. Spencer*, 2014 SCC 43, an Internet service provider furnished the police with information identifying the account holder associated with a particular IP address. Again, the account holder did not hold a property interest in the Internet service provider's records, nor did he have control over them. After an examination of the contractual and regulatory provisions and the totality of the circumstances, the Supreme Court of Canada held that the account holder had a reasonable expectation that the Internet service provider would maintain confidentiality over his personal information.

[41] In *Siniscalchi*, prison authorities recorded inmate telephone conversations, in conformity with prison regulations. The inmate had no property interest in the recordings, nor did he have control over them. Nonetheless, this Court held that he had a privacy interest in the recordings of his conversations sufficient to found a claim under s. 8 of the *Charter*.

[42] While a claimant's right and ability to control the subject matter of a search is relevant to a s. 8 inquiry, then, it is not determinative.

Existing Case Law

[43] Counsel have not located any decisions of appellate courts in Canada dealing with expectations of privacy in text messages that have been delivered to a recipient. They have, however, noted some decisions at the trial level.

[44] In *R. v. S.M.*, 2012 ONSC 2949, Nordheimer J. was of the view that the originator of a text message maintains a privacy interest in the recipient's copy of the message. He considered a text conversation to be analogous to a voice conversation on a cellphone:

> [24] The fact that a digital record exists of a text message does not substantially change the privacy interest that arises from the nature of the message. It is still a private communication that the sender intends only for the recipient. While I accept that the fact that there is a record of that message beyond the control of the originator slightly lessens the privacy interest, in the sense that the originator must be alert to the possibility that the recipient might show or otherwise transmit the message to others, I believe

> that there is a qualitative difference between that risk and the risk that the state will seize the message.

[45] In *R. v. Pammett*, 2014 ONSC 1213, however, McCarthy J. declined to follow the reasoning in *S.M.* He considered that the ceding of control over a text message to the recipient meant that, in the absence of evidence to the contrary, the sender had no reasonable expectation of privacy in the text message:

> [8] With the greatest of respect to my brother Nordheimer J., I am unable to agree with his conclusion that text messages generally carry with them a reasonable expectation of privacy. While it may be possible, in an appropriate case, for an accused to establish a reasonable expectation of privacy, this expectation should not, in the absence of some subjective evidence, apply to routinely exchanged text messages. Taking into account the factors as set out in *Edwards*, I am unable to find any indicia of ownership or possession by the Applicant of the text messages in question. One has to presume that the Applicant understood that, in sending a text message, he was surrendering the content of the message, in a written and permanent form, to another party. The party who receives the message on his or her device inherits, from that moment, the unfettered ability and means to preserve, forward or disseminate the message, and indeed to print or archive it.

[46] In *R. c. Nöel*, 2013 QCCQ 15544, Simard, J.C.Q. considered the issue and came to a similar conclusion:

> [49] L'expéditeur d'un message texte peut évidemment s'attendre à ce que son envoi soit confidentiel et réservé à la seule connaissance de son destinataire. Cependant il est difficile de conférer à Simon Noël un droit résultant d'une expectative de vie privée: il ne décide pas s'il faut supprimer ou conserver le message, s'il faut en interdire l'accès par un code, bref, il n'a aucun contrôle sur la confidentialité des messages.[1]

[47] We have been referred to only one British Columbia case dealing with the issue: *R. v. Sandhu*, 2014 BCSC 303. In *Sandhu*, the accused sent threatening text messages. The recipient gave the police his cellphone, and they attempted to enter the text messages into evidence at trial. The judge held that the police violated

[1] The unofficial translation, available on CanLII, is as follows:

> The sender of a text message can obviously expect that the message will remain private and be read only by its recipient. However, it is difficult to give Simon Noël a right arising from an expectation of privacy: he could not decide whether a message should be deleted or saved, or whether access to the message should be password-protected. In short, he has no control over the privacy of the messages.

Mr. Sandhu's s. 8 rights in reading the messages without obtaining a warrant. He nonetheless admitted the text evidence after conducting an analysis under s. 24(2) of the *Charter*.

[48] The reasoning in *Sandhu* was held by this Court in *Belcourt* to have been in error to the extent that it found that the reading of messages on a recipient's cellphone constituted an interception of communications under the *Criminal Code.* As I will discuss, it is my view that the judge in *Sandhu* also erred in finding the accused's belief that the extortionate text messages would be kept private to be objectively reasonable.

[49] While we have also been referred to *R. v. Thompson*, 2013 ONSC 4624, I note that that case did not involve an unlawful search. In my view that is an important distinction from the other cases. A person cannot have a reasonable expectation that messages on another person's cellphone will remain private in the face of a lawful search of the device.

Analysis

[50] The trial judge emphasized the last two of the *Edwards* factors − the existence of a subjective expectation of privacy and the objective reasonableness of that expectation – in analysing the s. 8 issue. In my opinion, he was right to do so. As a general rule, those two factors will be the most important elements of the analysis. Recently, in *R. v. Simpson*, 2015 SCC 40 the Court said:

> [47] Section 8 of the *Charter* only confers protection against unreasonable searches and seizures to the extent that an individual establishes a reasonable expectation of privacy: *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 159. It is the claimant who bears the burden of demonstrating this expectation on a balance of probabilities: *R. v. Edwards*, [1996] 1 S.C.R. 128, at para. 45. In determining whether this burden has been met, the court must assess the totality of the circumstances, with particular emphasis on the existence of a subjective expectation of privacy and the objective reasonableness of that expectation: *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432, at para. 19; *Edwards*, at para. 45.
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> [Emphasis added.]

[51] Considerations of control and proprietary interest are important primarily because they may, in certain situations, undermine reasonable expectations of privacy. The point was, again, adverted to in *Simpson*:

> [51] Although an individual need not show a proprietary or possessory interest in a place in order to establish a reasonable expectation of privacy, this Court has held that the fact that the accused is a trespasser or otherwise has a tenuous connection to the place in question may, when considered in the totality of the circumstances, significantly undermine any reasonable expectation of privacy: *Edwards*, at para. 43; *R. v. Lauda*, [1998] 2 S.C.R. 683, at para. 1; *R. v. Belnavis*, [1997] 3 S.C.R. 341, at paras. 20-22.

[52] The question that the trial judge was faced with was whether, despite the fact that the cellphone was the property of Mr. Guray, and despite the fact that Mr. Guray had control over the copies of the text messages on the cellphone, Mr. Pelucco nonetheless maintained a reasonable expectation of privacy in the messages that he had sent. In my view, the analyses in *Noël* and in *Pammett*, which give superordinate weight to considerations of property and control, and de-emphasize reasonable expectations, are not persuasive.

[53] I agree with the trial judge's conclusion that Mr. Pelucco had a subjective expectation that his text conversation with Mr. Guray was private. Although the defence called no evidence to establish that expectation, the circumstances leave little room for any other conclusion. It would strain credulity to suggest that a reasonable person would have engaged in such a conversation if they thought that the messages would be shared with others.

[54] The real question in this case, then, is whether Mr. Pelucco's belief that his conversation was private was objectively reasonable.

[55] The judge analysed the issue by saying that both Mr. Pelucco's and Mr. Guray's interests lay in keeping the texts private, and that there was no reason for them to believe that they would not succeed in doing so. He therefore found that Mr. Pelucco's subjective expectation of privacy was objectively reasonable.

[56] I have some difficulty with this step in the trial judge's reasoning. First, in answering the question of whether Mr. Pelucco's expectation of privacy was objectively reasonable, the court ought to have placed itself in Mr. Pelucco's shoes, and analysed the issue from the standpoint of the information that was available to him at the time he sent the text messages. Instead of doing that, the court analysed the situation from the standpoint of an assumed joint position of Mr. Pelucco and Mr. Guray.

[57] The defence presented no evidence on the voir dire. Neither Mr. Pelucco nor Mr. Guray testified. The evidence that was before the court provided little information about the knowledge Mr. Pelucco had of Mr. Guray. While it is clear that Mr. Pelucco hoped, and probably assumed, that Mr. Guray was genuinely interested in purchasing cocaine from him, it is not clear what information was available to Mr. Pelucco to give him confidence that that was the case. There were other possibilities: for all Mr. Pelucco knew, Mr. Guray could have been an undercover officer, a rival drug dealer, or a prankster. In assessing the objective reasonableness of Mr. Pelucco's expectation of privacy, there was no basis for the judge's assumption that Mr. Pelucco was able to accurately assess Mr. Guray's motives and goals.

[58] I think, though, that there is a more fundamental error in the way the judge analysed the question of whether there was an objectively reasonable basis for Mr. Pelucco's expectation of privacy. The judge's analysis suggests that the question was one of probability: was it likely, in the circumstances, that the text messages would remain private? Case law shows, however, that the question of objective reasonableness is not one of probability – rather, it is a normative assessment of the reasonableness of a privacy claim.

[59] In the majority reasons in *R. v. Patrick*, 2009 SCC 17, Binnie J. described the normative nature of the inquiry:

> [14] "Expectation of privacy is a normative rather than a descriptive standard" (*Tessling*, at para. 42). A government that increases its snooping on the lives of citizens, and thereby makes them suspicious and reduces their

> expectation of privacy, will not thereby succeed in unilaterally reducing their constitutional entitlement to privacy protection. Equally, however, while a disembarking passenger at the Toronto airport might feel entitled to privacy when emptying his bowels after an intercontinental flight, the obligation to make use of a "drug loo facility" under the supervision of the authorities was upheld in the context of border formalities in *R. v. Monney*, [1999] 1 S.C.R. 652. Privacy analysis 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. This is inherent in the "assessment" called for by Dickson J. (as he then was) in *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at pp. 159-60:
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> > This limitation on the right guaranteed by s. 8, whether it is expressed negatively as freedom from "unreasonable" search and seizure, or positively as an entitlement to a "reasonable" expectation of privacy, indicates that an assessment must be made as to whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement.
>
> Dickson J.'s analysis paid tribute to *Katz v. United States*, 389 U.S. 347 (1967), and quoted its foundational privacy principle that "the Fourth Amendment protects people, not places" (Stewart J., at p. 351). This was elaborated upon by Harlan J. in *Katz* in a concurring opinion which gave rise to the twin subjective/objective enquiries into privacy expectations (p. 361).

[60] Justice Binnie then proceeded to analyze a number of cases, and highlighted the normative considerations that impinged on the courts' assessments of the reasonableness of expectations of privacy. See also *Spencer* at para. 18.

[61] It is because the objective reasonableness of an expectation of privacy includes normative elements that I am of the view that the analysis in *Sandhu* cannot be sustained. In that case, the judge found that the sender of a threatening text message had an objectively reasonable expectation that the recipient would not turn the message over to police. If objective reasonableness were merely a measure of probability, it could be said that the sender had an objectively reasonable expectation of privacy – he could reasonably expect that the threat would be sufficient to silence the victim and his message would, therefore, remain private. Once normative elements of reasonableness are recognized, however, it becomes clear that a person who threatens another has no right to expect that the person who has been threatened will keep the threat private.

[62] There are many other cases that clearly demonstrate that the "objective reasonableness" of an expectation of privacy is not a matter of probability: for example, in *R. v. Lauda*, [1998] 2 S.C.R. 683 affirming (1998), 37 O.R. (3d) 513, the Court held that a trespasser who was cultivating marijuana on abandoned fields had no reasonable expectation of privacy. The Court did not ask itself how likely it was that police would come across the operation, or choose to enter the land. Rather, the question was a normative one – does a trespasser who is unlawfully using land to cultivate illicit drugs have a right to expect that he will enjoy privacy in doing so?

[63] Normative considerations also apply in the case before us. The question is whether, in keeping with societal and legal norms in Canada, the sender of a text message should reasonably expect that the texts will remain private on the recipient's device.

[64] As Nordheimer J. suggested in *S.M.*, 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, archived, or forwarded to others. In ordinary circumstances, the sender and recipient expect the record to be transitory, and not to be shared.

[65] 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.

[66] It is true that once a text message has been delivered to the recipient, it will, as the Crown argues, cease to be under the exclusive control of the sender. With respect to the recipient's copy of the message, it is the recipient who will be in a position to keep it private or to disseminate it further. The sender, therefore, cannot have absolute confidence that the message will remain private. Much will depend on the nature of the message, the relationship between the sender and recipient, the character of the recipient, and the circumstances in which the message is received.

[67] These factors, however, do not necessarily impinge on the question of whether, for s. 8 purposes, the sender has a reasonable expectation of privacy in the message. A person's right to privacy does not depend on there being no reasonable possibility of an intrusion on that right. For example, a person who shares a home with others will, to a greater or lesser degree, surrender some privacy. In an intimate setting, there may, in fact, be a limited sphere of absolute privacy. Even in such a setting, however, the person retains a reasonable expectation that his or her private affairs will be free from state intrusion. A person's home remains his or her castle even if that castle is shared with family members or other residents.

[68] The Crown's position on this appeal – effectively that a sender *never* has a reasonable expectation that a message will remain private after delivered to a recipient's device – does not, in my view, comport with social or legal norms. A sender will ordinarily have a reasonable expectation that a text message will remain private in the hands of its recipient.

[69] The text conversation between Mr. Pelucco and Mr. Guray was for a criminal purpose, but that fact does not, by itself, affect the reasonable expectation of privacy. In *Spencer*, Cromwell J. speaking for a unanimous Court, said:

> [36] The nature of the 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. To paraphrase Binnie J. in *Patrick*, the issue is not whether Mr. Spencer had a legitimate privacy interest in concealing his use of the Internet for the purpose of accessing child pornography, but whether people generally have a privacy interest in subscriber information with respect to computers which they use in their home for private purposes: *Patrick*, at para. 32.

[70] Apart from criminality, there is nothing remarkable about the content or circumstances of the text conversation at issue in the case before us. Nothing in the situation suggests that the ordinary expectation that a text message exchange will remain private was displaced.

[71] Mr. Pelucco had a reasonable expectation that the text messages would remain private on Mr. Guray's cellphone. To be sure, he assumed the risk that

Mr. Guray could disseminate the messages further. He was entitled, however, to expect that the police would not search the messages without authorization. When they did so, they violated his reasonable expectation of privacy.

[72] In the result, I agree with the trial judge's conclusion that Mr. Pelucco's s. 8 rights were violated by the unlawful seizure of text messages from Mr. Guray's cellphone. As the Crown has properly conceded, once that conclusion is reached, the balance of the trial judge's analysis is unassailable.

[73] In the result, I would dismiss the appeal.

"The Honourable Mr. Justice Groberman"

I agree:

"The Honourable Mr. Justice Savage"

Reasons for Judgment of the Honourable Mr. Justice Goepel:

Introduction

[74] I have had the benefit of reading the reasons, in draft form, of my colleague, Mr. Justice Groberman. I have, however, reached a different conclusion on whether the sender of a text message has a reasonable expectation of privacy in that message after it reaches its intended recipient.

[75] For the reasons that follow, I would allow the Crown appeal, set aside the acquittal, and order a new trial.

Background

[76] Mr. Justice Groberman at paras. 7-28 of his reasons has set out in some detail the background facts. I need only touch on them but briefly. On November 12, 2010, the police stopped a man named Mr. Guray for speeding. In the course of the traffic stop the police developed a suspicion that Mr. Guray might have something dangerous or illegal in his trunk, leading to the discovery of a bag that smelled of drugs and was ultimately found to contain $38,000 cash. The police then arrested Mr. Guray.

[77] Following the arrest the police searched Mr. Guray's vehicle and located a cell phone. A search of the cell phone disclosed a string of text messages relating to an unfolding drug transaction in which Mr. Guray had arranged to meet someone in a park to purchase a quantity of cocaine consistent with the amount of cash found in Mr. Guray's trunk. Using Mr. Guray's phone, the investigating officer continued the text message dialogue, proposing a new location for the meeting. When they arrived at the designated location, the police saw Mr. Pelucco sitting in a car with a phone in his hand, arrested him, and seized one kilogram of cocaine from the trunk of his car together with a flap of methamphetamine and a plastic bag with a small sample of crack cocaine.

[78] Largely on the strength of the text messages, which suggested that Mr. Pelucco had another kilogram of cocaine, the police obtained a warrant to search his residence. The residence belonged to Mr. Pelucco's parents, who occupied the main floor of the house, while Mr. Pelucco occupied the basement. In the search of the residence the police found a bag containing 280 grams of heroin, a money counter, and a vacuum sealed bag containing $57,550 in cash.

[79] Mr. Pelucco was charged with two counts of possession of a controlled substance for the purpose of trafficking under s. 5(2) of the *Controlled Drugs and Substances Act,* S.C. 1996, c. 19 (the "*Act*"): one in respect of cocaine found in the trunk of his car at the time of his arrest and one in respect of heroin subsequently found during a search of his residence. He was also charged with one count of simple possession of methamphetamine under s. 4(1) of the *Act*, in respect of a flap of the drug found in the trunk of his car at the time of his arrest.

[80] At trial, Mr. Pelucco applied to exclude the evidence on the basis of alleged violations of his rights under the *Canadian Charter of Rights and Freedoms* (the "*Charter*"). The key allegation was that the police breached Mr. Pelucco's right to privacy under s. 8 of the *Charter* by reading his private text messages on Mr. Guray's phone. The trial judge held that Mr. Pelucco had a reasonable expectation of privacy in the text messages on Mr. Guray's phone, that the arrest of Mr. Guray was unlawful, that the search of Mr. Guray's phone was not authorized by law, and that the subsequent arrest of Mr. Pelucco was based on grounds obtained in breach his privacy rights. The trial judge went on to hold that without the facts relating to Mr. Pelucco's arrest, there were no grounds to support the issuance of a search warrant for Mr. Pelucco's residence, where the police found a further quantity of drugs. The trial judge excluded all of the evidence under s. 24(2) of the *Charter* and acquitted Mr. Pelucco.

Issues On Appeal

[81] The Crown says the trial judge erred in law in finding that Mr. Pelucco had a reasonable expectation of privacy in text messages located on Mr. Guray's phone.

While Mr. Pelucco clearly had an expectation of privacy in his own phone and the data stored on it, and in the communication process used to send the text messages to Mr. Guray, he could have no such reasonable expectation of privacy in Mr. Guray's copy of the text messages. Mr. Pelucco, having chosen to communicate with Mr. Guray, via a medium that created a record, had no control over what Mr. Guray chose to do with the resulting records once they reached his phone. The Crown submits the trial judge's error on this fundamental point was the lynchpin in the reasoning that led to the exclusion of the evidence and the acquittal of Mr. Pelucco.

[82] Mr. Pelucco seeks to uphold the trial decision. He submits that the originator of a private communication maintains an ongoing privacy interest in that communication. He submits his s. 8 *Charter* rights were violated when the police read the text messages he had sent to Mr. Guray.

Discussion

[83] The fundamental issue for determination on this appeal is whether the sender of a text message has an ongoing privacy interest in that text message once the recipient of the message has received it.

[84] The police searched Mr. Guray's phone without a warrant. Any warrantless search is *prima facie* unreasonable: see e.g., *R. v. Collins*, [1987] 1 S.C.R. 265 at para. 22. The onus is on the Crown to demonstrate that the search is justified and reasonable in the circumstances of the case. There is, however, a preliminary question of standing on the part of a claimant.

[85] Section 8 of the *Charter* only confers protection against unreasonable searches and seizures to the extent that an individual establishes a reasonable expectation of privacy: *R. v. Simpson*, 2015 SCC 40 at para. 47. The Court must first determine whether or not an individual, here Mr. Pelucco, had a reasonable expectation of privacy in the "totality of the circumstances": *R. v. Edwards*, [1996] 1

S.C.R. 128 at para. 45. It is the claimant who bears the burden of demonstrating this expectation on a balance of probabilities.

[86] In *Edwards,* the Court at para. 45 set out several factors to assist with determining whether a person has reasonable expectation of privacy. In submissions, the parties devoted substantial time on whether, and to what degree, the factors in *Edwards* are appropriate for this case.

[87] In my view, ultimately, these factors are merely tools for determining whether an asserted subjective expectation of privacy is objectively reasonable in the totality of circumstances of a given case. Supreme Court decisions subsequent to *Edwards* have generally adopted this approach: see e.g., *R. v. Tessling,* 2004 SCC 67 at para. 32; *R. v. Patrick*, 2009 SCC 17 at para. 26; and *R. v. Cole*, 2012 SCC 53 at para. 40; and see generally *R. v. Morelli*, 2010 SCC 8 and *R. v. Spencer*, 2014 SCC 43. The exact factors relied on in any one case are, partly, the product of the kind of subject matter over a privacy interest that is being asserted.

[88] In the end, the question is whether, in "the totality of circumstances", a reasonable expectation of privacy exists. In some cases, setting out these circumstances exhaustively will assist the court in reaching a final determination; but that is not always the case. Here, as I discuss below, absence of one of the factors − the inability to ultimately regulate and control the dissemination of the content of a communication that was voluntarily sent to another person once it is received by that person − is determinative of the analysis. *Edwards* is illustrative.

[89] In *Edwards*, the Supreme Court clearly set out that "the right to be free from intrusion or interference" − a "key element of privacy" − is dependent on one's ability to regulate others' access to the subject matter forming the core of a privacy claim.

[90] The facts of *Edwards* are important and bear on its ultimate conclusion. The police placed the accused under surveillance on a suspicion that he was trafficking in drugs. The police were informed that he either had the drugs hidden on his person or at his girlfriend's apartment. The police did not have sufficient evidence to obtain

a search warrant of the apartment. After arresting the accused, two officers attended at the girlfriend's apartment. The two officers, after persuading the accused's girlfriend to allow them access to her home, searched the premise and found several bags of crack cocaine. The Crown then sought to adduce the bags as evidence against the accused in his trial.

[91] The question before the Court was whether the accused had a reasonable expectation of privacy in his girlfriend's apartment. Mr. Justice Cory concluded that there was no such expectation of privacy. His reasons are set out at paras. 46-50:

> 46 … [I]t is my view that the appellant has not demonstrated that he had an expectation of privacy in Ms. Evers' apartment. … [I]t is significant that, apart from a history of use of Ms. Evers' apartment, the appellant cannot comply with any of the other factors listed [above at para. 45].
>
> 47 There are, as well, several factors which specifically militate against a finding that the appellant had any reasonable expectation of privacy in the apartment. First, Ms. Evers stated in her testimony that the appellant was "just a visitor" who stayed over occasionally. As McKinlay J.A. found at pp. 136 and 134, respectively, "he was no more than an especially privileged guest" who "took advantage of Ms. Evers by making use of her premises to conceal a substantial quantity of illegal drugs".
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> …
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> 49 Third, although only he and Ms. Evers had keys to the apartment, the appellant lacked the authority to regulate access to the premises. In the words of McKinlay J.A. at p. 136, "Ms. Evers could admit anyone to the apartment whom the appellant wished to exclude, and could exclude anyone he wished to admit". An important aspect of privacy is the ability to exclude others from the premises….
>
> 50 The right to be free from intrusion or interference is a key element of privacy. It follows that the fact that the appellant could not be free from intrusion or interference in Ms. Evers' apartment is a very important factor in confirming the finding that he did not have a reasonable expectation of privacy. He was no more than a privileged guest.
>
> [Emphasis added.]

[92] I note that the Court reached this conclusion notwithstanding the fact that the police may have potentially breached Ms. Evers' s. 8 *Charter* right in gaining entry to the residence (La Forest J., concurring in the result, described the police conduct as "at best … a constructive break-in": at para. 69). In the opinion of the majority, a s. 8 claim, being a "personal right", first requires a claimant to have proper standing, i.e.,

to be able to point to a breach of their own right, notwithstanding the effect of police conduct on the rights of others: at paras. 43, 45, 52-56.

[93] I turn, therefore, to examine the nature of the privacy right being asserted by Mr. Pelucco in this case. Mr. Pelucco asserts a privacy interest in the contents of his communication to Mr. Guray. This is, ultimately, an assertion of informational privacy. However, not all claims to informational privacy are equivalent. To determine the extent (if any) of the privacy interest that exists in this particular case, this Court must carefully consider the basis for his assertion of privacy.

[94] In his written submissions, Mr. Pelucco asserts his privacy interest in the following manner:

> 1. At its core this case is about the right of all citizens engaging in private communications through digital or electronic media to maintain their privacy vis-a-vis the state…
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> …
>
> 31. The Appellant agrees that text communicators can reasonably expect no one will surreptitiously eavesdrop or prospectively gather text messages … Pelucco says that text communicators are similarly entitled to expect that the state will not unlawfully access those private communications by the unlawful seizure and search of the devices used to facilitate them.
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> …
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> 35. In the context of private communications (which is what we are unquestionably dealing with) it is the originator who enjoys the protection of privacy provision of the *Criminal Code* and the *Charter* …
>
> …
>
> 45 … [W]e say first, the subject matter of the search is a private communication and as such there is a very high privacy interest. Secondly, we say that Pelucco's interest in the private communication is that he is the originator of it. The law has long recognized that the privacy protections afforded by law extend to the originator of a private communication.
>
> …
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> 47 … The Trial Judge concludes that the subject matter of the message supports the inference that Messrs. Pelucco and Guray wished to keep the message private and that there would be no basis for them to believe someone else might access those messages … [W]e submit that the conclusion is strengthened considering that reasonable people would not expect their private communications to be accessed by police officers

> engaged in illegal searches. Accordingly we submit the Trial Judge was correct to conclude that Pelucco had an ongoing expectation of privacy in his sent text messages.
>
> [Emphasis in original.]

[95] In substance, Mr. Pelucco submits that the mere fact that there is a risk that Mr. Guray would disseminate his communication to other people does not alter the presumption that he is entitled (ultimately, or at least, as against the state) to determine "when, how, and to what extent" the content of the message is disseminated": see *Tessling* at para. 23. In other words, he submits that the fact that Mr. Guray could breach his confidence and disseminate information does not mean that, from a "normative" perspective, he is not ultimately entitled to determine how the information should be disseminated to others (including state authorities).

[96] The principle that privacy is to be approached from a "normative" perspective reflects an important caveat: the expectation of privacy is not meant to be a factual description of whether Canadians expect to be free from interference from the state, such that the state could reduce subjective expectations of privacy solely through adopting sufficiently invasive techniques. Binnie J. explains in *Tessling* at para. 42:

> 42 I should add a *caveat*. The *subjective* expectation of privacy is important but its absence should not be used too quickly to undermine the protection afforded by s. 8 to the values of a free and democratic society. In an age of expanding means for snooping readily available on the retail market, ordinary people may come to fear (with or without justification) that their telephones are wiretapped or their private correspondence is being read. One recalls the evidence at the Watergate inquiry of conspirator Gordon Liddy who testified that he regularly cranked up the volume of his portable radio to mask (or drown out) private conversations because he feared being "bugged" by unknown forces. Whether or not he was justified in doing so, we should not wish on ourselves such an environment. Suggestions that a diminished *subjective* expectation of privacy should automatically result in a lowering of constitutional protection should therefore be opposed. It is one thing to say that a person who puts out the garbage has no reasonable expectation of privacy in it. It is quite another to say that someone who fears their telephone is bugged no longer has a *subjective* expectation of privacy and thereby forfeits the protection of s. 8. Expectation of privacy is a normative rather than a descriptive standard.

[97] In *Patrick*, Binnie J. reiterates that government "snooping" cannot attenuate the reasonableness of an expectation of privacy. This is, ultimately, reflective of the

self-evident principle that the government cannot create an intrusive spying regime, diminishing Canadians' expectation of privacy as a result, and claim that its conduct does not offend the constitution because Canadians, due to the serious invasion of privacy, no longer expect their affairs to remain private from government agents.

[98] The situation of concern in *Tessling* and in *Patrick* is not at issue in this case. The Crown's position is not predicated on the assertion that Canadians' expectation of privacy is attenuated due to the use of an invasive investigative technique by the government. Instead, the Crown's position is predicated on the proposition that when a person successfully communicates information to its intended recipient, there is no longer an expectation that the information will be kept private (at least, absent any evidence of an affirmative assertion of confidentiality or an understanding between the parties that the information is to be kept confidential).

[99] The present case is distinctive because the subject matter at issue is not just information, but specifically a communication. It is, furthermore, distinctive because the police are not seeking to prospectively intercept a communication, but rather to access it on a particular device on which it is stored. It is for this reason that Part VI of the *Criminal Code*, R.S.C. 1985, c. C-46 ("the *Code*") is a wholly inappropriate lens through which to consider this case: *R. v. Belcourt,* 2015 BCCA 126 at paras. 45-50. It is, moreover, distinct from cases such as *R. v. Telus,* 2013 SCC 16, and *Belcourt*, because the party storing the communication, its intended recipient, does not have a contractual arrangement (or publicly available privacy policy) that the information will be kept private in relation to other third parties.

[100] As a general principle, the manner in which one elects to communicate must affect the degree of privacy protection one may reasonably expect. I agree with the submission of the Crown that this is nothing more than the recognition that privacy depends on the way that individuals choose to communicate. Privacy rights are not absolute; not everything that one would like to keep confidential will be protected under s. 8 of the *Charter*: see e.g., *Tessling* at para. 26 and *Belcourt* at para. 55.

[101] The question to be determined in this case is not whether text messaging as a medium of communication is, in the abstract, a medium that people, again in the abstract, expect to be confidential. Instead, the question is whether Mr. Pelucco, in the totality of circumstances of this case, had a reasonable expectation of privacy with regard to text messages he had chosen to send to Mr. Guray and which were stored on Mr. Guray's phone.

[102] In his submissions, Mr. Pelucco relies on *R. v. S.M.*, 2012 ONSC 2949. The accused in that case sought to challenge a series of search warrants authorizing a search of the cell phones of third parties for contact lists, text messages and records of telephone calls made by the accused. Nordheimer J. found that the accused had no standing to challenge the warrants, because any privacy interest in information is substantially reduced once it is voluntarily disclosed to other persons, who may themselves record it and share it with others. In addition to this finding, Nordheimer J. made several comments in *obiter* on the expectation of privacy in text message communications (and, by implication, on the privacy interest in those messages located in the phone of the receiver) at paras. 17-18, 24 and 26:

> [17] … I conclude that the non-owner of a cell phone does have an ongoing and important privacy interest in other information that might be obtained from another person's cell phone. In particular, the non-owner of a cell phone has an ongoing privacy interest in text messages that are either contained in a cell phone or that can be obtained from the records of the carrier for that cell phone. I reach that conclusion for the following reasons.
>
> [18] Text messages are a relatively recent phenomenon but their increasing use as a method of communication between individuals cannot be denied. Text messages are instantaneously transmitted and it is generally expected that text messages will receive an equally timely response. The contents of the text messages in this case demonstrate that reality. Text messages are not like email messages where an immediate response is not an expectation inherent in the mode of communication used – although a quick response may nonetheless be wanted. Text messages occur very much more in "real time". Indeed, text messages are often a substitute for an actual conversation and thus are much more akin to a traditional telephone conversation than they are to other modes of communication. Emails, on the other hand, are more akin to an electronic version of a letter.
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> …
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> [24] The fact that a digital record exists of a text message does not substantially change the privacy interest that arises from the nature of the message. It is still a private communication that the sender intends only for

> the recipient. While I accept that the fact that there is a record of that message beyond the control of the originator slightly lessens the privacy interest, in the sense that the originator must be alert to the possibility that the recipient might show or otherwise transmit the message to others, I believe that there is a qualitative difference between that risk and the risk that the state will seize the message.
>
> …
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> [26] If my analysis that text messages are much closer to a telephone conversation than to other forms of communication is correct, then it would follow that S.M. has the right to challenge the authorization by which those communications were obtained even though he is not a named party in the authorization nor was it directed expressly at him or at his phone.
>
> [Emphasis added.]

[103] Himel J. comprehensively considered *S.M.* in *R. v. Thompson*, 2013 ONSC 4624. The facts are somewhat similar to those in this case. Several officers executed a search warrant against a man at his residence. Having found drugs in the residence, they arrested him for drug offences. During a subsequent search of the man, the police uncovered a Blackberry cellphone that was both unlocked and without a password. There was an active conversation being carried on by Blackberry messenger (BBM). The officer believed the conversation to be about a firearms purchase, because visible in the conversation window was a picture of a revolver. The officer, as in this case, posed as the man arrested on BBM to arrange for the revolver's sale. Subsequently, the police set up surveillance at the pre-arranged meeting point; ultimately, they arrested the seller (hereafter "the accused") when he arrived to complete the sale.

[104] The accused, like Mr. Pelucco in this case, took the position that his s. 8 rights had been breached. He sought to have the revolver found in his bag excluded from evidence at trial pursuant to s. 24(2) of the *Charter*. He took the position that while in general he would have no privacy interest in the contents of another person's cellphone, he did have a privacy interest in the contents of any text messages he had sent (on the basis that they were private communications as contemplated by s. 183 of the *Code*). The judge disagreed. Applying *Edwards*, she found that the sender of a text message does not have a continued privacy interest

in a text message after it is received by its intended recipient. She considered, in great detail, whether she was bound to follow the decision of Nordheimer J. in *S.M.*:

> 36 …I am mindful of the case of *R. v. M.(S.)*, 2012 ONSC 2949 … which is relied upon by the applicant as authority for the proposition that the applicant has a privacy interest in the content of the text communications sent by him and stored on the phone of the arrested person….
>
> …
>
> 43 …[T]hese comments were made in obiter and were based upon facts which may be distinguished from the circumstances of the case before me. In *M.(S.)*, the accused was attempting to challenge the validity of multiple search warrants. The case before me concerns the search of messages on a cell phone that was discovered by the police upon the arrest of a third party. The text messages initially sought in M.(S.) were intended to link M.(S.) as an accomplice to a first degree murder and to obtain evidence in furtherance of that prosecution. Here, the messages involved a person other than the owner of the phone communicating about the sale of a gun. In M.(S.), the court did not engage in the analysis of the factors to establish standing under section 8 as outlined in *Edwards*. In order to have standing under section 8, an accused must first establish a reasonable expectation of privacy: see *R. v. Ward*, supra, at para. 81. One of the factors that is considered is whether the person had a subjective expectation of privacy and that, in all of the circumstances, that expectation was reasonable: see *R. v. Buhay*, [2003] 1 S.C.R. 631, at para. 18; *R. v. Edwards*, supra, at para. 45; and *R. v. Belnavis*, [1997] 3 S.C.R. 341, at para. 20. Instead, the court referenced the cases of *R. v. Finlay* (1985), 23 C.C.C. (3d) 48 (Ont. C.A.), *R. v. Duarte*, [1990] 1 S.C.R. 30 and *R. v. Shayesteh* (1996), 111 C.C.C. (3d) 225 (Ont. C.A.) which deal with the interception of voice communications. I conclude that, in the case at bar, the analysis outlined in Edwards is required to determine whether the applicant in the context of these circumstances, had a reasonable expectation of privacy in messages in a cell phone owned by a third party and I find that the applicant did not.
>
> [Emphasis added.]

[105] In *Thompson*, Himel J. identified two material features of *S.M.*, which are of substantial relevance. First, she noted that the discussion of a privacy interest in the text messages was *obiter*, the case having been disposed of on other grounds. Second, she observed Nordheimer J. had not considered a number of seminal decisions on s. 8, instead focusing on authorities which had applied to Part VI authorizations (which, as this Court said in *Belcourt*, do not apply to the pre-existing text messages).

[106] To Himel J.'s analysis, with which I agree, I would add that, in my view, the appropriate analogy to a text message is not, as suggested by Nordheimer J., a telephone conversation, but rather a letter. A telephone conversation is distinct not just because of the nature of its content, but because of the manner in which the police may acquire it (i.e., by recording it themselves). Telephone conversations are inherently private unless one attempts to intercept it through surveillance.

[107] The broad scope of s. 8 protection that is found in Part VI is to avoid "fishing expeditions". This Court explained in *Belcourt* at para. 47:

> [47] The detailed requirements found in Part VI exist to address the fact that the evidence sought to be acquired by the police has not yet come into existence at the time that the judicial authorization for its acquisition is being sought: see *R. v. Finlay* (1985), 23 C.C.C. (3d) 48 (Ont. C.A.) at 63-64. Indeed, the constitutionality of Part VI derives from the safeguards that are imposed by the role of the judge granting the authorization, which exist because of the danger that the interception of private communications could easily transform into a fishing expedition: *Finlay* 78; see also *R. v. Araujou*, [2000] 2 S.C.R. 992 at para. 29 …
>
> [Emphasis added.]

[108] The fact that a contemporaneous record is being created as the text message is sent, combined with the fact that the police are seeking to acquire the text message from the phone of the recipient brings this case in line with the consideration of letters and emails, and not telephone conversations (which, as I said above, implicate privacy in an entirely different manner because the only way for anyone to acquire the content of the communication is to intercept the communication, whether state or third party). The nature of the privacy interest is wholly different; this is why, ultimately, there is no constitutional requirement for Part VI authorization (or equivalent thereof) when one looks to acquire stored text messages from a service provider's database.

[109] I note that the analogy (albeit to an e-mail, rather than a letter) was adopted by McCarthy J. in *R. v. Pammett*, 2014 ONSC 1213. In the course of holding that the sender had no reasonable expectation of privacy in a text message, he challenged Nordheimer's J. conclusion that text messages were different than emails:

> [9] I utterly fail to see the distinction between a text message and an email for the purposes of determining whether there is a reasonable expectation of privacy. Modern hand-held devices have the capability of sending and receiving both. Email is entirely capable of serving as an informal and instantaneous means of communication. Text messages are as capable of sending a perfunctory greeting as they are of conveying detailed information, attachments, photographs and the like. There was no evidence here, such as a disclaimer, of any subjective expectation of privacy. There was no restriction placed on the forwarding or disseminating of the messages. There was no instruction to delete the messages, once received. Nor is there any evidence that the Applicant or the cell phone owners ever turned their minds to the question of privacy … In the absence of evidence to the contrary, one has to assume that the Applicant must have known that the recipients' devices could not provide any assurance of privacy. There is certainly no evidence to support that the Applicant had any expectation in that regard and I am not able to infer such an expectation from the record.

[110] In the United States of America, there is a clear line of appellate authority on the Fourth Amendment which has found that there is no reasonable expectation of privacy in e-mail communication when the email has reached the intended recipient: see e.g., *Guest v. Leis*, 255 F. 3d 325 at 333 (6. Cir. 2001); *United States v. Lifshitz*, 369 F. 3d 137 at 190 (2d Cir. 2004). The analogy is to a letter-writer, whose privacy interest terminates when the intended recipient of the letter receives it: *Guest* at 333.

[111] As a general rule, the American Fourth Amendment jurisprudence has been highly influential in the development of search and seizure law in Canada. Our courts have adopted a Fourth Amendment analyses as persuasive in interpreting s. 8: see e.g., *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 at 161; see also *R. v. Finlay* (1985), 23 C.C.C. (3d) 48 (Ont. C.A.). As in *Edwards*, the American authorities consider the absence of control, in the appropriate case, to be ultimately determinative (because, as *Edwards* has said, "[t]he right to be free from intrusion or interference is a key element of privacy").

[112] The clearest articulation for the American rationale that a letter's author does not have a reasonable expectation of privacy is found in *Ray. v. United States Dept. of Justice*, 658 F. 2d 608 (8th Cir. 1981) at 610. The Court explains while citing an earlier authority (*United States v. Hubbard*, 493 F. Supp. 209 (D.D.C. 1979)):

> *Hubbard* involved the attempts of criminal defendants to suppress evidence, but its analysis of Fourth Amendment standing seems equally relevant here. Hubbard states that the test for Fourth Amendment standing is whether an individual, based on the facts and circumstances presented by that individual, has a legitimate expectation of privacy in the invaded place. Significantly for this appeal, the district court in *Hubbard* was "unable to understand how sending letters to a third party would form a basis for a legitimate expectation of privacy after their delivery. The reasonableness of one's privacy expectations would certainly be undermined by the act of relinquishing control." The *Hubbard* court's conclusion controls the standing issue in this case because Ray only alleged that Patterson purloined and photocopied letters he had written to his brother, Jerry Ray. Therefore, the appellant did not retain a legitimate expectation of privacy in those papers. We agree with the district court's dismissal of this claim because James Earl Ray lacks standing to contest the alleged search of Jerry Ray's hotel room.
>
> [Citations omitted.]

[113] Furthermore, I note the American authorities draw a clear distinction between the situation of a communication between parties by way of letters in general and a situation where there would be a legal obligation to keep information confidential: see e.g., *U.S. v. Knoll*, 16 F. 3d 1313 at 1321 (2d Cir. 1994) (where the Court held it would be a reasonable expectation of privacy if a duty of confidentiality existed (such as solicitor-client privilege)).

[114] All of the above-cited cases are consistent with the view that I adopt here: the privacy interest in a text message intentionally sent to other people to communicate information terminates at the time the message reaches the intended recipient(s).

[115] In my view, where a person voluntarily communicates information to a third party using a method of communication that creates a contemporaneous record and that message reaches its intended recipient, the autonomy interest underlying our s. 8 understanding of privacy is fully realized (see e.g., *Hunter v. Southam* at 159, *R. v. Plant*, [1993] 3 S.C.R. 281 at 293, and *Tessling* at para. 63). This approach derives from the conceptual framework underpinning informational privacy in text messages in our s. 8 jurisprudence, i.e., the "wider notion of control over, access to and use of information, that is, 'the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others'": *Spencer* at para. 40. This view is predicated on an

"assumption that all information about a person is in a fundamental way his own, for him to communicate or retain … as he sees fit": see *Tessling* at para. 23 and *Spencer* at para. 40.

[116] Where a person sends a text message, they have already made a preliminary decision on "when, how and to what extent information about them is communicated to others". The question is whether they have a continued claim as against the recipient on how he or she may use (and further communicate) the information to others. In the alternative, the question is whether a residual privacy right exists for information that is intentionally communicated to a third party and reaches its intended recipient.

[117] The expectation that one person would keep a communication wholly secret from all others becomes more or less reasonable depending on the relationship with that person. It would, in my view, be wholly unreasonable to find that it would be expected that a complete stranger would keep any and all information, no matter how personal or revealing, secret solely because it was sent to him or her by way of text message. This would amount to a conclusion that the medium itself creates an expectation of privacy. Such a finding would not be consistent with the s. 8 authorities, which recognize that the assessment must focus on the particular case in the totality of its particular circumstances.

[118] A person who − without any guarantee of confidentiality or indication from the recipient that the message will be kept confidential − communicates information has made an autonomous choice (i.e., determined for himself or herself) who, how and to what extent to communicate information to the fullest extent possible. Any further claim against a recipient is a claim that the sender can then determine who, how and to what extent the recipient will communicate information to further third parties, which interferes with the recipient's notional sphere of personal autonomy. Without a pre-existing obligation or arrangement that information will be kept confidential, it is wholly unreasonable to expect the information will be private. This is the conclusion found in *Thompson* and *Pammett* and one with which I agree.

[119] Mr. Pelucco did not testify on the *voir dire.* In this case, there was no evidence as to a relationship between Mr. Pelucco and Mr. Guray. We do not know, for example, whether they were complete strangers in communication only because of an interest in participating in the sale of drugs, or if they were acquaintances or friends (and if friends, close friends). The mere fact that Mr. Pelucco used text messaging as a medium to communicate − a medium known to create a contemporaneous record of a communication which allows the recipient to disseminate the communication at will − does not result in an objectively reasonable expectation that the information will be kept private.

[120] The burden was on Mr. Pelucco to demonstrate on a balance of probabilities that in the "totality of the circumstances" he had a reasonable expectation of privacy. There was no evidence to support that Mr. Pelucco had any expectation in that regard and I am not able to infer such an expectation from the record. Like McCarthy J. in *Pammett*, I find that in the absence of evidence to the contrary, one has to assume that Mr. Pelucco must have known that the recipients' devices could not provide any assurance of privacy. The mere hope or assumption that information will be kept private is not enough to justify the objective reasonableness of a subjective expectation of privacy. This is akin to *Edwards*, where being a "privileged guest" is not grounds to reasonably expect privacy when finding oneself in the apartment of one's long-term romantic partner.

[121] Mr. Pelucco cites *Spencer*, *Cole*, *R. v. Fearon*, 2014 SCC 77 and *R. v. Vu*, 2013 SCC 60 as demonstrative of the fact that a reasonable expectation of privacy will exist even when the claimant does not have, as a matter of fact, ultimate control over whether information in the hands of a third party will ultimately be disseminated. In my view, the cases are distinguishable.

[122] In *Spencer*, the main question before the court was whether the accused had a reasonable expectation of privacy in any incidental information that is created and stored on the server of an Internet Service Provider (ISP) when people use the Internet.

[123] By way of background, the accused had used his sister's Internet connection to browse for child pornography, which he then downloaded to her computer using a file sharing program. The police, using publically accessible programs, "see" the Internet Protocol (IP) address of the person who downloaded the child pornography and a globally unique identifier (GUD) assigned to each computer using the program (if certain conditions were met, which are not relevant here). The police generated a list of IP addresses for computers believed to be sharing child pornography. At issue was the fact that the police, with the IP address alone, could not identify the people who had accessed the child pornography. Thus, the police sought to contact the ISP to obtain information regarding the identity of the persons using a particular IP address. The Court, after an extensive analysis at paras. 22-32, noted that "the subject matter of the search is the identity of a subscriber whose Internet connection is linked to particular, monitored internet activity". The question was then what kind of privacy interest was being asserted in that information.

[124] The Court identified three conceptual bases for privacy:

> [38] To return to informational privacy, it seems to me that privacy in relation to information includes at least three conceptually distinct although overlapping understandings of what privacy is. These are privacy as secrecy, privacy as control and privacy as anonymity.
>
> [39] Informational privacy is often equated with secrecy or confidentiality. For example, a patient has a reasonable expectation that his or her medical information will be held in trust and confidence by the patient's physician: see, e.g., *McInerney v. MacDonald*, [1992] 2 S.C.R. 138, at p. 149.
>
> [40] Privacy also includes the related but wider notion of control over, access to and use of information, that is, "the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others": A. F. Westin, *Privacy and Freedom* (1970), at p. 7, cited in *Tessling*, at para. 23. La Forest J. made this point in *Dyment*. The understanding of informational privacy as control "derives from the assumption that all information about a person is in a fundamental way his own, for him to communicate or retain for himself as he sees fit" (*Dyment*, at p. 429, quoting from *Privacy and Computers*, the Report of the Task Force established by the Department of Communications/Department of Justice (1972), at p. 13). Even though the information will be communicated and cannot be thought of as secret or confidential, "situations abound where the reasonable expectations of the individual that the information shall remain confidential to the persons to whom, and restricted to the purposes for which it is divulged, must be protected" (pp. 429-30); see also *R. v. Duarte*, [1990] 1 S.C.R. 30, at p. 46.

> [41] There is also a third conception of informational privacy that is particularly important in the context of Internet usage. This is the understanding of privacy as anonymity. In my view, the concept of privacy potentially protected by s. 8 must include this understanding of privacy.

[125] As Cromwell J. explains (after setting out the understanding of privacy as being concerned with anonymity at paras. 42-49), that the conceptual basis for an assertion of privacy in *Spencer* was anonymity:

> [50] Applying this framework to the facts of the present case is straightforward. In the circumstances of this case, the police request to link a given IP address to subscriber information was in effect a request to link a specific person (or a limited number of persons in the case of shared Internet services) to specific online activities. This sort of request engages the anonymity aspect of the informational privacy interest by attempting to link the suspect with anonymously undertaken online activities, activities which have been recognized by the Court in other circumstances as engaging significant privacy interests.
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> [51] I conclude therefore that the police request to Shaw for subscriber information corresponding to specifically observed, anonymous Internet activity engages a high level of informational privacy. I agree with Caldwell J.A.'s conclusion on this point (at para. 27):
>
> > ... a reasonable and informed person concerned about the protection of privacy would expect one's activities on one's own computer used in one's own home would be private. ... In my judgment, it matters not that the personal attributes of the Disclosed Information pertained to Mr. Spencer's sister because Mr. Spencer was personally and directly exposed to the consequences of the police conduct in this case. As such, the police conduct *prima facie* engaged a personal privacy right of Mr. Spencer and, in this respect, his interest in the privacy of the Disclosed Information was direct and personal.
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> [Citations omitted.]

[126] Thus the question of whether one had control over the information became wholly tangential. In the "totality of the circumstances" of *Spencer*, the fact that the accused did not have control over the dissemination of information that was connected to his identity as "a subscriber whose Internet connection is linked to particular, monitored internet activity" does not mean that, in this case, the absence of control over the dissemination of a voluntarily made communication that reached its intended recipient is inapplicable.

[127] The decision in *Cole* is similarly distinguishable. I note that in *Cole* the Court recognized that, where control over dissemination of information is compromised, the expectation of privacy will attenuate (or become "diminished"): see paras. 8-9 and 58. Before addressing the significance of this point, I turn to review the facts of the case, which as in *Edwards* are material to the ultimate determination.

[128] By way of background, the issue before the Court was whether (and to what extent) a high school teacher had a reasonable expectation of privacy in his work-issued laptop. The Court summarized the essential facts at paras. 4 and 15-18:

> [4] …Mr. Cole, a high-school teacher, was permitted to use his work-issued laptop computer for incidental personal purposes. He did. He browsed the Internet and stored personal information on his hard drive.
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> …
>
> [15] … In addition to his regular teaching duties, [Mr. Cole] was responsible for policing the use by students of their networked laptops. To this end, he was supplied with a laptop owned by the school board and accorded domain administration rights on the school's network. This permitted him to access the hard drives of the students' laptops.
>
> [16] The use of Mr. Cole's work-issued laptop was governed by the school board's Policy and Procedures Manual, which allowed for incidental personal use of the board's information technology. The policy stipulated that teachers' e-mail correspondence remained private, but subject to access by school administrators if specified conditions were met. It did not address privacy in other types of files, but it did state that "all data and messages generated on or handled by board equipment are considered to be the property of [the school board]".
>
> [17] There is evidence as well that the school's Acceptable Use Policy — written for and signed by students — applied *mutatis mutandis* to teachers. This policy not only restricted the uses to which the students could put their laptops, but also warned users not to expect privacy in their files.
>
> [18] Mr. Cole was not the only person who could remotely access networked laptops. School board technicians could do so as well. While performing maintenance activities, a school board technician found, on Mr. Cole's laptop, a hidden folder containing nude and partially nude photographs of an underage female student.

[129] The Supreme Court summarized its conclusion as follows at para. 58:

> [58] The nature of the information in issue heavily favours recognition of a constitutionally protected privacy interest. Mr. Cole's personal use of his work-issued laptop generated information that is meaningful, intimate, and organically connected to his biographical core. Pulling in the other direction,

> of course, are the ownership of the laptop by the school board, the workplace policies and practices, and the technology in place at the school. These considerations diminished Mr. Cole's privacy interest in his laptop, at least in comparison to the personal computer at issue in [*R. v. Morelli*, 2010 SCC 8], but they did not eliminate it entirely.
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> [Emphasis added.]

[130] In *Cole*, the expectation of privacy was grounded in the fact that the teacher had stored deeply sensitive biographical information on his work-issued laptop in a case where he had been encouraged (or permitted) by school policies (and told that he was to expect privacy in, for example, his communication).

[131] In *Fearon*, the Supreme Court explained that the lack of control led to an attenuation of privacy rather than to a finding that there was no reasonable expectation thereof because of the unique nature of the computer. The Court explains the unique nature of smart phones at paras. 51-52 and 54:

> [51] It is well settled that the search of cell phones, like the search of computers, implicates important privacy interests which are different in both nature and extent from the search of "other places": *R. v. Vu*, 2013 SCC 60, [2013] 3 S.C.R. 657, at paras. 38 and 40-45. It is unrealistic to equate a cell phone with a briefcase or document found in someone's possession at the time of arrest. As outlined in *Vu*, computers — and I would add cell phones — may have immense storage capacity, may generate information about intimate details of the user's interests, habits and identity without the knowledge or intent of the user, may retain information even after the user thinks that it has been destroyed, and may provide access to information that is in no meaningful sense "at" the location of the search: paras. 41-44.
>
> [52] We should not differentiate among different cellular devices based on their particular capacities when setting the general framework for the search power. So, for example, the same general framework for determining the legality of the search incident to arrest should apply to the relatively unsophisticated cellular telephone in issue in this case as it would to other devices that are the equivalent of computers: see *Vu*, at para. 38.
>
> …
>
> [54] First, while cell phone searches — especially searches of "smart phones", which are the functional equivalent of computers —may constitute very significant intrusions of privacy, not every search is inevitably a significant intrusion. Suppose, for example, that in the course of the search in this case, the police had looked only at the unsent text message and the photo of the handgun. The invasion of privacy in those circumstances would, in my view, be minimal. So we must keep in mind that the real issue is the potentially broad invasion of privacy that may, *but not inevitably will*, result from law enforcement searches of cell phones.

[132] For completeness, I note that the Court in *Vu* explained the unique nature of computers (and, included in the term "computer", cell phones) and the way in which they are distinguishable from other "containers" of information as follows:

> [40] It is difficult to imagine a more intrusive invasion of privacy than the search of a personal or home computer: *Morelli*, at para. 105; *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34, at para. 3. Computers are "a multi-faceted instrumentality without precedent in our society": A. D. Gold, "Applying Section 8 in the Digital World: Seizures and Searches", prepared for the 7th Annual Six-Minute Criminal Defence Lawyer (June 9, 2007), at para. 3 (emphasis added) …
>
> [41] First, computers store immense amounts of information, some of which, in the case of personal computers, will touch the "biographical core of personal information" referred to by this Court in *R. v. Plant*, [1993] 3 S.C.R. 281, at p. 293. The scale and variety of this material makes comparison with traditional storage receptacles unrealistic. We are told that, as of April 2009, the highest capacity commercial hard drives were capable of storing two terabytes of data. A single terabyte can hold roughly 1,000,000 books of 500 pages each, 1,000 hours of video, or 250,000 four-minute songs. Even an 80-gigabyte desktop drive can store the equivalent of 40 million pages of text: L. R. Robinton, "Courting Chaos: Conflicting Guidance from Courts Highlights the Need for Clearer Rules to Govern the Search and Seizure of Digital Evidence" (2010), 12 *Yale J.L.& Tech.* 311, at pp. 321-22. In light of this massive storage capacity, the Ontario Court of Appeal was surely right to find that there is a significant distinction between the search of a computer and the search of a briefcase found in the same location. As the court put it, a computer "can be a repository for an almost unlimited universe of information": *R. v. Mohamad* (2004), 69 O.R. (3d) 481, at para. 43.
>
> [42] Second …computers contain information that is automatically generated, often unbeknownst to the user. A computer is, as A. D. Gold put it, a "fastidious record keeper" (para. 6). Word-processing programs will often automatically generate temporary files that permit analysts to reconstruct the development of a file and access information about who created and worked on it. Similarly, most browsers used to surf the Internet are programmed to automatically retain information about the websites the user has visited in recent weeks and the search terms that were employed to access those websites. Ordinarily, this information can help a user retrace his or her cybernetic steps. In the context of a criminal investigation, however, it can also enable investigators to access intimate details about a user's interests, habits, and identity, drawing on a record that the user created unwittingly: O. S. Kerr, "Searches and Seizures in a Digital World" (2005), 119 *Harv. L. Rev.* 531, at pp. 542-43. This kind of information has no analogue in the physical world in which other types of receptacles are found.
>
> [43] Third, and related to this second point, a computer retains files and data even after users think that they have destroyed them. Oft-cited American scholar O. S. Kerr explains:

> . . . marking a file as "deleted" normally does not actually delete the file; operating systems do not "zero out" the zeros and ones associated with that file when it is marked for deletion. Rather, most operating systems merely go to the Master File Table and mark that particular file's clusters available for future use by other files. If the operating system does not reuse that cluster for another file by the time the computer is analyzed, the file marked for deletion will remain undisturbed. Even if another file is assigned to that cluster, a tremendous amount of data often can be recovered from the hard drive's "slack space," space within a cluster left temporarily unused. It can be accessed by an analyst just like any other file. [p. 542]
>
> Computers thus compromise the ability of users to control the information that is available about them in two ways: they create information without the users' knowledge and they retain information that users have tried to erase. These features make computers fundamentally different from the receptacles that search and seizure law has had to respond to in the past.

[133] The immense storage capacity of computers and cellphones and their ability to generate information about the intimate details about a user's interests, habits, and identity that made it reasonable − even in cases where access or control was reduced or eliminated − to nevertheless reasonably expect privacy, do not arise in this case when one focuses solely on text messages that are voluntarily communicated and that have reached its intended recipient.

Conclusion

[134] For all of the reasons given above I find, in the totality of the circumstances of this case, that Mr. Pelucco did not have a reasonable expectation of privacy in the text messages stored on Mr. Guray's phone. Since no personal right of Mr. Pelucco was infringed by the police search of Mr. Guray's cell phone, Mr. Pelucco cannot challenge the admissibility of the text messages. As in *Edwards*, it matters not whether someone else's rights may have been infringed.

[135] The trial judge's finding that Mr. Pelucco's s. 8 *Charter* rights had been infringed was the lynchpin for his finding that Mr. Pelucco had not been lawfully arrested and led directly to the exclusion of the evidence found on the cell phone, in Mr. Pelucco's car and in his residence. Those determinations cannot survive the

finding that Mr. Pelucco's s. 8 were not infringed. Whether there are other grounds to exclude the evidence will be a matter to be determined in a new trial.

[136] I would allow the appeal, set aside the acquittals and order a new trial.

"The Honourable Mr. Justice Goepel"