Court File Number: 37118

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

B E T W E E N:

NOUR MARAKAH

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

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PART I. OVERVIEW

1. This case raises the issue of whether there is a reasonable expectation of privacy in text messages once delivered to the recipient's device and, in turn, whether there are constitutional privacy protections for text messages, which require the State to conform to the section 8 *Charter* right of individuals to be free from unreasonable search and seizure.

2. This Honourable Court has recognized that privacy "is essential for the well-being of the individual" and lies at the heart of a democratic state.[1] The Court has clarified that "the broad and general right to be secure from unreasonable search and seizure guaranteed by section 8 is meant to keep pace with technological development and, accordingly, to ensure that we are ever protected against unauthorized intrusions upon our privacy by agents of the state, whatever technical form the means of invasion might take."[2] In *Telus*, all three opinions of this Court recognized that text messages are private communications.[3] This Court has recognized the intrusive nature of searching a personal computer specifically, because they contain our most intimate correspondence[4] and has recognized that searches of personal digital devices, such as cell phones, risk serious encroachments on privacy.[5]

3. However, we respectfully argue that the lower court, in the case at bar, has failed to recognize the objective reasonable expectation of privacy in text messages. Text messages are private communications between sender and recipient. They are no different than a voice telephone call, in that regard. The lower court's failure to recognize the privacy interests at stake in text messages opens the door for unauthorized, unreasonable search and seizure.

4. This Honourable Court has recognized that technological innovation "has incrementally separated the close link between property and privacy."[6] Property-based factors should not overshadow the inherent privacy rights of individuals in their own communications. Nor should the technological **mode** of communication drive the reasonable expectation of privacy. This Honourable Court should affirm that there is a reasonable expectation of privacy in text message

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[1] *R v Dyment*, [1988] 2 SCR 417 at para 17.
[2] *R v Wong* [1990] 3 SCR 36 at para 9.
[3] *R v TELUS Communications*, 2013 SCC 16 at para 12 per Abella J, at para 67 per Moldaver J, and at para 135 per Cromwell J [*Telus*].
[4] *R. v Morelli*, 2010 SCC 8 at para 105 [*Morelli*].
[5] *R v Fearon*, 2014 SCC 77 at paras 54, 104 [*Fearon*].
[6] *R v Shearing*, [2002] 3 SCR 33 at para 91[*Shearing*].

conversations, including in delivered text messages.

5. Once the reasonable expectation of privacy is recognized, the section 8 right is engaged. A sender or a recipient would have standing to challenge an unauthorized search and seizure. This Honourable Court should clarify that the standing test is capable of keeping pace with evolving claims of informational privacy, and the following elements of the standing test continue to apply:

(a) Courts ought to continue to have regard to "the totality of the circumstances," which by definition precludes a single factor from being determinative;

(b) Courts ought to recognize that the relevant factors may differ depending upon the particular context. Control factors, which relate to the means of communication rather than the communication itself have little or no role to play in informational privacy cases; and

(c) The claimant's subjective privacy interest and expectation in the information at issue – including whether such subjective interest and expectation was objectively reasonable and whether the information relates connects to an individual's biographical core – are the factors which ought to drive the Courts' analysis.

PART II. ARGUMENTS

THE CASELAW ON REASONABLE EXPECTATION OF PRIVACY AND STANDING

6. Standing in privacy cases has two parts: (i) Once an individual has established an objectively reasonable expectation of privacy in a communication, (ii) then that individual has standing to challenge the section 8 constitutionality of a search or seizure of the communication. Whether a reasonable expectation of privacy exists is a determination to be made by the court at the first stage of the analysis.

7. This Honourable Court has consistently held, since *R v Edwards*,[7] that a reasonable expectation of privacy should be assessed in light of the "totality of the circumstances."[8] In

[7] [1996] 1 SCR 128 [*Edwards*].

[8] *Edwards*, *supra* at paras 31, 45.

privacy expectation assessments, the particular "circumstances" have dictated varying factors as relevant to the particular assessment before the Court. In *Edwards*, the accused challenged a drug search at his girlfriend's apartment. This Court listed factors to evaluate the totality of the circumstances which were attuned to that context. Five of the seven non-exhaustive factors this Court listed were property-based. [9] In other words, they can only be satisfied in property rights cases involving physical spaces or objects.

8. In *R v Tessling*,[10] which dealt with information captured by a thermal camera, this Court re-configured the factors it considered as four broad, initial lines of inquiry. Two of these were directed at teasing out the nature of the privacy interest at stake[11] and two were re-articulations of the neutral factors from *Edwards*[12] with a more precise list of factors to evaluate the objective reasonableness of the expectation of privacy.[13] Then, in *R v Patrick*,[14] which dealt with informational privacy in garbage left on the street, this Court used the *Edwards* "totality of circumstances" test and the *Tessling* questions,[15] but also listed a further, different series of sub-factors to assess the objective reasonableness of the expectation of privacy.[16]

9. It is this simultaneous insistence on the totality of circumstances approach[17] and

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[9] The factors are: (a) presence at the time of the search; (b) possession or control of the place searched; (c) ownership of the property or place; (d) historical use of the property item; (e) ability to regulate access. The remaining more general factors are (f) a subjective expectation of privacy and (g) an objective expectation of privacy. See *Edwards* at para 45.

[10] 2004 SCC 67 [*Tessling*].

[11] *Tessling*, *supra* at para 31. Binnie, J. first asked (a) what the subject matter of the thermal image was and (b) whether the respondent had a direct interest in the subject matter of the thermal image where directed at teasing out the nature of the privacy interest at stake.

[12] *Tessling*, *supra* at para 31. Binnie, J. then asked (c) whether there was a subjective expectation of privacy and (d) whether that expectation was objectively reasonable.

[13] The factors set out by Binnie, J. to evaluate the objective reasonable of the claim are: (a) the place where the alleged search occurred; (b) whether the information was in public view; (c) whether the information had been abandoned; (d) whether the information was in the hands of third parties and, if so, whether it was subject to an obligation of confidentiality; (e) whether the investigative technique was intrusive, or objectively unreasonable; and (d) whether the information exposed any of the intimate details of the accused's lifestyle or was information of a biographical nature, see *Tessling* at para 31.

[14] 2009 SCC 17 [*Patrick*].

[15] *Patrick*, *supra* at para 27.

[16] The factors set out by Binnie, J. are (a) the place the alleged search occurred, whether the informational content was in public view; (b) whether the informational content had been abandoned; (c) whether it was already in the hands of third parties and if so whether it was subject to an obligation of confidentiality; (d) whether the police technique was intrusive; (e) was the use of the evidence gathering technique unreasonable; and (f) whether the information exposed any intimate details of the appellant's lifestyle or information of a biographic nature. See *Patrick*, *supra* at para 27.

[17] *Edwards*, *supra* at paras 31, 45; *Tessling*, *supra* at paras 19, 31; *Patrick*, *supra* at paras 26, 37, 45, 68; *R v Cole*, 2012 SCC 53 at paras 39-40 [*Cole*].

reliance on changing factors that has, respectfully, been misinterpreted and misapplied by the lower courts, leading some to recognize that the originator of a text message maintains a privacy interest in the recipient's copy of the message[18] and others not. [19]

10. In the case at bar, the Ontario Court of Appeal's approach to the analysis fundamentally weakens the *Charter*'s protection against unreasonable search and seizure. Though the Majority acknowledged the totality of the circumstances principle, they employed a particularly property-centric interpretation of the *Edwards/Tessling* test, which effectively precluded them from considering all the relevant circumstances. The Majority read this Court's jurisprudence as directing them to focus on **control** and **access** as fundamental to informational privacy.[20] Though MacPherson, J., writing for the Majority, noted that the significance of each of the factors affirmed in *Patrick* will vary depending on the facts of the case, he also noted that "the manner in which one elects to communicate must affect the degree of privacy protection one can reasonably expect" and "the ability to control access to the information is of central importance to the assessment of the privacy claim."[21] Thus, he concluded that the fact that the accused had **no ownership interest over the phone** from which the text was recovered and that there was **no obligation of confidentiality** between the parties vitiated the reasonable expectation of privacy.[22]

11. Any individual who communicates with another person (i.e. the intended recipient) – whatever the mode of communication – always loses control over what the intended recipient will do with that information. This is as true of oral phone conversations as it is about text-based conversations, regardless of the differences in the transmission process. [23] To focus on the loss of control over a sent text message is to employ the very risk analysis this Court rejected in *R v Duarte*.[24] The mode of communication should not determine whether there is a reasonable expectation of privacy in the communication.

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[18] See e.g. *R v S.M.*, 2012 ONSC 2949, *R v Pelucco*, 2015 BCCA 370; *R v Craig*, 2016 BCCA 154.

[19] See e.g. *R. v. Pammett*, 2014 ONSC; *R. c Noël*, 2013 QCCQ 15544; *R v Marakah*, 2016 ONCA 542 at para 58 [*Marakah*].

[20] *Marakah*, *supra* at para 58.

[21] *Marakah*, *supra* at paras 57, 65, 63.

[22] *Marakah*, *supra* at paras 57, 64.

[23] See the CCLA's Factum in the companion case *R v Jones* for more on the practices and norms around text messages.

[24] [1990] 1 SCR 30 at para 21 [*Duarte*]. As LaForest, J. explained, the rationale for regulating the State's access to communications that are meant to be private is not about addressing "the risk that someone will repeat our words but [rather about] the much more insidious danger inherent in allowing the state, in its unfettered discretion, to record and transmit our words."

CLARIFYING THE TOTALITY OF CIRCUMSTANCES TEST

12. Endorsing the lower court's determinative focus on control would permit technological innovation to erode privacy rights and to undermine the constitutional section 8 protection against unreasonable search and seizure. As Abella, J. explained in *Telus*, "[t]ext messaging is, in essence, an electronic conversation. Technical differences inherent in new technology should not determine the scope of protection afforded to private communications."[25] By definition, digital information – which can simultaneously be stored in numerous locations and accessed without physical proximity – defies the traditional notions of ownership and control applied by the court below. To afford the same protection to these electronic means of communication necessarily requires a move beyond property-based factors. After all, the *Charter* protects people, not places.[26]

13. We respectfully argue that when a privacy claim is asserted, a Court must first determine whether a reasonable privacy interest exists and this assessment requires a consideration of the "totality of circumstances." The totality of circumstances test was intended to be adapted to the nature of the specific claim it was addressing. An individual's interest in the privacy of his or her body or a particular physical location may be effectively assessed in spatial terms, but the same cannot be said of informational privacy. The right of "individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others,"[27] by definition, cannot be assessed through physical factors. It is the act of communicating privately, not the means of doing so that engages *Charter* protection.

14. Parallel to the jurisprudence of standing cases, there is a line of informational privacy claim cases in which this Honourable Court declined to explicitly deal with standing, or to formally address the *Edwards*/*Tessling* factors , yet still made decisions based on two essential principles:

(a) A direct interest in the information, including if the person is its author or the information is about them, supports a reasonable expectation of privacy.

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[25] *Telus*, *supra* at para 5.

[26] *Hunter et al v Southam Inc.*, [1984] 2 SCR 145 at page 159 [*Hunter*]; *Dyment*, *supra* at para 20; *Edwards*, *supra* at para 29; *Tessling*, *supra* at para 16.

[27] *Tessling*, *supra* at para 23.

(b) Biographical core information supports a reasonable expectation of privacy.

15. Explicitly and implicitly, these principles have properly guided this Court's approach to standing in informational privacy cases for almost three decades, for example:

(a) *R v A.M.*[28] dealt with the inference to be made from a sniffer dog's positive reaction to the accused's backpack that he had come into contact with a controlled substance. The information **originated** from the accused. Standing was granted in a manner consistent with the principle that information about an individual's **biographical core** invokes a reasonable expectation of privacy.[29] If control had been the deciding factor, standing would not have been granted. The backpack was left unattended. The property in which the information was contained was not in the possession or control of the accused.[30]

(b) *Cole* dealt with internet browsing history stored on a work-issued laptop issued to the accused, a school teacher. The information **originated** from the accused. Standing was granted in a manner consistent with the principle that information about an individual's **biographical core** invokes a reasonable expectation of privacy.[31] If control had been a determinative factor, standing would not been granted. The accused voluntarily relinquished possession and control to a technician who discovered the information. The laptop was also school property, thus giving the school a possessory interest.[32]

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[28] 2008 SCC 19, [*A.M.*].

[29] *A.M.*, *supra* at paras 48-49.

[30] *A.M.*, *supra* at para 48, where LeBel, J. discusses how an item that is not in the possession or control of the accused at the time of the search does not mean the accused automatically forfeits its expectation of privacy.

[31] *Cole*, *supra* at paras 46-48.

[32] *Cole*, *supra* at para 67. Fish, J. explained that, even though the school was in lawful possession of the laptop, this did not give it derivative authority and did not negate the accused's expectation of privacy in providing the laptop to the police.

(c) *R v Spencer*[33] dealt with association between subscriber information and a computer whose IP address had been used to access and store child pornography. The information **originated** from the accused. It revealed biographical core information. Standing was granted.[34] This Court granted standing in a manner consistent with the principle that information about an individual's **biographical core** invokes a reasonable expectation of privacy. If control had been determinative, standing would not have been granted. The information was in the lawful possession and control of the Internet Service Provider.[35]

16. This line of cases presents a clear jurisprudential direction for informational privacy claims, which ought to be articulated to ensure lower Courts apply this same reasoning consistently. To ensure that informational privacy rights are appropriately and strongly protected, this Court should clarify the standing test for information privacy. This test should:

(a) affirm the importance of the totality of circumstances approach;

(b) give no or reduced weight to control and access factors; and

(c) direct courts to focus on (i) the nature of the claimant's direct interest in the information at issue, including whether that person is its author or the information is about them, and (ii) whether the information at issue speaks to the person's biographical core, broadly interpreted, to include intimate details that reveal lifestyle decisions.

THIRD PARTIES

17. This refined approach is further supported by the jurisprudence around the disclosure of third party records,[36] which draws on this Court's section 8 *Charter* jurisprudence, generally, and

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[33] 2014 SCC 43 [*Spencer*].

[34] *Spencer*, *supra* at paras 27-32.

[35] *Spencer*, *supra* at para 19.

[36] *Criminal Code*, RSC 1985, c C-46, as amended at section 287.1.

on *Edwards*, *Tessling* and *Patrick*, specifically.[37]

18. In *R v Quesnelle*,[38] this Court dealt with whether there was a reasonable expectation of privacy in a police occurrence report. Karakatsanis, J. was emphatic that "a reasonable expectation of privacy is not an all or nothing concept."[39] Disclosure to a third party does not destroy the privacy interest[40] and reasonable expectations of privacy are not confined to trust-like, confidential or therapeutic relationships.[41] The loss of control through disclosure to a third party and the absence of an obligation of confidentiality, factors cited as dispositive by the Court of Appeal in *Marakah*,[42] were both rejected by the court in *Quesnelle*[43].

19. In *Shearing*, this Court dealt with the admission into evidence of the complainant's diary, which she had lost 22 years prior.[44] Contrary to *Marakah*, in which losing control over the information proved determinative,[45] in *Shearing*, Binnie, J. held that "loss of a physical possession or ownership will not necessarily defeat a person's privacy interest in personal information contained in the document in question."[46]

EVOLVING PRIVACY TORTS

20. This dissociation of privacy from property is further supported by evolving civil privacy torts, which draw on the section 8 *Charter* jurisprudence and are strong indicators of social norms.[47] Reasonable expectations of privacy apply to everyone, not just those accused of crimes. The same behavior may be the subject of criminal or civil law. Coherence in the Courts' approach to privacy across these contexts is necessary.

21. In *Tsige*, the court was driven by the need to respond to technological change in

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[37] *Quesnelle*, *supra* at para 27.
[38] 2014 SCC 46 [*Quesnelle*].
[39] *Quesnelle*, *supra* at para 29.
[40] *Quesnelle*, *supra* at para 37.
[41] *Quesnelle*, *supra* at para 27, 38.
[42] *Marakah*, *supra* at para 57.
[43] *Quesnelle*, *supra* at para 37.
[44] *Shearing*, *supra* at para 86. In *Shearing*, this Court took care to distinguish between the production context from *R v O'Connor*, [1995] 4 SCR 411 cases and the admissibility line of cases flowing from *R v Osolin*, [1993] 4 SCR 595.
[45] *Marakah*, *supra* at para 57.
[46] *Shearing*, *supra* at para 92.
[47] *Jones v Tsige* 2012 ONCA 32 at paras 39-41, 45-46 [*Tsige*].

recognizing a privacy tort of intrusion upon seclusion.[48] This tort now applies to "[i]ntrusions into matters such as one's financial or health records, sexual practices and orientation, employment, diary or **private correspondence** that, viewed objectively on the reasonable person standard, can be described as highly offensive" [emphasis added].[49] The Court recognized the need for an even greater focus on protecting privacy as the means of intrusion grew.

22. In *Jane Doe*, the Ontario Superior Court affirmed that sharing information with one party was not a waiver of a privacy right vis-à-vis anyone else in recognizing a privacy tort.[50] The complainant, whose ex-boyfriend had posted an intimate video of her on a pornographic site without her knowledge or consent, would have been without a remedy if, by sending the video to one person, she had given up her reasonable expectation of privacy.

LONG-TERM CONSEQUENCES

23. New modes of private communication deserve the same principled protection we have long granted to more traditional forms or modes of communication. In an age of increasingly pervasive use of electronic communication, every person who uses text messages to conduct a private conversation, whether or not they are accused of a crime, is impacted by the Court's analysis in this case.

24. The Crown's suggestion that educational efforts in schools to warn about the dangers of "sexting" removes any reasonable expectation of privacy is misplaced. Privacy is normative, not descriptive. The fact that educators are concerned that information children send to one another may be shared, with negative consequences, does not determine the standard of privacy interest in our society. For example, similar efforts have been undertaken to educate the young around risky sexual behaviors,[51] but preventative education does not move the legal yardstick with respect to the law of consent.

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[48] *Tsige*, *supra* at para 67. This tort has been tort has been made out when opening private or personal mail or examining a bank account (*Tsige*, *supra* at para 20); conducting a credit bureau check without consent (*Somwar v. McDonalds Restaurants of Canada Ltd* [2006] OJ No 64 (QL)), and when an ex-boyfriend posted an intimate video sent to him electronically on a pornography site without the sender's knowledge or consent (*Jane Doe 464533 v N.D.* 2016 ONSC 541 [*Jane Doe*]).

[49] *Tsige*, *supra* at para 72.

[50] *Jane Doe*, *supra*.

[51] Ontario, Ministry of Education, *Ontario Curriculum Grades 9 to 12, Health and Physical Education, 2015, Revised*, online: Ministry of Education <http://www.edu.gov.on.ca/eng/curriculum/secondary/health9to12.pdf>.

25. The Ontario Court of Appeal's approach also invites an overreach in police powers. The need to prevent systematic abuse underlies the requirement for prior authorization. First, in cases in which both parties to a text conversation are accused of crimes, it permits and could lead to the police to search both parties without proper authorization and use the texts recovered from one individual's phone as evidence in the other's trial, and vice versa. Second, in cases where one or more of the parties to a text conversation is not accused of a crime, it permits and could lead to searches of those parties to obtain text messages of interest from the recipients rather than senders. This would introduce a loophole into section 8 *Charter* protection with adverse consequences that would reach far beyond this case.

PART III. CONCLUSION

26. Years earlier, this Court noted that "[w]hatever evolution occurs in the future will have to be dealt with by the Courts step by step. Concerns should be addressed as they truly arise."[52] The *Marakah* case brings this matter squarely before the court. Informational privacy claims are increasingly important as technology facilitates private communications. The current standing test is ill-adapted to these claims as this case illustrates. Text messaging has become a ubiquitous form of communication in Canadian society. Clear guidance from this Court is needed to ensure that the authors of text message communications or those whose biographical core is the subject of private communications are able to assert standing and avail themselves of *Charter* protection. If the decision below stands and there is no reasonable expectation of privacy in a text message once it is sent, it will represent palpable erosion in the zone of privacy each Canadian carries with them.

ALL OF WHICH is respectfully submitted by,

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[52] *Tessling*, *supra* at para 55.

PART IV. TABLE OF AUTHORITIES

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