SCC File No.: 37118

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

BETWEEN:

NOUR MARAKAH

APPELLANT

-and-

HER MAJESTY THE QUEEN

RESPONDENT

APPELLANT'S FACTUM

(NOUR MARAKAH, APPELLANT)
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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FACTUM OF THE APPELLANT

PART I – OVERVIEW AND THE STATEMENT OF THE FACTS

I. Overview

1. The appellant, Nour Marakah, was convicted by the Honourable Mr. Justice O'Marra of multiple firearms offences.[1] The convictions were ultimately dependent on the contents of private text messages between the appellant and Andrew Winchester, a former co-accused, which police obtained from Winchester's cell phone. All of the other incriminating evidence, including the same text messages extracted from the appellant's cell phone, was excluded due to serious violations of the *Charter of Rights and Freedoms* (the "*Charter*").

2. The motions judge, the Honourable Justice Pattillo, found that the police unlawfully searched for and seized the text messages from Winchester's cell phone. Nonetheless, he concluded that the appellant's rights had not been infringed as a result of this unlawful search. He held that the appellant had a subjective expectation of privacy in the text messages, but that his expectation was not objectively reasonable.

3. The appellant appealed to the Ontario Court of Appeal. The majority of the Ontario Court of Appeal upheld the motions judge's ruling. The majority concluded that the appellant's reasonable expectation of privacy in the text messages was lost once they were received by Winchester. The Honourable Justice H. LaForme dissented. He concluded that the appellant retained a reasonable expectation of privacy in the text messages and that they should have been excluded pursuant to s. 24(2) of the *Charter*. The appellant appeals to this Honourable Court.

4. For the reasons given by LaForme J.A. and by the majority of the British Columbia Court of Appeal in *R. v. Pelucco*[2], the appellant held a reasonable expectation of privacy in his text messages, whether extracted from his or the recipient's cell phone, and accordingly, had "standing" to seek their exclusion from evidence. This conclusion is supported by the "totality of circumstances" test articulated by this Court, and its application in the context of informational

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[1] Two counts of trafficking in firearms, and one count each of conspiracy to traffic in firearms, possession of a loaded restricted firearm and possession of a firearm without a valid license. Two additional counts of conspiracy to traffic in firearms were conditionally stayed.

[2] *R. v. Pelucco*, 327 C.C.C. (3d) 15 [Appellant's Book of Authorities ("ABA") Tab 19].

privacy. The contrary conclusion severely undermines the legitimate privacy interests captured by s. 8 of the *Charter*, and would effectively allow unrestricted state access to private communications through text messages. The contrary conclusion also offends this Court's jurisprudence, including its characterization of text messages in *R. v. Telus Communications Co.*[3] and its rejection of the "risk analysis" unsuccessfully advanced by the Crown in *R. v. Duarte*[4].

II. Concise Summary of the Facts

The Initial Investigation

5. In 2012, the Toronto Police Service (TPS) commenced an investigation into persons who had legally purchased a number of firearms over a short period of time. This led to Winchester and then, through a confidential informant, to the appellant.[5]

6. On November 5, 2012, the TPS applied for and obtained search warrants for the appellant's residence ("the Marakah warrant") and three locations associated with Winchester.[6]

7. In support of its application for all four search warrants, TPS prepared and submitted Informations to Obtain ("ITOs"). The content of each ITO was largely the same. The motions judge concluded, after a Part VI *Garafoli* hearing, that the ITOs contained sufficient and credible evidence to permit the authorizing justice to issue the warrants. That ruling is unchallenged on appeal. However, the motions judge also determined that the Marakah warrant was invalid due to its overbreadth. He held that it countenanced a virtually limitless search and seizure.[7]

The Arrest of Mr. Marakah and the Execution of the Marakah Search Warrant

8. On November 6, 2012, at 12:10 p.m., the TPS executed the search warrant for 1 Dean Park Road, Apartment 512 (Mr. Marakah's residence). The search warrant did not authorize (indeed, it specifically excluded) the seizure of any cell phone found on the person of anyone on the premises.

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[3] *R. v. Telus Communications Co.*, [2013] 2 S.C.R. 3 [ABA Tab 25].
[4] *R. v. Duarte*, [1990] 1 S.C.R. 30 [ABA Tab 4].
[5] Reasons Court of Appeal, paras. 5 to 6 [Appellant's Record ("AR") Tab 1B].
[6] Reasons for Decision on the *Charter* Applications, para. 10 [AR Tab 1A].
[7] Reasons for Decision on the *Charter* Applications, paras. 34 to 37 and 45 to 54 [AR Tab 1A].

9. On the admissibility *voir dire*, there was conflicting evidence of what occurred inside the residence.[8]

10. Officer Sukumaran testified that when he entered Mr. Marakah's residence, Mr. Marakah was seated at a computer table. He claimed that Mr. Marakah grabbed a Blackberry from the table, and when Sukumaran yelled "Police! Don't move!" Mr. Marakah dropped the phone on the floor. Officer Sukumaran then proceeded through the living room of the residence and onto the balcony. Officer Sukumaran acknowledged that Mr. Marakah ended up on the floor, but claimed he was unaware how that happened. The motions judge rejected the evidence of Officer Sukumaran on controversial points.[9]

11. Mr. Marakah testified that before the police entered the apartment, he was in the living room with his headphones on listening to music on his laptop. He heard a loud bang. Before the police entered his residence, he picked up his cell phone (a Blackberry), stood up from the table and took his headphones off. He tried to enter his password for the phone to call 911. He thought a home invasion was underway. He quickly realized that it was the police entering his apartment. They came into the living room yelling for him to get down on the ground. The lead officer knocked the phone out of his hand and told him to get down. The phone fell to the floor. Mr. Marakah never had a chance to enter his password and unlock his cell phone. The motions judge accepted his evidence.[10]

12. Officer Asselin was part of the team that searched Mr. Marakah's residence. He heard a commotion in the living room of the apartment. When he entered the living room, he saw Mr. Marakah on the ground, being handcuffed with a Blackberry on the floor close to him. Officer Asselin seized the Blackberry. He subsequently searched the living room and seized a laptop computer and a thumb drive.[11]

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[8] Reasons for Decision on the *Charter* Applications, paras. 17 to 19 [AR Tab 1A].
[9] Reasons for Decision on the *Charter* Applications, paras. 17 and 80 [AR Tab 1A].
[10] Reasons for Decision on the *Charter* Applications, paras. 19 and 80 [AR Tab 1A].
[11] Reasons for Decision on the *Charter* Applications, para. 18 [AR Tab 1A].

13. Officer Sukumaran was the exhibits officer during the search of 1 Dean Park Road. He testified that a Blackberry, an iPhone, a laptop computer and a thumb drive were seized.[12] It was clear from all the evidence (and conceded by the Crown) that there was no iPhone seized from Mr. Marakah's residence.

The Arrest of Winchester and Execution of the Remaining Search Warrants

14. That same morning, Mr. Winchester was under police surveillance. The police observed him enter a store that was holding two guns for him. He left a short time later with two white shopping bags. He put the bags in the trunk of his car and drove to 30 Carabob Court where he parked.[13]

15. Mr. Winchester was arrested at 12:05 p.m. as he opened the trunk of his car and was removing the two bags. An iPhone was seized from his front pocket. The police did not search it at the scene.[14] The police also executed search warrants respecting his vehicle and addresses associated with him. They obtained guns and ammunition from those seizures which implicated Winchester. (Those seizures are irrelevant to the appellant's appeal.)

The Search of Mr. Marakah's and Mr. Winchester's Cell Phones

16. All items seized by the police, including Mr. Winchester's iPhone and Mr. Marakah's Blackberry, were transported to 42 Division. Officer Asselin testified that while at 42 Division he received and examined Mr. Marakah's Blackberry and Mr. Winchester's iPhone. Each phone contained the contact information of the other. Both phones were unlocked. (The evidence was unclear as to how Mr. Marakah's Blackberry was purportedly unlocked at that time).[15]

17. Detective Tim Wilson, the officer in charge, returned to 42 Division after having been involved in the execution of the search warrant at Mr. Marakah's residence. He remembered receiving Mr. Winchester's iPhone at some point, but was not sure when or from whom. He looked at it briefly and saw there were text messages from someone he understood to be Mr. Marakah. He did not read the texts. Concerned that they could be deleted remotely (though Mr. Winchester and Mr. Marakah were both in custody) and in order to preserve the messages,

[12] Reasons for Decision on the *Charter* Applications, para. 17 [AR Tab 1A].
[13] Reasons for Decision on the *Charter* Applications, para. 12 [AR Tab 1A].
[14] Reasons for Decision on the *Charter* Applications, para. 13 [AR Tab 1A].
[15] Reasons for Decision on the *Charter* Applications, para. 20 [AR Tab 1A].

Wilson had Officer Robert Frigon take photographs of the text messages.[16] Remote tampering could have been prevented by removing the SIM card from the iPhone.[17] The text messages contained discussions between Mr. Winchester and Mr. Marakah concerning gun trafficking. In total, 161 photographs of the messages were taken.[18]

18. Subsequently, Officer Sukumaran submitted the thumb drive, the Blackberry seized from Mr. Marakah and the iPhone seized from Mr. Winchester to the Technical Crimes Unit ("Tech Crimes") for analysis. Mr. Marakah's Blackberry was password protected. The intake document noted that it was locked, but listed a possible password. Officer Sukumaran said he did not recall where he got the password from. Tech Crimes extracted the information contained in both Mr. Marakah's Blackberry and Mr. Winchester's iPhone. No warrants were obtained respecting the searches of the two cell phones by Tech Crimes and no restrictions were placed (by anyone) on the searches that the tech officers conducted.[19]

The Admissibility Motions

19. On the admissibility *voir dire*, Mr. Marakah acknowledged his exchange of incriminating text messages with Winchester. He expected those text messages to be kept confidential by Winchester. Mr. Marakah had deleted those text messages from his own cell phone, and had told Winchester a number of times to delete the messages at his end. He had no ownership interest in or control over Winchester's phone.[20]

20. Pursuant to ss. 8 and 24(2) of the *Charter*, the motions judge excluded all of the evidence seized from Mr. Marakah's residence, as well as from him personally, including the deleted text messages extracted by the police from his cell phone.[21] The defence also challenged the admissibility of statements made by Mr. Marakah after his arrest, and evidence derived from those statements. During the *voir dire* into those statements, the Crown abandoned its efforts to have that evidence admitted. Hence, the prosecution was ultimately dependent entirely on the admissibility of the same text messages obtained from Winchester's cell phone. The motions

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[16] Reasons for Decision on the *Charter* Applications, para. 15 [AR Tab 1A].
[17] Agreed Statement of Fact, Transcript of Proceedings, June 25, 2014, pp. 73 to74
[18] Reasons for Decision on the *Charter* Applications, para. 15 [AR Tab 1A].
[19] Reasons for Decision on the *Charter* Applications, para. 20 [AR Tab 1A].
[20] Reasons for Decision on the *Charter* Applications, paras 90 to 91 [AR Tab 1A].
[21] Reasons for Decision on the *Charter* Applications, paras. 123 to125 [AR Tab 1A].

judge found that those text messages were also unlawfully obtained by the police. However, as indicated in the Overview, he concluded that Mr. Marakah only had a subjective expectation of privacy in those messages, but that his expectation was not objectively reasonable. Hence, he had no "standing" to challenge the admissibility of this evidence. He summarized as follows:

> [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.[22]

PART II – STATEMENT OF ISSUES

21. The Issues on appeal are:

1. Did the Ontario Court of Appeal err in holding that that the appellant had no "standing" to bring a s. 8 *Charter* challenge concerning the search and seizure of text messages from Mr. Winchester's cell phone?

2. If the answer to (1) is yes, should the evidence obtained be excluded pursuant to s. 24(2) of the *Charter*?

PART III – STATEMENT OF ARGUMENT

I. Section 8 of the *Charter*: General Principles

22. Section 8 of the *Charter* guarantees the right to be secure against unreasonable search and seizure. It provides constitutional protection for a right to privacy. As observed by La Forest J. in *R. v. Dyment*[23], this right is "grounded in man's physical and moral autonomy" and as such, is "essential for the well-being of the individual. For this reason alone, it is worthy of constitutional protection." However, this right 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."

23. As interpreted by this Court, s. 8 provides 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."[24] Depending on the context, state action may intrude

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[22] Reasons for Decision on the *Charter* Applications, para. 102 [AR Tab 1A].
[23] *R. v. Dyment*, [1988] 2 S.C.R. 417, at para. 28 [ABA Tab 5].
[24] Reasons Court of Appeal, LaForme J.A. (dissent), para. 88 [AR Tab 1B].

upon "personal," "possessory", "proprietary", "territorial" or "informational" privacy or some combination thereof.

24. It is common ground that the framework for determining whether an assertion of privacy attracts constitutional protection includes the existence or absence of a reasonable expectation of privacy. This is to be determined based on the "totality of circumstances." It is also common ground that the "totality of circumstances" test, first developed in *R. v. Edwards*[25] requires that courts consider a number of relevant, and often interrelated factors. The relevant factors will differ depending on the particular context.[26]

25. So, for example, some of the factors identified in *Edwards*, a case involving an assertion of territorial privacy, will have little relevance to an assertion of informational privacy. This is not a rejection of *Edwards*, but recognition that the "totality of circumstances" test requires a flexible analysis. As stated by this Court in *R. v. McKinlay Transport Ltd.*, a "realistic and meaningful"[27] analysis cannot take place without such flexibility because "individuals have different expectations of privacy in different contexts and with regard to different kinds of information."

26. In the context of an assertion of informational privacy, this Court has grouped the wide variety of factors to be considered under four main headings:

(i) what was the nature or subject matter of the evidence gathered by the police;

(ii) did the appellant have a direct interest in the *contents*;

(iii) Did the appellant have a *subjective* expectation of privacy in the *informational content of the information;* and

(iv) If so, was the expectation *objectively* reasonable?[28]

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[25] *R. v. Edwards*, [1996] 1 S.C.R. 12 [ABA Tab 6].
[26] Reasons Court of Appeal, LaForme J.A. (dissent), para. 95 [AR Tab 1B]; *R. v. Edwards, supra*, para. 45 [ABA Tab 6]; *R. v. Spencer*, [2014] 2 S.C.R. 212, para. 17 [ABA Tab 24]; *R. v. Tessling*, [2004] 3 S.C.R. 432, paras. 31 to 32 [ABA Tab 26]; *R. v. Craig*, (2016), 335 C.C.C. (3d) 28 (B.C.C.A.), para. 97 [ABA Tab 3].
[27] *R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627 at para. 30 [ABA Tab 17].
[28] *R. v. Tessling, supra*, para. 32 [ABA Tab 26]*; R. v. Patrick*, [2009] 1 S.C.R. 579, para. 27 [ABA Tab 18].

27. Four additional principles, already reflected in existing jurisprudence, also inform the analysis. These principles were identified by LaForme J.A. at paras. 100 to 103 of his reasons.

28. First, the protection afforded by s. 8 should be interpreted broadly and purposively given the importance of privacy to individual security, self-fulfillment, and autonomy, and to the maintenance of a thriving democratic society. It follows that a generous and purposive approach should be taken when evaluating whether a reasonable expectation of privacy exists since this is "the threshold for accessing the protection afforded by s. 8."[29]

29. Second, a reasonable expectation of privacy is not merely descriptive, but involves a "normative" assessment, 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."[30]

30. Third, the analysis cannot too narrowly focus on the particular circumstances of the case. As stated by Doherty J.A. in *R. v. Ward*[31]:

> 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.]

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[29] *R. v. Spencer, supra,* para. 15 [ABA Tab 24]; Reasons Court of Appeal, Laforme J.A. (dissent), para. 100.
[30] *R. v. Patrick, supra,* para. 14 [ABA Tab 18]; Reasons Court of Appeal, Laforme J.A. (dissent), para. 101.
[31] *R. v. Ward* (2012), 112 O.R. (3d) 321 at paras. 86 to 87 [ABA Tab 27].

31. Fourth, the fact that the content of the information or evidence seized reveals criminality does not diminish the asserted privacy claim or disqualify it from constitutional protection.[32] This principle is, of course, related to the third principle. As stated by this Court in *R. v. Wong*[33]:

> [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].

This was recently reiterated by the Court in *R. v. Spencer*, at para. 36:

> 36 The nature of the privacy interest does not depend on whether, in the particular case, privacy shelters legal or illegal activity. The analysis turns on the privacy of the area or the thing being searched and the impact of the search on its target, not the legal or illegal nature of the items sought. To paraphrase Binnie J. in *Patrick*, the issue is not whether Mr. Spencer had a legitimate privacy interest in concealing his use of the Internet for the purpose of accessing child pornography, but whether people generally have a privacy interest in subscriber information with respect to computers which they use in their home for private purposes: *Patrick*, at para. 32.

(i) The Subject Matter of the Search

32. In defining the subject matter of the search, this Court has endorsed the broad and functional approach earlier described in connection with s. 8 more generally.[34] As Doherty J. stated in *R. v. Ward*, 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."[35]

33. LaForme J.A. correctly characterized the subject matter of the search here as "an electronic conversation conducted between two people through text messages that is capable of revealing private and intimate information about both participants."[36] He said this:

> 108 As noted by Abella J. in *R. v. Telus Communications Co.*, 2013 SCC 16, [2013] 2 S.C.R. 3 (S.C.C.), at para. 5, "[t]ext messaging is, in essence, an

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[32] *R. v. Ward, supra,* para. 65 [ABA Tab 27]; Reasons Court of Appeal, LaForme J.A. (dissent), para. 107.
[33] *R. v. Wong*, [1990] 3 S.C.R. 36, at para. 20 [ABA Tab 28].
[34] *R. v. Spencer, supra*, para. 26 [ABA Tab 24.]
[35] *R. v. Ward, supra,* para. 65 [ABA Tab 27]; See also *R. v. Gomboc*, [2010] 3 S.C.R. 211, para. 34 [ABA Tab 9]; *R. v. Patrick, supra,* para. 14 [ABA Tab 18]; *R. v. Spencer, supra*, para. 36 [ABA Tab 24].
[36] Reasons Court of Appeal, Laforme J.A. (dissent), para. 111 [AR Tab 1B].

> 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 CarswellOnt 8024 (Ont. S.C.J.)], 2009 CanLII 41212, aff'd, 2014 ONCA 339 (Ont. C.A.), 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 (B.C. C.A.), 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".[37]

34. With respect, the majority erred in its narrow construction of the subject matter of the search:

> 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.[38] [emphasis added]

This characterization effectively promotes the evaluation of an asserted expectation of privacy based on *ex post facto* discovery of criminal activity – an approach rightly disapproved of by this Court. Such an approach would provide no advance guidance to the police; indeed, as reflected later, it would promote the unrestricted viewing by police of private electronic conversations that routinely contain revealing intimate information about both participants.[39] In any event, these text messages did reveal intimate details about the participants' lifestyle activities and biographical core – albeit illegal.

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[37] Reasons Court of Appeal, Laforme J.A. (dissent), paras. 108 to 110 [AR Tab 1B].
[38] Reasons Court of Appeal, para. 63 [AR Tab 1B].
[39] Reasons Court of Appeal, LaForme J.A. (dissent), para. 111 [AR Tab 1B].

(ii) The Appellant's Direct Interest in the Text Messages

35. The appellant does not assert a proprietary or territorial privacy interest in Mr. Winchester's telephone. Rather, he asserts an informational privacy interest in the content of his communications with Mr. Winchester. The motions judge accepted, at para. 89 of his reasons, that Mr. Marakah had a direct interest in the text messages because he was the author of a number of the messages and a participant in the conversations with Winchester.

36. As reflected by LaForme J.A., the nature of the appellant's privacy interest compromised by the police is also of significance here. In his view, the ability of the state to review and take copies of text messages implicates two privacy interests protected under s. 8. His analysis is relevant not only to the nature of the appellant's direct interest in the text messages, but to the reasonableness of his expectation of privacy (addressed below).

37. 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."[40] Second, the reviewing or taking of text messages also constitutes an intrusion on a "sphere of privacy" that is protected under the *Charter*. Text messaging is an increasingly common way in which people choose to communicate and interact with each other. In LaForme J.A.'s view, "these private communications are an increasingly central element of the private sphere that must be protected under s. 8."[41] In *R. v. Duarte*, La Forest J. identified the dangers of permitting the state to intrude on private conversations in its discretion. If permitted, "there would be no meaningful residuum to our right to live our lives free from surveillance." It would "smother that spontaneity – reflected in frivolous, impetuous, sacrilegious and defiant discourse – that liberates daily life."[42] As LaForme J.A. explained, permitting the police to review and take records of text messages in their discretion would result in the harmful intrusions described in *Duarte*.

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[40] Reasons Court of Appeal, LaForme J.A. (dissent), para. 114 [AR Tab 1B].
[41] Reasons Court of Appeal, LaForme J.A. (dissent), para. 123 [AR Tab 1B].
[42] *R. v. Duarte*, *supra*, paras. 24 and 44 [ABA Tab 4].

(iii) The Appellant's Subjective Expectation of Privacy in the Text Messages

38. The appellant testified and the motions judge found that he had a subjective expectation of privacy in the text messages seized from Mr. Winchester's telephone.[43] This finding was unchallenged by the Crown on appeal.

(iv) The Objective Reasonableness of the Expectation of Privacy

39. As already noted, the appellant asserts an informational privacy interest in the content of the text messages. He does not assert – nor does his reasonable expectation of privacy depend on -- a "territorial" or "proprietary" or "possessory" right in Winchester's cell phone or the location where the cell phone was seized.[44]

(a) The Majority's Decision Is Inconsistent with *R. v. Telus*

40. In. *R. v. Telus,* this Court determined that a Part VI *Criminal Code* authorization was needed, rather than a general warrant, in order to obtain copies of text messages stored for a brief period of time on the server's computer database. The general warrant that had been utilized required the server, Telus, to produce any messages sent or received by two named subscribers during a two week period. This would include prospective text messages: that is, messages to be sent or received after the general warrant was issued.

41. This Court's majority decision was not merely dependent on its determination that the seizure of prospective text messages (not the issue here) was an "interception" (Abella J.) or "substantively equivalent" to an interception (Moldaver J.). The Court determined that text messages are "private communications" respecting which the senders and recipients have a reasonable expectation of privacy. This was so despite the fact that copies of the text communications were held by the server outside of the control of the sender or recipient. Equally important, the text communications were treated as private communications, regardless of whether the recipient had already received them when they were to be produced by the server to the police.[45]

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[43] Reasons for Decision on the *Charter* Applications, paras. 90 to 91 [AR Tab 1A].
[44] *R. v. Spencer, supra,* para. 40 [ABA Tab 24]; *R. v. Dyment, supra,* para. 33 [ABA Tab 5].
[45] *R. v. Telus, supra,* paras. 1, 5 and 32 [ABA Tab 25].

42. The majority of the Court of Appeal accurately reflected that *Telus* "was not a standing case," but that "*Telus* is an important case for understanding the Supreme Court of Canada's view of the nature and implications of informational privacy interests."[46] The appellant agrees. However, with respect, it is difficult to reconcile this Court's decision in *Telus* (and its other jurisprudence on informational privacy) with the majority of the Court of Appeal's view that Mr. Marakah lost any reasonable expectation of privacy once his text messages were received by Winchester. As LaForme J.A. observed, both Abella J. and Cromwell J. in their respective opinions in *Telus* agreed that text messages are private communications. All three opinions assumed that some form of authorization was required, meaning that they accepted that text messages – at least ordinarily – attract a reasonable expectation of privacy. *Telus* treated text messaging as essentially electronic conversations. It also reinforced the principle that conversations conducted by text messages should not be deprived of constitutional protection merely because of "differences created through technological development." As LaForme J.A. concluded, even if *Telus* is not determinative, it provides a starting point for the relevant analysis. The fact that *Telus* was not a "standing" case is not a basis for ignoring it.[47]

(b) *Edwards* to *Spencer*: the Totality of Circumstances, Informational Privacy and Control

43. The true point of departure between the majority and dissenting reasons in the Court of Appeal relates to the role to be played by "control" over the dissemination of text messages. The majority accepted the proposition that the sender's reasonable expectation of privacy is lost once these messages reach their intended destination, and the sender no longer has control over what might be done with them. The majority said that control is not necessarily a prerequisite to any successful privacy claim, and that the court was only determining, as did the motions judge, that control is of importance in this particular case. However, the reality is that the majority effectively did treat lack of control as a prerequisite to a successful privacy claim respecting private electronic conversations. After all, as LaForme J.A. observed, the absence of control 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…"[48] The appellant

[46] Reasons Court of Appeal, paras. 41 and 43 [AR Tab 1B].
[47] Reasons Court of Appeal, LaForme J.A. (dissent) paras. 128 to 131 [AR Tab 1B].
[48] Reasons Court of Appeal, LaForme J.A. (dissent) para. 134 [AR Tab 1B].

submits that the prominence given to loss of control here is fundamentally incompatible with this Court's treatment of assertions involving informational privacy.

44. In *R. v. Cole*[49], this Court found that the appellant had a reasonable expectation of privacy in information stored on a workplace laptop. This was so despite the fact that he did not own the laptop and that technicians from his workplace could (and did) remotely access the computer and see the information stored on it. 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.[50] Although ownership of the laptop was a consideration, it should not "carry undue weight" as there is "nothing in the language of [s. 8] to restrict it to the protection of property or to associate it with the law of trespass."[51]

45. More recently, in *R. v. Quesnelle*[52] and *R. v. Spencer*, this Court considered privacy interests in informational content that were completely outside the control of the party asserting a reasonable expectation of privacy. In both cases, the outcome of the case was decided on the nature of the information that the content could disclose, not on control.[53]

46. In *R. v. Quesnelle*, this Court considered whether s. 278.1 of the *Criminal Code* protected police occurrence reports involving complainants, or whether such reports should be disclosed as part of the *Stinchcombe* regime. The Court drew directly upon the principles developed in s. 8 jurisprudence.[54] It found that a reasonable expectation of privacy extended to the occurrence reports even though the complainants had absolutely no control over the release or dissemination of the reports. Karakatsanis J. reflected that "the reasonable expectation of privacy is not limited to trust-like, confidential or therapeutic relationships."[55]

47. In *R. v. Spencer*, the police identified the Internet Protocol (IP) address of a computer that was accessing a child pornography website. Without any judicial authorization, the police

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[49] *R. v. Cole*, [2012] 3 S.C.R. 34 [ABA Tab 2].
[50] *R. v. Cole, supra,* para. 54 [ABA Tab 2].
[51] *R. v. Cole, supra,* para. 51 [ABA Tab 2].
[52] *R. v. Quesnelle*, [2014] 2 S.C.R. 390 [ABA Tab 21].
[53] *R. v. Quesnelle, supra,* para. 67 [ABA Tab 21]; *R. v. Spencer, supra,* para. 66 [ABA Tab 24].
[54] *R. v. Quesnelle, supra,* para. 27 [ABA Tab 21].
[55] *R. v. Quesnelle, supra,* para. 27 [ABA Tab 21].

obtained the subscriber information related to the IP address from the service provider.[56] The Court viewed the release of the subscriber information as a gateway to providing highly personal information at the biological core of the target. The Court found that it was reasonable for the subscribers to believe that their names and addresses would not be disclosed to the police.[57]

48. Cromwell J. identified three aspects of informational privacy: privacy as secrecy, privacy as control, and privacy as anonymity. Of importance here is the discussion of privacy as control. Justice Cromwell reaffirmed the principle 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 acknowledged that the privacy interest survives even where "the information [has been] communicated and cannot be thought of as secret or confidential."[58]

49. The majority of the Court of Appeal, placing reliance, in large part, on *Spencer*, concluded at para. 58 that ""[c]ontrol" and "access" are fundamental to our understanding of informational privacy." The appellant submits that LaForme J.A. was correct in drawing a different conclusion from *Spencer*. He observed that Cromwell J. did not say that access and control are central to an informational privacy claim. Rather, *Spencer* "emphasizes that a person retains a privacy interest in information even where she no longer exercises control over access to that information."[59]

50. With respect, the majority misconceived the point being made by Cromwell J. in *Spencer*. The discussion about privacy as control in *Spencer* makes the point that privacy in relation to information means, in part, the right to choose for himself/herself the person to whom that information is communicated: *ie* control or choice respecting the persons with whom confidences will be shared. That is different than controlling whether the recipient decides to breach those confidences. As LaForme J.A. stated at para. 115:

> 115 This interest has been recognized since at least *Dyment*. At [para. 33], 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

[56] *R. v. Spencer, supra,* para. 2 [ABA Tab 24]
[57] *R. v. Spencer, supra,* paras. 52 to 66 [ABA Tab 24]
[58] *R. v. Spencer, supra,* para. 40 [ABA Tab 24].
[59] Reasons Court of Appeal, LaForme J.A. (dissent), para. 146 [AR Tab 1B].

> 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.In *Edwards*, this Court identified "presence at the time of the search", "possession or control of the property or place searched", "ownership of the property or place", "historical use of the property or item" and "the ability to regulate access, including the right to admit or exclude others from the place" as factors to be considered. These factors undoubtedly figure prominently in the "totality of circumstances" to be considered when possessory, proprietary or territorial privacy rights are asserted. Some of those factors may or may not continue to have some relevance where personal, territorial and informational privacy interests overlap: for example, where garbage is seized from the target's premises: *R. v. Patrick*. However, these factors play a significantly diminished role in the context of state intrusions involving informational privacy in the context of modern communication technology. *Dyment, Cole, Spencer* make that clear.

51. This view is reinforced by this Court's decision in *R. v. Duarte*. The reasons of the motions judge and the majority of the Court of Appeal effectively reintroduce the "risk analysis" that was rejected in *Duarte*.[60]

52. In *Duarte*, the Court of Appeal held that the police did not need prior judicial authorization to conduct "participant surveillance" which involves the taping of conversations between the targeted individual and a police undercover officer or agent. The Court's rationale was that any person who divulges a confidence always runs the risk that the other party will betray that confidence; hence, the target has no reasonable expectation of privacy in such conversations.[61]

53. This Court disagreed. La Forest J. stated, at para. 32, that there is 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. He said this:

> 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

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[60] Reasons Court of Appeal, paras. 57 and 64 [AR Tab 1B]; *R. v. Duarte*, *supra*, paras. 12 to 18 [ABA Tab 4].
[61] *R. v. Duarte*, *supra*, paras. 12 to 18 [ABA Tab 4].

> [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.[62]

54. LaForme J.A. explained why the distinction drawn by the Crown, the motions judge and the majority of the Court of Appeal between the reasoning in *Duarte* and the case at bar does not withstand scrutiny:

> 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

[62] Reasons Court of Appeal, LaForme J.A. (dissent), para. 150 [AR Tab 1B]; See also *R. v. Craig, supra,* paras. 108 to 116 [ABA Tab 3].

> 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.[63]

(c) *R v. Pelucco* and Normative Considerations

55. In *R. v. Pelucco*, the British Columbia Court of Appeal was faced with the same issue raised in the case at bar. Groberman J.A., speaking for the majority, identified the central issue regarding standing as: "whether, in keeping with societal and legal norms in Canada, the sender of a text message should reasonably expect that the texts will remain private on the recipient's device."[64] 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. A sender will ordinarily have a reasonable expectation that a text message will remain private in the hands of its recipient."[65] Despite a dissenting opinion in the British Columbia Court of Appeal, no appeal was brought by the Crown from the decision. The majority's reasoning is sound.

56. The majority of the Ontario Court of Appeal, in the case at bar, said that *Pelucco* was wrongly decided, in part, because a presumptive approach to text messages is incompatible with the "totality of circumstances" test which is case or fact-specific. With respect, the majority's approach effectively would mean that the police are to remain largely unguided as to whether they will ordinarily require judicial authorization before seizing text messages from a cell phone. As LaForme J.A. observed, in most, if not all cases, the police will not know the content of the

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[63] Reasons Court of App eal, LaForme J.A. (dissent), paras. 151 to 154 [AR Tab 1B].
[64] *R. v. Pelucco*, *supra*, para. 63 [ABA Tab 19]; See also *R. v. Craig*, *supra*, paras. 117 to 124 [ABA Tab 3].
[65] *R. v. Pelucco, supra,* para. 68 [ABA Tab 19]

messages before accessing them. As a result, they will not know whether their search will intrude upon a protected privacy interest until it is too late. [66]

57. Moreover, recognition that text messages will ordinarily attract a reasonable expectation of privacy allows for the existence of evidence that displaces the ordinary. As Groberman J.A. stated at para. 65,

> While there will be situations in which the content of the text message or the situation negative these ordinary expectations, it seems to me that the social norm is to expect that text messages remain private communications between the sender and recipient

For example, the evidence may disclose that the sender invited the recipient to widely circulate their communications or did so himself/herself. This would support a finding that the sender had no subjective expectation of privacy and/or that any such subjective expectation was patently unreasonable. Of course, the contrary is true here. Mr. Marakah testified as to his privacy expectations, deleted his own emails (albeit imperfectly) in accordance with those expectations, and advised Winchester to do the same. Contrary to the majority of the Court of Appeal's reasons, his awareness of the possibility that his messages could end up in the hands of others (hence, his advice to Winchester) did not undermine his reasonable expectation of privacy. The possibility that one's legitimate privacy interests may be compromised cannot immunize the state from intruding on those privacy interests.[67] Otherwise, few, if any, private communications would be protected.

58. As already indicated, the existence or absence of a reasonable expectation of privacy involves, at its core, a normative judgment.[68] For the reasons given by LaForme J.A., relevant social norms support the view that people should be able to maintain a reasonable expectation in their text messages, even where they do not control the records of those messages.[69]

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[66] Reasons Court of Appeal, LaForme J.A. (dissent), paras. 179 to 183 [AR Tab 1B].
[67] *R. v. Tessling, supra,* para. 42 [ABA Tab 26]; Reasons Court of Appeal, LaForme J.A. (dissent), para. 162
[68] *R. v. Spencer, supra,* para. 18 [ABA Tab 24]; *R. v. Quesnelle, supra,* para. 44 [ABA Tab 21]; *R. v. Craig, supra,* para. 117 [ABA Tab 3].
[69] Reasons Court of Appeal, LaForme J.A. (dissent), paras. 155 to 163 [AR Tab 1B].

59. In support of the contrary position, the Crown relied upon s. 162.1 of the *Criminal Code* which was recently enacted by Parliament. It reads:

> 162.1 (1) Everyone who knowingly publishes, distributes, transmits, sells, makes available or advertises an intimate image of a person knowing that the person depicted in the image did not give their consent to that conduct, or being reckless as to whether or not that person gave their consent to that conduct, is guilty
>
> …
>
> Definition of *intimate image*
>
> (2) In this section, *intimate image* means a visual recording of a person made by any means including a photographic, film or video recording,
>
> (a) in which the person is nude, is exposing his or her genital organs or anal region or her breasts or is engaged in explicit sexual activity;
>
> (b) in respect of which, at the time of the recording, there were circumstances that gave rise to a reasonable expectation of privacy; and
>
> (c) in respect of which the person depicted retains a reasonable expectation of privacy at the time the offence is committed. [emphasis added]

This legislation is designed, in part, to protect against the publication and further dissemination of electronic photos consensually transmitted between individuals. The Crown argued that this legislation demonstrates that individuals cannot reasonably expect such information to remain private. The majority also noted that students are cautioned, in the educational system, about the dangers that their electronic communications may be misused. With respect, s. 162.1 expressly recognizes that a person depicted may retain a reasonable expectation of privacy despite his/her loss of control over the transmitted images. As LaForme J.A. stated at para. 159, this legislation reflects normative values that favour finding a reasonable expectation of privacy. Similarly, cautioning individuals about the potential misuse of their private communications does not rob them of the reasonable expectation that the state will not intrude, in its discretion, in their privacy interests. At para. 160 of his reasons, LaForme J.A. also provided additional examples of legislation that reflects society's recognition that individuals retain privacy interests which should be protected in information he/she does not control.

60. Like private voice communications, text messages can contain information of a highly personal and private nature that can lie at our biological core. There is no logical basis to permit

the police to arbitrarily seize this information without lawful authority. Indeed, this is precisely the type of information that it is fundamental for s. 8 of the *Charter* to protect. The effect of the majority's position, despite its articulation of a fact-specific analysis, is that a sender of text messages virtually never has a reasonable expectation of privacy in his/her messages once in the hands of the recipient. This is contrary to societal expectations and norms, and leads to highly problematic consequences.

(d) Implications of the Competing Outcomes

61. One problematic consequence of the Crown's (and the majority's) interpretation is illustrated in this very case. The text messages between Mr. Marakah and Mr. Winchester were unlawfully obtained both from Mr. Marakah's cell phone and from Mr. Winchester's cell phone. However, the same text messages could, on one hand, be excluded due to serious *Charter* violations, but on the other hand, not even be challenged. Police would remain free to search through the contents of a recipient's cell phone, without any lawful authority whatsoever, to collect evidence against the sender. LaForme J.A.'s comments in this regard are instructive:

> 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 CanLII 70 (SCC), [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 (CanLII), [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.

62. The Crown has raised concerns about the implications of the appellant's position: for example, requiring police to obtain a warrant to seize threatening texts. These concerns are unfounded. Although text messages ought to presumptively attract a reasonable expectation of privacy, there are circumstances where this expectation can be displaced by the facts in a particular case or through normative considerations.

63. The scenario involving threatening text messages arose in *R. v. Sandu*[70]. Both the majority in *R. v. Pelucco* and LaForme J.A. concluded that a reasonable expectation of privacy cannot be recognized in those circumstances. Groberman J.A. said this:

> 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

[70] *R. v. Sandu*, 2014 BCSC 2482.

> 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.[71]

Similarly, LaForme J.A. stated:

> [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. [Emphasis added]

II. The Motions Judge Found that Winchester's Cellular Phone was Unlawfully Searched and Seized

64. The motions judge found that Winchester's cellular phone was unlawfully searched and the appellant's private communications seized as a result. If, as submitted above, the appellant had a reasonable expectation of privacy in those communications, he had standing to challenge their admissibility, and rely upon the motions judge's findings as to how they were unlawfully obtained.[72]

65. The Crown relied exclusively on the police power to search incidental to arrest to attempt to justify the warrantless seizure and search of Mr. Winchester's iPhone. The motions judge properly identified the legal test[73] and explained why the Crown had failed to justify this warrantless search:

> 110 I am unable to conclude from the evidence that the search of Winchester's iPhone at 42 Division was a search incident to arrest. The Crown submits that the reason the phone was not looked at until it was returned to the station was because the arresting officers were otherwise engaged in executing the search warrants for Winchester's car and his girlfriend's residence. There is no evidence from the arresting officer concerning why he seized the phone. Nor is there any evidence of the searches themselves, what they entailed and the officers involved to enable me to reach such a conclusion.
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> 111 I also have a concern with the evidence as to how long after Winchester's arrest before his iPhone was looked at by Officer Wilson. He said he was not sure

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[71] *R. v. Pelucco, supra,* para. 61 [ABA Tab 19].
[72] *R. v. Shayesteh,* [1996] O.J. No. 3934, para. 40-41 [ABA Tab 22].
[73] The motions judge ruling predated the heightened standard for the search of cellphones pursuant to arrest that was articulated by this court in *R. v. Fearon*, [2014] S.C.J. No. 77 [ABA Tab 7]. The Crown conceded, on appeal, that the police conduct was did not comply with the *Fearon* decision.

> when or from whom he received the phone.
>
> …
>
> 113 I accept that the search does not have to be contemporaneous with the arrest to be a valid search incident to arrest. Time and distance may elapse from the arrest. Whether the search, when it occurs, can still be considered a search incident to arrest depends on the circumstances of the case.
>
> 114 As noted, in this case there is no evidence from the arresting officer or another officer who was at the scene as to why Winchester's phone could not have been searched at the time of arrest and at least rendered safe. Nor is there any evidence of why the delay of more than two hours occurred before the phone was looked at. Accordingly, in the absence of evidence and given the time period and distance which had elapsed since the arrest, I am not prepared to find that the search of Winchester's phone was incident to his arrest.

III. The Motions Judge Found that the Appellant's *Charter* Rights were Violated with Respect to the Evidence Seized From His Residence and His Person

66. In evaluating whether the text messages seized from Mr. Winchester's cell phone should be excluded, this Court should have regard to the motions judge's findings respecting the other evidence relied upon by the Crown.

67. As noted in the Overview, the appellant brought an application pursuant to sections 8 and 10 of the *Charter* before the motions judge. He sought to exclude two other categories of evidence:

(i) His statements to the police and the derivative evidence, namely three firearms seized as a result of those statements. He also challenged the voluntariness of the statements; and

(ii) Evidence seized from his residence pursuant to the warrant, and the contents of his cell phone (a Blackberry) seized from him personally, most particularly text messages exchanged with Mr. Winchester.

68. After the application commenced before the motions judge, the Crown abandoned its efforts to introduce the appellant's statements and the evidence derived therefrom.

69. In relation to the search and seizure of items from the appellant's residence, the motions judge held that Appendix "A" to the warrant authorized a limitless search, was overbroad, and invalidated the warrant. He stated:

> [62] The investigation involved in this case was not complex. The allegations were straightforward and the time period over which they occurred was relatively short. Nonetheless, there were, in my view, no meaningful limitations on the

> items to be searched for and seized in Mr. Marakah's residence either by time, by offence, or by offender. The police were not confined to search for or seize items connected to firearms or ammunition or any association between the alleged conspirators.
>
> [63] By authorizing the search of all documents or records of any form that evidence an association or non-association with the premises, without limitation to time, the Warrant authorized the search and seizure of virtually everything in Mr. Marakah's apartment. It follows that the Warrant was overly broad.[74]

70. The motions judge also held that the search warrant (even if it had been valid) would not have authorized the seizure of the appellant's Blackberry. (That was the only basis upon which the Crown at trial purported to justify this seizure.) Appendix "A" specifically excluded the seizure of any cellular phone, Blackberry or other listed device found on the person of anyone found on the premises. The motions judge stated:

> [80] To determine this issue, it is necessary to resolve the factual differences earlier noted in the evidence concerning what occurred when the police entered Mr. Marakah's residence on November 6, 2012. In that regard, I accept Mr. Marakah's version of the events as they unfolded at the time of the police entry into his apartment and his arrest. I do not accept Officer Sukumaran's evidence about what he saw. To be charitable, he clearly did not have a good recollection of what occurred. He remembered seeing the phone on the table but had no recollection of the arrest. He was clearly mistaken about there being an iPhone present in the residence. I was also not impressed that he had no information about the "possible" password for the Blackberry which he advised Tech Crimes about when he delivered the phone later that day. I did not find his evidence to be reliable.
>
> [81] Based on the wording of the exclusion in Item 6 in Appendix "A", the operable time to determine where the Blackberry was in the residence was when it was found, not when the police breached the front door. Based on Mr. Marakah's evidence, I find that his Blackberry was on his person at the time he was arrested. It was in his hand when the police entered the room where he was. It only ended up on the floor because it was knocked from his hand by an officer.[75]

71. The motions judge concluded that the seizures from the appellant's residence and from his person were warrantless, and a violation of his s. 8 rights. After he conducted a s. 24(2) analysis, the motions judge excluded the evidence seized from the appellant's residence and from him personally.

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[74] Reasons for Decision on the *Charter* Applications, paras. 62 to 63 [AR Tab 1A].
[75] Reasons for Decision on the *Charter* Applications, paras. 80 to 81 [AR Tab 1A].

IV. The Text Messages Seized from Winchester's IPhone Ought to Be Excluded: s. 24(2)

V.

72. Of course, admissibility of this evidence requires the Court to consider the three factors articulated in *R. v. Grant*[76]: the seriousness of the *Charter*-infringing state conduct; the impact of the breach on the applicant's *Charter* rights; and society's interest in the adjudication of the case on its merits.

(i) The seriousness of the *Charter*-infringing conduct

73. Where the police conduct a warrantless search and the Crown fails to discharge its onus of demonstrating that the search was reasonable, there is a presumption that the breach is serious.[77] That presumption has not been displaced here.[78]

74. Further, the obligations upon police respecting searches incident to arrest were well settled at the material time. (Subsequently, the Supreme Court of Canada, in *R. v. Fearon*, articulated a special standard for searching cell phones. The breach here, as found by the motions judge, did not depend on any special standard, but on settled jurisprudence.) As reflected in this Court's jurisprudence, s. 24(2) of the *Charter* should not be used as a matter of course to excuse conduct which has in the past been found to be unlawful.[79] The police must be taken to be aware of previous decisions of the Court and it is not open to officers to test the limits by ignoring constraints to the scope of their power. Good faith cannot be pleaded in such circumstances. [80] As also reflected by Cory J.A. in *R. v. Silveira*, it will be rare that once the permissible scope of police conduct is defined, a future violation will nonetheless result in the admission of the evidence obtained as a result.[81] Here, the Crown tendered no evidence from the arresting officer purporting to explain why he seized the cell phone or what he did with it. The officer in charge, who ordered the initial search of the cell phone's contents could not even

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[76] *R. v. Grant*, [2009] 2 S.C.R. 353 [ABA Tab 10].
[77] *R. v. Bartle*, [1994] 3 S.C.R. 173, para. 51 [ABA Tab 1]; *R. v. Haas* (2005), 200 C.C.C. (3d), 81 (ONCA), para. 40 [ABA Tab 11].
[78] *R. v. Pino*, 2016 ONCA 389, para. 96 [ABA Tab 20].
[79] *R. v. Silveira*, [1995] 2 S.C.R 297, para. 167 [ABA Tab 23].
[80] *R. v. Kokesch*, [1990] 3 SCR 3, paras. 54 to 56 [ABA Tab 14].
[81] *R. v. Silveira*, *supra*, para. 167 [ABA Tab 23].

indicate who provided the cell phone to him.[82] Nor was the Tech Unit provided with any rationale for its wholesale search of the contents of the cell phone.

75. Second, there was a pattern of disregard of the appellant's s. 8 rights. Every item seized in connection with the appellant's case was obtained in violation of the *Charter*. While the trial judge did not view the conduct as bad faith, the additional violation affects the overall seriousness of the police conduct.[83] As LaForme J.A. held, given the totality of breaches, the police conduct amounted to negligence:

> As noted by this court in *R. v. Dhillon*, 2010 ONCA 582 (CanLII), 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 CanLII 838 (SCC), [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.[84]

(ii) Impact of the breach on the appellant's Charter protected interests

76. The search and seizure of the appellant's private text communications had a serious impact on the appellant's *Charter* protected interests. There is a high expectation of privacy in

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[82] Reasons for Decision on the *Charter* Applications, paras. 15 and 115 [AR Tab 1A].
[83] *R. v. Pino*, *supra*, para. 101 [ABA Tab 20].
[84] Reasons Court of Appeal, LaForme J.A. (dissent), para. 192 [AR Tab 1B].

such private communications.[85] It would be anomalous to conclude (given the exclusion of the same text messages seized from the appellant) that the search and seizure of the text messages extracted unlawfully from Mr. Winchester's I-phone did not seriously impact on the appellant's *Charter* interests.

77. Even if this Court finds that there is a reduced expectation of privacy in the messages on Winchester's phone, this does not mean that an unjustified search is permissible.[86] As Iacobucci J. noted in *R. v. Mann*[87], a minimally intrusive search "must be weighed against the absence of any reasonable basis for justification."[88] There was no justification provided for the search of Winchester's telephone and this factor ought to militate towards exclusion.

(iii) Society's interest on adjudication on the merits

78. The evidence sought to be excluded is reliable. Nonetheless, the motions judge found, in relation to the physical items seized from the appellant's residence and the text messages extracted from the appellant's Blackberry that the evidence should nonetheless be excluded. In fairness, in so concluding, the motions judge did reflect that the evidence was not crucial to the Crown's case since he was admitting into evidence, based on the appellant's lack of standing, the text messages extracted from Winchester's iPhone. Assuming the appellant's success before this Court on the issue of standing, the Crown will undoubtedly submit that the text messages are now crucial to its case.

79. In the circumstances of this case, the importance of this evidence cannot favour admissibility under s. 24(2). Its importance here is explained by the fact that every other piece of relevant evidence in relation to the appellant was obtained as a result of multiple violations of the *Charter*.[89] The Crown's position would be analogous to the man who kills both parents and then pleads to the Court for mercy because he is an orphan. These text messages are so crucial to the Crown's case because the unlawful activity of the police made them crucial.

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[85] *R. v. Finlayson*, 2015 ONSC 3476 , para. 13 [ABA Tab 8].
[86] *R. v. Harflett*, 2016 ONCA 248, para. 47 [ABA Tab 12].
[87] *R. v. Mann*, [2004] 3 S.C.R. 59 [ABA Tab 15].
[88] *R. v. Mann, supra*, para. 56 [ABA Tab 15].
[89] Reasons Court of Appeal, LaForme J.A. (dissent), paras. 193 to 194 [AR Tab 1B].

80. The appellant faces serious charges. However, as explained in *R. v. Grant*, the seriousness of the offence "has the potential to cut both ways."[90] While the public has a heightened interest in a determination on the merits, it also has "a vital interest in having a justice system that is above reproach, particularly where the penal stakes are high."[91] Admission of the text messages in the circumstances of this case would effectively immunize the authorities from accountability. It would impermissibly allow the seriousness of the offence and the reliability of the evidence to "overwhelm the s. 24(2) analysis."[92]

81. LaForme J.A. provided detailed reasons for why the remaining evidence in this case ought to be excluded.[93] The appellant adopts and relies upon those reasons.

PARTS IV & V – COSTS AND ORDER REQUESTED

82. It is respectfully requested that the appeal herein be allowed, the text messages seized from Winchester's iPhone be excluded and acquittals entered.

Dated at the City of Toronto, in the Province of Ontario, this 25th day of October, 2016.

SIGNED BY

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[90] *R. v. Grant*, *supra*, para. 84 [ABA Tab 10].
[91] *R. v. Grant*, *supra*, para. 84 [ABA Tab 10].
[92] *R. v. Harrison*, *supra,* para. 40 [ABA Tab 13]; *R. v. McGuffie*, [2016] O.J. No. 2504 (C.A.), paras. 73 to 74 [ABA Tab 16].
[93] Reasons Court of Appeal, LaForme J.A. (dissent), paras. 188 to 195 [AR Tab 1B].

PART VI – TABLE OF AUTHORITIES

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PART VI – STATUTORY PROVISIONS

***Charter of Rights and Freedoms*, ss. 8, 24(2)**

Search or seizure

8. Everyone has the right to be secure against unreasonable search or seizure.

Exclusion of evidence bringing administration of justice into disrepute

24. (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

Fouilles, perquisitions ou saisies

8. Chacun a droit à la protection contre les fouilles, les perquisitions ou les saisies abusives.

Irrecevabilité d'éléments de preuve qui risqueraient de déconsidérer l'administration de la justice

24. (2) Lorsque, dans une instance visée au paragraphe (1), le tribunal a conclu que des éléments de preuve ont été obtenus dans des conditions qui portent atteinte aux droits ou libertés garantis par la présente charte, ces éléments de preuve sont écartés s'il est établi, eu égard aux circonstances, que leur utilisation est susceptible de déconsidérer l'administration de la justice.

***Criminal Code*, R.S.C., 1985, c. C-46, ss. 162.1, 278.1**

Publication, etc., of an intimate image without consent

162.1 (1) Everyone who knowingly publishes, distributes, transmits, sells, makes available or advertises an intimate image of a person knowing that the person depicted in the image did not give their consent to that conduct, or being reckless as to whether or not that person gave their consent to that conduct, is guilty

(a) of an indictable offence and liable to imprisonment for a term of not more than five years; or

(b) of an offence punishable on summary conviction.

Definition of *intimate image*

(2) In this section, *intimate image* means a visual recording of a person made by any

Publication, etc. non consensuelle d'une image intime

162.1 (1) Quiconque sciemment publie, distribue, transmet, vend ou rend accessible une image intime d'une personne, ou en fait la publicité, sachant que cette personne n'y a pas consenti ou sans se soucier de savoir si elle y a consenti ou non, est coupable :

a) soit d'un acte criminel passible d'un emprisonnement maximal de cinq ans;

b) soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire.

Définition de *image intime*

(2) Au présent article, *image intime* s'entend d'un enregistrement visuel — photographique, filmé, vidéo ou autre — d'une personne, réalisé par tout moyen, où

means including a photographic, film or video recording,

(a) in which the person is nude, is exposing his or her genital organs or anal region or her breasts or is engaged in explicit sexual activity;

(b) in respect of which, at the time of the recording, there were circumstances that gave rise to a reasonable expectation of privacy; and

(c) in respect of which the person depicted retains a reasonable expectation of privacy at the time the offence is committed.

Defence

(3) No person shall be convicted of an offence under this section if the conduct that forms the subject-matter of the charge serves the public good and does not extend beyond what serves the public good.

Question of fact and law, motives

(4) For the purposes of subsection (3),

(a) it is a question of law whether the conduct serves the public good and whether there is evidence that the conduct alleged goes beyond what serves the public good, but it is a question of fact whether the conduct does or does not extend beyond what serves the public good; and

(b) the motives of an accused are irrelevant.

Definition of "record"

278.1 For the purposes of sections 278.2 to 278.9, *record* means any form of record that contains personal information for which there is a reasonable expectation of privacy and includes, without limiting the generality of the foregoing, medical, psychiatric, therapeutic, counselling, education, employment, child welfare, adoption and

celle-ci :

a) y figure nue, exposant ses seins, ses organes génitaux ou sa région anale ou se livrant à une activité sexuelle explicite;

b) se trouvait, lors de la réalisation de cet enregistrement, dans des circonstances pour lesquelles il existe une attente raisonnable de protection en matière de vie privée;

c) a toujours cette attente raisonnable de protection en matière de vie privée à l'égard de l'enregistrement au moment de la perpétration de l'infraction.

Moyen de défense

(3) Nul ne peut être déclaré coupable d'une infraction visée au présent article si les actes qui constitueraient l'infraction ont servi le bien public et n'ont pas outrepassé ce qui a servi celui-ci.

Question de fait et de droit et motifs

(4) Pour l'application du paragraphe (3) :

a) la question de savoir si un acte a servi le bien public et s'il y a preuve que l'acte reproché a outrepassé ce qui a servi le bien public est une question de droit, mais celle de savoir si l'acte a ou n'a pas outrepassé ce qui a servi le bien public est une question de fait;

b) les motifs du prévenu ne sont pas pertinents.

Définition de « dossier »

278.1 Pour l'application des articles 278.2 à 278.9, *dossier* s'entend de toute forme de document contenant des renseignements personnels pour lesquels il existe une attente raisonnable en matière de protection de la vie privée, notamment : le dossier médical, psychiatrique ou thérapeutique, le dossier tenu par les services d'aide à l'enfance, les services

social services records, personal journals and diaries, and records containing personal information the production or disclosure of which is protected by any other Act of Parliament or a provincial legislature, but does not include records made by persons responsible for the investigation or prosecution of the offence.

sociaux ou les services de consultation, le dossier relatif aux antécédents professionnels et à l'adoption, le journal intime et le document contenant des renseignements personnels et protégé par une autre loi fédérale ou une loi provinciale. N'est pas visé par la présente définition le dossier qui est produit par un responsable de l'enquête ou de la poursuite relativement à l'infraction qui fait l'objet de la procédure.