Court File No. 37971

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

B E T W E E N

TOM LE

Appellant (Appellant)

– and –

HER MAJESTY THE QUEEN

Respondent (Respondent)

– and –

CANADA WITHOUT POVERTY, CANADIAN MENTAL HEALTH ASSOCIATION MANITOBA AND WINNIPEG, ABORIGINAL COUNCIL OF WINNIPEG INC. and END HOMELESSNESS WINNIPEG INC.
CANADIAN CIVIL LIBERTIES ASSOCIATION
CANADIAN MUSLIM LAWYERS ASSOCIATION,
CRIMINAL LAWYERS' ASSOCIATION OF ONTARIO
DIRECTOR OF PUBLIC PROSECUTIONS
FEDERATION OF ASIAN CANADIAN LAWYERS and SOUTHEAST ASIAN LEGAL CLINIC
JUSTICE FOR CHILDREN AND YOUTH
SCADDING COURT COMMUNITY CENTRE
URBAN ALLIANCE ON RACE RELATIONS

Interveners

FACTUM OF THE INTERVENER CRIMINAL LAWYERS' ASSOCIATION OF ONTARIO

[*Rules of the Supreme Court of Canada,* Rules 37 and 42]

JONATHAN DAWE & SHERIF M. FODA
DAWE & DINEEN
171 John Street, Suite 101
Toronto, Ontario M5T 1X3

Tel.: (416) 649-5058
Fax: (416) 352-7733
email: jdawe@dawedineen.com

COUNSEL FOR THE INTERVENER CRIMINAL LAWYERS' ASSOCIATION OF ONTARIO

MOIRA DILLON
SUPREME LAW GROUP
900 - 275 Slater Street
Ottawa, Ontario K1P 5H9

Tel: (613) 691-1224
Fax: (613) 691-1338
email: mdillon@supremelawgroup.ca

OTTAWA AGENT FOR THE INTERVENER CRIMINAL LAWYERS' ASSOCIATION OF ONTARIO

EMILY LAM & SAMARA SECTER
GREENWOOD LAM LLP
65 Queen Street West, Suite 1240
Toronto, Ontario M5H 2M5

Tel: (416) 686-4612
Fax: (416) 362-3612
email: emily@greenwoodlam.com

COUNSEL FOR THE APPELLANT

COLLEEN BAUMAN
GOLDBLATT PARTNERS LLP
500-30 Metcalfe St.
Ottawa, Ontario K1P 5L4

Tel: (613) 482-2463
Fax: (613) 235-3041
email: cbauman@goldblattpartners.com

OTTAWA AGENT FOR THE APPELLANT

SANDY TSE & AMY ROSE
ATTORNEY GENERAL OF ONTARIO
Crown Law Office – Criminal
720 Bay Street, 10th Floor
Toronto, Ontario M5G 2K1

Telephone: (416) 326-4606
fax: (416) 326-4656
email: sandy.tse@ontario.ca

COUNSEL FOR THE RESPONDENT

NADIA EFFENDI
BORDEN LADNER GERVAIS LLP
World Exchange Plaza
100 Queen Street, suite 1300
Ottawa, Ontario K1P 1J9

Tel: (613) 237-5160
Fax: (613) 230-8842
email: neffendi@blg.com

OTTAWA AGENT FOR THE RESPONDENT

BYRON WILLIAMS
PUBLIC INTEREST LAW CENTRE
200 - 393 Portage Avenue
Winnipeg, Manitoba R3B 3H6

Tel: (204) 985-8540
Fax: (204) 985-8544
email: bywil@pilc.mb.ca

COUNSEL FOR THE JOINT INTERVENERS CANADA WITHOUT POVERTY, THE CANADIAN MENTAL HEALTH ASSOCIATION MANITOBA AND WINNIPEG, THE ABORIGINAL COUNCIL OF WINNIPEG, INC., AND END HOMELESSNESS WINNIPEG INC.

MAXINE VINCELETTE
POWER LAW
130 Albert Street, Suite 1103
Ottawa, Ontario K1P 5G4

Tel: (613) 702-5561
Fax: (613) 702-5561
email: mvincelette@powerlaw.ca

OTTAWA AGENT FOR THE JOINT INTERVENERS CANADA WITHOUT POVERTY, THE CANADIAN MENTAL HEALTH ASSOCIATION MANITOBA AND WINNIPEG, THE ABORIGINAL COUNCIL OF WINNIPEG, INC., AND END HOMELESSNESS WINNIPEG INC.

KATE ROBERTSON & DANIELLE GLATT
MARKSON LAW PROFESSIONAL CORP.
390 Bay Street, Suite 1000
Toronto, Ontario M5H 2Y2

Tel: (416) 800-0502
Fax: (416) 601-2514
email: krobertson@marksonlaw.com

COUNSEL FOR THE INTERVENER CANADIAN CIVIL LIBERTIES ASSOCIATION

DAVID R. ELLIOTT
DENTONS CANADA LLP
99 Bank Street, Suite 1420
Ottawa, Ontario K1P 1H4

Tel: (613) 783-9699
Fax: (613) 783-9690
email: david.elliott@fmc-law.com

OTTAWA AGENT FOR THE INTERVENER CANADIAN CIVIL LIBERTIES ASSOCIATION

FAISAL MIRZA
FAISAL MIRZA PROFESSIONAL CORP.
301-55 Village Centre Place
Mississauga, Ontario L4Z 1V9

Tel: (905) 897-5600
Fax: (905) 897-5657
email: fm@mirzakwok.com

COUNSEL FOR THE INTERVENER CANADIAN MUSLIM LAWYERS ASSOCIATION

YAVAR HAMEED
HAMEED LAW
43 Florence Street
Ottawa, Ontario K2P 0W6

Tel: (613) 232-2688 Ext: 200
Fax: (613) 232-2680
email: yhameed@hf-law.ca

OTTAWA AGENT FOR THE INTERVENER CANADIAN MUSLIM LAWYERS ASSOCIATION

JANNA A. HYMAN
PUBLIC PROSECUTION SERVICE OF CANADA
515 - 234 Donald Street
Winnipeg, Manitoba R3C 1M8

Tel: (204) 984-0493
Fax: (204) 984-1350
E-mail: janna.hyman@ppsc.gc.ca

COUNSEL FOR THE INTERVENER DIRECTOR OF PUBLIC PROSECUTIONS

FRANÇOIS LACASSE
DIRECTOR OF PUBLIC PROSECUTIONS OF CANADA
160 Elgin Street, 12th Floor
Ottawa, Ontario K1A 0H8

Tel: (613) 957-4770
Fax: (613) 941-7865
E-mail: francois.lacasse@ppsc-sppc.gc.ca

OTTAWA AGENT FOR THE INTERVENER DIRECTOR OF PUBLIC PROSECUTIONS

GERALD CHAN & LINDSAY BOARD
STOCKWOODS LLP
TD North Tower, Toronto-Dominion Centre
77 King Street West, Suite 4130
Toronto, Ontario M5K 1H1

Tel: (416) 593-1617
Fax: (416) 593-9345
email: geraldc@stockwoods.ca

COUNSEL FOR THE JOINT INTERVENERS FEDERATION OF ASIAN CANADIAN LAWYERS AND THE CHINESE AND SOUTHEAST ASIAN LEGAL CLINIC

MAXINE VINCELETTE
POWER LAW
130 Albert Street, Suite 1103
Ottawa, Ontario K1P 5G4

Tel: (613) 702-5561
Fax: (613) 702-5561
email: mvincelette@powerlaw.ca

OTTAWA AGENT FOR THE JOINT INTERVENERS FEDERATION OF ASIAN CANADIAN LAWYERS AND THE CHINESE AND SOUTHEAST ASIAN LEGAL CLINIC

MARY BIRDSELL & JANE STEWART
JUSTICE FOR CHILDREN AND YOUTH
55 University Avenue, Suite 1500
Toronto, Ontario M5J 2H7

Tel: (416) 920-1633 Ext: 8229
Fax: (416) 920-5855
email: stewartja@lao.on.ca

COUNSEL FOR THE INTERVENER JUSTICE FOR CHILDREN AND YOUTH

JEFFREY W. BEEDELL
GOWLING WLG (CANADA) LLP
160 Elgin Street, Suite 2600
Ottawa, Ontario, K1P 1C3

Tel.: (613) 233-1781
Fax: (613) 563-9869
email: jeff.beedell@gowlingwlg.com

OTTAWA AGENT FOR THE INTERVENER JUSTICE FOR CHILDREN AND YOUTH

TINA LIE & LAUREN PEARCE
PALIARE, ROLAND, ROSENBERG, ROTHSTEIN, LLP
155 Wellington Street West, 35th Floor
Toronto, Ontario M5V 3H1

Tel: (416) 646-4332
Fax: (416) 646-4301
email: tina.lie@paliareroland.com

COUNSEL FOR THE INTERVENER SCADDING COURT COMMUNITY CENTRE

DAVID P. TAYLOR
CONWAY BAXTER WILSON LLP
400 - 411 Roosevelt Avenue
Ottawa, Ontario K2A 3X9

Tel: (613) 691-0368
Fax: (613) 688-0271
email: dtaylor@conway.pro

OTTAWA AGENT FOR THE INTERVENER SCADDING COURT COMMUNITY CENTRE

JULIAN N. FALCONER & ANTHONY N. MORGAN
FALCONERS LLP
10 Alcorn Avenue, Suite 204
Toronto, Ontario M4V 3A9

Tel: (416) 964-0495 Ext: 222
Fax: (416) 929-8179
email: julianf@falconers.ca

COUNSEL FOR THE INTERVENER URBAN ALLIANCE ON RACE RELATIONS

Court File No. 37971

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA)

B E T W E E N

TOM LE

Appellant (Appellant)

– and –

HER MAJESTY THE QUEEN

Respondent (Respondent)

– and –

CANADA WITHOUT POVERTY, CANADIAN MENTAL HEALTH ASSOCIATION (MANITOBA AND WINNIPEG), ABORIGINAL COUNCIL OF WINNIPEG INC. and END HOMELESSNESS WINNIPEG INC.
CANADIAN CIVIL LIBERTIES ASSOCIATION
CANADIAN MUSLIM LAWYERS ASSOCIATION,
CRIMINAL LAWYERS' ASSOCIATION OF ONTARIO
FEDERATION OF ASIAN CANADIAN LAWYERS and SOUTHEAST ASIAN LEGAL CLINIC
JUSTICE FOR CHILDREN AND YOUTH
PUBLIC PROSECUTION SERVICE OF CANADA
SCADDING COURT COMMUNITY CENTRE
URBAN ALLIANCE ON RACE RELATIONS

Interveners

FACTUM OF THE INTERVENER
CRIMINAL LAWYERS' ASSOCIATION OF ONTARIO

[*Rules of the Supreme Court of Canada,* Rules 37 and 42]

PART I: STATEMENT OF FACTS

1. The Criminal Lawyers' Association ("the CLA") accepts the parties' summaries of the facts.

PART II: THE CLA'S POSITION ON THE QUESTIONS IN ISSUE

2. The CLA's submissions focus on the general legal principles that govern the question of whether the Appellant had a reasonable expectation of privacy in his friend's back yard, but the CLA takes no position on how these principles should apply to the facts of this case. The CLA adopts the Appellant's legal arguments concerning ss. 9 and 24(2) of the *Charter* but takes no position on the application of the law to the facts of this case.

10

PART III: ARGUMENT

A. "Control" and third-party consent hypotheticals

3. "Control" – the ability to regulate access to private spaces or "mak[e] choices about how, when and to whom"[1] information is disclosed – has been identified as "one element to be considered in the totality of circumstances in determining the objective reasonableness of a subjective expectation of privacy".[2] In his majority reasons in the judgment on appeal, Doherty J.A. held that property law concepts can "inform the inquiry into issues like control and access that are central to the reasonable expectation of privacy inquiry". Although he cautioned that "[t]he assessment of whether a person has a reasonable expectation of privacy is not limited by, or dependent upon, property law concepts even if the subject matter of the claim is real

20 property", he nevertheless treated it as highly significant that the Appellant, as a mere guest on his friend Dixon's property, did not have "any legal power to prevent the police or anyone else from coming onto the property or remaining on the property".[3] He explained:

> The right to be left alone, when exercised in relation to real property, must, in my view, include some ability, either as a matter of law, or in the circumstances as they existed, to control who can access and/or stay on the property. One cannot realistically talk about a reasonable expectation of privacy in respect of real property without talking about an ability to control, in some way, those who can enter upon, or remain on, the property.[4]

---

[1] *R. v. Marakah*, 2017 S.C.C. 59, [2017] 2 S.C.R. 608 at ¶39.
[2] *R. v. Marakah, supra* at ¶38.
[3] Reasons, Court of Appeal, *per* Doherty J.A., ¶49, 53 (emphasis added) [A.R. Vol. 1, Tab 2].
[4] Reasons, Court of Appeal, *per* Doherty J.A., ¶52 [A.R. Vol. 1, Tab 2].

4. The Respondent endorses this approach, arguing in its factum that a guest on private property ordinarily assumes the risk that the police will enter:

> The risk that the Appellant took in entering his friend's backyard – a space where he lacked control – was the very foreseeable and, indeed, likely possibility that other visitors, potentially law enforcement, would also enter the backyard.[5]

According to the Respondent, the mere possibility that Dixon could have let the police enter the yard over the Appellant's objection made it unreasonable for the Appellant to expect any privacy in the yard, even though this risk never materialized – the police actually entered the yard without seeking permission from anyone – and even though there is no reason to suppose Dixon would have given permission if he had been asked.[6]

5. This argument is structurally indistinguishable from the risk analysis arguments this Court has rejected in previous s. 8 *Charter* cases,[7] most recently and decisively in *Marakah.* While these prior judgments also addressed broader questions about the impact of new technologies on privacy, the CLA's position is that there is no principled justification for limiting the rejection of risk analysis rationales to cases involving new technologies or novel forms of search. Rather, the CLA submits that a general principle emerging from this Court's s. 8 jurisprudence is that expectations of privacy do not become unreasonable merely because there is some imaginable but unlikely way that the claimant's privacy *could* be lost or compromised. Rather, regardless of whether a particular s. 8 claim is characterized as involving "territorial", "personal" or "informational" privacy, courts must consider the broader normative question of whether the risk of a breach of privacy is one that citizens in a free and democratic society should be expected to bear in the circumstances.

---

[5] Respondent's Factum, ¶54.

[6] Since a s. 8 search "may be defined as the state invasion of a reasonable expectation of privacy" (*R. v. A.M.,* 2008 SCC 19, [2008] 1 S.C.R. 569 at ¶8; see also *R. v. Wise,* [1992] 1 S.C.R. 527 at p. 533), the possibility that the police might enter the yard pursuant to some lawful search power had no bearing on the reasonableness of the Appellant's expectation of privacy. Likewise, the prospect of the police entering unlawfully had no bearing on the normative question of whether the Appellant should have been able to expect to be left alone by the state.

[7] See, *e.g., R. v. Duarte,* [1990] 1 S.C.R. 30; *R. v. Wong,* [1990] 3 S.C.R. 36; *R. v. Cole,* 2012 S.C.C. 53, [2012] S.C.R. 34; *R. v. Spencer,* 2014 SCC 43, [2014] 2 S.C.R. 212.

6. In the present case, the question of whether a guest on another person's property should be recognized as having a reasonable expectation of privacy cannot be resolved merely by imagining hypothetical scenarios in which the host could undermine the guest's ability to be left alone by the state. Rather, the normative nature of the s. 8 inquiry demands a case-specific examination of whether it was likely that the host actually would permit state entry or surveillance and whether, in all the circumstances, the host's consent to such state intrusion should be treated as negating the guest's reasonable expectation of privacy. The CLA submits further that expectations of privacy based on personal relationships of friendship or trust or on social norms should not be dismissed as unreasonable merely because they would not be enforceable in a private law action.

7. The Respondent accepts that "[c]ertain invited guests" may be able to "establish a reasonable expectation of privacy in another person's private property", but argues that they should be required to "demonstrate an ability to make a meaningful choice to be left alone on that property".[8] Since the Respondent also argues that "[a]n individual who has no authority to admit or exclude visitors from a physical space cannot, in any real sense, be left alone in that space",[9] the Respondent is effectively proposing to limit privacy rights to a narrow subset of guests who have been delegated the power to exclude by the owner or leaseholder, either expressly (*e.g.,* the Respondent's example of the temporary house-sitter who has been given a key by the absent owner[10]) or implicitly (*e.g.*, the Respondent's example of the "long term romantic partner who sleeps over two weeks of every month",[11] who is effectively a co-occupant). Despite the Respondent's professed distaste for bright-line rules,[12] the Respondent is seemingly so troubled by the perceived difficulty of drawing principled distinctions between friends, lovers and relatives, on the one hand, and commercial visitors like door-to-door salespersons, gardeners and pool maintenance workers, on the other, that it proposes what is in essence a bright-line rule of its own, which would closely tie privacy to the ability to exercise private law access rights.

---

[8] Respondent's Factum, ¶56.
[9] Respondent's Factum, ¶51.
[10] Respondent's Factum, ¶56, footnote 91.
[11] Respondent's Factum, ¶56.
[12] Respondent's Factum, ¶56.

8. The CLA submits that the Ontario Court of Appeal majority's reasons and the Respondent's arguments both overemphasize the significance of legal control over access to property and undervalue the role of personal relationships and social conventions in shaping ordinary Canadians' expectations of privacy. Daily life is regulated by a web of personal ties of friendship, trust, reciprocal expectations and social obligations, which for most people in most circumstances have greater practical importance than the enforcement mechanisms of the civil courts. We expect our friends, colleagues and neighbours to keep promises even when they are not legally binding contracts and to respect our privacy even when they are not legally obliged to do so, and these expectations do not become "unreasonable" merely because we cannot sue for damages or seek an injunction when we are disappointed. This was recognized in *Marakah*, where the majority found that the sender of text messages had an objectively reasonable expectation that the recipient would keep them private, even though this expectation was not backed up by the force of contract or property law. The Chief Justice explained:

> I may have a high expectation of privacy in my own phone, which I completely control, a lesser expectation of privacy in my friend's phone, which I expect her to control, and no reasonable expectation of privacy at all if I expect the text message to be displayed to the public. A reasonable expectation of privacy may exist on a spectrum or in a "hierarchy" of places.[13]

Indeed, while the US courts have generally embraced "risk analysis" arguments in Fourth Amendment cases – as discussed further below – the US Supreme Court has nevertheless held that privacy can be rooted in "understandings that are recognized and permitted by society".[14] For instance, in *Minnesota v. Olson,* White J. concluded that "[t]o hold that an overnight guest has a legitimate expectation of privacy in his host's home merely recognizes the everyday expectations of privacy that we all share".[15]

9. While the CLA recognizes that not everyone who is invited onto another person's property should necessarily be seen as having s. 8 *Charter* rights against state intrusion onto that property, the CLA submits that the Respondent's suggestion that a "fleeting, one-time visitor … will likely not be successful in asserting a privacy interest"[16] places undue emphasis on temporal and historical use factors. While the facts of the present appeal involves guests in a back yard,

---

[13] *R. v. Marakah*, *supra* at ¶29.
[14] *Rakas v. Illinois*, 439 U.S. 128 (1978)
[15] *Minnesota v. Olson*, 495 U.S. 91 at p. 98 (1990).
[16] Respondent's Factum, ¶56.

the logic of the Respondent's argument would seemingly also deny s. 8 *Charter* rights to a "fleeting, one-time visitor" who had entered Dixon's home to make a private phone call, use the bathroom or engage in sexual activity. To adopt Lauwers J.A.'s language in his dissenting reasons, the conclusion that a guest who did these things would nevertheless have no reasonable expectation of privacy because he or she had not spent enough previous time on the property "must be rejected as utterly inconsistent with ordinary life in our free and democratic society".[17] As Abella J.A. (as she then was) put it in her dissenting reasons in the Ontario Court of Appeal in *R. v. Edwards,* "[t]he expectation of privacy cannot be reduced to a quantitative analysis".[18]

B. Revisiting *Edwards* after *Marakah*

10. This Court's prior decision in *R. v. Edwards*[19] loomed large in the Ontario Court of Appeal. Doherty J.A. considered *Edwards* to be essentially dispositive, since "[o]n the facts of *Edwards,* the accused's privacy claim in his girlfriend's apartment was far superior to the appellant's claim in respect of the Dixon backyard and yet it failed".[20] However, Lauwers J.A. found *Edwards* distinguishable, primarily on the grounds that the Appellant, unlike Edwards, had been present when the police entered the property.[21]

11. *Edwards* was decided more than twenty years ago, at a relatively early stage in this Court's development of s. 8 *Charter* principles. Cory J.'s majority reasons drew heavily on US Fourth Amendment privacy law, which he found "convincing and properly applicable to the situation presented in the case at bar".[22] The CLA submits that the *Edwards* majority's endorsement of American precedents is ripe for reassessment in light of this Court's subsequent decisive rejection of the US Fourth Amendment "assumption of risk" doctrine.

12. The American "assumption of risk" doctrine originated in cases where the "assumed risk" had actually materialized and was what led to the police seizure at issue. For instance, when the US Supreme Court held in *Rathbun v. United States,* that a party to a telephone conversation

---

[17] Reasons, Court of Appeal, *per* Lauwers J.A., dissenting, ¶49, 52-53 [A.R. Vol. 1, Tab 2]
[18] *R. v. Edwards,* 1994 CanLII 1461, 91 C.C.C. (3d) 123 at p. 141, *per* Abella J.A., dissenting (Ont. C.A.)
[19] *R. v. Edwards,* [1996] 1 S.C.R. 128, *aff'g* (1994), 91 C.C.C. (3d) 123 (Ont. C.A.)
[20] Reasons, Court of Appeal, *per* Doherty J.A., ¶50 [A.R. Vol. 1, Tab 2]
[21] Reasons, Court of Appeal, *per* Lauwers J.A., dissenting, ¶122-28 [A.R. Vol. 1, Tab 2]
[22] *Edwards, supra* at ¶45.

"takes the risk that the other party may have an extension telephone and may allow another to overhear the conversation", this reflected the actual facts of the case, in which an extortion victim had invited the police to listen in during a threatening phone call.[23] Similarly, in *Frazier v. Cupp* and *United States v. Matlock* the Court found the defendants to have assumed the risk of a third party consenting to the police search in situations where the third party had indeed consented.[24] When the Court extended the assumption of risk reasoning to consent electronic recordings, it also originally did so in cases where the risk of a conversation partner turning out to be a state agent wearing a wire had actually materialized.[25]

13. However, US courts later began taking much more expansive approach to the significance of "assumed risks" and began treating the mere existence of a threat to privacy as sufficient to eliminate all "legitimate expectation of privacy", even when the risk remained purely hypothetical. For instance, US courts held that people have no right to challenge police seizures of information about them from banks and telephone companies on the grounds that "an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties".[26] Although the major US Supreme Court decisions principally relied on by Cory J. in *Edwards – Rakas v. Illinois* and *Rawlings v. Kentucky*[27]– do not expressly invoke the language of "risk analysis", they are based on this same reasoning. For instance, in *Rakas* Rehnquist J. justified denying Fourth Amendment standing to passengers in a searched car by distinguishing the Court's earlier decisions in *Jones v. United States* and *Katz v. United States*[28] on the basis that in *Jones*, an apartment search case, the defendant had "complete dominion and control over the apartment, and could exclude others" because he had a key and the leaseholder's permission to use it, while the defendant in *Katz*, who had used a phone booth that had been electronically "bugged" by the police, had "shut the door behind him to exclude all others".[29] Since the passengers in *Rakas* had also shut the doors of the car to exclude others, Rehnquist J.'s

---

[23] *Rathbun v. United States*, 255 U.S. 107 (1957).
[24] *Frazier v. Cupp*, 394 U.S. 731 (1969); *United States v. Matlock*, 415 U.S. 164 (1974).
[25] See, *e.g., On Lee v. United States*, 343 U.S. 747 (1952); *Lopez v. United States*, 373 U.S. 427 (1963).
[26] *United States v. Jones*, 565 U.S. 400, *per* Sotomayor J. (concurring)
[27] *Rakas v. Illinois, supra*; *Rawlings v. Kentucky*, 448 U.S. 98 (1980)
[28] *Jones v. United States*, 362 U.S. 257 (1960); *Katz v. United States*, 389 U.S. 347 (1967)
[29] *Rakas, supra* at p. 149.

distinction seemingly hinges on the hypothetical possibility that the driver in *Rakas*, who owned the car, could have consented to the police search, even though she did not actually do so.

14. Rehnquist J.'s reliance on risk analysis reasoning became even more explicit in his judgment two years later in *Rawlings v. Kentucky,* where he found the defendant, who had stored drugs in his companion's purse, could not object to what was conceded to be an unlawful[30] police search of the purse because he had "[no] right to exclude other person's from access to [the] purse".[31] Even though the purse's owner had not consented to the police search, the hypothetical possibility that she could have done so was treated as dispositive of the defendant's rights. Cory J. adopted similar reasoning in *Edwards,* treating it as highly significant that Edwards, despite having a key to his girlfriend Evers's apartment, storing property there and sometimes sleeping over, "lacked the authority to regulate access to the premises":

> In the words of McKinlay J.A.[32] "Ms. Evers could admit anyone to the apartment whom the appellant wished to exclude, and could exclude anyone he wished to admit". An important aspect of privacy is the ability to exclude others. … It follows that the fact that the appellant could not be free from intrusion or interference in Ms Evers' apartment is a very important factor in confirming the finding that he did not have a reasonable expectation of privacy.[33]

In short, the hypothetical possibility that Evers might have willingly let the police search the apartment was treated as barring Edwards from claiming a reasonable expectation of privacy, even though on the actual facts "[t]he police lied and tricked her" into consenting.[34]

15. When *Edwards* and the Court's subsequent decision in *R. v. Belnavis*[35] were decided in 1996 and 1997, the validity of US-style "assumption of risk" arguments in s. 8 *Charter* privacy analysis had not yet been conclusively determined. In *Duarte* and *Wong, supra,* both decided in 1990, this Court had declined to follow the US law permitting warrantless consent recordings, but these decisions focused on the special privacy concerns raised by electronic recordings and did not squarely address the relevance of consent hypotheticals in the analysis. More recently, this Court declined to adopt the US approaches to third party consent or privacy over information

---

[30] *Rawlings v. Kentucky, supra* at p. 114, *per* Marshall J., dissenting.
[31] *Rawlings v. Kentucky, supra* at p. 105, *per* Rehnquist J.
[32] *Edwards* (Ont. C.A.), *supra* at p. 136 [C.C.C.]
[33] *Edwards, supra* at p. 147
[34] *R. v. Edwards* (Ont. C.A.), *supra* at p. 142, *per* Abella J.A., dissenting.
[35] *R. v. Belnavis,* [1997] 3 S.C.R. 341

in the hands of third parties, and cited *Duarte* and *Wong* for the proposition that this Court had "rejected … 'risk analysis'" arguments.[36] However, these cases involved ostensible actual consent by third parties, and it was not until *Marakah* that this Court was called on to squarely address – and decisively reject – the analytically distinct argument that the hypothetical possibility of a third party consenting to a search should be treated as eliminating any reasonable expectation of privacy.

16. The CLA's position is that *Marakah* substantially undercuts a key plank of the *Edwards* majority's reasoning. While the general *Edwards* framework of considering the "totality of the circumstances" remains valid, and while the extent of the claimant's "control of the property or place searched" remains one of many relevant factors, *Marakah* rejects the narrowly legalistic understanding of control relied on by the *Edwards* majority. In particular, the CLA submits that after *Marakah* it should no longer be sufficient for a court to rely on the purely hypothetical possibility that some person with stronger proprietary rights than the claimant could have consented to the search at issue, without considering (i) whether it was likely that this person would have consented or (ii) whether, considered from a normative perspective, it was reasonable in the circumstances for the claimant to expect this person not to consent. The CLA recognizes that text messages and other forms of digital data raise certain unique privacy concerns but submits that it would be fundamentally incoherent for this Court, having categorically rejected "risk analysis" arguments in the context of informational and electronic data seizures, to continue giving effect to structurally indistinguishable arguments in territorial privacy cases.

17. Moreover, this Court's decision in *R. v. Jones* – the companion case to *Marakah* – has already changed the law in a way that will significantly limit the practical impact of *Edwards* and *Belnavis* in many future cases. *Jones* establishes that *Charter* applicants:

> … may ask the court to assume as true for s. 8 purposes any fact that the Crown has alleged or will allege in the prosecution against him. In other words, where the alleged Crown facts, if taken to be true, would establish certain elements of the applicant's s. 8 claim, he or she need not tender additional evidence probative of those facts in order to make out those same elements.[37]

---

[36] *R. v. Cole*, *supra* at 76; see also *R. v. Spencer*, *supra*.
[37] *R. v. Jones*, 2017 SCC 60, [2017] 2 S.C.R. 696 at ¶32

In many cases involving possessory offences this will make it irrelevant whether the defendant can establish a reasonable expectation of privacy over the general location searched, since he or she will often be able to assert a s. 8 breach on the basis of the Crown's theory that he or she had possession of the seized goods. For instance, in *Belnavis*, the driver and a passenger were both charged with possession of several bags of stolen clothing found by the police during an unlawful vehicle search. A majority of this Court applied *Edwards* to hold that only the driver had a reasonable expectation of privacy in the vehicle. However, the majority also held that the passenger would have been able to assert a s. 8 breach if she had "demonstrate[d] a reasonable expectation of privacy in relation to the items seized, specifically, the bags of merchandise", but found that she had failed to do so because she had not asserted ownership of any particular bag.[38] After *Jones* she would no longer bear this burden, since the Crown's theory required the proof that she exercised control over all of the bags in relation to which she was charged. This substantially undermines the Respondent's objection that revisiting *Edwards* would "fundamentally change the law of standing".[39] That ship already sailed with *Jones*.

C. Policy considerations

18. The CLA's further submission is that the narrow and legalistic *Edwards* approach to "control" is not supportable as a matter of policy, for several reasons. First, "expectation of privacy is a normative … standard".[40] The ability to meet, converse and socialize with other people at their homes or other private places they control is a basic and essential aspect of ordinary life in a free society that s. 8 should protect. Defining privacy rights "not by reference to what the citizen should expect in a free society but by reference to legalistic property concepts"[41] inevitably requires drawing distinctions that make no sense from a normative perspective.

19. Second, the purpose of s. 8 is to "protect individuals from unjustified state intrusions on their privacy" by preventing unjustified searches.[42] Judicial review and oversight of illegal police searches is not a purely remedial exercise, but also serves to educate the police about the limits on their powers. Narrow s. 8 standing rules undermine this important objective.

---

[38] *Belnavis, supra* at ¶24, *per* Cory J.
[39] Respondent's Factum, ¶57.
[40] *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432 at ¶42, *per* Binnie J.
[41] *Belnavis, supra* at ¶50 (*per* La Forest J., dissenting).
[42] *Hunter v. Southam*, [1984] 2 S.C.R. 145 at p. 160

20. Third, even if s. 24(2) *Charter* remedies are not seen as primarily intended to deter the police, this Court has recognized that "deterrence of *Charter* breaches may be a happy consequence" of s. 24(2) exclusion.[43] Equally, narrow standing rules that shield unlawful police conduct from judicial scrutiny inevitably give the police an incentive to ignore the limits on their powers. While the Respondent denies the existence of any such effect,[44] our entire system of criminal justice is based on the premise that people respond to incentives, and there is no reason to imagine that police officers are somehow immune. Narrow s. 8 standing rules that effectively permit the police in some cases to benefit by breaking the law without consequence will in the long run tend to bring the administration of justice into disrepute.

10 21. Finally, the narrowing of Fourth Amendment standing rules that began in *Rakas* has been interpreted by many commentators as a reaction by US courts to the perceived inflexibility of the US exclusionary rule and the "substantial social cost"[45] of excluding reliable evidence. These concerns are inapposite in Canada, since s. 24(2) already requires a principled and explicit cost-benefit analysis. The CLA's position is that it is both unnecessary and inadvisable for Canadian courts to resort to narrow standing rules as an indirect means of avoiding the exclusionary remedy. From a purposive perspective that takes rights seriously, limiting *Charter* standing in order to sweep police misconduct under the rug also carries substantial social costs.

PARTS IV & V: SUBMISSIONS RE COSTS AND ORAL ARGUMENT

22. The CLA does not seek costs and asks that none be awarded against it. The CLA was
20 given permission to present oral argument in the Order granting leave to intervene.

23. ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 20th DAY OF AUGUST, 2018.

agent for
JONATHAN DAWE

agent for
SHERIF M. FODA

COUNSEL FOR THE INTERVENER CRIMINAL LAWYERS' ASSOCIATION OF ONTARIO

---

[43] *R. v. Grant,* 2009 SCC 32, [2009] 2 S.C.R. 353 at ¶73
[44] Respondent's Factum, ¶59-61.
[45] *Rakas, supra* at p. 137.

PART VI: LIST OF AUTHORITIES

Paragraphs