File Number: 37971

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

TOM LE

Appellant
(Appellant)

and

HER MAJESTY THE QUEEN

Respondent
(Respondent)

and

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

Interveners

FACTUM OF THE INTERVENER
DIRECTOR OF PUBLIC PROSECUTIONS

(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW AND STATEMENT OF FACTS

1. If this Court's decision in *Edwards* is applied to the s. 8 issue raised in this case, the result is straight forward – the appellant had no reasonable expectation of privacy in the backyard of a friend's house where he was a social guest. However, the appellant and some of the interveners ask this Court to overturn the reasoning in *Edwards* in favour of a test that rejects the concept of territorial privacy and treats all privacy claims as informational privacy claims. The impact of this approach is to effectively eradicate the concept of standing and the personal nature of *Charter* protection by permitting claims for breaches of third parties privacy simply because those breaches reveal information about the accused. The Director of Public Prosecutions (DPP) says this Court should reject this approach and confirm the applicability of *Edwards*.

PART II – POSITION ON THE QUESTION IN ISSUE

2. The DPP intervenes to address the territorial privacy issues raised in this case (1) by addressing the subject matter of the search; (2) by addressing the normative expectation of privacy of a social guest; (3) by addressing the practical impacts of any reconsideration of *Edwards* and how this could effectively lead to automatic standing for *Charter* challenges; and (4) by providing a comparative law analysis of the reasonable expectation of privacy of a guest from other common law jurisdictions.

PART III – ARGUMENT

A. *Edwards* is the Correct Test for Territorial Privacy Claims

3. *Charter* rights are personal. It is only those whose rights are violated by a search who can challenge the legality of the search, not those who are merely aggrieved by the introduction of damaging evidence obtained without impact on their personal privacy. In this Court's foundational *Charter* decisions,[1] the scope of the protection from unreasonable search and seizure was defined by the existence of a reasonable expectation of privacy.

4. This Court's more recent jurisprudence has maintained the fundamental principle that *Charter* rights are personal, while acknowledging that the scope of a reasonable expectation of privacy, and the relevant factors in assessing it, are highly fact driven and contextual. This

[1] *Hunter et al. v Southam Inc.*, [1984] 2 SCR 145, *R v Edwards*, [1996] 1 SCR 128.

necessary contextual analysis does not warrant abandoning the notion of varying types of privacy claims, each with a different focus.

a. The Subject Matter of the Search

5. The appellant attempts to define the subject matter of the search as being both territorial and informational, in an effort to divert focus from a social guest's lack of connection and control over a residence, a key consideration in territorial privacy cases, and towards the possibility that personal information is being obtained while police are on the property where he is a guest.

6. The first step in properly determining standing to claim a violation of personal *Charter* rights is to define the subject matter of the search in order to identify the privacy interests at stake. This is an important first step because the subject matter of the search—personal, territorial or informational—will help define the nature of the privacy interests at stake.[2]

7. Territorial privacy includes protection of the home and, in diluted measure, of the perimeter space around the home including the yard.[3] While s. 8 protects people, not places, the location of the search is an important contextual feature in evaluating the reasonableness of any claim of an expectation of privacy.

8. In contrast, true informational privacy relates to a biographical core of information about a person that may be divulged to certain persons, for a limited purpose, but over which the accused may retain a reasonable expectation of privacy. Informational privacy is aimed at protecting the right to make a choice about sharing that information.[4] In other words, informational privacy is about how and with whom one shares personal information.

9. The definition of the subject matter of the search has often been a key point in the standing analysis. This Court has repeatedly noted the importance of looking both at the nature of the information sought and the nature of the information it reveals to properly characterize the subject matter of the search.[5] For example, the key question in *Spencer* was whether the information provided by the service provider was simply a name and address, or information about who was accessing child pornography. In *Tessling*, the question was whether the use of the FLIR device was

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[2] *R v Spencer*, [2014] 2 SCR 212, 2014 SCC 43, at para 31.
[3] *R v Tessling*, [2004] 3 SCR 432, 2004 SCC 67, at para 22.
[4] *R v Jones*, [2017] 2 SCR 696, 2017 SCC 60, at para 39.
[5] *R v Spencer* at para 26; *R v Kang-Brown*, [2008] 1 SCR 456, 2008 SCC 18 at paras 174-175.

a search of the home or externally obtained information about the home that did not disclose any intimate details about activities in the home.[6] A focus on the true subject matter of the search helps determine the correct approach to standing.

10. In this case, the subject matter of the search is the observation of the presence of the appellant in the backyard, with the bag over his shoulder. The substance of the complaint is about the police entry into the backyard, which permitted them the opportunity to observe the appellant more closely than they could have from the public laneway—which necessarily implicates territorial privacy.

11. The DPP notes that a social guest retains an expectation of privacy in their person while on the premise of their host, which would generally extend to their purse (or their duffle bag) and its contents. But the initial police entry into the backyard was not a search of the appellant's person or a search of the appellant's bag. The police entry into the backyard simply allowed them to see the appellant was there and had the bag. The subject matter of the search can be seen clearly by moving the same interaction into the public laneway behind the townhouses. In that case, there would be no expectation of privacy claimed in the police observations of the appellant. As the only difference in those scenarios is where they occurred, by definition this is a territorial privacy claim.

12. While all searches have an informational aspect in the sense that all police investigative steps are aimed at gathering information, the search for information does not define the privacy interest at stake. The perimeter search in *Kokesch*[7] was undertaken to determine if there was evidence of a marihuana grow operation being run by the accused (a piece of information about the accused), but the impact of the search was on the territorial privacy of the accused because the police intruded on his property to make those observations. Had the police observations of smell and condensation been made from the sidewalk, there would have been no impact on the privacy interests of the accused. By analogy to this case, had the police observations of the appellant in the backyard been made from the sidewalk, there would have been no impact on his privacy interests.

13. The search for information also arises in situations that implicate bodily integrity, but such searches, which involve personal privacy, do not transform into informational privacy cases. Consider where police obtain a blood sample to determine the alcohol content of the accused's

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[6] *R v Tessling* at para 54.
[7] *R v Kokesch*, [1990] 3 SCR 3.

blood (a piece of information about the accused). While information about the accused is being sought, the privacy implications are not assessed based on that informational content. Indeed, information about how much alcohol is in the accused's blood might be obtained in other (less precise and less intrusive) ways such as observations by a bartender of drinking or a count of empty bottles in the trash. But taking blood to determine that same information involves a significant intrusion into a highly protected sphere of privacy, one's bodily integrity. Any assessment of the privacy interests at stake in the search must be understood by reference to the state intrusion into the body, not the information obtained from that intrusion.

14. The observations made by police in this case did not engage informational privacy. This is not a case about a biographical core of information. This is not a case about the manner in which information may be shared in this modern age. This is not a case about sharing information in one context, but retaining a privacy interest in another context. Instead, this is an "old fashioned" case about the ability of the state to enter a backyard and see what is happening there. It is a territorial privacy case where the reasonable expectation of privacy must be assessed on the basis of the privacy interests and expectations involved in visiting the backyard of a friend.

b. Normative Expectations

15. An expectation of privacy must be objectively reasonable to engage s. 8. The DPP says the majority of the Court of Appeal was correct in finding that, as an invited guest with no ability to control access to the property, the appellant had no expectation of privacy.[8]

16. The appellant points to the societal value of social interactions as a basis to suggest that the normative expectation of privacy should be extended to guests. With respect, this reasoning is flawed. A normative expectation does not depend on the value of the interaction – if it was dependent on the value of the interaction there would be no expectation of privacy in criminal or other anti-social behaviour. A normative expectation may involve value judgments about the impact of the long-term consequences of government action on privacy, but not about the value of social behaviour involved.[9]

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[8] Reasons for Judgment of the ONCA, paras 51-58 [Appellant's Record, Vol I, Tab 2].
[9] *R v Spencer*, *supra*, at para 18.

17. The Court in *Edwards* placed considerable emphasis on control of property in assessing the reasonableness of an expectation of privacy from a normative perspective—because without the ability to control access to property, there can be no true territorial expectation of privacy.[10] Control is not about property ownership but about the nature of the privacy interest. It is tied up with the privacy notion that one is entitled to be left undisturbed—and having the ability to regulate access to property defines that right.

18. A social guest's lack of control over a property, while not determinative of the totality of the circumstances test, remains a key factor in assessing the reasonable expectation of privacy. If the guest does not have the ability to regulate access, they do not have a personal privacy right in the space—their ability to use the space and the purposes for which they may use it are wholly dependent on the permission of their host and can be changed, limited or revoked by that host. This perspective, as reflected in *Edwards*, remains consistent with modern social norms. An independent and informed observer would not accept that a social guest's asserted expectation of privacy is reasonable, in the absence of some facts that show a degree of control over the property.

19. The appellant and some of the interveners rely on this Court's recent decision in *Marakah*, where a lack of control over the phone of a co-accused was not determinative of the existence of a reasonable expectation of privacy. The appellant suggests this decision should result in a shift in the assessment of the expectation of privacy of a guest, which should now equally reject the significance of control of the premises. The appellant's analogy to *Marakah* is flawed, primarily because of the difference in the subject matter of the search.[11]

20. The key finding of the majority of this Court in *Marakah* was that the subject matter of the search was not the physical device itself but an electronic conversation. Had the device been the subject matter, control of the device would have been an important consideration in the analysis. However, by defining the subject matter of the search as being an electronic conversation, and therefore pure informational privacy, the analysis of the totality of the circumstances did not focus on control.

21. Control, as concluded by this Court's majority in *Marakah*, plays a lesser role in an informational privacy context because the essence of informational privacy is that one has usually

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[10] *R v Edwards, supra*, at paras 49-50, *R v Belnavis*, [1997] 3 SCR 341, at para 22.
[11] *R v Marakah*, [2017] 2 SCR 608, at para 39.

provided the information to someone, in some context, thus relinquishing some degree of control over it, but still maintaining a degree of privacy over the content of the information. Where the definition of the privacy interest generally involves ceding some level of control, it is consistent with normative standards that control is not determinative of the existence of an expectation of privacy. When one shares information, reasonably expecting the other person to keep it private, the lack of control over their actions is not determinative of the objective reasonableness of one's expectation.

22. The normative expectation of privacy must be assessed by reference to the subject matter. Importing informational concepts into a territorial privacy case distorts this assessment. In a territorial privacy case, the ability to control whether one can be left alone remains key[12].

23. Nothing in the normative assessment of a social guest's privacy, nor in this Court's decision in *Marakah*, requires a re-assessment of the test for territorial privacy from *Edwards*.

c. Impact of the appellant's proposed change in approach

24. The approach the appellant proposes would have potentially broad implications. In the DPP's submission, it would come close to permitting a *Charter* challenge in all contexts where the Crown proposes to tender evidence against the accused, without the accused establishing the evidence was obtained in a manner that impacted their personal privacy rights. It would redefine the focus of s. 8 from protecting personal privacy to assessing the legality of all police action—essentially the automatic standing principle endorsed by Justice La Forest in dissent in *Edwards* and *Belnavis*.

25. While the appellant does not explicitly advocate automatic standing or target-based standing, this Court should examine the realistic impact of his position in assessing whether accepting it would be consistent with this Court's overarching approach to privacy.

26. This Court's analysis in defining privacy explicitly rejected the notion of automatic standing in *Edwards*.[13] It is important to recall that this Court accepted that there were sound policy reasons for this approach. Vicarious standing is inconsistent with the language of s. 24(2) of the *Charter* which grants the ability to apply for a remedy to "anyone whose rights or freedoms…have

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[12] *R v Jones*, at para 40.
[13] *R v Edwards*, at para 52.

been infringed or denied". The constitutional choice to limit the ability to apply for a remedy only to those whose personal privacy has been impacted by state action is a constitutional imperative that must remain at the foundation of *Charter* law.

27. The most obvious impact of the appellant's approach would be in assessing the expectation of privacy of a passenger in a vehicle, as *Edwards* was applied directly in *Belnavis*. If the mere presence of an invited guest in a backyard is sufficient to establish an objectively reasonable expectation of privacy, then the passenger in a vehicle would equally have a reasonable expectation of privacy based on mere presence.[14]

28. What if the vehicle were stolen or obtained from a stranger? In the DPP's submission, there cannot be an expectation of privacy in a stolen car.[15] Similarly, a person who obtains possession of a house by fraud does not have a reasonable expectation of privacy[16] because a thief or fraudster is not entitled to control of the property and so has no right to be left undisturbed. As a result of their lack of entitlement to control, a thief is in a similar position to a guest in terms of their privacy interest. But if mere presence is sufficient to establish an expectation of privacy, then a car thief may have a reasonable expectation of privacy as well.

29. Another likely impact would be on a person who attends a residence solely for the purpose of taking care of an illegal enterprise, with no other connection to the residence, such as a "gardener" of a marihuana grow operation,[17] or a person who stores drugs in an empty house.[18] Each of those people is present with the invitation of the person in control of the property, as is a social guest. Here, the distinction is the purpose of the invitation—the social gathering valued by the appellant and some of the interveners, as opposed to the illegal enterprises being operated in these cases. This clearly shows why the purpose of the attendance cannot determine the reasonableness of an expectation of privacy.

30. Not everyone charged in a joint enterprise or conspiracy will have an expectation of privacy in all of the many locations where evidence is seized from such as the homes, garages, vehicles,

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[14] *Belnavis, supra*, at para 22.
[15] *R v Balendra*, 2016 ONSC 5143, at para 45; *R v Bacchus and Benyamin*, 2011 ONSC 6173, at paras 50-52, *R v Crocker*, 2009 BCCA 388, at paras 83-86.
[16] *R v Van Duong*, 2018 ONCA 115.
[17] *R v Novak*, 2000 BCCA 257, *R v Khuc* 2000 BCCA 20, *R v Vu* 1998 CanLII 4892 (BCCA).
[18] *R v Farrell*, 2010 ONSC 5774.

boats, safety deposit boxes and storage lockers of their co-conspirators. This commonly arises in large scale project cases where multiple search warrants may be executed at various times and at various locations. All of the seized evidence may be tendered by the Crown against all of the targets of the investigation in order to prove the scope and nature of the conspiracy. In some, but not all, of these scenarios the accused would at some point have been present at the search location as part of their ongoing involvement in the conspiracy but would have no other connection to the search locations. This was essentially the case in *Pugliese* where Pugliese rented a home to his drug runner, the runner controlled that rented home to Pugliese's exclusion, but the seized drugs were evidence against both on a joint enterprise allegation.[19]

31. Consider also the circumstance where the police, attempting to determine the precise source of a smell of marihuana attend on the property of the neighbours to confirm the smell does not come from those locations.[20] This is a desirable investigative step, as it tends to confirm or refute the police belief that the illegal activity is occurring in the target premises. But what if the target of the investigation sometimes visits that neighbour for a social event, or even has a key to pick up the mail when the neighbour is away? Should that relationship permit the target to challenge the police entry onto the neighbour's premises? This example demonstrates the slippery slope from a personal privacy interest towards automatic standing.

B. Comparative law

U.S. Case law

32. The Fourth Amendment to the U.S. Constitution guarantees the right of the people to be secure against unreasonable search and seizure except on probable cause.

33. The Supreme Court of the United States has considered the Fourth Amendment rights of guests in different circumstances. Overnight guests will in most cases have Fourth Amendment protection,[21] but those merely "legitimately on the premises" will not.[22] The Court most recently considered a claim of Fourth Amendment protection made by non-residents present in a home in

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[19] *R v Pugliese*, 1992 CanLII 2781 (ONCA), see also *R v Scott*, unreported May 21, 2015, MBQB.
[20] *R v Vereczki*, 1998 CanLII 1996 (BCSC), *R v Roy and Biesinger*, 2017 ONSC 6020, at paras 38-39, 49-52.
[21] *Minnesota v. Olson*, 495 U.S. 91 (1990)
[22] *Rakas v. Illinois*, 439 U.S. 128 (178)

Minnesota v. Carter.[23] Defendants in that drug trafficking case asserted a Fourth Amendment violation when a police officer peered through a ground-floor apartment window and observed them packaging cocaine. A majority of the Court found that the defendants had no legitimate expectation of privacy considering: the purely commercial nature of the activity in which they were engaged; defendants lived in Chicago, some 400 miles away; they had never been to the apartment before and were only there for two and a half hours. Some members of the Court would have been in favour of recognizing that social guests enjoyed an expectation of privacy even where their stay in the premises was of short duration.

34. Following is a sampling of U.S. appellate and circuit court decisions considering Fourth Amendment claims subsequent to *Carter*. In *Payne*, police in a patrol car pursed the defendant after witnessing a traffic violation. Mr. Payne drove into the driveway of his cousin's home and ran into the backyard. Police followed and saw him drop a gun. Payne's unsuccessful motion to suppress on the basis police were not justified in pursuing him onto private property was upheld by the Tenth Circuit. "…while Payne was a frequent visitor at his cousin's house, he was not an overnight guest.'[24] In *Rose*, a privacy claimant who had no possessory interest in any part of an apartment, stored no clothing or other property there, had no key, had no permission to be there without the lessee's presence or consent, had no ability to exclude others, was an infrequent visitor was found to lack standing to challenge the search of the apartment.[25] In *Talkington*, a social guest who had known his host for 7-8 years, had been to the house numerous times to visit, worked on cars in the backyard with his host, was at the home for several hours before police arrived, established a degree of acceptance into the household and an ongoing and meaningful connection which entitled him to a reasonable expectation of privacy in the curtilage of his host's home where methamphetamine was found by police when they entered the backyard without a warrant, looking for a third man.[26]

35. Earlier this year, in *Byrd v United States*[27], the U.S. Supreme Court reviewed the principle of standing to assert a Fourth Amendment right in the context of a vehicle search. Mr. Byrd was

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[23] 525 U.S. 83 (1998)
[24] *U.S. v. Payne*, 99 Fed.Appx. 204 (2004) at 208
[25] *U.S. v. Rose*, 613 Fed.Appx. 125 (2015) at 129
[26] *State v. Talkington*, 301 Kan. 453 (2015) at 474
[27] *Byrd v* United States, 584 U.S. ____ (2018).

pulled over for a traffic stop by Pennsylvania State Troopers as he was driving a rental car from Patterson, New Jersey to Pittsburgh. The car had been rented by another person. The Troopers found 49 kilos of heroin and body armour in the trunk. His attempt to suppress this evidence failed in the lower courts which held that because he was not named on the rental agreement, he lacked a reasonable expectation of privacy in the vehicle. The Supreme Court disagreed, saying " … it is by now well-established that a person need not always have a recognized common-law property interest in the place searched to be able to claim a reasonable expectation of privacy in it" but "… legitimate presence on the premises … standing alone, is not enough to accord a reasonable expectation of privacy."[28] The Court remanded the case for rehearing on the holding that, as a general rule, someone in lawful possession and control of a rental car has a reasonable expectation of privacy in it even if the rental agreement does not list him or her as an authorized driver.

New Zealand

36. The New Zealand Bill of Rights also contains a protection against unreasonable search or seizure. While the New Zealand courts also require consideration of privacy interests in determining who has standing to complain of a breach of their rights, the New Zealand Court of Appeal has explicitly rejected this Court's approach in *Edwards* and *Belnavis* in favour of a broader approach to standing that applies to anyone present at a premises which are the subject of the search, even a "gate-crasher".[29] For the most part, New Zealand considers the reasonableness of the expectation of privacy at the exclusion stage in a manner somewhat comparable to the assessment of the impact of the breach on the protected right in the *Grant* analysis for exclusion.[30]

PART IV AND V – SUBMISSIONS AS TO COSTS AND ORDER SOUGHT

37. The DPP does not seek costs and asks that no costs be ordered against her.

All of which is respectfully submitted this 20th day of August, 2018.

Janna Hyman Carole Sheppard

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[28] *Ibid*, p 8.
[29] *R v Williams*, [2007] NZCA 52l, [2007] 3 NZLR 207.
[30] *R v Hunt*, [2010] NZCA 528, [2011] 2 NZLR 499.

PART VI – TABLE OF AUTHORITIES

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R v Pugliese, 1992 CanLII 2781 (ONCA)	30
R v Roy and Biesinger, 2017 ONSC 6020	31
R v Scott, unreported May 21, 2015, MBQB	30

Statutory Provisions
Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s. 24(2)