COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Marakah, 2016 ONCA 542
DATE: 20160708
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MacPherson, MacFarland and LaForme JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Nour Marakah

Appellant

Mark J. Sandler and Wayne Cunningham, for the appellant

Randy Schwartz, for the respondent Her Majesty in Right of Ontario

Nick Devlin, for Her Majesty in Right of Canada

Susan Chapman and Naomi Greckol-Herlich, for the intervener Criminal Lawyers' Association

Heard: April 4 and 5, 2016

On appeal from the pre-trial ruling by Justice Laurence A. Pattillo of the Superior Court of Justice, dated September 17, 2014 and the convictions entered on November 14, 2014 by Justice Brian P. O'Marra of the Superior Court of Justice.

MacPherson J.A.:

A. INTRODUCTION

[1] The appellant, Nour Marakah, was convicted of multiple firearms offences. The convictions were ultimately dependent on the contents of text messages between Marakah and his former co-accused, Andrew Winchester. The text messages contained discussions between the two men concerning gun trafficking.

[2] In a pre-trial ruling on a *Charter* application, the application judge held that the appellant did not have standing to challenge the search of Winchester's iPhone as unlawful. He lacked standing because he did not have a reasonable expectation of privacy in the text messages extracted from Winchester's iPhone. In the words of the application judge:

> [102] … Once the message reaches its intended recipient … it is no longer under the control of the sender. It is under the complete control of the recipient to do with what he or she wants. In my view, there is no longer any reasonable expectation of privacy in the sender.

[3] The principal issue on this appeal is whether the application judge's ruling is correct.

[4] This appeal was heard together with *R. v. Jones*, 2016 ONCA 543 and *R. v. Smith,* 2016 ONCA 544. The court has released three separate sets of reasons in these appeals.

B. FACTS

(1) The parties and events

[5] In 2012, the Toronto Police Service commenced an investigation into persons who had legally purchased a number of firearms over a short period of time. The investigation led to Winchester who had legally purchased 45 firearms over a six-month period.

[6] As part of the investigation, the police received information from a confidential informant that implicated Marakah.

[7] The police obtained search warrants at four locations – three associated with Winchester and one with Marakah.

[8] On November 6, 2012, the police executed all four search warrants. They arrested Winchester and seized his iPhone. Later that same day, the police searched Marakah's residence. When the police entered Marakah's residence, Marakah grabbed his Blackberry phone. A police officer knocked it out of his hand and arrested him.

[9] Both phones were put through a forensic search. The phones contained text messages between Marakah and Winchester that clearly implicated them in gun trafficking.

(2) The application judge's decision

[10] Marakah challenged the search warrant on his residence and the search and seizure of both his and Winchester's cell phones. After a 10-day hearing, the application judge delivered a comprehensive judgment in which he reached three conclusions:

> [126] For the above reasons therefore, the following are my conclusions with respect to the three parts of Mr. Marakah's *Charter* Application:
>
> > 1. Mr. Marakah's s. 8 *Charter* challenge to exclude from evidence the items seized by the police during the search of his residence on November 6, 2012 is allowed and the evidence is excluded pursuant to s. 24(2) of the *Charter*;
> >
> > 2. Mr. Marakah's s. 8 *Charter* challenge to exclude evidence obtained from his phone that was seized from him by police at the time of his arrest on November 6, 2012 is also allowed and the evidence is excluded pursuant to s. 24(2) of the *Charter*; and
> >
> > 3. Mr. Marakah's s. 8 *Charter* challenge to exclude the evidence of his text messages found by the police on Andrew Winchester's phone on November 6, 2012, is dismissed.

[11] On the third issue above, the core of the application judge's ruling is contained in the following paragraphs:

> [84] In order to assert a s. 8 *Charter* right, the applicant must establish a reasonable expectation of privacy. See: *R. v. Edwards*, [1996] 1 S.C.R. 128 (SCC) at paras. 33 and 39.

…

[87] Mr. Marakah's assertion of a privacy interest in text messages he sent to Winchester invokes an assertion of informational privacy. *Patrick* dealt with informational privacy, specifically information contained in garbage. Paraphrasing the totality of circumstances test set out by Binnie J. at para. 27 of *Patrick*, it is necessary to address:

1. Whether Mr. Marakah had a direct interest in the contents of the text messages?

2. Whether Mr. Marakah had a subjective expectation of privacy in the text messages?

3. If so, whether the expectation was objectively reasonable?

…

[89] Mr. Marakah was the author of the text messages in issue. They contained details about his activities, albeit criminal, which were personal to him. In my view, Mr. Marakah had a direct interest in the text messages.

[90] Binnie J. stated in *Patrick*, at para. 37, that the subjective stage test was not a high hurdle. The question is whether Mr. Marakah had or is presumed to have had an expectation of privacy in the information contained in the text messages.

[91] Mr. Marakah testified that the text messages he sent to Winchester dealt with gun trafficking. He expected them to be kept confidential by Winchester and said that he told him a number of times to delete the messages. Notwithstanding Mr. Marakah's candor about the contents of his messages, I have some difficulty accepting his evidence that he expected the messages to be kept confidential. If that was the case, there would have been no need to tell Winchester to delete them. However, given the low hurdle and the subject matter of the messages, I am prepared to

accept that Mr. Marakah had a subjective expectation of privacy in the text messages.

[92] The search in issue here was of Winchester's phone. There is no suggestion or evidence that Mr. Marakah had any ownership interest in or control over Winchester's phone.

[93] The text messages in issue were sent by Mr. Marakah knowing that he had no control over what would happen to them once they reached Winchester's phone. He obviously had some concern over what might happen to them, given his instruction to Winchester to delete them. Winchester was purchasing guns legally in large numbers which were subsequently re-sold illegally. Some were involved in criminal acts. Mr. Marakah is alleged by the Crown to have been buying guns from Winchester and reselling them. In such circumstances, it is reasonable to assume that at some point the police would trace the guns back to Winchester and that his phone may fall into the hands of the police.

[94] Mr. Marakah submits that in *R. v. Duarte*, [1990] 1 S.C.R. 30, the Supreme Court rejected the notion that a reasonable expectation of privacy no longer exists because the recipient of a private communication may choose to disclose or disseminate it. *Duarte* dealt with the simultaneous interception of voice communication by the state. In my view, the risk that was considered and rejected in *Duarte* is much different than the risk that an intended recipient will forward the text to a third party. The message has already been recorded by the originator and is not being intercepted by the state. In my view, a text message, because it is written, is more akin to an email or letter than voice communication. And because it is sent to the recipient, it is completely beyond the control of the sender and entirely at the whim of the recipient.

…

> [100] Mr. Marakah relies on the statements of Abella J. in *R. v. Telus Communications Co.*, [2013] 2 S.C.R. 3, to the effect that text messages are like voice communications and are made under circumstances that attract a reasonable expectation of privacy.
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> [101] *Telus* considered whether a general warrant under the *Criminal Code* could be used to authorize the prospective daily production of text messages stored on a computer database maintained by a service provider. The case did not involve text messages on the recipient's phone. Nor did it consider the issue of standing of the sender where the text messages were in the hands of the recipient.
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> [102] I do not consider that the reasoning in *Telus* changes my analysis. I accept that the sender of a text message has a reasonable expectation of privacy in its contents after it has been sent but before it reaches its intended destination. This would include text messages stored in a service provider's data base. Once the message reaches its intended recipient, however, it is no longer under the control of the sender. It is under the complete control of the recipient to do with what he or she wants. In my view, there is no longer any reasonable expectation of privacy in the sender.
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> …
>
> [105] Having regard to the circumstances of this case, therefore, I am unable to conclude that Mr. Marakah's expectation of privacy in regards to his text messages on Winchester's phone was objectively reasonable. Accordingly, I hold that Mr. Marakah had no reasonable expectation of privacy in respect of the text messages on Winchester's phone and therefore has no standing to bring a s. 8 *Charter* challenge concerning the search of Winchester's phone.

[12] Turning to s. 24(2) of the *Charter*, the application judge applied the factors in *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, and excluded the evidence

obtained from both the search of Marakah's residence and the search of his cell phone.

(3) The trial

[13] On November 14, 2014, Marakah was convicted of two counts of trafficking in firearms, and one count of conspiracy to traffic in firearms, possession of a loaded restricted firearm, and possession of a firearm without a valid license. Two other counts of conspiracy to traffic in firearms were conditionally stayed.

[14] On February 20, 2015, Marakah was sentenced to nine years' imprisonment, less 910 days as credit for pre-trial custody.

[15] Marakah appeals his convictions. Although the Crown has not filed a cross-appeal, it seeks to challenge the application judge's exclusion of evidence from the search of Marakah's apartment and the seizure and search of his cell phone.

C. ISSUES

[16] The issues on this appeal are:

Appellant's issues

(1) Did the application judge err by concluding that the appellant had no standing to bring a s. 8 *Charter* challenge concerning the search of Winchester's cell phone?

(2) If the answer to (1) is 'Yes', should the evidence obtained by the search of Winchester's cell phone be excluded pursuant to s. 24(2) of the *Charter*?

Respondent's issues

(3) Did the application judge err by concluding that the search of the appellant's apartment infringed s. 8 of the *Charter*?

(4) Did the application judge err by concluding that the seizure and search of the appellant's cell phone infringed s. 8 of the *Charter*?

(5) If the answers to (3) or (4) are 'No', did the application judge err by excluding the evidence obtained by these searches and seizure pursuant s. 24(2) of the *Charter*?

D. ANALYSIS ON STANDING

(1) The parties' positions

[17] The appellant contends that the application judge erred in concluding that his subjective expectation of privacy in the text messages was not objectively reasonable after the messages were received by Winchester. The appellant makes three arguments on this issue.

[18] First, the appellant submits that the application judge erred in law in concluding that a reasonable expectation of privacy only extends to text messages prior to reaching their intended destination. He relies on the broad language in *R. v. TELUS Communications Co.*, 2013 SCC 16, [2013] 2 S.C.R. 3,

that text messages are “private communications” akin to voice communications. He submits that this means a reasonable expectation of privacy exists over text messages regardless of where the text message is located, or whether it is outside the control of the sender.

[19] Second, the appellant argues that the factors set out in *R. v. Edwards*, [1996] 1 S.C.R. 128, relate to claims of proprietary privacy interests and, as a result, are not the appropriate lens through which courts should assess informational privacy claims. He submits that the application judge erred in relying on the analysis in *R. v. Thompson*, 2013 ONSC 4624, [2013] O.J. No. 6302, and *R. v. Pammett*, 2014 ONSC 1213, [2014] O.J. No. 918, which assessed the standing issue through the lens of the *Edwards* factors.

[20] In support of his argument, the appellant points to the recent British Columbia Court of Appeal decisions in *R. v. Pelucco*, 2015 BCCA 370, 327 C.C.C. (3d) 151, and *R. v. Craig*, 2016 BCCA 154, [2016] B.C.J. No. 699. Both of these cases found that the accused had standing to challenge the search and seizure of electronic messages on someone else’s electronic device. In *Pelucco*, the court held that a sender will ordinarily have an objectively reasonable expectation that text messages will remain private in the hands of the recipient.

[21] Third, the appellant submits that the application judge erred in finding the appellant had no reasonable expectation of privacy on the basis that Winchester

could have shared the text messages with third parties. He argues that *Duarte* rejected this exact "risk analysis". The appellant argues that *Duarte* cannot be distinguished from the current situation simply because it concerned voice communications instead of text messaging.

[22] The intervener, the Criminal Lawyers' Association supports the appellant's position.

[23] The respondent submits that *TELUS* has no application to the issue of standing in this case. Abella J.'s references to prospective text messages as "private communications" giving rise to a reasonable expectation of privacy, in the specific context of that case, does not mean text messages are equally private once they are sent and stored in a recipient's phone.

[24] Second, the respondent submits that *Edwards*, as modified and expanded upon by *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432, continues to be the appropriate framework to determine the issue of standing. Applying *Edwards*, the key factors in this case are one's ability to regulate access and control. Because the appellant could neither regulate access nor control what happens to Winchester's phone, he does not have a reasonable expectation of privacy in the copy of his messages stored on Winchester's phone.

[25] Finally, the respondent submits that the appellant misapplies *Duarte* and points to numerous cases from the Supreme Court of Canada in which the Court

has specifically considered the factors of regulating access and control as relevant to, and sometimes determinative of, whether a claimant has an objectively reasonable expectation of privacy.

(2) Section 8 of the *Charter* and standing

[26] Section 8 of the *Charter* protects the right to be secure from unreasonable search and seizure. It is framed in a way that attempts to strike a balance between important societal interests and an individual's privacy interests: see *Hunter et al. v. Southam Inc.*, [1984] 2 S.C.R. 145, at 159-60.

[27] Like all other *Charter* rights, s. 8 protects people, not places. The right to challenge the legality of a search depends upon the accused establishing that his personal privacy interests are engaged: *Edwards*, at paras. 34, 45.

[28] Section 8 does not protect all privacy interests, though. It protects only a reasonable expectation of privacy, as explained by Dickson J. in *Hunter v. Southam*, at 159-60:

> The guarantee of security from unreasonable search and seizure only protects a reasonable expectation. 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. [Emphasis in original.]

[29] Accordingly, an accused will only have standing to challenge a search or seizure when he or she has a reasonable expectation of privacy. Standing is not automatic. The Supreme Court of Canada long ago rejected the notion that a particular circumstance can attract "automatic standing". As Cory J. emphasized in *Edwards*, at para. 56: "[t]he reasonable expectation of privacy concept has worked well in Canada. It has proved to be reasonable, flexible, and viable. I can see no reason for abandoning it in favour of the discredited rule of automatic standing." See also *R. v. Kang-Brown*, 2008 SCC 18, [2008] 1 S.C.R. 456, at para. 139.

[30] Further, the decision as to whether an accused has a reasonable expectation of privacy must be made without reference to the conduct of the police during the impugned search: see *Edwards*, at para. 33. The legality or illegality of the police search is irrelevant to the determination of standing. The court must first determine the threshold question of whether the accused has a reasonable expectation of privacy. If one is found, the accused then has standing to challenge the reasonableness of the search and seizure.

[31] It is well-established that to determine whether an accused has a reasonable expectation of privacy, courts must take a contextual approach and consider the totality of the circumstances: *Edwards,* at para. 45; *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34, at para. 39.

[32] This is true whether it is a personal, territorial or informational privacy interest at stake. The “totality of the circumstances” test is one of substance, not of form: *Cole*, at para. 40.

(a) Is *TELUS* determinative of standing?

[33] The appellant contends that *TELUS* is conclusive on the issue of standing in this case.

[34] In *TELUS,* the police obtained a general warrant to compel Telus to provide copies of any text messages sent or received by two subscribers. Unlike most telecommunication service providers at the time, Telus routinely made electronic copies of all text messages sent or received by its subscribers during the communications process and stored them on a database for a brief period of time.

[35] The issue before the court in *TELUS* was whether a wiretap authorization under Part VI of the *Criminal Code*, R.S.C. 1985, c. C-46, as opposed to a general warrant, was required to authorize the prospective, continuous production of text messages stored in Telus’s database. In other words, the issue was whether the particular technique employed by the police constituted an “interception” of “private communications” within the meaning of s. 183 of the *Criminal Code*. A majority of the court determined that a Part VI authorization was required in those circumstances.

[36] Three sets of reasons were delivered in *TELUS*. The plurality reasons were written by Abella J., with Lebel and Fish JJ. concurring. Moldaver J. wrote separate concurring reasons that Karakatsanis J. joined. Cromwell J. delivered dissenting reasons that were joined by McLachlin C.J.

[37] The appellant relies on these passages from Abella J.'s judgment:

> [1] … Despite technological differences, text messaging bears several hallmarks of traditional voice communication: it is intended to be conversational, transmission is generally instantaneous, and there is an expectation of privacy in the communication.
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> …
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> [5] Text messaging is, in essence, an electronic conversation. The only practical difference between text messaging and the traditional voice communications is the transmission process. This distinction should not take text messages outside the protection of private communications to which they are entitled in Part VI. Technical differences inherent in new technology should not determine the scope of protection afforded to private communications.
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> …
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> [32] As all parties acknowledged, it is clear that text messages qualify as telecommunications under the definition in the *Interpretation Act*. They also acknowledged that these messages, like voice communications, are made under circumstances that attract a reasonable expectation of privacy and therefore constitute "private communication" within the meaning of s. 183. Similarly, there is no question that the computer used by Telus would qualify as "any device" under the definitions in s. 183.

[38] The appellant's position is that the language in these passages is conclusive of the standing issue. If text messages "attract a reasonable expectation of privacy" then the appellant has standing to challenge the search of Winchester's cell phone.

[39] I do not accept this submission for two reasons.

[40] First, Abella J. expressly declined to decide the issue that is before the court in this appeal:

> [15] We have not been asked to determine whether a general warrant is available to authorize the production of historical text messages, or to consider the operation and validity of the production order provision with respect to private communications. Rather, the focus of this appeal is on whether the general warrant power in s. 487.01 of the *Code* can authorize the *prospective* production of future text messages from a service provider's computer. That means that we need not address whether the seizure of the text messages would constitute an interception if it were authorized after the messages were stored. [Emphasis in original.]

[41] Second, *TELUS* is not a standing case. It does not address any of the considerations relevant to the "totality of the circumstances" test applicable to the question of standing. In my view, the appellant's interpretation of *TELUS* would create, in effect, automatic standing for anyone who sends a text message to challenge the seizure of the text message on another's phone. As mentioned above, the Supreme Court of Canada explicitly rejected the automatic standing rule.

[42] Such an approach would also run contrary to a long line of well-reasoned cases that calls for an assessment of the particular facts of the case and the totality of the circumstances, including those specifically addressing electronic communications such as *Cole* and *R. v. Spencer*, 2014 SCC 43, [2014] 2 S.C.R. 212.

[43] In summary, *TELUS* is an important case for understanding the Supreme Court of Canada's view of the nature and implications of informational privacy interests. However, *TELUS* is far removed from being determinative of the issues in this appeal.

(b) Did the application judge err in applying the *Edwards* factors?

[44] The appellant contends that the assessment of a reasonable expectation of privacy in information is governed by different considerations than those set out in *Edwards*. He argues that the application judge placed undue weight on the "territorial or proprietary analysis" in *Edwards* (and other cases following it) and failed to give due consideration to the normative nature of determining a reasonable expectation of privacy over information.

[45] I am not persuaded by this submission.

(i) The Edwards *factors and totality of the circumstances*

[46] In my view, *Edwards* sets out the relevant framework for assessing whether, "in light of the totality of the circumstances", an asserted expectation of privacy is subjectively and objectively reasonable: *Edwards*, at para. 45*,* *Tessling*, at paras. 31-32. What particular contextual factors will be significant to the analysis will depend on the circumstances of each case.

[47] While I accept that the facts in *Edwards* concerned a privacy interest in a property, it does not follow that the factors it sets out as relevant to standing are inconsistent with an analysis of a right to informational privacy. On the contrary, the factors it identifies are non-exhaustive and non-restrictive and are meant to provide guidance, to be tailored to the precise facts of the case. Cory J. stated:

> [45] … 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 [of the accused] 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;
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> (v) the ability to regulate access, including the right to admit or exclude others from the place;
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> (vi) the existence of a subjective expectation of privacy; and
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> (vii) the objective reasonableness of the expectation.

[48] Far from abandoning the *Edwards* framework, a review of the jurisprudence reflects the Supreme Court of Canada's recognition of *Edwards* as the foundation for any analysis of a claimed privacy right. The compatibility of the *Edwards* framework to assessing an informational privacy claim was first confirmed in *Tessling*, when Binnie J. stated, at para. 31:

> I proceed on the basis of the "totality of the circumstances" test set out by Cory J. in *Edwards* and the questions listed therein, at para. 45, but the questions need to be tailored to the circumstances of the present case.

[49] Several other Supreme Court of Canada decisions involving informational privacy interests also expressly adopt *Edwards* or *Tessling* and engage the same or related considerations. For example, in *Patrick*, the Supreme Court of Canada considered the factors relevant to assessing whether the accused had a reasonable expectation of privacy in his garbage. Recognizing that personal, territorial and informational privacy interests can often overlap, Binnie J. provided the following factors for whether the expectation was objectively reasonable, at para. 27:

> a. the place where the alleged "search" occurred; in particular, did the police trespass on the appellant's property and, if so, what is the impact of such a finding on the privacy analysis?
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> b. whether the informational content of the subject matter was in public view;

c. whether the informational content of the subject matter had been abandoned;

d. whether such information was already in the hands of third parties; if so, was it subject to an obligation of confidentiality;

e. whether the police technique was intrusive in relation to the privacy interest;

f. whether the use of this evidence gathering technique was itself objectively unreasonable;

g. whether the informational content exposed intimate details of the appellant's lifestyle, or information of a biographic nature.

[50] In *Spencer*, the Supreme Court of Canada considered whether a computer user has a reasonable expectation of privacy in his Internet Protocol ("IP") address. The police requested an Internet service provider to provide the name and address of a subscriber assigned to a particular IP address after an investigation revealed that the IP address was used to access and download child pornography.

[51] Cromwell J. noted that the assessment of whether there is a reasonable expectation of privacy in the totality of the circumstances depends on "a large number of interrelated factors" and that they must be adapted to the circumstances of the particular case and looked at as a whole: *Spencer,* at para. 17.

[52] In the next paragraph, Cromwell J. listed four factors, citing *Edwards*, *Tessling*, *Cole* and *Patrick*, that he considered relevant to the assessment on the

facts of the case: (1) the subject matter of the alleged search; (2) the claimant's interest in the subject matter; (3) the claimant's subjective expectation of privacy; and (4) whether this subjective expectation of privacy was objectively reasonable, having regard to the totality of the circumstances.

[53] Finally, the Supreme Court of Canada referenced the same set of factors in *Cole*, at para. 40, in which the court considered a teacher's privacy interest in data that he generated on a work-issued laptop. The Court concluded that the accused had a reasonable expectation of privacy in the school's laptop, but only after balancing a number of factors including ownership of the property, the school's policies and practices related to computer use, and the nature of the information obtained.

[54] While the cases may phrase considerations slightly differently from one factual scenario to another, there is much in common between the factors set out in *Edwards* and those cases addressing informational privacy such as *Patrick*, as well as those cases specifically addressing technological/electronic information, such as *Spencer* and *Cole.*

[55] In my view, the appellant's submission that utilizing the *Edwards* framework does not adequately engage normative considerations relevant to informational privacy claims is not borne out in the jurisprudence. In particular, the submission misses a fundamental point articulated in virtually all of the cases.

The particular facts of each case, and not necessarily the category of privacy right claimed (as they can often overlap), will dictate which contextual factors are most and least relevant to the "totality of the circumstances" analysis. As expressed by Deschamps J., dissenting in *Kang-Brown*, at para. 141:

> As in any contextual analysis, not all the factors will be relevant in a given case. The purpose of setting out a non-exhaustive list of factors stated in general terms is not to have each one considered slavishly regardless of materiality to the specific case, but to provide a helpful guide to ensure that relevant factors are not disregarded.

[56] In summary, the "totality of the circumstances" approach set out in *Edwards* and restated in several Supreme Court of Canada cases fully engages normative considerations and remains the proper framework within which to address informational privacy issues like the one that arose in this case. I turn, therefore, to an application of *Edwards* and its progeny to this appeal.

(ii) The importance of control and access in this case

[57] In this case, the application judge's analysis was guided by *Edwards* and, on the objective reasonableness of the expectation of privacy, the factors set out by Binnie J. in *Patrick.* Having regard to those factors, he found that the factors that weighed most heavily in his assessment of the totality of the circumstances were that: (1) the appellant had no ownership in or control over Winchester's phone; and (2) there was no obligation of confidentiality between the parties. I agree with his analysis.

[58] The appellant argues that, while lack of exclusive control may be a factor in assessing his right to privacy, it cannot be determinative because the significance of "possession" and "control" is diminished in the age of modern communication technology. I do not agree. "Control" and "access" are fundamental to our understanding of informational privacy. As expressed by Cromwell J. in *Spencer*, at paras. 39-40:

> Informational privacy is often equated with secrecy or confidentiality.
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> …
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> 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."

[59] In some circumstances, "control" and "access" will have lesser significance in analyzing whether an expectation of privacy is objectively reasonable, where other factors must carry greater weight, based on the facts of the case.

[60] For example, in *Spencer*, the overriding consideration leading to the conclusion that the accused's IP address engaged significant privacy interests was the subject matter involved (anonymously undertaken on-line activities

carried out on a personal computer in a private residence). The lack of control arising from the fact that the service provider could disclose information on the computer to the police was a relevant, but not determinative, factor. In particular, the service provider's ability to disclose the personal information of subscribers was so heavily circumscribed, the Supreme Court of Canada held this factor favoured a finding of a reasonable expectation of privacy.

[61] In *Spencer*, the Supreme Court of Canada also acknowledged its jurisprudence emphasizing confidentiality and control in cases of informational privacy. On the facts of that case, however, anonymity also played an important role in the privacy interest at stake.

[62] Similarly, in *Cole* the school's policy, which permitted users to use the computers for personal purposes, heavily favoured recognizing a constitutionally protected privacy interest. As Fish J. noted at para. 58, the accused's web-browsing history generated intimate information about his specific interests and propensities going to his "biographical core". The fact that the accused was deprived of exclusive control and access to the personal information he chose to record on his work computer reduced, but did not entirely override, his privacy interest in this biographical information.

[63] The facts of this case demonstrate that, unlike in *Spencer* and *Cole*, the ability to control access to the information is of central importance to the

assessment of the privacy claim. We are not talking about the appellant's privacy interest in the contents of his own phone, or even the contents of a phone belonging to someone else, but which he occasionally used. We are also not dealing with deeply personal, intimate details going to the appellant's biographical core. Here, we are talking about text messages on someone else's phone that reveal no more than what the messages contained – discussions regarding the trafficking of firearms.

[64] This is far from being a question of whether the appellant had "exclusive control" over the content. He had no ability to regulate access and no control over what Winchester (or anyone) did with the contents of Winchester's phone. The appellant's request to Winchester that he delete the messages is some indication of his awareness of this fact. Further, his choice over his method of communication created a permanent record over which Winchester exercised control.

[65] It has never been the case that privacy rights are absolute. Not everything we wish to keep confidential is protected under s. 8 of the *Charter.* In my view, the manner in which one elects to communicate must affect the degree of privacy protection one can reasonably expect.

[66] In this case, the application judge properly focused on the factors of control, access and lack of confidentiality.

(c) Contrary authorities

[67] The principal authorities that have come to a different conclusion are two recent decisions of the British Columbia Court of Appeal, *Pelucco* and *Craig*.

[68] In *Pelucco*, the accused arranged a deal through text messages to sell a kilogram of cocaine to a buyer. Unknown to the accused, the police stopped the buyer during the text conversation. The buyer's phone displayed a series of text messages about the drug deal and the police continued the text conversation with the accused from the buyer's phone.

[69] At trial, the accused sought the exclusion of the text message exchange retrieved from the buyer's phone. On appeal, the majority of the court upheld the trial judge's ruling that the accused's right to privacy had been breached and excluded the text messages. The anchor of the majority decision in *Pelucco*, as I read it, is the proposition at para. 68 that "[a] sender will ordinarily have a reasonable expectation that a text message will remain private in the hands of its recipient".

[70] With respect, I do not agree with this proposition.

[71] There is, in my view, a lack of empirical evidence to support a conclusion that senders of text messages have a presumptively reasonable expectation, from an objective standpoint, that their text messages will remain private in the hands of the recipient. In fact, there are many examples of behaviour in text

messaging (and in other forms of communication) that suggest that senders are alive to the fact that their communications may no longer be private once sent or made.

[72] For example, the use of pseudonyms and coded language in text messaging (generally in the context of criminal activity) is often used to disguise who is speaking in a text message and the subject matter of the message.

[73] It is also apparent that the lack of privacy over electronic messages once in the hands of the recipient is a message reinforced in Ontario's school curriculum on health and safety: see Ontario, Ministry of Education, *The Ontario Curriculum, Grades 1-8, Health and Physical Education,* 2015 at 194-95, online: http://www.edu.gov.on.ca/eng/curriculum/elementary/health1to8.pdf.

[74] Because many contextual factors can tip the balance in either direction, it must be that the objectively reasonable expectation of a text user in a particular case should be assessed on a case-by-case basis, not on a broad presumption about how text messaging is used in society. Respectfully, the analysis in *Pelucco* misses the mark by effectively replacing the *Edwards* factors with a broad presumption not previously recognized in the jurisprudence.

[75] *Craig*, on the other hand, is entirely distinguishable from the case before this court. In *Craig* the accused was convicted of two offences for Internet luring using a social media website called Nexopia used primarily by teenagers.

[76] The British Columbia Court of Appeal dismissed the appeal, but only on the basis of the proviso in s. 686(1)(b)(iii) of the *Criminal Code*. It disagreed with the trial judge's analysis of the objective reasonableness of the accused's expectation of privacy, and concluded that the private, intimate nature of the messages, coupled with the circumstances in which the information was divulged suggested an expectation that the messages would be kept confidential.

[77] Like *Spencer* and *Cole*, *Craig* placed greater weight on the subject matter of the communications than on control because the court found the subject matter was connected to the accused's biographical core. However, in this case, the subject matter does not touch on the appellant's biographical core, and is not of an intimate nature. As such, control and access, as discussed above, are the primary considerations.

[78] In the end, *Edwards* and its progeny apply to this appeal. Under that umbrella, the control and access factors emphasized in *Spencer* are particularly important in cases involving informational privacy and modern forms of communication. In most cases – but not all – that should lead to a decision that a sender controls the content and recipient of a message. However, once the message is received, the recipient becomes the controller and the sender's privacy interest will generally disappear. As expressed in the dissenting reasons of Goepel J.A. in *Pelucco*, with which I agree:

> [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).
>
> ...
>
> [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.

[79] On the basis of the preceding analysis, my conclusion is that the application judge did not err in applying the *Edwards* factors to the assessment of whether the appellant had an objectively reasonable expectation of privacy.

(3) *Duarte* and risk analysis

[80] The appellant contends that the application judge erred by, in effect, applying a risk analysis that was rejected by the Supreme Court of Canada in *Duarte*. In *Duarte*, La Forest J. said, at 49:

> In summary, the question whether to regulate participant surveillance cannot logically be made to turn on the expectations of individuals as to whether their interlocutor will betray their confidence. No justification for the arbitrary exercise of state power can be made to rest on the simple fact that persons often prove to be poor judges of whom to trust when divulging confidences or on the fact that the risk of divulgation is a given in the decision to speak to another human being.

[81] This passage, says the appellant, is directly applicable to this case and renders the application judge's sharp distinction between sender and recipient problematic.

[82] I disagree. The key point in *Duarte* was that the state surreptitiously created a permanent record of oral conversations, where otherwise none would exist. In this case, the appellant himself chose to communicate by text message, using a medium that necessarily creates a permanent record over which he had no control. The risk analysis rejected in *Duarte* does not preclude a court from considering this choice in assessing one's reasonable expectation of privacy in text messages on another's phone. The risk in this case is of a different order than that in *Duarte*.

[83] The application judge said this about the appellant's argument grounded in *Duarte*:

> [94] ... *Duarte* dealt with the simultaneous interception of voice communication by the state. In my view, the risk that was considered and rejected in *Duarte* is much different than the risk that an intended recipient will forward the text to a third party. The message has

> already been recorded by the originator and is not being intercepted by the state. In my view, a text message, because it is written, is more akin to an email or letter than voice communication. And because it is sent to the recipient, it is completely beyond the control of the sender and entirely at the whim of the recipient.

[84] I agree with this analysis.

(4) Conclusion

[85] In my view, the application judge did not err by concluding that the appellant had no standing to bring a *Charter* s. 8 challenge concerning the search of Winchester's cell phone. I endorse the application judge's reasoning:

> [102] ... I accept that the sender of a text message has a reasonable expectation of privacy in its contents after it has been sent but before it reaches its intended destination. This would include text messages stored in a service provider's data base. Once the message reaches its intended recipient, however, it is no longer under the control of the sender. It is under the complete control of the recipient to do with what he or she wants. In my view, there is no longer any reasonable expectation of privacy in the sender.
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> ...
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> [105] Having regard to the circumstances of this case, therefore, I am unable to conclude that Mr. Marakah's expectation of privacy in regards to his text messages on Winchester's phone was objectively reasonable.

[86] In light of my conclusion on this issue, it is not necessary to address the s. 24(2) of the *Charter* issue relating to the evidence obtained by the search of

Winchester's cell phone. Nor is it necessary to consider the three issues raised by the respondent.

E. DISPOSITION

[87] I would dismiss the appeal.

"J.C. MacPherson J.A."

"I agree. J. MacFarland J.A."

H.S. LaForme J.A. (Dissenting):

A. INTRODUCTION

[88] Section 8 of the *Charter*, which guarantees "the right to be secure against unreasonable search or seizure", provides constitutional protection for a right to privacy. Since *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, s. 8 has provided a broad and general protection that shields a wide variety of interests, ranging from intimate secrets hidden in one's home to data generated and stored by an internet service provider. In all its myriad forms, this right to privacy is valued for its own sake and because it is a prerequisite for a free and democratic society. As noted by La Forest J. in *R. v. Dyment*, [1988] 2 S.C.R. 417, at pp. 427-428,

> [g]rounded in man's physical and moral autonomy, privacy is essential for the well-being of the individual. For this reason alone, it is worthy of constitutional protection, but it also has profound significance for the public order. The restraints imposed on government to pry into the lives of the citizen go to the essence of a democratic state.

[89] Does that constitutional right to privacy provide any protection for private communications that have been exchanged with family members, friends, acquaintances, and other members of one's community? Or can the state review and take records of these communications without legal authority to effect a search or seizure? That is the question at the heart of this appeal.

[90] My colleague concludes that the text messages exchanged between the appellant and his accomplice, Andrew Winchester, do not attract a reasonable

expectation of privacy. With the greatest of respect, I cannot agree with his position. Unlike my colleague, I do not believe that it is possible to confine his analysis to the particular circumstances of this case. In my view, a purposive approach to s. 8, one that recognizes the values underlying that section and its role in a free and democratic society, compels a different conclusion.[1]

[91] To recap, in this case, the police seized two cell phones and obtained copies of the text messages used to convict the appellant from both phones. The application judge concluded that the appellant's cell phone was seized without legal authorization and excluded the copies of the messages obtained from his phone. The application judge also concluded that the police searched Winchester's phone without legal authority to do so; however, he held that the appellant did not have standing to challenge the latter search because he did not have a reasonable expectation of privacy in the copies of the messages stored on Winchester's cell phone. As noted by the application judge at para. 102 of his reasons, this is because

> [o]nce the message reaches its intended recipient…it is no longer under the control of the sender. It is under the complete control of the recipient to do with what he or she wants. In my view, there is no longer any reasonable expectation of privacy in the sender.

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[1] This appeal was heard together with *R. v. Jones*, 2016 ONCA 543 and *R. v. Smith*, 2016 ONCA 544. The court has released three separate sets of reasons in these appeals. My reasons herein are only in respect of the *Marakah* appeal.

[92] With respect, I disagree. For the reasons that follow I conclude that (1) the appellant had standing to challenge the search of Winchester's phone and that the search infringed the appellant's rights under s. 8 of the *Charter*; (2) the copies of the text messages obtained from Winchester's phone should be excluded under s. 24(2) of the *Charter*; and (3) this court cannot consider the Crown's cross-appeal. Based on these conclusions, I would allow the appeal.

B. THE APPELLANT HAD STANDING AND THE SEARCH OF WINCHESTER'S CELL PHONE INFRINGED SECTION 8 OF THE *CHARTER*

[93] As my colleague correctly articulates, a s. 8 analysis must be conducted in two stages. At the first stage, the court must determine if the claimant had a reasonable expectation of privacy affected by state conduct. If the claimant had a reasonable expectation of privacy, then she has standing and s. 8 is engaged. At the second stage, the court must determine whether the search or seizure was reasonable: *R. v. Edwards*, [1996] 1 S.C.R. 128, at para. 45; *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34, at para. 36.

[94] Below I first outline the legal principles that are relevant when evaluating an asserted expectation of privacy. Then I turn to the application of those principles and my reasons for concluding that the appellant had a reasonable expectation of privacy implicated in the search of Winchester's cell phone. Finally I explain why the search of Winchester's phone was unreasonable.

(1) Legal Principles Regarding Reasonable Expectation of Privacy

[95] The framework for determining whether an asserted expectation of privacy attracts constitutional protection is well established. The existence or absence of a reasonable expectation of privacy is determined by taking into account the "totality of the circumstances". That, in turn, requires that courts consider and weigh a large number of interrelated factors. The relevant factors may differ depending on the particular context: *Edwards,* at para. 45; *R. v. Spencer*, 2014 SCC 43, [2014] 2 S.C.R. 212, at para. 17; *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432, at paras. 31-32.

[96] The wide variety and number of factors considered in assessing an asserted expectation of privacy can be grouped under four main headings, namely

(1) the subject matter of the alleged search;

(2) the claimant's interest in the subject matter;

(3) the claimant's subjective expectation of privacy in the subject matter; and

(4) whether this subjective expectation of privacy was objectively reasonable, having regard to the totality of the circumstances.

Spencer, at para. 18; *Tessling*, at para. 32; *R. v. Patrick*, 2009 SCC 17, [2009] 1 S.C.R. 579, at para. 27; *Cole*, at para. 40.

[97] The fact that these considerations must be looked at in the totality of the circumstances underlines the point that they are often interrelated, that they must be adapted to the circumstances of the particular case, and that they must be looked at as a whole: *Spencer*, at para. 17.

[98] The totality of the circumstances analysis requires a flexible approach. A "realistic and meaningful" analysis cannot be conducted without such flexibility because "individuals have different expectations of privacy in different contexts and with regard to different kinds of information": *R. v. McKinlay Transport Ltd.,* [1990] 1 S.C.R. 627, at p. 645.

[99] There are a few other principles that are significant for this case as well. I note those principles now.

[100] First, the protection afforded by s. 8 should be interpreted broadly and purposively because the protection of privacy is a prerequisite to individual security, self-fulfilment, and autonomy, as well as to the maintenance of a thriving democratic society: *Spencer*, at para. 15. Therefore, courts should take a generous and purposive approach when evaluating an assertion of a reasonable expectation of privacy, as that is the threshold for accessing the protection afforded by s. 8.

[101] Second, a reasonable expectation of privacy is not merely a descriptive term or something to be ascertained through a factual inquiry. Ultimately, as

noted in *Patrick,* at para. 14, the inquiry is a normative one and is driven by "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."

[102] Third, the analysis has a broader dimension beyond the particular circumstances of the case before the court. This was observed by Doherty J.A. in *R. v. Ward*, 2012 ONCA 660, 112 O.R. (3d) 321, at paras. 86-87:

> The courts have approached the reasonable expectation of privacy inquiry by asking whether the claimant had a subjective expectation of privacy and, if so, whether in all of the circumstances that expectation was reasonable. While both questions help to focus the inquiry on the specific facts of the case and the values underlying s. 8, neither question captures the entirety of the reasonable expectation of privacy inquiry. Section 8 is concerned with the degree of privacy needed to maintain a free and open society, not necessarily the degree of privacy expected by the individual or respected by the state in a given situation…
>
> …
>
> The ultimate question is whether the personal privacy claim advanced in a particular case must, upon a review of the totality of the circumstances, be recognized as beyond state intrusion absent constitutional justification if Canadian society is to remain a free, democratic and open society. [Citations omitted.]

[103] Fourth, and related to the third point, it is immaterial that in a particular case the asserted privacy claim seeks to shelter illegal activity: *Spencer*, at para. 36. A search that lacked legal authorization cannot be justified by the after-the-

fact discovery of evidence of a crime: *Patrick*, at para. 32. This point was made as follows in *R. v. Wong*, [1990] 3 S.C.R. 36, at p. 50:

> [I]t would be an error to suppose that the question that must be asked in these circumstances is whether persons who engage in illegal activity behind the locked door of a hotel room have a reasonable expectation of privacy. Rather, the question must be framed in broad and neutral terms so as to become whether in a society such as ours persons who retire to a hotel room and close the door behind them have a reasonable expectation of privacy. [Emphasis added].

(2) The Appellant had a Reasonable Expectation of Privacy

[104] Applying the principles noted above, I would describe the question before us as follows: Does a person usually have a reasonable expectation of privacy in copies of text messages exchanged with another person stored on that other person's cell phone?[2]

[105] I intend to conduct my analysis in the manner employed by Cromwell J. in *Spencer* by considering (a) the subject matter of the search; (b) whether the appellant had a personal interest in the messages and the nature of the interest compromised by state action; (c) whether the appellant had a subjective expectation of privacy; and (d) whether the expectation of privacy was reasonable in these circumstances.

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[2] I fully appreciate that the same answer might not apply to all text messages exchanged in all situations and that the answer may be different for different electronic communications (for instance, messages shared with a group of people instead of just one person). On this appeal, the question will only be answered for messages like the one at issue here.

(a) Subject Matter of the Search

[106] As noted by Doherty J.A. in *Ward*, at para. 65, a court identifying the subject matter of a search must not do so "narrowly in terms of the physical acts involved or the physical space invaded, but rather by reference to the nature of the privacy interests potentially compromised by the state action." Justice Cromwell reinforced those observations in *Spencer* and, at para. 26, added that courts should take "a broad and functional approach to the question, examining the connection between the police investigative technique and the privacy interest at stake" and should look at "not only the nature of the precise information sought, but also at the nature of the information that it reveals."

[107] Applying those principles to this case, with respect, I believe that my colleague construes the subject matter of the search too narrowly. He poses the question as being specific to the appellant's "text messages on someone else's phone that reveal no more than what the messages contained – discussions regarding the trafficking of firearms." In my view, the analysis should not focus too much on the individual case or messages before the court; rather, we must consider the subject matter of searches of text messages generally.

[108] As noted by Abella J. in *R. v. TELUS Communications Co.*, 2013 SCC 16, [2013] 2 S.C.R. 3, at para. 5, "[t]ext messaging is, in essence, an electronic conversation". She also noted, at para. 1, that "[d]espite technological differences, text messaging bears several hallmarks of traditional voice

communication: it is intended to be conversational, transmission is generally instantaneous, and there is an expectation of privacy in the communication."

[109] As such, a typical exchange of text messages is a private communication between two people. It is essentially a modern version of a conversation and can contain as much private information as an oral conversation.

[110] This fact has been encountered in a few cases. For instance, in *R. v. Little*, 2009 CanLII 41212 (Ont. S.C.), aff'd, 2014 ONCA 339, at para. 124, Fuerst J. noted that the police's search of a cell phone revealed intimate details about the defendant's life, including text messages to and from his estranged wife. In *R. v. Craig*, 2016 BCCA 154, the court was considering online private messages that are more or less equivalent to text messages. The court noted, at para. 137, that these communications "can be the written expression of an individual's thoughts, views and feelings revealing intimate and personal information about their interests, likes, and propensities" and added, at para. 139, that the messages before them "exposed highly intimate details of Mr. Craig's lifestyle and personal choices" like "aspects of his sexuality, sexual history, [and] drug use".

[111] To conclude, I would characterize the subject matter of the search as follows: an electronic conversation conducted between two people through text messages that is capable of revealing private and intimate information about both participants.

(b) Personal Interest and Nature of Interest Compromised

[112] There is little question that the appellant had a direct interest in the subject matter of the search. The application judge, at para. 89, accepted that proposition because the appellant is the author of a number of the messages and a participant in the conversation with Winchester. I concur and, below, I focus on the nature of the privacy interest at stake here.

[113] In my view, the ability of the state to review and take copies of text messages implicates two privacy interests that are protected under s. 8.

[114] First, because text messages may contain intimate and personal information about a person, the ability of the state to review those messages implicates a right to control access to and use of information about oneself.

[115] This interest has been recognized since at least *Dyment*. At pp. 429-439, La Forest J. noted that the notion of privacy in relation to information "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" and that "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". That privacy interest can subsist even if the information at issue has been communicated and cannot be thought of as secret or confidential: *Spencer*, at para. 40.

[116] The Crown attempted to distinguish *Dyment* on the basis that, understood in context, the principles articulated in that decision only applied to situations where an individual retains some measure of control over the information at issue. I do not accept this submission.

[117] In my opinion, it is clear that retaining control is not a prerequisite to maintaining this interest in potentially private information. In *R. v. Quesnelle*, 2014 SCC 46, [2014] 2 S.C.R. 390, at para. 27, while discussing principles regarding s. 8, a unanimous Supreme Court held that "[t]he circumstances (or nature of the relationship) in which information is shared are not determinative: the reasonable expectation of privacy is not limited to trust-like, confidential, or therapeutic relationships" (emphasis added). The court added, at para. 38, that "[w]hile such relationships may give rise to heightened privacy interests, their absence is not dispositive."

[118] To cite one obvious example, in *R. v. Law*, 2002 SCC 10, [2002] 1 S.C.R. 227, the court held that the defendants in that case retained a reasonable expectation of privacy in documents that had been stolen from them and over which they exercised no control at the time the police examined them.

[119] As such, in my view, an individual in the appellant's position retains an interest in information about herself even if that information has been communicated in the absence of a confidential or trust-like relationship.

[120] Second, the reviewing or taking of text messages also constitutes an intrusion on a "sphere of privacy" that is protected under the *Charter*: *R. v. Fearon*, 2014 SCC 77, [2014] 2 S.C.R. 621, at para. 112, *per* Karakatsanis J., dissenting, citing *Tessling*, at para. 16.

[121] The harms caused by such intrusions have been acknowledged in the case of electronic surveillance or wiretapping, which is recognized as highly intrusive because it allows the state to intrude upon "human relations in the sphere of very close, if not intimate communications": *R. v. Araujo*, 2000 SCC 65, [2000] 2 S.C.R. 992, at para. 21. The state reviewing or taking text messages also provides it a window into intimate conversations and is, therefore, similarly intrusive.

[122] Moreover, this protected private sphere is undermined by both the fact of surveillance and the threat of intrusion. In *R. v. Duarte*, [1990] 1 S.C.R. 30, at p. 44, La Forest J. eloquently recorded the dangers of permitting the state to intrude on private conversations at its discretion and how, if that were permitted, "there would be no meaningful residuum to our right to live our lives free from surveillance". The effects of this intrusion would be severe. As noted by La Forest J., at p. 54, referring to the opinion of Harlan J., dissenting, in *United States v. White*, 401 U.S. 745 (1971), at pp. 787-788, such intrusion would "smother that spontaneity – reflected in frivolous, impetuous, sacrilegious, and defiant discourse – that liberates daily life."

[123] It is trite to note that text messaging is an increasingly common way in which people choose to communicate and interact with one another. In my view, these private communications are an increasingly central element of the private sphere that must be protected under s. 8. And permitting the state to review and take records of these communications at its discretion would result in the same harmful intrusions decried in *Duarte*.

(c) Subjective Expectation of Privacy

[124] The appellant asserted that he had a subjective expectation of privacy in the text messages and testified in support of that assertion. The application judge accepted this testimony.

[125] The Crown has not provided any reason for reversing the application judge's conclusion. This requirement is not a high hurdle and, in fact, in many cases individuals are presumed to have a subjective expectation of privacy in the subject matter of a search: *Patrick*, at para. 37. As such, I accept the application judge's conclusion.

(d) Objective Reasonableness of Expectation of Privacy

[126] This stage of the analysis is the key issue on this appeal. The Crown's arguments are essentially focused on this stage, and my colleague generally accepts and endorses the Crown's submissions. As I discuss below, and with respect to my colleague, I reject the Crown's submissions.

[127] I begin my analysis of this issue by discussing the decision in *TELUS* and the nature of text messages as private communications. Then I address the Crown's submissions on the role played by control in this analysis and why I would reject its submissions regarding *Duarte*. After that I address the role of normative values in this analysis. After addressing some relevant practical considerations I conclude my analysis of this issue.

(i) *TELUS* and Text Messages as Private Communications

[128] Contrary to the Crown's position, the fact that *TELUS* was not a "standing" case is not a basis for ignoring it. As my colleague acknowledges, at para. 43 of his reasons, "*TELUS* is an important case for understanding the Supreme Court of Canada's view of the nature and implications of informational privacy interests."

[129] Both Abella and Cromwell JJ., in their respective opinions, agreed that text messages are private communications: *TELUS*, at paras. 32 and 135. Moreover, the fact that all three opinions assumed that some form of authorization was needed means that they accepted that text messages attract a reasonable expectation of privacy.

[130] Furthermore, as already noted, after *TELUS* it is clear that text messaging is essentially an electronic conversation: *TELUS,* at para. 5. It is well established that an individual has a reasonable expectation of privacy in an oral

conversation: *R. v. Shayesteh* (1996), 31 O.R. (3d) 161 (C.A.). Conversations conducted via text messages should not be denied constitutional protection merely because of differences introduced as a result of technological development: *TELUS*, at para. 5. As a result of these principles, *TELUS* establishes that a text message attracts a reasonable expectation of privacy, at least while it is being transmitted.

[131] Therefore, even if *TELUS* is not determinative of the issues presented on this appeal, it provides the starting point for our analysis.

(ii) The Role of Control

[132] As noted, *TELUS* establishes that a person has a reasonable expectation of privacy in a text message until it reaches its intended destination. The Crown and my colleague seem to accept that proposition. The central issue that divides the parties is the following: is the Crown correct in saying that the picture changes once the message reaches its intended destination and once there is a copy in the recipient's phone? My colleague concludes that the Crown is correct. For the reasons that follow, I respectfully disagree.

[133] In my opinion, the Crown overstates the role that control plays in this analysis. *Edwards* and the cases that follow it have repeatedly held that a privacy interest must be examined by looking to the totality of the circumstances. The

jurisprudence has not provided any rigid guidelines or prerequisites for finding a reasonable expectation of privacy.

[134] The Crown's position, however, effectively makes control a prerequisite to any claim for privacy. I say that is the case because the Crown is relying solely on the absence of control in this case, and that is the only thing that distinguishes a text message in transition (which attracts a reasonable expectation of privacy) and one that has arrived at its intended destination (which, the Crown argues, does not attract a reasonable expectation of privacy).

[135] In oral argument, the Crown referred to seven cases that it says demonstrate the role played by control and lead to the conclusion it advances: *Edwards*; *R. v. Belnavis*, [1997] 3 S.C.R. 341; *R. v. Buhay*, 2003 SCC 30, [2003] 1 S.C.R. 631; *R. v. Kang-Brown*, 2008 SCC 18, [2008] 1 S.C.R. 456; *Patrick*; *R. v. Gomboc*, 2010 SCC 55, [2010] 3 S.C.R. 211; and *Spencer*.

[136] In my opinion, the Crown's interpretation of the jurisprudence amounts to revisionism. None of these cases state that control is a prerequisite for a reasonable expectation of privacy. Every one reaffirms the notion that a claim for a reasonable expectation of privacy is assessed by looking to the totality of the circumstances. All emphasize that the analysis is context-specific and incorporates many factors depending on the nature of the case. The very nature

of this analysis rebuts the Crown's submission that the absence of control alone can end a reasonable expectation of privacy.

[137] I accept that control and the ability to regulate access is part of the totality of the circumstances that must be considered. However, as noted in *Cole*, at para. 58, while the absence of control may diminish an expectation of privacy, it does not eliminate it.

[138] In particular, I note that courts have recognized an informational privacy interest in cases where a claimant does not have the ability to control or regulate access to the information at issue.

[139] For instance, in *Cole*, the Supreme Court found that the appellant had a reasonable expectation of privacy in information stored on his workplace laptop. The court reached this conclusion despite the fact that technicians from the appellant's workplace could remotely access the laptop and see all of the information stored there: *Cole*, at para. 18. In fact, at para. 54, Fish J. noted that "both policy [at the appellant's workplace] and technological reality deprived him of exclusive control over — and access to — the personal information he chose to record on" his workplace laptop. Yet the information stored on that laptop attracted a reasonable expectation of privacy.

[140] And in *Quesnelle*, the Supreme Court found that complainants have a reasonable expectation of privacy in police occurrence reports involving them.

The court found this expectation even though the complainants had absolutely no control over the release or dissemination of the reports. And, at para. 38, Karakatsanis J. stated that the absence of a “trust-like, confidential or therapeutic relationship” did not eliminate the complainants’ expectation of privacy.

[141] The fact that the information at issue has been revealed to or shared with someone else does not preclude a reasonable expectation of privacy. A reasonable expectation of privacy is not an all or nothing concept: *Quesnelle*, at para. 29; *R. v. Mills*, [1999] 3 S.C.R. 668, at para. 108. That fact has been recognized since the origins of informational privacy and, as affirmed by Cromwell J. in *Spencer,* at para. 40, there are many situations where a person maintains a reasonable expectation of privacy even though the information at issue has been communicated and cannot be thought of as secret or confidential.

[142] Moreover, the jurisprudence reveals a distinction between information being revealed or available to private actors on the one hand and the same information being examined by the state. The former does not necessarily permit the latter. For instance, people can have a reasonable expectation that the state will not have access to their hotel room, even if they fully expect hotel staff to enter the room: *Buhay*, at para. 22; *R. v. Mercer* (1992), 70 C.C.C. (3d) 180 (Ont. C.A.), at p. 186.

[143] And, in *R. v. Chehil*, 2013 SCC 49, [2013] 3 S.C.R. 220, at para. 59, the court rejected the proposition that the appellant in that case lacked any reasonable expectation of privacy in his checked luggage in an airport setting because of the security screening that such luggage is subjected to as a condition of travel. The court approved of the trial judge's analysis, namely that "while the appellant was aware of and implicitly consented to the security screening that his bag would undergo, this did not undermine his reasonable expectation of privacy in his checked luggage with regard to general police investigations."

[144] As I noted earlier, my colleague accepts the Crown's position on the role of control in this analysis. Relying primarily on *Spencer*, at para. 58 of his reasons, he states that "'control' and 'access' are fundamental to our understanding of informational privacy."

[145] With respect, I draw a different conclusion from *Spencer*. Beginning at para. 38, Cromwell J. identified three aspects of informational privacy: privacy as secrecy, privacy as control, and privacy as anonymity. However, by referring to "privacy as control", he did not say that access and control are central to an informational privacy claim. Rather, at para. 40, Cromwell J. affirms the principle that "<u>all information</u> about a person is in a fundamental way his own, for him to communicate or retain for himself as he sees fit" (emphasis added). And he further affirms that this interest in maintaining control over information about

oneself survives even where “the information [has been] communicated and cannot be thought of as secret or confidential”.

[146] As such, I do not interpret *Spencer* as making control and access central to our understanding of informational privacy. Rather, in my view, that decision clearly emphasizes that a person retains a privacy interest in information even where she no longer exercises control over access to that information.

[147] In conclusion, I agree that control is a factor to consider in the totality of the circumstances. However, I do not agree that the appellant cannot maintain a reasonable expectation of privacy in his text messages once they reached Winchester just because he lacked the ability to control or regulate access to those copies of his messages.

(iii) Crown’s Position Reintroduces a Risk Analysis

[148] In addition to the foregoing, I agree with the appellant’s submission that the Crown’s position reintroduces the “risk analysis” that was soundly rejected in *Duarte.*

[149] In *Duarte*, this court had concluded that the police did not need a warrant to conduct “participant surveillance” and to bug conversations. This court’s rationale was that a person who divulges any confidence always runs the risk that her interlocutor will betray the confidence. Justice Cory explained that "[t]he expression of the idea and the assumption of the risk of disclosure are therefore

concomitant." Because of that risk, this court concluded that the target of wiretapping did not have a reasonable expectation of privacy in their conversations in a “participant surveillance” setting.

[150] The Supreme Court explicitly rejected that proposition. Justice La Forest declared, at p. 48, that there was no “similarity between the risk that someone will listen to one's words with the intention of repeating them” and the risk of the state acquiring a record of those words. Moreover, he went on to note that

> [t]he risk analysis relied on by the Court of Appeal fails to take due account of this key fact that our right under s. 8 of the *Charter* extends to a right to be free from unreasonable invasions of our right to privacy. The Court of Appeal was correct in stating that the expression of an idea and the assumption of the risk of disclosure are concomitant. However, it does not follow that, because in any conversation we run the risk that our interlocutor may in fact be bent on divulging our confidences, it is therefore constitutionally proper for the person to whom we speak to make a permanent electronic recording of that conversation. The *Charter*, it is accepted, proscribes the surreptitious recording by third parties of our private communications on the basis of mere suspicion alone. It would be strange indeed if, in the absence of a warrant requirement, instrumentalities of the state, through the medium of participant surveillance, were free to conduct just such random fishing expeditions in the hope of uncovering evidence of crime, or by the same token, to satisfy any curiosity they may have as to a person's views on any matter whatsoever.

[151] The Crown argues that the analysis from *Duarte* does not apply in the present case. They argue that its rationale applies only to ephemeral oral

conversations, but cannot apply to text messaging since it is not ephemeral and since using text messages necessarily creates a record. My colleague, at para. 82 of his reasons, finds merit in the Crown's submissions.

[152] In my opinion, and with respect to my colleague, the Crown's attempt to distinguish *Duarte* is not persuasive. The decision in *Duarte* demonstrates that the police cannot interfere with individuals' reasonable expectation of privacy in their conversations without prior judicial authorization. As already noted, text messaging is an electronic conversation. The only difference between the text messages at issue here and the conversations at issue in *Duarte* is that in *Duarte* the state was creating records of the conversations whereas in this case the state is obtaining records created by the transmission process of text messaging.

[153] That distinction, in my view, is not enough to make *Duarte* inapplicable. In particular, I note that it makes no meaningful difference to the privacy interests implicated or the dynamics at issue. In both scenarios an individual is sharing potentially private information with another person and not with the general public or the state, the person revealing the information is abandoning control over the information by expressing it and no longer keeping it to herself, and the person sharing the information assumes the risk that the recipient may breach their confidence.

[154] If the expression of an idea does not eliminate a reasonable expectation of privacy in the case of oral communications, there is no rational reason why it should in the case of text messaging. Therefore, the fact that the recipient of a text message may disseminate it does not preclude the sender maintaining a reasonable expectation of privacy in that text message.

(iv) Privacy as a Normative Concept

[155] The Crown's position, in my view, ignores the normative aspect of this inquiry. As noted, assessments of privacy claims are "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": *Patrick*, at para. 14.

[156] This observation was the cornerstone of the analysis of the majority in *R. v. Pelucco*, 2015 BCCA 370, 327 C.C.C. (3d) 151. At para. 63, Groberman J.A. explained that the real question before them was "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" (emphasis added). At para. 68, he concluded that "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…comport with social or legal norms."

[157] I agree with that conclusion.

[158] The Crown, before this court, attacks the analysis in *Pelucco*. According to the Crown it simply isn't reasonable for individuals to expect privacy in anything they cannot control. However, the closest the Crown comes to making a normative argument is to point to s. 162.1 of the *Criminal Code*, R.S.C. 1985, c. C-46, which penalizes the dissemination of intimate pictures. They argue that legislation like this proves that individuals cannot reasonably expect such information to stay private.

[159] I disagree. Legislation that protects private information actually reflects normative values that favour finding a reasonable expectation of privacy in this case.

[160] For instance, legislation like the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 ("*PIPEDA*"), has been enacted to protect private information collected and retained by private sector organizations engaged in commercial activities. In other words, it recognizes and protects individuals' privacy interests in information no longer under their control. As noted in *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, 2013 SCC 62, [2013] 3 S.C.R. 733, at para. 13, it is "part of an international movement towards giving individuals better control over their personal information." In my view, legislation like *PIPEDA* evidences

societal norms to the effect that an individual can have a privacy interest in information she does not control and that such interests should be protected.

[161] My colleague accepts the Crown's critique of *Pelucco*, and, at para. 71 of his reasons, relies on "a lack of empirical evidence…that senders of text messages have a presumptively reasonable expectation…that their text messages will remain private in the hands of the recipient." He also mentions behaviour like the use of pseudonyms or coded language.

[162] With respect, evidence that some people do not expect that their text messages will stay private is not a basis for denying constitutional protection for private communications. As noted by Binnie J. in *Tessling*, at para. 42, courts should not focus too much on evidence of people's belief that their privacy interests will not be respected or that certain information will not stay private.

[163] Moreover, in my view, my colleague's approach turns the analysis into an empirical one. Such an approach would not answer the real question: whether people should be able to maintain a reasonable expectation of privacy in text messages. And, as I have explained, relevant societal norms show that people should be able to maintain a reasonable expectation of privacy in their text messages, even where they do not control the records of those messages.

(e) Practical Concerns

[164] The Crown raises a number of practical consequences that would flow from recognizing a privacy interest in this case. A number of them (such as a prolixity of litigation) simply beg the question. My short response is that the Crown's concerns are persuasive only if the appellant does not have a reasonable expectation of privacy; however, if he does then those concerns are the cost we are generally willing to incur to protect the rights underlying s. 8.

[165] One of the problems raised, the "*Sandhu* scenario", deserves greater attention. I will first address that concern. Then I will outline the undesirable consequences that would flow from accepting the Crown's position. Finally I will address some concerns that arise from my colleague's analysis.

(i) The *Sandhu* Scenario

[166] The Crown points to *R. v. Sandhu*, 2014 BCSC 303, as an example of what could go wrong if we accept that the appellant had a reasonable expectation of privacy in copies of text messages exchanged with Winchester.

[167] In *Sandhu*, the accused sent threatening text messages to the complainant. The complainant gave the police his cell phone to look at the text messages. The Crown later attempted to enter the text messages into evidence at Sandhu's trial. The trial judge held that the police violated Sandhu's s. 8 rights by reading the messages without obtaining a warrant.

[168] The Crown argues that *Sandhu* illustrates how police investigations would be illogically frustrated if the appellant's position were accepted.

[169] I reject the Crown's proposition. The scenario before this court is manifestly different from that in *Sandhu*, and I do not accept that adopting the appellant's arguments would lead to the outcome posited by the Crown.

[170] A majority of the Court of Appeal for British Columbia rejected the same argument in *Pelucco*. I would adopt their analysis on this issue, which can be found at para. 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. [Emphasis added.]

[171] The fact that the sender of the text messages in *Sandhu* was threatening the recipient is a part of the totality of the circumstances that must be considered when evaluating an assertion of a reasonable expectation of privacy. In the

Sandhu scenario, it just would not be reasonable for someone in Sandhu's position to expect that their communication should be kept private.

(ii) Permitting Infringements of *Charter* Rights

[172] A serious concern with the Crown's position is made obvious by the facts of this case. Here, the police had two separate opportunities to obtain the evidence they seek to introduce: from the appellant's phone and from Winchester's phone. The application judge found that the police infringed the *Charter* when obtaining the evidence from both sources. However, if the Crown's position is accepted, the appellant can challenge only the admissibility of the evidence obtained from his phone and Winchester could challenge only the admissibility of the evidence obtained from his phone. Despite failing to conform to the *Charter*, and without even the possibility of a s. 24(2) challenge, the Crown would be permitted to use the messages as evidence against both the appellant and Winchester.

[173] This gives rise to a serious concern in the modern world. Increasingly, the police have access to records of electronic communications stored by third parties. And, as far as text messages are concerned, they will always have this ability since there will always be at least two parties with a copy of the messages.

[174] In my view, concluding that individuals cannot challenge the search or seizure of records of their text messages will permit the Crown to routinely admit

such messages into evidence even if the messages were obtained in defiance of *Charter*-protected rights and even if the admission of the evidence will bring the administration of justice into disrepute.

[175] The Crown argues that denying standing will not lead to the problem identified by relying on the decision in *R. v. Harrer*, [1995] 3 S.C.R. 562. In that case, the Supreme Court noted that trial judges have a residual discretion to exclude evidence if it would render a trial unfair. The Crown relies on that proposition.

[176] In my view, *Harrer* does not remedy the negative consequences that flow from the Crown's position. Justice La Forest (who wrote the majority opinion) was addressing a trial judge's discretion to exclude evidence that would result in an unfair trial. However, the exclusion of evidence under s. 24(2) is not concerned with the fairness of individual trials; rather, its purpose is to maintain "the integrity of, and public confidence in, the justice system" over the long-term: *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, at para. 68.

[177] These two concepts – the fairness of individual trials and the long-term reputation of the administration of justice – cannot be equated. That gap was identified in *Harrer*, at para. 14, where La Forest J. noted that he did "not think one can automatically assume that the evidence was unfairly obtained or that its admission would be unfair (which may not be precisely the same question)

simply because it was obtained in a manner that would…violate a *Charter* guarantee."

[178] In my view, denying standing in this case would allow the Crown to routinely admit evidence (or at least certain kinds of evidence, i.e. text messages and, potentially, other electronic communications) in the face of *Charter* infringements. The power to protect the fairness of individual trials cannot protect against that danger and the resulting damage to the administration of justice.

(iii) Concerns with a Case-By-Case Approach

[179] As noted, my colleague's analysis is focused on the particular messages at issue on this appeal. He seems to adopt a case-by-case approach that may result in a reasonable expectation of privacy in text messages, depending on the content of the messages reviewed or taken by the state.

[180] With the greatest of respect, I have concerns about how such an approach would work in practice.

[181] First, it creates an amorphous and uncertain standard that will be difficult to implement. In most, if not all, cases, the police will not know the content of the messages before accessing them. As such, it will be extremely difficult for them to know whether they are complying with the *Charter* when they choose to review any text messages and whether any evidence obtained during a search will ultimately be admissible.

[182] Second, and once again because the police must review the messages to learn of their content, police officers will have no way of knowing whether a particular search will intrude upon a protected privacy interest until it is too late. The harm to people's privacy interests will be unavoidable under such an approach.

[183] On the other hand, requiring legal authorization before the search or seizure of a text message provides clearer guidelines to the police, makes it more likely that copies of messages seized will be admissible at the end of the day, and meaningfully protects privacy interests. In my view, it is a preferable approach from the perspective of law enforcement, people investigated by the police, and the legal system as a whole.

(f) Conclusion on Standing

[184] We are required to consider whether people in the appellant's situation can generally maintain a reasonable expectation of privacy in text messages sent to another person. The nature of the information that such communications might reveal and the nature of interests implicated support the appellant's position. The absence of control does not negate a reasonable expectation of privacy and any reliance on the absence of control reintroduces the discredited risk analysis. Relevant normative considerations suggest that people should be able to maintain a reasonable expectation of privacy in text messages generally. The appellant's position is the practically preferable option. As such, in my view, the

application judge erred in concluding that the appellant had no standing to bring a s. 8 *Charter* challenge in connection with the search of Winchester's cell phone.

(3) The Search was Unreasonable

[185] The question here is whether the search of Winchester's cell phone was reasonable. A search will be reasonable if (a) it was authorized by law; (b) the authorizing law was itself reasonable; and (c) it was conducted in a reasonable manner: *Cole*, at para. 37. A warrantless search is presumptively unreasonable: *Hunter*, at p. 161.

[186] During the application below, the Crown relied on the common law power to conduct a search incident to arrest. The application judge concluded that the Crown had not provided any evidence that could discharge its onus for justifying the warrantless search.

[187] On appeal, the Crown properly concedes that the warrantless search of Winchester's cell phone cannot satisfy the requirements provided in *Fearon*, which was released after the application judge rendered his decision. As such, the search was unreasonable and infringed the appellant's rights under s. 8.

C. THE TEXT MESSAGES OBTAINED FROM WINCHESTER'S PHONE SHOULD BE EXCLUDED

[188] The application judge did not conduct a s. 24(2) analysis for the search of Winchester's cell phone. Given my conclusion that the appellant's s. 8 rights

were infringed, I must now consider whether the copies of the text messages obtained from Winchester's phone should be excluded under s. 24(2).

[189] As noted in *Grant*, at paras. 71-86, the admissibility of evidence under s. 24(2) is determined by examining (a) the seriousness of the *Charter*-infringing state conduct; (b) the impact of the breach on the *Charter*-protected interests of the accused; and (c) society's interest in an adjudication on the merits. The court's role is to balance the results of these three inquiries and to "determine whether, considering all the circumstances, admission of the evidence would bring the administration of justice into disrepute": *Grant,* at para. 71.

[190] I would exclude the evidence.

[191] On the one hand, society's interest in adjudication on the merits favours inclusion because the evidence at issue is reliable and essential for the Crown's case. Moreover, it must be acknowledged that, given the lack of control in this case, the appellant could only maintain a reduced expectation of privacy in the text messages stored on Winchester's cell phone; as in *Cole*, that fact makes the impact on the accused's *Charter* rights less serious.

[192] On the other hand, the seriousness of the police's conduct strongly favours exclusion. Although the application judge indicated that the police did not exhibit any bad faith in this case, in my view, his analysis was too restrictive. As noted by this court in *R. v. Dhillon*, 2010 ONCA 582, 260 C.C.C. (3d) 53, at para. 51,

serious negligence on the part of the police, while not bad faith, can nevertheless be significant and support the exclusion of evidence. The police conduct in this case reveals such negligence and a pattern of breaches of or disregard for *Charter* rights:

- All of the evidence obtained from the appellant's phone and his apartment was seized pursuant to a warrant that was quashed for being overbroad. This breach was not technical. Despite the straightforward nature of the alleged offences, the application judge found that the "list of items to be searched for and seized…[was] virtually limitless". At para. 63, the application judge concluded that the warrant "authorized the search and seizure of virtually everything in [the appellant's] apartment." There was no justification for such a broad warrant in this case.

- The copies of the messages from Winchester's phone were obtained through a warrantless, unconstitutional search. Moreover, contrary to the Crown's submission on appeal, the police failed to abide by well-established principles governing a search incident to arrest articulated in *R. v. Caslake*, [1998] 1 S.C.R. 51.

- The search of both cell phones also displayed a lack of respect for privacy rights. Both the appellant's phone and Winchester's phone were subjected to a full forensic analysis, without legal authority and without placing any limits on the analysis. There was no urgency in this case, as removing the

> cell phones' SIM cards would have prevented remote tampering.

[193] Furthermore, the text messages at issue are essential to the Crown's case only because of this pattern of *Charter* infringements. The messages obtained from the appellant's phone and evidence seized from his apartment are not admissible because the police infringed the appellant's s. 8 rights when obtaining that evidence. The Crown abandoned reliance on the accused's inculpatory statements and evidence obtained from them when faced with a challenge to their admissibility. And now the admissibility of the text messages obtained from Winchester's phone is in issue because they too were obtained in a manner that infringed a *Charter*-protected right.

[194] Finally, while the search of Winchester's phone, considered in isolation, may be classified as a less serious breach of the appellant's *Charter*-protected interests, I would take into account the fact that the appellant suffered many serious breaches of his *Charter* rights. In this case the police intruded upon significant privacy interests by conducting a warrantless search of his home and conducting an unnecessary and unrestricted forensic analysis of the appellant's phone. Refusing to exclude the text messages obtained from Winchester's phone would, in effect, neutralize any remedy granted for those breaches.

[195] In these circumstances, the court must distance itself from the pattern of disregard for *Charter* rights and it cannot do that if it gives effect to society's

interest in having an adjudication on the merits. Therefore, the copies of the text messages obtained from Winchester's phone should be excluded.

D. THIS COURT CANNOT CONSIDER THE CROWN'S CROSS-APPEAL

[196] To recap, the application judge excluded the copies of the messages obtained from the appellant's cell phone under s. 24(2). The Crown seeks to challenge that decision on this appeal.

[197] The *Criminal Code* does not provide the Crown with a right of appeal where an accused has been convicted. The Crown relies on the curative proviso in s. 686(1)(b)(iii) of the *Criminal Code,* as interpreted in *R. v. C.(W.B.)* (2000), 142 C.C.C. (3d) 490 (Ont. C.A.), as the basis for its assertion that this court has jurisdiction to entertain these arguments. It is worth emphasizing that the decision in *C.(W.B.)* is the only basis for the Crown's position that this court can consider its proposed cross-appeal.

[198] In *C.(W.B.)*, in order to establish similar fact evidence that the Crown wanted to introduce at trial, the Crown tendered two documents. The first document was a transcript of the facts read into court in support of the accused's guilty plea at a previous trial. The second document recorded a statement given to a police officer by the complainant on the prior conviction. The trial judge allowed the officer to read in the statement but refused to admit the transcript because the content was the same as the statement read in by the police officer.

[199] On appeal, the Crown agreed that the statement should not have been entered but argued that the transcript was wrongly excluded. A majority of this court agreed and applied the curative proviso to uphold the conviction.

[200] In my view, the Crown reads *C.(W.B.)* too expansively.

[201] In *C.(W.B.)*, the trial judge had dismissed the Crown's application to admit the transcript because the same statement had been admitted in another form and, therefore, the trial judge concluded that the requirement for necessity could not be established. As such, Weiler J.A. noted, at para. 67, that the trial judge "did not commit two separate compartmentalized errors. He committed one global error" (emphasis added).

[202] Here, the application judge did not commit one global error but rather ruled on two separate challenges to the admissibility of two separate sets of evidence. The application judge noted, at para. 6, that although only one *voir dire* was held, there were, in effect, three separate applications before him. Therefore, I do not think that the two decisions at issue here can be considered as one. And, as noted by Weiler J.A. in *C.(W.B.)*, at para. 68, her decision was not "a wholesale license to re-examine, on appeal, any evidence that may have been excluded in error at a trial in order to determine whether a conviction may be upheld."

[203] Put differently, *C.(W.B.)* is about the scope of the error to which the curative proviso can be applied. Weiler J.A. concluded that the error at issue

included both the decision to include inadmissible evidence and the resulting decision to exclude admissible evidence. However, in this case, the Crown is not asking us to take an expansive view of a particular error. Rather, the Crown is trying to rely on the unique circumstances of this case (specifically that the two separate rulings happen to concern identical evidence) to create a right to appeal that the *Criminal Code* does not provide.

[204] In my view, this court should not adopt this expansive interpretation of the curative proviso because the right to appeal is an "exceptional right" and exists only where and to the extent provided by statute: *Welch v. R.*, [1950] S.C.R. 412, at p. 428. The *Criminal Code*, which "provides a comprehensive scheme of criminal procedure…provides only limited rights of appeal" and Parliament's decision to provide or deny an appellate route in any given matter will be motivated by various policy considerations that should not be undermined by courts: *Kourtessis v. M.N.R.*, [1993] 2 S.C.R. 53, at pp. 69 and 72; see also *R. v. E.F.H.* (1997), 33 O.R. (3d) 202 (C.A.), at p. 214. As noted by Charron J.A. (as she then was) in *E.F.H.*, at p. 208,

> [t]he single fundamental principle which lies beneath the issues under consideration in this matter pertains to the exceptional nature of an appeal. It has long been settled law that appellate review of verdicts in criminal cases is not a procedure known to common law. All appeals have been creatures of statute. An appellate tribunal has no inherent jurisdiction to entertain an appeal in criminal cases. In order for any right of appeal to be said to exist, it must be founded in statutory authority.

[205] In light of these considerations, the decision in *C.(W.B.)* should be construed narrowly to avoid undermining the limits placed on appeals by the *Criminal Code*. Accordingly, I would decline to consider the Crown's proposed cross-appeal.

E. DISPOSITION

[206] For the reasons given, I would allow the appeal, order the text messages seized from Winchester's cell phone be excluded from evidence, and enter acquittals on all charges.

Released: July 8, 2016 ("J.C.M.")

"H.S. LaForme J.A."