

Case Name:

R. v. Marakah

Nour Marakah, Appellant

v.

**Her Majesty the Queen, Respondent, and
Director of Public Prosecutions, Attorney General of
British Columbia, Attorney General of Alberta, Samuelson-
Glushko Canadian Internet Policy and Public Interest
Clinic, Criminal Lawyers' Association of Ontario, British
Columbia Civil Liberties Association and Canadian Civil
Liberties Association, Interveners**

[2017] S.C.J. No. 59

[2017] A.C.S. no 59

2017 SCC 59

2017 CSC 59

[2017] 2 S.C.R. 608

[2017] 2 R.C.S. 608

142 W.C.B. (2d) 490

42 C.R. (7th) 1

357 C.C.C. (3d) 281

418 D.L.R. (4th) 313

2017 CarswellOnt 19341

396 C.R.R. (2d) 247

2017EXP-3390

EYB 2017-287961

File No.: 37118.

Supreme Court of Canada

Heard: March 23, 2017;
Judgment: December 8, 2017.

**Present: B. McLachlin C.J., R.S. Abella, M.J. Moldaver,
A. Karakatsanis, C. Gascon, S. Côté and M. Rowe JJ.**

(200 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law -- Constitutional issues -- Canadian Charter of Rights and Freedoms -- Legal rights -- Protection against unreasonable search and seizure -- Remedies for denial of rights -- Specific remedies -- Exclusion of evidence - Appeal by Marakah from appeal court judgment affirming his convictions for firearms offences and upholding pre-trial application ruling in Crown's favour allowed -- Marakah sent accomplice incriminating text messages in context of illegal firearms transactions -- Application judge erroneously concluded Marakah did not have reasonable expectation of privacy in text messages recovered from accomplice's cell phone and that he did not have standing to challenge the search -- Marakah's subjective expectation that his electronic conversation with accomplice would remain private was objectively reasonable in totality of the circumstances -- Grant factors favoured the exclusion of the evidence -- Marakah acquitted -- Canadian Charter of Rights and Freedoms, 1982, s. 8.

Appeal by Marakah from an Ontario Court of Appeal judgment affirming his convictions for firearms offences and upholding a pre-trial application ruling in the Crown's favour. Marakah sent text messages regarding illegal transactions in firearms. The police obtained warrants to search his home and that of his accomplice, Winchester. They seized Marakah's BlackBerry and Winchester's iPhone, searched both devices, and found incriminating text messages. They charged Marakah and sought to use the text messages as evidence against him. At trial, Marakah argued that the messages should not be admitted against him because they were obtained in violation of his s. 8 Charter right against unreasonable search and seizure. The application judge held that the warrant for Marakah's residence was invalid and that the text messages recovered from his BlackBerry could not be used against him, but that Marakah had no standing to argue that the text messages recovered from Winchester's iPhone should not be admitted against him. He admitted the text messages and convicted Marakah of multiple firearms offences. The majority of the Ontario Court of Appeal

agreed that Marakah could have no expectation of privacy in the text messages recovered from Winchester's iPhone, and hence did not have standing to argue against their admissibility. The main question on appeal was whether Marakah could have had a reasonable expectation of privacy in the messages he sent to Winchester and whether he could claim s. 8 Charter protection for the text messages accessed through Winchester's iPhone.

HELD: Appeal allowed. To claim s. 8 protection, a claimant was required to first establish a reasonable expectation of privacy in the subject matter of the search. Whether a claimant had a reasonable expectation of privacy had to be assessed with regard to the "totality of the circumstances". In considering the totality of the circumstances, four "lines of inquiry" guided the court's analysis: 1) What was the subject matter of the alleged search?; 2) Did the claimant have a direct interest in the subject matter?; 3) Did the claimant have a subjective expectation of privacy in the subject matter?; and 4) If so, was the claimant's subjective expectation of privacy objectively reasonable? The subject matter of the search was to be defined functionally, not in terms of physical acts, physical space, or modalities of transmission. The claimant would only have standing to assert his s. 8 right if the fourth question was answered by the court in the affirmative. The four-pronged inquiry established that Marakah had a reasonable expectation of privacy in the text messages recovered from Winchester's iPhone. The subject matter of the alleged search was the electronic conversation between Marakah and Winchester. Marakah had a direct interest in that subject matter, he subjectively expected it to remain private, and that expectation was objectively reasonable. He therefore had standing to challenge the search. The three factors most relevant to the fourth line of inquiry in this case were: 1) the place where the search occurred; 2) the private nature of the subject matter; and 3) control over the subject matter. If the place of the search was viewed as a private electronic space accessible by only Marakah and Winchester, Marakah's reasonable expectation of privacy was clear. If the place of the search was viewed as Mr. Winchester's phone, this would reduce, but not negate, Marakah's expectation of privacy. The mere fact of the electronic conversation between the two men tended to reveal personal information about Marakah's lifestyle; namely, that he was engaged in a criminal enterprise. In addition, Marakah exercised control over the informational content of the electronic conversation and the manner in which information was disclosed. A person did not lose control of information for the purposes of s. 8 simply because another possessed it or could access it. The risk that Winchester could have disclosed the text messages did not negate Marakah's control over the information contained therein. It followed that Marakah had standing to challenge the search and the admission of the evidence, even though the state accessed his electronic conversation with Winchester through the latter's iPhone. This conclusion was not displaced by policy concerns. The Court noted, however, that not every communication occurring through an electronic medium would attract a reasonable expectation of privacy and grant an accused standing to make arguments regarding s. 8 protection. Different facts could lead to different results. The Crown conceded that, if Marakah had standing, the search was unreasonable and violated his right under s. 8 of the Charter. After applying the Grant analysis, the Court concluded that the evidence of the electronic conversation should have been excluded under s. 24(2) of the Charter. The curative proviso in s. 686(1)(b)(iii) of the Criminal Code did not apply. The convictions were set aside and acquittals were entered on all charges.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, s. 7, s. 8, s. 11(d), s. 24(1), s. 24(2)

Criminal Code, R.S.C. 1985, c. C-46, s. 183, s. 184.1, s. 184.4, s. 278.1-278.91, s. 686(1)(b)(iii)

Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5,

Subsequent History:

NOTE: This document is subject to editorial revision before its reproduction in final form in the Canada Supreme Court Reports.

Court Catchwords:

Constitutional law -- Charter of Rights -- Enforcement -- Standing -- Search and seizure -- Evidence -- Admissibility -- Text messages -- Mobile devices of accused and accomplice seized and searched without warrant -- Whether accused has reasonable expectation of privacy in text message conversation recovered on accomplice's device and therefore standing to challenge search and admission of evidence -- Whether guarantee against unreasonable search and seizure in s. 8 of Canadian Charter of Rights and Freedoms protects text messages recovered on recipient's device -- Whether evidence should be excluded under s. 24(2) of Charter -- If so, whether curative proviso in s. 686(1)(b)(iii) of Criminal Code applies -- Criminal Code, R.S.C. 1985, c. C-46, s. 686(1)(b)(iii).

Court Summary:

M sent text messages to an accomplice, W, regarding illegal transactions in firearms. The police obtained warrants to search his home and that of W. They seized M's BlackBerry and W's iPhone, searched both devices, and found incriminating text messages. They charged M and sought to use the text messages as evidence against him. At trial, M argued that the messages should not be admitted against him because they were obtained in violation of his s. 8 *Charter* right against unreasonable search or seizure. The application judge held that the warrant for M's home was invalid and that the text messages recovered from his BlackBerry could not be used against him, but that M had no standing to argue that the text messages recovered from W's iPhone should not be admitted against M. The judge admitted the text messages and convicted M of multiple firearms offences. A majority of the Court of Appeal agreed that M could have no expectation of privacy in the text messages recovered from W's iPhone, and hence did not have standing to argue against their admissibility.

Held (Moldaver and Côté JJ. dissenting): The appeal should be allowed, the convictions set aside and acquittals entered.

Per McLachlin C.J. and Abella, Karakatsanis and Gascon JJ.: Text messages that have been sent

and received can, in some cases, attract a reasonable expectation of privacy and therefore can be protected against unreasonable search or seizure under s. 8 of the *Charter*. Whether a claimant had a reasonable expectation of privacy must be assessed in the totality of the circumstances. To claim s. 8 protection, claimants must establish that they had a direct interest in the subject matter of the search, that they had a subjective expectation of privacy in that subject matter and that their subjective expectation of privacy was objectively reasonable. Only if a claimant's subjective expectation of privacy was objectively reasonable will the claimant have standing to argue that the search was unreasonable. However, standing is merely the opportunity to argue one's case. It does not follow that the accused's argument will succeed, or that the evidence will be found to violate s. 8.

With a text message, the subject matter of the search is the electronic conversation between the sender and the recipient(s). This includes the existence of the conversation, the identities of the participants, the information shared, and any inferences about associations and activities that can be drawn from that information. The subject matter is not the copy of the message stored on the sender's device, the copy stored on a service provider's server, or the copy received on the recipient's device that the police are after; it is the electronic conversation itself, not its components.

A number of factors may assist in determining whether it was objectively reasonable to expect privacy in different circumstances, including: (1) the place where the search occurred whether it be a real physical place or a metaphorical chat room; (2) the private nature of the subject matter, that is whether the informational content of the electronic conversation revealed details of the claimant's lifestyle or information of a biographic nature; and (3) control over the subject matter.

Control is not an absolute indicator of a reasonable expectation of privacy, nor is lack of control fatal to a privacy interest. It is only one factor to be considered in the totality of the circumstances. Control must be analyzed in relation to the subject matter of the search, which in this case was an electronic conversation. Individuals exercise meaningful control over the information that they send by text message by making choices about how, when, and to whom they disclose the information. An individual does not lose control over information for the purposes of s. 8 of the *Charter* simply because another individual possesses it or can access it. Nor does the risk that a recipient could disclose an electronic conversation negate a reasonable expectation of privacy in an electronic conversation. Therefore, even where an individual does not have exclusive control over his or her personal information, only shared control, he or she may yet reasonably expect that information to remain safe from state scrutiny.

In this case, M had a reasonable expectation of privacy in the text messages recovered from W's iPhone. First, the subject matter of the alleged search was the electronic conversation between M and W, not W's iPhone, from which the text messages were recovered. Second, M had a direct interest in that subject matter. He was a participant in that electronic conversation and the author of the particular text messages introduced as evidence against him. Third, he subjectively expected the conversation to remain private. M testified that he asked W numerous times to delete the text

messages from his iPhone. Fourth, his subjective expectation was objectively reasonable. Each of the three factors relevant to objective reasonableness in this case support this conclusion. If the place of the search is viewed as a private electronic space accessible by only M and W, M's reasonable expectation of privacy is clear. If the place of the search is viewed as W's phone, this reduces, but does not negate, M's expectation of privacy. The mere fact of the electronic conversation between the two men tended to reveal personal information about M's lifestyle; namely, that he was engaged in a criminal enterprise. In addition, M exercised control over the informational content of the electronic conversation and the manner in which information was disclosed. The risk that W could have disclosed it, if he chose to, does not negate the reasonableness of M's expectation of privacy. Therefore, M has standing to challenge the search and the admission of the evidence of the text messages recovered from W's iPhone. This conclusion is not displaced by policy concerns. There is nothing in the record to suggest that the justice system cannot adapt to the challenges of recognizing that some electronic conversations may engage s. 8 of the *Charter*. Moreover, different facts may well lead to a different result.

The Crown concedes that if M had standing the search was unreasonable. The text messages are thus presumptively inadmissible against him, subject to s. 24(2) of the *Charter*. In considering whether this evidence should be excluded under s. 24(2), society's interest in the adjudication of M's case on its merits is significant. The text messages offer highly reliable and probative evidence in the prosecution of a serious offence and their exclusion would result in the absence of evidence by which M could be convicted. This favours admission. However, the police conduct in accessing and searching the electronic conversation through W's iPhone without a warrant two hours after his arrest was sufficiently serious to favour the exclusion of the evidence. This breached s. 8 of the *Charter* not only because of the extent of the search, but also because of its timing. On the application judge's findings, this simply was not a search incident to arrest. In addition, the police conduct had a substantial impact on M's *Charter*-protected privacy interest in the electronic conversation. On balance, the admission of the evidence would bring the administration of justice into disrepute. It must therefore be excluded under s. 24(2).

Without the erroneously admitted evidence obtained from W's iPhone, M would have been acquitted. He was convicted instead. To allow that conviction to stand would be a miscarriage of justice. Therefore, the curative proviso in s. 686(1)(b)(iii) of the *Criminal Code* does not apply.

Per Rowe J.: The approach based on the totality of circumstances set out by the majority with respect to the existence of a reasonable expectation of privacy accords with the jurisprudence of the Court. The technological means by which we communicate continue to change. An approach based on the totality of circumstances responds to such change because the broad and general right to be secure from unreasonable search and seizure guaranteed by s. 8 of the *Charter* is meant to keep pace with technological development. Applying that approach to the facts of this case, M has standing to challenge the search. The modalities of texting inherently limited M in his capacity to exercise control over the record of his text message conversation with W. This alone should not be fatal to M's reasonable expectation of privacy. Although the concerns raised by the minority are

shared, those concerns do not arise on the facts of this case.

Per Moldaver and Côté JJ. (dissenting): M did not have a reasonable expectation of personal privacy in his text message conversations with W and therefore, M lacked standing to challenge the search of W's phone under s. 8 of the *Charter*. Both legal and policy considerations lead to this conclusion. From a legal standpoint, the reasonableness of a person's expectation of privacy depends on the nature and strength of that person's connection to the subject matter of the search. This connection must be examined by looking at the totality of the circumstances in a particular case. Control over the subject matter of the search in the circumstances is a crucial factor in assessing an individual's personal connection to it.

Control does not need to be exclusive. While a lack of exclusive control may diminish the strength of a reasonable expectation of privacy, it does not necessarily eliminate it. However, recognizing a reasonable expectation of privacy in the face of a total absence of control is both unprecedented and antithetical to the notion of personal privacy. Therefore, a total absence of control is a compelling indicator that an expectation of personal privacy is unreasonable, and that the individual does not have standing to challenge the search.

In addition, control need not be direct. A reasonable expectation of privacy will likely arise where a claimant exercises personal control over the subject matter in issue, as in the case of one's home, possessions and body. However, under a functional approach, constructive control may suffice to ground a reasonable expectation of personal privacy in other contexts, including a legal, professional or commercial relationship.

In this case, the subject matter of the search is the text message conversations between M and W. Those conversations were accessed by police after they had been received on W's phone. The conversations were not intercepted by police during the transmission process, and they were not accessed on M's phone. These are important contextual distinctions that show that M had no control over the subject matter of the search in the circumstances of this case. Rather, W had exclusive control over the text message conversations on his phone. W was free to disclose them to anyone he wished, at any time and for any purpose. To conclude that M had a reasonable expectation of personal privacy in those conversations on W's phone despite his total lack of control over them severs the interconnected relationship between privacy and control that has long formed part of the Court's s. 8 jurisprudence. It is equally at odds with the fundamental principle that individuals can and will share information as they see fit in a free and democratic society.

The risks of state access and public access are not distinct for the purposes of the reasonable expectation of privacy test. If an expectation of personal privacy is unreasonable against the public, then it is also unreasonable against the state. If M assumed the risk of W allowing the public to access his text message conversations, then M assumed the risk of the police also accessing it.

The majority's approach to the reasonable expectation of privacy analysis in this case suffers from three notable shortcomings. First, it does not determine where the search actually occurred, despite

maintaining that the strength of M's expectation of privacy will vary depending on the place of the search. Without knowing whether the place of the search is a metaphorical chat room or W's physical phone, courts have no way of knowing how to assess the strength of M's expectation of privacy. This uncertainty will have serious implications when courts must assess the impact of an unlawful search on a claimant's s. 8 right for the purposes of a s. 24(2) *Charter* analysis.

Second, although the majority purports to confine its finding of a reasonable expectation of privacy to the circumstances of this case, applying its framework leads to only two possible conclusions. Either all participants to text message conversations enjoy a reasonable expectation of privacy, or criminal justice stakeholders, including trial and appellate judges, are left to decipher on a case-by-case basis -- without any guidance -- whether a claimant has standing to challenge the search of an electronic conversation. To hold that everyone has a reasonable expectation of privacy in text message conversations when those conversations are on another person's phone effectively eradicates the principle of standing and renders it all but meaningless. As such, under the majority's all-encompassing approach to standing, even a sexual predator who lures a child into committing sexual acts and then threatens to kill the child if he or she tells anyone will retain a reasonable expectation of privacy in the text message conversations on the child's phone. It is hard to think of anything more unreasonable. In the alternative, it is highly unsatisfactory to leave criminal justice stakeholders to guess when and under what circumstances electronic messages will not attract a reasonable expectation of privacy.

Third, from a policy standpoint, granting M standing in these circumstances vastly expands the scope of persons who can bring a s. 8 challenge. The majority adopts an approach to s. 8 that has no ascertainable bounds and threatens a sweeping expansion of s. 8 standing. This carries with it a host of foreseeable consequences that will add to the complexity and length of criminal trial proceedings and place even greater strains on a criminal justice system that is already overburdened. Worse yet, expanding the scope of persons who can bring a s. 8 challenge risks disrupting the delicate balance that s. 8 strives to achieve between privacy and law enforcement interests, particularly in respect of offences that target the most vulnerable members of our society. Although these consequences are not determinative of the reasonableness of M's expectation of privacy, their cumulative effect weighs heavily in favour of denying him standing.

Denying M standing does not however grant the police immunity from s. 8 of the *Charter*. Where, as here, the police activity amounts to a search or seizure, it remains subject to s. 8 and a particular claimant's standing should not be mistaken as the exclusive means of enforcement. Another claimant may have standing to bring a s. 8 challenge against the search or seizure in his or her own criminal trial, or to bring a claim for *Charter* damages. Moreover, even where s. 8 standing is denied, ss. 7 and 11(d) of the *Charter* offer residual protection that can, in certain circumstances, provide a claimant with an alternative route to challenge the propriety of police conduct in the course of a search or seizure. This ensures that the effects of the standing requirement are not exploited by the police as a loophole in *Charter* protection.

This is not a case in which it is appropriate to exercise the residual discretion to exclude evidence under ss. 7 and 11(d) of the *Charter*. The application judge found that the searches of the text message conversations stored on the phones of M and W both infringed s. 8 of the *Charter*. As neither claimant had standing to challenge the search of the other's phone, evidence of those text message conversations was admissible against both M and W. It has not been suggested that the police conduct giving rise to it was a product of design. Nor do the application judge's findings indicate that the police engaged in deliberate *Charter* evasion or serious misconduct in the course of either search. In these circumstances, there is no basis to conclude that the fairness of M's trial was tainted by the admission of the record of the conversations obtained in the search of W's phone.

Cases Cited

By McLachlin C.J.

Applied: *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34
 ; *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353
 ; **distinguished:** *R. v. C. (W.B.)*
 (2000), 142 C.C.C. (3d) 490, aff'd 2001 SCC 17, [2001] 1 S.C.R. 530
 ; **referred to:** *R. v. Spencer*,
 2014 SCC 43, [2014] 2 S.C.R. 212; *R. v. Tessling*,
 2004 SCC 67, [2004] 3 S.C.R. 432; *R. v. Edwards*,
 [1996] 1 S.C.R. 128; *Hunter v. Southam Inc.*,
 [1984] 2 S.C.R. 145; *Katz v. United States*, 389 U.S. 347
 (1967); *R. v. Patrick*, 2009 SCC 17,
 [2009] 1 S.C.R. 579; *R. v. Ward*, 2012 ONCA 660,
 112 O.R. (3d) 321; *R. v. TELUS Communications Co.*,
 2013 SCC 16, [2013] 2 S.C.R. 3; *R. v. Wong*, [1990] 3 S.C.R. 36
 ; *R. v. Gomboc*, 2010 SCC 55, [2010] 3 S.C.R. 211
 ; *R. v. Kang-Brown*, 2008 SCC 18, [2008] 1 S.C.R. 456
 ; *R. v. A.M.*, 2008 SCC 19, [2008] 1 S.C.R. 569
 ; *R. v. Jones*, 2017 SCC 60; *R. v.*
Plant, [1993] 3 S.C.R. 281; *R. v. Duarte*,
 [1990] 1 S.C.R. 30; *R. v. Buhay*, 2003 SCC 30,
 [2003] 1 S.C.R. 631; *R. v. Dymont*, [1988] 2 S.C.R. 417
 ; *R. v. Orlandis-Habsburgo*, 2017 ONCA 649;
R. v. Collins, [1987] 1 S.C.R. 265; *R. v.*
Paterson, 2017 SCC 15, [2017] 1 S.C.R. 202; *R. v.*
Fearon, 2014 SCC 77, [2014] 3 S.C.R. 621; *R. v.*
Harrison, 2009 SCC 34, [2009] 2 S.C.R. 494; *R. v.*
Belnavis, [1997] 3 S.C.R. 341; *R. v. Wildman*,
 [1984] 2 S.C.R. 311; *Colpitts v. The Queen*, [1965] S.C.R. 739
 ; *R. v. James*, 2011 ONCA 839, 283 C.C.C. (3d) 212

By Rowe J.

Referred to: *R. v. Spencer*, 2014 SCC 43, [2014] 2 S.C.R. 212; *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34; *R. v. Patrick*, 2009 SCC 17, [2009] 1 S.C.R. 579; *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432; *R. v. Wong*, [1990] 3 S.C.R. 36; *R. v. Vu*, 2013 SCC 60, [2013] 3 S.C.R. 657.

By Moldaver J. (dissenting)

R. v. Jones, 2017 SCC 60; *R. v. Belnavis* (1996), 29 O.R. (3d) 321, aff'd [1997] 3 S.C.R. 341; *R. v. Spencer*, 2014 SCC 43, [2014] 2 S.C.R. 212; *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34; *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432; *R. v. Patrick*, 2009 SCC 17, [2009] 1 S.C.R. 579; *R. v. Fearon*, 2014 SCC 77, [2014] 3 S.C.R. 621; *R. v. TELUS Communications Co.*, 2013 SCC 16, [2013] 2 S.C.R. 3; *R. v. Pugliese* (1992), 8 O.R. (3d) 259; *R. v. Wong*, [1990] 3 S.C.R. 36; *R. v. Buhay*, 2003 SCC 30, [2003] 1 S.C.R. 631; *R. v. Plant*, [1993] 3 S.C.R. 281; *R. v. Ward*, 2012 ONCA 660, 112 O.R. (3d) 321; *R. v. Edwards*, [1996] 1 S.C.R. 128; *R. v. Sandhu* (1993), 82 C.C.C. (3d) 236; *R. v. Dymont*, [1988] 2 S.C.R. 417; *R. v. Stillman*, [1997] 1 S.C.R. 607; *R. v. Duarte*, [1990] 1 S.C.R. 30; *R. v. Shayesteh* (1996), 31 O.R. (3d) 161; *R. v. Rendon* (1999), 140 C.C.C. (3d) 12; *R. v. Law*, 2002 SCC 10, [2002] 1 S.C.R. 227; *R. v. Gomboc*, 2010 SCC 55, [2010] 3 S.C.R. 211; *R. v. Quesnelle*, 2014 SCC 46, [2014] 2 S.C.R. 390; *R. v. Rogers Communications Partnership*, 2016 ONSC 70, 128 O.R. (3d) 692; *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353; *R. v. Sandhu*, 2014 BCSC 303; *R. v. Lowrey*, 2016 ABPC 131, 357 C.R.R. (2d) 76; *R. v. Craig*, 2016 BCCA 154, 335 C.C.C. (3d) 28; *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640; *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *R. v. Orlandis-Habsburgo*, 2017 ONCA 649; *R. v. Reeves*, 2017 ONCA 365, 350 C.C.C. (3d) 1; *R. v.*

Nolet, 2010 SCC 24, [2010] 1 S.C.R. 851; *R. v. Collins*, [1987] 1 S.C.R. 265; *R. v. Wills* (1992), 7 O.R. (3d) 337; *R. v. Borden*, [1994] 3 S.C.R. 145; *R. v. McBride*, 2016 BCSC 1059; *R. v. D.A.I.*, 2012 SCC 5, [2012] 1 S.C.R. 149; *R. v. Hutchinson*, 2014 SCC 19, [2014] 1 S.C.R. 346; *Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28; *R. v. Bjelland*, 2009 SCC 38, [2009] 2 S.C.R. 651; *R. v. Babos*, 2014 SCC 16, [2014] 1 S.C.R. 309; *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292; *R. v. Harrer*, [1995] 3 S.C.R. 562.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 7, 8, 11(d), 24(1), (2).

Criminal Code, R.S.C. 1985, c. C-46, ss. 183 "private communication", 184.1, 184.4, 278.1 to 278.91, 686(1)(b)(iii).

Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5.

Authors Cited

Hubbard, Robert W., Peter M. Brauti and Scott K. Fenton. *Wiretapping and Other Electronic Surveillance: Law and Procedure*, vol. 2. Aurora, Ont.: Canada Law Book, 2000 (loose-leaf updated June 2017, release 50).

McLuhan, Marshall. *Understanding Media: The Extensions of Man*. New York: McGraw-Hill, 1964.

Westin, Alan F. *Privacy and Freedom*. New York: Atheneum, 1970.

History and Disposition:

APPEAL from a judgment of the Ontario Court of Appeal (MacPherson, MacFarland and LaForme JJ.A.), 2016 ONCA 542, 131 O.R. (3d) 561, 359 C.R.R. (2d) 70, 338 C.C.C. (3d) 269, 30 C.R. (7th) 263, 352 O.A.C. 68, [2016] O.J. No. 3738 (QL), 2016 CarswellOnt 10861 (WL Can.), affirming the accused's convictions for firearms offences and the pre-trial application ruling. Appeal allowed, Moldaver and Côté JJ. dissenting.

Counsel:

Mark J. Sandler and *Wayne Cunningham*, for the appellant.

Randy Schwartz and *Andrew Hotke*, for the respondent.

Nicholas E. Devlin and *Jennifer Conroy*, for the intervener the Director of Public Prosecutions.

Written submissions only by *Daniel M. Scanlan*, for the intervener the Attorney General of British Columbia.

Maureen McGuire, for the intervener the Attorney General of Alberta.

Jill R. Presser and *David A. Fewer*, for the intervener the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic.

Susan M. Chapman, *Naomi Greckol-Herlich* and *Bianca Bell*, for the intervener the Criminal Lawyers' Association of Ontario.

Gerald Chan, for the intervener the British Columbia Civil Liberties Association.

Christine Lonsdale and *Charlotte-Anne Malischewski*, for the intervener the Canadian Civil Liberties Association.

The judgment of McLachlin C.J and Abella, Karakatsanis and Gascon was delivered by

B. McLACHLIN C.J.:--

I. Introduction

1 Can Canadians ever reasonably expect the text messages they send to remain private, even after the messages have reached their destination? Or is the state free, regardless of the circumstances, to access text messages from a recipient's device without a warrant? The question in this appeal is whether the guarantee against unreasonable search and seizure in s. 8 of the *Canadian Charter of Rights and Freedoms* can ever apply to such messages.

2 The appellant, Nour Marakah, sent text messages regarding illegal transactions in firearms. The police obtained warrants to search his home and that of his accomplice, Andrew Winchester. They seized Mr. Marakah's BlackBerry and Mr. Winchester's iPhone, searched both devices, and found incriminating text messages. They charged Mr. Marakah and sought to use the text messages as evidence against him. At trial, Mr. Marakah argued that the messages should not be admitted against him because they were obtained in violation of his s. 8 right against unreasonable search and seizure: see trial reasons, reproduced in R.R., at pp. 1-26.

3 The application judge held that the warrant for Mr. Marakah's residence was invalid and that the text messages recovered from his BlackBerry could not be used against him, but that Mr. Marakah had no standing to argue that the text messages recovered from Mr. Winchester's iPhone should not be admitted against him: application judge's reasons, reproduced in A.R., at pp. 1-27. He admitted the text messages and convicted Mr. Marakah of multiple firearms offences. The majority of the Court of Appeal for Ontario, LaForme J.A. dissenting, agreed that Mr. Marakah could have no expectation of privacy in the text messages recovered from Mr. Winchester's iPhone, and hence did not have standing to argue against their admissibility: 2016 ONCA 542, 131 O.R. (3d) 561.

4 I conclude that, depending on the totality of the circumstances, text messages that have been sent and received may in some cases be protected under s. 8 and that, in this case, Mr. Marakah had standing to argue that the text messages at issue enjoy s. 8 protection.

5 The conclusion that a text message conversation *can*, in some circumstances, attract a reasonable expectation of privacy does not lead inexorably to the conclusion that an exchange of electronic messages *will always* attract a reasonable expectation of privacy (see Moldaver J.'s reasons, at paras. 100 and 167-68); whether a reasonable expectation of privacy in such a conversation is present in any particular case must be assessed on those facts by the trial judge.

6 In this case, Mr. Marakah subjectively believed his text messages to be private, even after Mr. Winchester received them. This expectation was objectively reasonable. I therefore conclude that Mr. Marakah has standing to challenge the use of the text messages against him on the grounds that the search violated s. 8 of the *Charter*.

7 Ordinarily, standing established, it would be for the trial judge to determine whether the text messages in fact enjoyed s. 8 protection in all of the circumstances of the case. However, the Crown concedes that, if Mr. Marakah has standing, the search was unreasonable and violated Mr. Marakah's right under s. 8 of the *Charter*. The remaining question is whether the evidence of the conversation should have been excluded under s. 24(2). I conclude that it should have been. This principled approach conforms to the jurisprudence, and should not be undermined by impassioned hypotheses. I would therefore allow the appeal, set aside the convictions and acquit Mr. Marakah.

II. Analysis

A. *When Does Section 8 Protection Apply?*

8 The issue is whether the courts below erred in holding that an accused can never claim s. 8 protection for text messages accessed through a recipient's phone because the sender has no privacy interest in the messages if they are not contained within his or her own device. The question is whether Mr. Marakah could have had a reasonable expectation of privacy in those messages.

9 Section 8 of the *Charter* provides that

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

10 Section 8 applies "where a person has a reasonable privacy interest in the object or subject matter of the state action and the information to which it gives access": *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34, at para. 34; see also *R. v. Spencer*, 2014 SCC 43, [2014] 2 S.C.R. 212, at para. 16; *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432, at para. 18. To claim s. 8 protection, a claimant must first establish a reasonable expectation of privacy in the subject matter of the search, i.e., that the person subjectively expected it would be private and that this expectation was objectively reasonable: *R. v. Edwards*, [1996] 1 S.C.R. 128, at para. 45; see also *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at pp. 159-60; *Katz v. United States*, 389 U.S. 347 (1967), at p. 361, per Harlan J., concurring. Whether the claimant had a reasonable expectation of privacy must be assessed in "the totality of the circumstances": *Edwards*, at paras. 31 and 45; see also *Spencer*, at paras. 16-18; *Cole*, at para. 39; *R. v. Patrick*, 2009 SCC 17, [2009] 1 S.C.R. 579, at para. 26; *Tessling*, at para. 19. This approach applies to determining whether there is a reasonable expectation of privacy in a given text message conversation.

11 In considering the totality of the circumstances, four "lines of inquiry" (*Cole*, at para. 40) guide the court's analysis:

1. What was the subject matter of the alleged search?
2. Did the claimant have a direct interest in the subject matter?
3. Did the claimant have a subjective expectation of privacy in the subject matter?
4. If so, was the claimant's subjective expectation of privacy objectively reasonable?

See also *Spencer*, at para. 18; *Patrick*, at para. 27; *Tessling*, at para. 32.

12 Only if the answer to the fourth question is "yes" -- that is, if the claimant's subjective expectation of privacy was objectively reasonable -- will the claimant have standing to assert his s. 8 right. If the court so concludes, the claimant may argue that the state action in question was unreasonable. If, however, the court determines that the claimant did not have a reasonable expectation of privacy in the subject matter of the alleged search, then the state action cannot have violated the claimant's s. 8 right. He will not have standing to challenge its constitutionality.

B. *Did Mr. Marakah Have a Reasonable Expectation of Privacy in the Text Messages?*

13 I conclude that the four lines of inquiry referred to above establish that Mr. Marakah had a reasonable expectation of privacy in the text messages recovered from Mr. Winchester's iPhone. The subject matter of the alleged search was the electronic conversation between Mr. Marakah and Mr. Winchester. Mr. Marakah had a direct interest in that subject matter. He subjectively expected it to remain private. That expectation was objectively reasonable. He therefore has standing to challenge the search.

(1) What Was the Subject Matter of the Search?

14 The first step in the analysis is to identify the subject matter of the search: see *Spencer*, at para. 18; *Cole*, at para. 40; *Patrick*, at para. 27; *Tessling*, at para. 32. How the subject matter is defined may affect whether the applicant has a reasonable expectation of privacy. Care must therefore be taken in defining the subject matter of a search, particularly where the search is of electronic data: see *Spencer*, at para. 23.

15 The subject matter of a search must be defined functionally, not in terms of physical acts, physical space, or modalities of transmission. As Doherty J.A. stated in *R. v. Ward*, 2012 ONCA 660, 112 O.R. (3d) 321, at para. 65, a court identifying the subject matter of a search must not do so "narrowly in terms of the physical acts involved or the physical space invaded, but rather by reference to the nature of the privacy interests potentially compromised by the state action". In *Spencer*, at para. 26, Cromwell J. endorsed these words and added that courts should take "a broad and functional approach to the question, examining the connection between the police investigative technique and the privacy interest at stake" and should look at "not only the nature of the precise information sought, but also at the nature of the information that it reveals". The court's task, as Doherty J.A. put it in *Ward*, is to determine "what the police were really after" (para. 67).

16 One option can be eliminated at the outset. The subject matter of the search at issue was not Mr. Winchester's iPhone, from which the text messages in this case were recovered. Neither the iPhone itself nor its contents generally is what the police were really after. The subject matter must, therefore, be defined more precisely.

17 Correctly characterized, the subject matter of the search was Mr. Marakah's "electronic conversation" with Mr. Winchester: see *R. v. TELUS Communications Co.*, 2013 SCC 16, [2013] 2 S.C.R. 3, at para. 5, per Abella J. To describe text messages as part of an electronic conversation is to take a holistic view of the subject matter of the search. This properly avoids a mechanical approach that defines the subject matter in terms of physical acts, spaces, or modalities of transmission: see *Spencer*, at paras. 26 and 31. It also reflects the technological reality of text messaging.

18 "Text messaging" refers to the electronic communications medium technically known as Short Message Service ("SMS"). SMS uses standardized communication protocols and mobile telephone service networks to transmit short text messages from one mobile phone to another: *TELUS*, at para. 111, per Cromwell J., dissenting but not on this point. Colloquially, however, "text messaging" (or

the verb "to text") can also describe various other person-to-person electronic communications tools, such as Apple iMessage, Google Hangouts, and BlackBerry Messenger. These means of nearly instant communication are both technologically distinct from and functionally equivalent to SMS. Different service providers also handle SMS messages differently. The data that constitute individual SMS or other text messages may exist in different places at different times. They may be transmitted, stored, and accessed in different ways. But the interconnected system in which they all participate functions to permit rapid communication of short messages between individuals. In these reasons, I use "text messages" to refer to the broader category of electronic communications media, and "SMS" or "SMS messages" to refer to that medium specifically.

19 When a text message is searched, it is not the copy of the message stored on the sender's device, the copy stored on a service provider's server, or the copy in the recipient's "inbox" that the police are really after; it is the electronic conversation between two or more people that law enforcement seeks to access. Where data are physically or electronically located varies from phone to phone, from service provider to service provider, or, with text messaging more broadly, from technology to technology. The s. 8 analysis must be robust to these distinctions, in harmony with the need to take a broad, purposive approach to privacy protection under s. 8 of the *Charter*: *Spencer*, at para. 15; *Hunter*, at pp. 156-57. If "the broad and general right to be secure from unreasonable search and seizure guaranteed by s. 8 is meant to keep pace with technological development" (*R. v. Wong*, [1990] 3 S.C.R. 36, at p. 44), then courts must recognize that SMS technology, in which messages may be said to be "sent", "received", and "transmitted" between devices, is just one means of text messaging among many and is, from the point of view of the user, functionally identical to numerous others. As Abella J. stated in *TELUS*, at para. 5, "[t]echnical differences inherent in new technology should not determine the scope of protection afforded to private communications". The subject matter of the search is the conversation, not its components.

20 I conclude, and Moldaver J. agrees, that for the purpose of determining whether s. 8 is capable of protecting SMS or other text messages, the subject matter of the search is the electronic conversation between the sender and the recipient(s). This includes the existence of the conversation, the identities of the participants, the information shared, and any inferences about associations and activities that can be drawn from that information: see *Spencer*, at paras. 26-31; see also *R. v. Gomboc*, 2010 SCC 55, [2010] 3 S.C.R. 211, at para. 38, per Deschamps J., at para. 81, per Abella J., and at para. 119, per McLachlin C.J. and Fish J.; *R. v. Kang-Brown*, 2008 SCC 18, [2008] 1 S.C.R. 456, at paras. 174-75, per Deschamps J., and at para. 227, per Bastarache J.; *R. v. A.M.*, 2008 SCC 19, [2008] 1 S.C.R. 569, at para. 67, per Binnie J. So it was here.

(2) Did Mr. Marakah Have a Direct Interest in the Subject Matter?

21 Mr. Marakah had a direct interest in the information contained in the electronic conversation that was the subject matter of the search: see *Spencer*, at para. 50; *Patrick*, at para. 31. He was a participant in that electronic conversation and the author of the particular text messages introduced as evidence against him.

(3) Did Mr. Marakah Have a Subjective Expectation of Privacy in the Subject Matter?

22 The claimant must have had a subjective expectation of privacy in the subject matter of the alleged search for s. 8 to be engaged. As Binnie J. acknowledged in *Patrick*, at para. 37, the requirement that the claimant establish a subjective expectation of privacy is not "a high hurdle": see also *R. v. Jones*, 2017 SCC 60, at para. 20, per Côté J.

23 Whether Mr. Marakah had a subjective expectation of privacy in the contents of his electronic conversation with Mr. Winchester has never been in serious dispute. Mr. Marakah's evidence was that he expected Mr. Winchester to keep the contents of their electronic conversation private: see application judge's reasons, at para. 91. He testified that he asked Mr. Winchester numerous times to delete the text messages from his iPhone: (*ibid.*) I conclude that Mr. Marakah subjectively expected that the contents of his electronic conversation with Mr. Winchester would remain private.

(4) Was Mr. Marakah's Subjective Expectation of Privacy Objectively Reasonable?

24 The claimant's subjective expectation of privacy in the subject matter of the alleged search must have been objectively reasonable in order to engage s. 8. Over the years, courts have referred to a number of factors that may assist in determining whether it was reasonable to expect privacy in different circumstances: see *Cole*, at para. 45; *Tessling*, at para. 32; *Edwards*, at para. 45. The factors that figured most prominently in the arguments before us are: (1) the place where the search occurred; (2) the private nature of the subject matter, i.e., whether the informational content of the electronic conversation revealed details of the claimant's lifestyle or information of a biographic nature; and (3) control over the subject matter. I will consider each of these factors in turn. I will then deal with the policy arguments raised against recognizing s. 8 protection for text messages.

(a) *The Place of the Search*

25 Place may be helpful in determining whether a person has a reasonable expectation of privacy for the purposes of s. 8. At common law, privacy was often designated by place, as evident in the old dictum that every man's home is his castle: see *Tessling*, at para. 22.

26 Place may inform whether it is reasonable to expect a verbal conversation to remain private; depending on the circumstances, a conversation in a crowded restaurant may not attract the protection of s. 8, while the same conversation behind closed doors may.

27 The factor of "place" was largely developed in the context of territorial privacy interests, and digital subject matter, such as an electronic conversation, does not fit easily within the strictures set out by the jurisprudence. What is the place of an electronic text message conversation? And what light does that shed on a claimant's reasonable expectation of privacy? Place is important only insofar as it informs the objective reasonableness of a subjective expectation of privacy.

28 One possibility is that an electronic conversation does not occupy a particular physical place. All or part of it may be on the sender's phone or the recipient's, or in radio waves or a service provider's database, or on a remote server to which both the sender and the recipient (or the recipients) have access, or some combination of these. This interconnected web of devices and servers creates an electronic world of digital communication that, in the 21st century, is every bit as real as physical space. The millions of us who text friends, family, and acquaintances may each be viewed as having appropriated a corner of this electronic space for our own purposes. There, we seclude ourselves and convey our private messages, just as we might use a room in a home or an office to talk behind closed doors. The phrase "chat room" to describe an Internet site through which people communicate is not merely a metaphor. In a similar way, text messaging can create *private* chat rooms between individuals. Although electronic, these rooms are the place of the search. This suggests that there would be a reasonable expectation of privacy in a text message conversation.

29 Another option is to say that the place of the search is the device through which the messages are accessed or stored: see Moldaver J.'s reasons, at paras. 144-45 and 151. Again, this suggests there may be a reasonable expectation of privacy in a text message conversation. Control or regulation of access to a place is relevant to a reasonable expectation of privacy: see *Edwards*, at para. 45. 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: *Tessling*, at para. 22.

30 The place of the search is simply one of several factors that must be weighed to determine whether the accused had a reasonable expectation of privacy for the purposes of s. 8 of the *Charter*. Whether one views the place of an electronic conversation as a metaphorical chat room or a real physical place, it is clear that the place of the text message conversation does not exclude an expectation of privacy. At the end of the day, s. 8 "protects people, not places": *Hunter*, at p. 159. The question always comes back to what the individual, in all of the circumstances, should reasonably have expected.

(b) *The Private Nature of the Information*

31 The purpose of s. 8 is "to protect a biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state": *R. v. Plant*, [1993] 3 S.C.R. 281, at p. 293. It follows that the potential for revealing private information is a factor to consider in determining whether an electronic conversation attracts a reasonable expectation of privacy and is protected by s. 8 of the *Charter*.

32 In considering this factor, the focus is not on the actual contents of the messages the police have seized, but rather on the potential of a given electronic conversation to reveal personal or biographical information. For the purposes of s. 8 of the *Charter*, the conversation is an "opaque

and sealed 'bag of information': *Patrick*, at para. 32; see also *Wong*, at p. 50. What matters is whether, in the circumstances, a search of an electronic conversation may betray "information which tends to reveal intimate details of the lifestyle and personal choices of the individual" (*Plant*, at p. 293), such that the conversation's participants have a reasonable expectation of privacy in its contents, whatever they may be: see *Cole*, at para. 47; *Tessling*, at paras. 25 and 27.

33 Individuals may even have an acute privacy interest in the *fact* of their electronic communications. As Marshall McLuhan observed at the dawn of the technological era, "the medium is the message": M. McLuhan, *Understanding Media: The Extensions of Man* (1964), at p. 7. The medium of text messaging broadcasts a wealth of personal information capable of revealing personal and core biological information about the participants in the conversation.

34 The personal nature of the information that can be derived from text messages is linked to the private nature of texting. People may be inclined to discuss personal matters in electronic conversations precisely because they understand that they are private. The receipt of the information is confined to the people to whom the text message is sent. Service providers are contracted to confidentiality. Apart from possible police interception -- which cannot be considered for the purpose of determining a reasonable expectation of privacy (see *Patrick*, at para. 14; *Wong*, at p. 47; *R. v. Duarte*, [1990] 1 S.C.R. 30, at pp. 43-44) -- no one else knows about the message or its contents.

35 Indeed, it is difficult to think of a type of conversation or communication that is capable of promising more privacy than text messaging. There is no more discreet form of correspondence. Participants need not be in the same physical place; in fact, they almost never are. It is, as this Court unanimously accepted in *TELUS*, a "private communication" as that term defined in s. 183 of the *Criminal Code*, R.S.C. 1985, c. C-46, namely, "[a] ... telecommunication ... that is made under circumstances in which it is reasonable for the originator to expect that it will not be intercepted by any person other than the person intended by the originator to receive it": see *TELUS*, at para. 12, per Abella J., at para. 67, per Moldaver J., and at para. 135, per Cromwell J.

36 One can even text privately in plain sight. A wife has no way of knowing that, when her husband appears to be catching up on emails, he is in fact conversing by text message with a paramour. A father does not know whom or what his daughter is texting at the dinner table. Electronic conversations can allow people to communicate details about their activities, their relationships, and even their identities that they would never reveal to the world at large, and to enjoy portable privacy in doing so.

37 Electronic conversations, in sum, are capable of revealing a great deal of personal information. Preservation of a "zone of privacy" in which personal information is safe from state intrusion is the very purpose of s. 8 of the *Charter*: see *Patrick*, at para. 77, per Abella J., dissenting but not on this point. As the foregoing examples illustrate, this zone of privacy extends beyond one's own mobile device; it can include the electronic conversations in which one shares private information with

others. It is reasonable to expect these private interactions -- and not just the contents of a particular cell phone at a particular point in time -- to remain private.

(c) *Control*

38 Control, ownership, possession, and historical use have long been considered relevant to determining whether a subjective expectation of privacy is objectively reasonable: see *Edwards*, at para. 45; *Cole*, at para. 51. Like the other factors, control is not an absolute indicator of a reasonable expectation of privacy, nor is lack of control fatal to a privacy interest: see *Cole*, at paras. 54 and 58; *R. v. Buhay*, 2003 SCC 30, [2003] 1 S.C.R. 631, at para. 22. Control is one element to be considered in the totality of the circumstances in determining the objective reasonableness of a subjective expectation of privacy.

39 Control must be analyzed in relation to the subject matter of the search: the electronic conversation. Individuals exercise meaningful control over the information they send by text message by making choices about how, when, and to whom they disclose the information. They "determine for themselves when, how, and to what extent information about them is communicated to others": A. F. Westin, *Privacy and Freedom* (1970), at p. 7, quoted in *Spencer*, at para. 40, citing *Tessling*, at para. 23; see also *R. v. Dymont*, [1988] 2 S.C.R. 417, at p. 429, per La Forest J.; *Duarte*, at p. 46.

40 The Crown argues that Mr. Marakah lost all control over the electronic conversation with Mr. Winchester because Mr. Winchester *could* have disclosed it to third parties. However, the risk that recipients can disclose the text messages they receive does not change the analysis: *Duarte*, at pp. 44 and 51; *Cole*, at para. 58. To accept the risk that a co-conversationalist could disclose an electronic conversation is not to accept the risk of a different order that the state will intrude upon an electronic conversation absent such disclosure. "[T]he regulation of electronic surveillance protects us from a risk of a different order, i.e., not the risk that someone will repeat our words but the much more insidious danger inherent in allowing the state, in its unfettered discretion, to record and transmit our words": *Duarte*, at p. 44. Therefore, the risk that a recipient could disclose an electronic conversation does not negate a reasonable expectation of privacy in an electronic conversation.

41 The cases are clear: a person does not lose control of information for the purposes of s. 8 simply because another person possesses it or can access it. Even where "technological reality" (*Cole*, at para. 54) deprives an individual of exclusive control over his or her personal information, he or she may yet reasonably expect that information to remain safe from state scrutiny. Mr. Marakah shared information with Mr. Winchester; in doing so, he accepted the risk that Mr. Winchester might disclose this information to third parties. However, by accepting this risk, Mr. Marakah did not give up control over the information or his right to protection under s. 8.

42 The shared control aspect of this case is similar to that in *Cole*. Mr. Cole had pornography stored on his work computer. His employer, like Mr. Winchester in this case, could access the

contents of the computer. Mr. Cole did not have exclusive control of the physical location searched (his work-issued laptop). Yet this Court held that Mr. Cole had a reasonable expectation of privacy in the subject matter of the search, i.e., the pornographic material stored on the computer: *Cole*, at paras. 51-58.

43 The majority of the Court of Appeal distinguished *Cole* on the ground that Mr. Cole's employer "permitted users to use the computers for personal purposes", in contrast to Mr. Marakah who had no such privileges with respect to Mr. Winchester's iPhone (paras. 62-64). Moldaver J., meanwhile, emphasizes that Mr. Cole "retained the ability to delete information on the computer and prevent its dissemination" (para. 134). With respect, it is difficult to see what difference it would have made if Mr. Winchester had permitted Mr. Marakah to use his iPhone to delete text messages or for any other purposes. The issue is not who owns the device through which the electronic conversation is accessed, but rather whether the claimant exercised control over the *information* reflected therein. In *Cole*, that was pornographic images. In this case, it is the electronic conversation between Mr. Marakah and Mr. Winchester.¹

44 My colleague Moldaver J. concludes that control is "a crucial contextual factor" in this case (para. 117) and finds that Mr. Marakah's lack of control over Mr. Winchester's phone is fatal to his reasonable expectation of privacy in the electronic conversation (paras. 99, 122 and 130). With great respect, I take a different view. First, control is not dispositive, but only one factor to be considered in the totality of the circumstances. Second, my colleague's approach focuses not on the subject matter of the search, the electronic conversation, but rather on the device through which the information was accessed, Mr. Winchester's phone. Sometimes, control over information may be a function of control over a physical object or place. However, this is not the only indicator of effective control. Sometimes, as with electronic conversations, control may arise from the choice of medium and the designated recipient.

45 I conclude that the risk that Mr. Winchester could have disclosed the text messages does not negate Mr. Marakah's control over the information contained therein. By choosing to send a text message by way of a private medium to a designated person, Mr. Marakah was exercising control over the electronic conversation. The risk that the recipient could have disclosed it, if he chose to, does not negate the reasonableness of Mr. Marakah's expectation of privacy against state intrusion.

(d) *Policy Considerations*

46 It is suggested that even if the place of the search, the private nature of the subject matter, and the control over the subject matter support the conclusion that there may be an objectively reasonable expectation of privacy in a given electronic conversation, the Court should not recognize such an expectation because of the impact this would have on law enforcement. The Crown argues, and Moldaver J. concludes, that these considerations should tip the balance against recognition. Respectfully, I disagree.

47 It is argued (see Moldaver J.'s reasons, at paras. 178-88) that if s. 8 may protect the sender's

privacy in a text message after it has been received then the police will either be required to obtain warrants in more situations or will be inclined to do so "out of an abundance of caution", and that this may impact the ability of police to review messages sent to victims of sexual assault, sexual interference, harassment, child luring, and various other offences without judicial authorization.

48 Moldaver J. rejects any interpretation of s. 8 that would allow sexual predators or abusive partners to retain a reasonable expectation of privacy in text messages that they may send to their victims (para. 169). However, since *Hunter*, prior judicial authorization has been relied on to preserve our privacy rights under s. 8. In consequence, the fruits of a search cannot be used to justify an unreasonable privacy violation. To be meaningful, the s. 8 analysis must be content neutral.

49 Nor does my position lead inevitably to the conclusion that text messages sent by sexual predators to children or sent by abusive partners to their spouses will not be allowed into evidence. Three scenarios are possible.

50 On the first scenario, the victim, his or her parents, or other intelligence alerts the police to the existence of offensive or threatening text messages on a device. Assuming that s. 8 is engaged when police access text messages volunteered by a third party (see *R. v. Orlandis-Habsburgo*, 2017 ONCA 649, at paras. 21-35 (CanLII)), a breach can be avoided if the police obtain a warrant prior to accessing the text messages. As stated in *Cole*, "[t]he school board was ... legally entitled to inform the police of its discovery of contraband on the laptop" and "[t]his would doubtless have permitted the police to obtain a warrant to search the computer for the contraband" (para. 73). Similarly, victims of cyber abuse are legally entitled to inform the police, which will typically permit the police to obtain a warrant. The police officers will be aware that they should not look at the text messages in question prior to obtaining a warrant. On this scenario, there is no breach of s. 8 and the text messages will be received in evidence.

51 The second scenario is where the police, for whatever reason, access an offensive or threatening text message without obtaining prior judicial authorization. On this scenario, depending on the totality of the circumstances, the accused may have a reasonable expectation of privacy in the text messages and therefore have standing to argue that the text message should be excluded. Standing is merely the opportunity to argue one's case. It does not follow that the accused's argument will succeed, or that the search of the text messages will be found to violate s. 8. While a warrantless search is presumptively unreasonable under s. 8, it is open to the Crown to establish on a balance of probabilities that the search was authorized by law, the law is reasonable, and the search was carried out in a reasonable manner: see *R. v. Collins*, [1987] 1 S.C.R. 265, at p. 278.

52 The third scenario arises where a reasonable expectation of privacy in the text messages and a breach of s. 8 are established under the second scenario. This does not mean that the evidence will be excluded. The Crown can argue that the evidence should be admitted under s. 24(2).

53 My colleague Moldaver J. "foresee[s]" various other "troubling consequences for law

enforcement and the administration of criminal justice" (para. 180). It is suggested that s. 8 challenges will add to the time required to try cases, and may disrupt the "balance" between the state's interest in effective law enforcement and individuals' expectations of privacy (*ibid.*). If and when such concerns arise, it will be for courts to address them. There is nothing in the record to suggest that the justice system cannot adapt to the challenges of recognizing that some text message conversations may engage s. 8 of the *Charter*. Nor is it disputed that, where scrutiny of an electronic conversation is concerned, the state's interest in effective law enforcement is outweighed by "the societal interests in protecting individual dignity, integrity and autonomy": *Plant*, at p. 293. Whatever law enforcement's interest in enjoying unfettered access to individuals' text messages, privacy in electronic conversations is worthy of constitutional protection. That protection should not be lightly denied.

(e) *Conclusion on Reasonable Expectation of Privacy*

54 I conclude that Mr. Marakah's subjective expectation that his electronic conversation with Mr. Winchester would remain private was objectively reasonable in the totality of the circumstances. Each of the three factors relevant to this inquiry in this case, place, capacity to reveal personal information, and control, support this conclusion. If the place of the search is viewed as a private electronic space accessible by only Mr. Marakah and Mr. Winchester, Mr. Marakah's reasonable expectation of privacy is clear. If the place of the search is viewed as Mr. Winchester's phone, this reduces, but does not negate, Mr. Marakah's expectation of privacy. The mere fact of the electronic conversation between the two men tended to reveal personal information about Mr. Marakah's lifestyle; namely, that he was engaged in a criminal enterprise: see *Patrick*, at para. 32. This the police could glean when they had done no more than scrolled through Mr. Winchester's messages and identified Mr. Marakah as one of his correspondents. In addition, Mr. Marakah exercised control over the informational content of the electronic conversation and the manner in which information was disclosed. Therefore, Mr. Marakah has standing to challenge the search and the admission of the evidence, even though the state accessed his electronic conversation with Mr. Winchester through the latter's iPhone. This conclusion is not displaced by policy concerns.

55 I conclude that in this case, Mr. Marakah had standing under s. 8 of the *Charter*. This is not to say, however, that every communication occurring through an electronic medium will attract a reasonable expectation of privacy and hence grant an accused standing to make arguments regarding s. 8 protection. This case does not concern, for example, messages posted on social media, conversations occurring in crowded Internet chat rooms, or comments posted on online message boards. On the facts of this case, Mr. Marakah had a reasonable expectation of privacy in the electronic conversation accessed through Mr. Winchester's device; different facts may well lead to a different result.

C. Was the Search Unreasonable?

56 If Mr. Marakah had standing, the Crown concedes that the search was unreasonable. Though

the Crown argued before the application judge that it was a valid search incident to Mr. Winchester's arrest, the application judge rejected that submission and the Crown did not pursue it before this Court.

57 It follows that the evidence was obtained by an unreasonable search of the electronic conversation between Mr. Marakah and Mr. Winchester, in violation of Mr. Marakah's right under s. 8 of the *Charter*. The text messages are thus presumptively inadmissible against him, subject to s. 24(2).

D. Should the Evidence Be Excluded?

58 The application judge did not conduct an analysis under s. 24(2) of the *Charter* because he ruled against Mr. Marakah on standing. The Crown submits that, if he has standing, the evidence should not be excluded under s. 24(2). I cannot agree.

59 Section 24(2) provides:

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.

60 In this case, consideration of the three lines of inquiry described in *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, at para. 71, leads to the conclusion that the evidence must be excluded.

(1) Seriousness of the *Charter*-Infringing Conduct

61 The police's *Charter*-infringing conduct was sufficiently serious to favour the exclusion of the evidence. As this Court recently explained in *R. v. Paterson*, 2017 SCC 15, [2017] 1 S.C.R. 202, "[t]he court's task in considering the seriousness of *Charter*-infringing state conduct is to situate that conduct on a scale of culpability", with "inadvertent or minor violations" at one end and "wilful or reckless disregard of *Charter* rights" at the other: para. 43, quoting *Grant*, at para. 74. Here, the actions of police fall toward the more serious end of the spectrum.

62 The search of Mr. Winchester's iPhone was not *Charter* compliant, the application judge concluded, because it was not a valid search incident to his arrest. Though there is no suggestion that Mr. Winchester's arrest was anything but lawful, the police did not search his iPhone until more than two hours later. It was in the course of this search -- which the Crown now concedes was unreasonable -- that police searched the electronic conversation between Mr. Winchester and Mr. Marakah.

63 The Crown submits that the lawfulness of Mr. Winchester's arrest diminishes the seriousness

of the *Charter* breach. The Crown argues that there was nothing improper about the seizure of Mr. Winchester's iPhone incident to his arrest, and notes that the application judge made no finding of bad faith on the part of police. Before this Court's decision in *R. v. Fearon*, 2014 SCC 77, [2014] 3 S.C.R. 621, the Crown says, it was "not so clear" that the police required "an additional warrant" to forensically examine Mr. Winchester's iPhone.

64 This reliance on *Fearon* is misplaced. In his reasons for the majority in that case, which concerned the extent of the common law power to search incident to arrest, Cromwell J. described the state of the law as follows, at para. 2:

At least four approaches have emerged. The first is to hold that the power to search incident to arrest generally includes the power to search cell phones, provided that the search is truly incidental to the arrest The second view is that "cursory" searches are permitted A third is that thorough "data-dump" searches are *not* permitted incident to arrest Finally, it has also been held that searches of cell phones incident to arrest are not permitted except in exigent circumstances, in which a "cursory" search is permissible. [Italics in original; citations omitted.]

65 None of these approaches would have justified the search of Mr. Winchester's iPhone. As the application judge noted, at para. 114 of his reasons, "there is no evidence ... as to why Winchester's phone could not have been searched at the time of arrest and at least rendered safe... . [or] of why the delay of more than two hours occurred before the phone was looked at". The forensic examination of Mr. Winchester's iPhone breached the *Charter* not only because of its extent, but also because of its timing. On the application judge's findings, this simply was not a search incident to arrest. Even if the police acted in good faith in waiting more than two hours to search the iPhone, their error cannot be described as reasonable: see *Paterson*, at para. 44, citing *Buhay*, at para. 59. The law in this regard was clear before *Fearon*, just as it is now. In the absence of any explanation of the delay, searching Mr. Winchester's iPhone without a warrant two hours after his arrest was "reckless and showed an insufficient regard for *Charter* rights": *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494, at para. 24.

66 The police committed a serious breach of the *Charter* in examining Mr. Winchester's iPhone. That this was an infringement of Mr. Winchester's s. 8 right, not Mr. Marakah's, does not detract from its seriousness. Of course, the police also breached Mr. Marakah's s. 8 right directly when, in their search of Mr. Winchester's iPhone, they examined the contents of the electronic conversation between the two men. This, too, lacked any reasonable pretext of lawful authority. I conclude that the conduct of police in accessing and searching the electronic conversation through Mr. Winchester's iPhone was sufficiently serious to favour the exclusion of the evidence.

(2) Impact of the *Charter*-Infringing Conduct on Mr. Marakah's *Charter*-Protected Interests

67 The impact of the *Charter*-infringing conduct on Mr. Marakah's *Charter*-protected privacy interest was significant. Though, as LaForme J.A. acknowledged, Mr. Marakah had no independent interest in Mr. Winchester's iPhone, he nonetheless had a considerable, *Charter*-protected privacy interest in his and Mr. Winchester's electronic conversation, the contents of which the illegal search of Mr. Winchester's iPhone revealed. That electronic conversation revealed private information that went to Mr. Marakah's biographical core, as I have described. Mr. Marakah had a reasonable expectation that the fact of his electronic conversation with Mr. Winchester, as well as its contents, would remain private. The *Charter*-infringing actions of police obliterated that expectation. The impact on Mr. Marakah's *Charter*-protected interest was not just substantial; it was total.

68 I recognize that, in certain circumstances, sharing control of subject matter diminishes an individual's privacy interest therein; because Mr. Marakah shared the ability to control access to the electronic conversation with Mr. Winchester, Mr. Marakah's reasonable expectation of privacy was diminished (see *Cole*, at paras. 58 and 92), and that the impact of the search must be assessed accordingly: see *Paterson*, at para. 49; *Grant*, at para. 78; *Buhay*, at para. 65; *R. v. Belnavis*, [1997] 3 S.C.R. 341, at para. 40. Even so, to argue against the evidence's exclusion on this basis would re-introduce at the s. 24(2) stage the very sort of risk analysis that this Court rejected in *Duarte*. It cannot be that the impact on an accused's *Charter*-protected interests is less serious when an electronic conversation is illegally accessed through someone else's phone than when the same conversation -- in which the accused has the same *Charter*-protected interest -- is illegally accessed through the accused's own phone. A search may impact other, different *Charter*-protected interests of the accused if it is his phone that is examined. But, so far as the impact on the accused's privacy interest *in the electronic conversation* is concerned, the two scenarios just described are indistinguishable.

69 Control of access to an electronic conversation is, by definition, shared by two or more participants. If this fact is sufficient to negate the impact of an illegal search of that conversation, then this factor will tend to favour the admission of the evidence in any case where an electronic conversation has been illegally searched. This can only undermine the very privacy interest that s. 8 of the *Charter* protects. This approach must be rejected. I conclude that the impact of the *Charter*-infringing search on Mr. Marakah's *Charter*-protected privacy interest was considerable. This factor favours exclusion.

(3) Society's Interest in the Adjudication of the Case on Its Merits

70 Society's interest in the adjudication of the case on its merits is significant. The SMS messages offer highly reliable and probative evidence in the prosecution of a serious offense. Exclusion of the messages "would result in the absence of evidence by which the appellant could be convicted": *Plant*, at p. 301.

71 This factor favours admission.

(4) The Evidence Should Be Excluded

72 As the Court recognized in *Grant*, at para. 84, "while the public has a heightened interest in seeing a determination on the merits where the offence charged is serious, it also has a vital interest in having a justice system that is above reproach, particularly where the penal stakes for the accused are high". Though the exclusion of the evidence would eviscerate the Crown's case against Mr. Marakah on serious charges, "[i]t is ... important not to allow ... society's interest in adjudicating a case on its merits to trump all other considerations, particularly where ... the impugned conduct was serious and worked a substantial impact on the appellant's *Charter* right": *Paterson*, at para. 56. That is this case.

73 On balance, I conclude that the admission of the evidence would bring the administration of justice into disrepute. It must therefore be excluded under s. 24(2) of the *Charter*.

E. Should the Proviso Apply?

74 The Crown submits that, even if the text messages obtained from Mr. Winchester's iPhone should be excluded, the appeal should nonetheless be dismissed on the basis of the "curative proviso" in s. 686(1)(b)(iii) of the *Criminal Code*. The proviso can apply only where the Crown satisfies the court "that the verdict would necessarily have been the same if [the] error had not occurred": *R. v. Wildman*, [1984] 2 S.C.R. 311, at p. 328, quoting *Colpitts v. The Queen*, [1965] S.C.R. 739, at p. 744. The Crown submits that this condition is satisfied in this case because, it says, even if the text messages obtained from Mr. Winchester's iPhone should have been excluded, the same text messages from Mr. Marakah's BlackBerry should not have been. According to the Crown, the application judge did not err in admitting the text messages from Mr. Winchester's phone; he erred in admitting the text messages from the *wrong* phone -- he should have admitted them from Mr. Marakah's BlackBerry, instead. The Crown asks this Court to reverse both rulings, conclude that the text messages from Mr. Marakah's BlackBerry should have been admitted, and, by operation of the proviso, allow his convictions to stand.

75 I would not entertain this submission. It is not open to this Court to speculate as to whether the application judge might have ruled differently on the admissibility of the text messages from Mr. Marakah's BlackBerry if he had not erred in admitting the text messages from Mr. Winchester's iPhone. The application judge made two different rulings based on his assessment of two different searches. That the searches both revealed the same text messages does not make the rulings any less distinct. Nor is it within the scope of this appeal to revisit the application judge's evidentiary decisions at large. As Doherty J.A. explained in *R. v. James*, 2011 ONCA 839, 283 C.C.C. (3d) 212, at para. 56:

The application of the *proviso* must be considered in the context of the evidence heard by the jury, not the evidence it might have heard had the trial judge made different rulings. To consider excluded evidence, even wrongly excluded evidence, in deciding whether the *proviso* should be applied, is to apply the *proviso* to a different case than the one heard by the

jury. [Emphasis added.]

76 The Crown notes that the application judge's reasons for excluding the text messages from Mr. Marakah's BlackBerry referred to his ruling admitting the text messages from Mr. Winchester's iPhone. The application judge said, at paras. 121-23:

Given the seriousness of the offences involved there is no question that society has a significant interest in adjudication of the charges against Mr. Marakah on the merits.

I do not understand, however, that the evidence in issue is crucial to the Crown's case... . The key evidence the Crown seeks to adduce at trial from what was seized [from Mr. Marakah's residence] are the text messages ... recovered from Mr. Marakah's phone. However, the text messages in question are also on Winchester's iPhone and I have held that Mr. Marakah has no standing to challenge its seizure under the Charter. Accordingly, I do not consider that exclusion of the evidence in issue would result in the termination of the Crown's case.

Having regard to all of the three [*Grant*] factors discussed above, it is my conclusion that the admission of the evidence seized in Mr. Marakah's residence at trial would bring the administration of justice into disrepute. Accordingly, the evidence from what was seized at Mr. Marakah's residence ... shall be excluded. [Emphasis added.]

77 This cross-reference, the Crown says, makes this a case like *R. v. C. (W.B.)* (2000), 142 C.C.C. (3d) 490 (Ont. C.A.). At trial, the Crown sought to introduce evidence that was contained in two separate documents, a transcript and a hearsay statement. The evidence in the two documents was substantially the same. The trial judge excluded the transcript and admitted the hearsay statement. A majority of the Court of Appeal concluded that both rulings were wrong and that the proviso applied, because, as Weiler J.A. reasoned for the majority, "[t]he trial judge did not commit two separate compartmentalized errors. He committed one global error respecting the form as to which to admit similar fact evidence or evidence of prior discreditable conduct" (para. 67). This Court unanimously agreed that the proviso was properly applied: 2001 SCC 17, [2001] 1 S.C.R. 530.

78 Like the trial judge in *C. (W.B.)*, the application judge in the case at bar admitted the evidence at issue from one source (Mr. Winchester's iPhone) and excluded the same evidence from another source (Mr. Marakah's BlackBerry) in the same ruling. In both cases, the reasons given for excluding the evidence from one source referred to the decision to admit it from the other. But the present case must be distinguished nonetheless. In *C. (W.B.)*, the trial judge, having (erroneously)

admitted the hearsay statement, "excluded the ... transcript on the basis that it had become unnecessary": *C. (W.B.) (C.A.)*, at para. 4 (emphasis added). In other words, the trial judge's rulings were mirror images of one another; the transcript was excluded *because* the statement was admitted. The same cannot be said here. The application judge admitted the text messages from Mr. Winchester's iPhone because he (erroneously) concluded that Mr. Marakah lacked standing to challenge the constitutionality of the police conduct that uncovered them. The application judge excluded the text messages from Mr. Marakah's BlackBerry on an entirely separate basis. He determined that the warrant for the search of Mr. Marakah's residence -- in the course of which his BlackBerry was seized -- was invalid. Though the application judge acknowledged the admission of the text messages from Mr. Winchester's iPhone in his ruling excluding the text messages from Mr. Marakah's BlackBerry, it simply cannot be said that the application judge excluded the text messages from Mr. Marakah's BlackBerry *because* the text messages from Mr. Winchester's iPhone would be admitted. Indeed, as I have already concluded, the text messages from Mr. Winchester's iPhone should have been excluded even though the text messages from Mr. Marakah's BlackBerry were not admitted, notwithstanding society's interest in the adjudication of the case on the merits. The two rulings in this case cannot be construed as a single error, and so *C. (W.B.)* does not assist the Crown.

79 Here, the application judge's error was in admitting the text messages from Mr. Winchester's iPhone. Without the erroneously admitted evidence obtained from Mr. Winchester's iPhone, Mr. Marakah would have been acquitted. He was convicted instead. To allow that conviction to stand would be a miscarriage of justice. The proviso does not apply.

III. Conclusion and Disposition

80 The application judge and the majority of the Court of Appeal erred in holding that Mr. Marakah had no standing to challenge the admission of the SMS messages obtained from Mr. Winchester's iPhone. Mr. Marakah reasonably expected that his electronic conversation with Mr. Winchester would remain private, even though it could be accessed through Mr. Winchester's mobile device. That reasonable expectation was protected by s. 8 of the *Charter*.

81 The Crown concedes that, if Mr. Marakah had standing, the search was unreasonable and violated Mr. Marakah's right under s. 8. It follows that the evidence is *prima facie* inadmissible. Since I conclude that its admission against Mr. Marakah would bring the administration of justice into disrepute, it must be excluded under s. 24(2) of the *Charter*. The curative proviso does not apply.

82 I would allow the appeal, set aside the convictions and enter acquittals on all charges.

The following are the reasons delivered by

83 M. ROWE J. (concurring reasons):-- Section 8 of the *Canadian Charter of Rights and Freedoms* provides that "[e]veryone has the right to be secure against unreasonable search or

seizure". To ground a claim under s. 8, individuals must establish that they have a reasonable expectation of privacy in the subject matter being searched. Once that expectation is established, the individual claimant gains standing, which allows them to challenge the lawfulness of a search or seizure and to seek to exclude unlawfully obtained evidence under s. 24(2) of the *Charter*. As noted by the Chief Justice, however, "[s]tanding is merely the opportunity to argue one's case. It does not follow that the [claimant's] argument will succeed, or that the search will be found to violate s. 8" (para. 51).

84 The existence of a reasonable expectation of privacy depends on the "totality of the circumstances" with reference to four factors: the subject matter of the search, the claimant's interest in the subject matter at stake, the claimant's subjective expectation of privacy in that subject matter, and the objective reasonableness of that expectation: *R. v. Spencer*, 2014 SCC 43, [2014] 2 S.C.R. 212, at para. 18; *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34, at para. 40; *R. v. Patrick*, 2009 SCC 17, [2009] 1 S.C.R. 579, at para. 27; *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432, at para. 42. This final factor -- the objective reasonableness of the expectation -- is assessed by a number of considerations that vary according to the circumstances of each case.

85 In this case, both the Chief Justice and Justice Moldaver assess the objective reasonableness of the expectation of privacy of the appellant, Mr. Marakah, on the basis of three considerations: the place of the search, the private nature of the subject matter, and control over the subject matter. The crux of their disagreement is the importance of control in this analysis. The Chief Justice takes the view that Mr. Marakah and his accomplice, Mr. Winchester, *shared control* over their electronic conversation and that this is "only one factor to be considered in the totality of the circumstances" (para. 44). Justice Moldaver, by contrast, considers control to be the decisive variable of the analysis on the basis that "when it comes to the reasonableness of a person's expectation of privacy in a communication -- including text message conversations -- control is a crucial contextual factor" (para. 117). He reasons that by virtue of Mr. Marakah having *no control* over his message, his expectation of privacy was not objectively reasonable.

86 The technological means by which we communicate continue to change. An approach based on the totality of circumstances responds to such change because "the broad and general right to be secure from unreasonable search and seizure guaranteed by s. 8 is meant to keep pace with technological development": *R. v. Wong*, [1990] 3 S.C.R. 36, at p. 44. Digital communication inherently limits the control we have over the messages we send, as it inevitably creates a record that is beyond our control. While the same may be true of letters, for example, courts should analogize with care when comparing such different modes of communication. As this Court held in *R. v. Vu*, 2013 SCC 60, [2013] 3 S.C.R. 657:

The privacy interests implicated by computer searches are markedly different from those at stake in searches of receptacles such as cupboards and filing cabinets. Computers potentially give police access to vast amounts of information that users cannot control, that they may not even

be aware of or may have chosen to discard and which may not be, in any meaningful sense, located in the place of the search. [Emphasis added; para. 24.]

87 Similar considerations apply to the search of text messages. The quantity of information they contain and the speed at which they are transmitted give text messages a conversational quality that differs markedly from letters. For this reason, text messages are akin to a digital conversation. The modalities of texting *inherently* limited Mr. Marakah in his capacity to exercise control over the record of his conversation with Mr. Winchester. This *alone* should not be fatal to his reasonable expectation of privacy.

88 The general approach set out by the Chief Justice with respect to the existence of a reasonable expectation of privacy accords with the jurisprudence of this Court. Applying that approach to the facts of this case, I would agree that Mr. Marakah has standing.

89 That being said, I share the concerns raised by Justice Moldaver as to the consequences of this decision on standing. If the sender has a reasonable expectation of privacy in the record of his digital conversation, what happens when the recipient wants to show that record to the police? Are we opening the door to challenges by senders of text messages to the voluntary disclosure of those messages by recipients? As Justice Moldaver suggests, this would lead to the perverse result where the voluntary disclosure of text messages received by a complainant could be challenged by a sender who is alleged to have abused the complainant. Furthermore, what Justice Moldaver refers to as large project prosecutions -- often with multiple accused allegedly involved in organized crime -- would become more complex and might collapse under their own weight if each accused gains standing to challenge the admissibility of messages received by any other person involved in the alleged offence. I see no way within the confines of this case to deal with these concerns, as they do not arise here on the facts. I would say only that principle and practicality must not be strangers in the application of s. 8 or we might well thwart justice in the course of seeking to achieve it.

90 In the end, I concur with the Chief Justice.

The reasons of M.J. Moldaver and S. Côté JJ. were delivered by

M.J. MOLDAVER J. (Dissenting reasons):--

I. Overview

91 Section 8 of the *Canadian Charter of Rights and Freedoms* guarantees "[e]veryone ... the right to be secure against unreasonable search or seizure." The protection guaranteed by s. 8 strikes a balance between the privacy rights of individuals and the public interest in law enforcement. In this appeal, the Court is called upon to consider that balance as it applies to text message conversations stored on personal devices.

92 Text messaging is a ubiquitous form of electronic communication in modern-day society. It is frequently used to convey intimate and deeply personal information. The question in this appeal is not whether text messaging is private -- clearly, it is. The police cannot intercept text messages without obtaining a judicial authorization under Part VI of the *Criminal Code*, R.S.C. 1985, c. C-46; a production order is necessary to obtain disclosure of text message conversations held by a service provider (see *R. v. Jones*, 2017 SCC 60); and the police require lawful authority to access text message conversations stored on a personal device.² In each of these contexts, the police are governed by the constitutional protections of s. 8 of the *Charter*.

93 This appeal is about standing.³ In particular, it asks whether an accused has standing to challenge the search and seizure of text message conversations stored on another person's cellular phone. The fact that text message conversations are private in nature, such that their inspection by the police will constitute a search under s. 8, does not mean that *anyone* has standing to challenge that search. Section 8 is a personal right. To bring a s. 8 challenge, an accused must show that his or her personal privacy right under s. 8 has been violated. More precisely, an accused must show that he or she has a reasonable expectation of *personal* privacy in the subject matter of the search.

94 In this case, the subject matter of the search is the text message conversations between the appellant, Nour Marakah, and his associate, Andrew Winchester. The two men exchanged a number of text messages pertaining to the illicit purchase and sale of firearms. They were both arrested, and in the process, the police seized their cell phones. A record of their text message conversations was later recovered from each of their phones.

95 Mr. Marakah brought s. 8 challenges against the search of his phone and the search of Mr. Winchester's phone. Justice Pattillo, the pre-trial application judge ("application judge") found that the search of Mr. Marakah's phone was unreasonable and he excluded the evidence obtained from it under s. 24(2) of the *Charter*: application judge's reasons, reproduced in A.R., at pp. 1-27. As for the search of Mr. Winchester's phone ("Winchester search"), while the application judge concluded that the search was unreasonable under s. 8, he found that Mr. Marakah lacked standing to pursue a s. 8 challenge. Accordingly, he ruled that the text message conversations recovered from the Winchester search were admissible. At trial, the trial judge, O'Marra J., used this evidence against Mr. Marakah in convicting him of two counts of trafficking in firearms, conspiracy to traffic in firearms, possession of a loaded restricted firearm, and possession of a firearm without a valid license: trial reasons, reproduced in R.R., at pp. 1-26. Two further counts of conspiracy to traffic in firearms were conditionally stayed. Mr. Marakah was sentenced to imprisonment for nine years, less credit for pre-sentence custody: 2015 ONSC 1576.

96 Mr. Marakah appealed from his convictions, arguing that the application judge erred in holding that he lacked standing to challenge the Winchester search and in refusing to exclude the evidence obtained from that search under s. 24(2). Writing for a majority of the Court of Appeal for Ontario, MacPherson J.A. agreed with the application judge on the issue of standing: 2016 ONCA 542, 131 O.R. (3d) 561. In dissent, LaForme J.A. concluded that Mr. Marakah had standing to

challenge the Winchester search. He accepted the application judge's finding that the Winchester search was unreasonable and determined that the evidence obtained from it, which was used to implicate Mr. Marakah in the various firearms offences, should be excluded.

97 For reasons that follow, I agree with both the application judge and the majority of the Court of Appeal that, in the circumstances, Mr. Marakah lacked standing to challenge the Winchester search. Both legal and policy considerations lead me to this conclusion.

98 From a legal standpoint, the reasonableness of a person's expectation of privacy depends on the nature and strength of that person's connection to the subject matter of the search. This connection must be examined by looking at the totality of the circumstances in a particular case. Control over the subject matter in the circumstances is a crucial factor in assessing an individual's personal connection to it. Where an individual lacks any measure of control, this serves as a compelling indicator that an expectation of personal privacy is unreasonable, and that the individual does not have standing to challenge the search.

99 Here, Mr. Marakah had no control whatsoever over the text message conversations on Mr. Winchester's phone. Mr. Winchester had complete autonomy over those conversations. He was free to disclose them to anyone he wished, at any time, and for any purpose. To say that Mr. Marakah had a reasonable expectation of personal privacy in the text message conversations despite his total lack of control over them severs the interconnected relationship between privacy and control that has long formed part of our s. 8 jurisprudence. It is equally at odds with the fundamental principle that individuals can and will share information as they see fit in a free and democratic society.

100 From the standpoint of policy, granting Mr. Marakah standing in these circumstances would vastly expand the scope of persons who can bring a s. 8 challenge. The Chief Justice, speaking for a majority of the Court, adopts an approach to s. 8 that has no ascertainable bounds and threatens a sweeping expansion of s. 8 standing. This carries with it a host of foreseeable consequences that will add to the complexity and length of criminal trial proceedings and place even greater strains on a criminal justice system that is already overburdened. Worse yet, expanding the scope of persons who can bring a s. 8 challenge risks disrupting the delicate balance that s. 8 strives to achieve between privacy and law enforcement interests, particularly in respect of offences that target the most vulnerable members of our society, including children, the elderly, and people with mental disabilities. In my view, the logic of the Chief Justice's approach leads inexorably to the conclusion that a sexual predator who sends sexually explicit text messages to a child, or an abusive partner who sends threatening text messages to his or her spouse, has a reasonable expectation of privacy in those messages on that child or spouse's phone. With respect, I cannot accept this result.

101 I would dismiss the appeal and uphold Mr. Marakah's convictions.

II. Analysis

A. *The Issue in This Case Is Standing*

(1) Introduction

102 A person who seeks to challenge police conduct under s. 8 of the *Charter* must establish the existence of a reasonable expectation of privacy in the subject matter of the alleged police search. To meet this requirement, the person must show that he or she had a subjective expectation of privacy in the subject matter and that this expectation was objectively reasonable in the circumstances: *R. v. Spencer*, 2014 SCC 43, [2014] 2 S.C.R. 212, at para. 18; *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34, at para. 40; *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432, at para. 32; *R. v. Patrick*, 2009 SCC 17, [2009] 1 S.C.R. 579, at para. 27. This case turns on the latter of these two requirements, namely: whether Mr. Marakah had an objectively reasonable expectation of privacy in the text message conversations between him and Mr. Winchester.

103 I hasten to point out that the issue in this appeal is not whether a text message conversation can *ever* attract a reasonable expectation of privacy -- clearly it can. Both police interception of text message conversations and police inspection of a private record of text messages amount to searches under s. 8 of the *Charter*, and the police require lawful authority to conduct them: see *R. v. Fearon*, 2014 SCC 77, [2014] 3 S.C.R. 621 (inspection of text messages); and *R. v. TELUS Communications Co.*, 2013 SCC 16, [2013] 2 S.C.R. 3 (interception of text messages).

104 To be clear, the issue in this appeal is whether Mr. Marakah has standing to challenge the search of the text message conversations on Mr. Winchester's phone. In that regard, while the subject matter of a police search may be private in nature, it does not follow that an individual with *any connection* to that subject matter has standing to challenge the search: *R. v. Pugliese* (1992), 8 O.R. (3d) 259 (C.A.), at pp. 266-67. Rather, as I will explain, in assessing whether a person can assert a reasonable expectation of *personal* privacy over the subject matter of the search, the nature and strength of the person's connection to the subject matter must be examined with an eye to the specific circumstances of the case.

(2) The Two Inquiries Addressed by the Reasonable Expectation of Privacy Test

105 The existence of a reasonable expectation of privacy has generally been framed as a single issue. However, the determination of whether there is a reasonable expectation of privacy addresses two distinct inquiries: (1) whether the police activity in question amounts to a "search" or "seizure" such that s. 8 of the *Charter* is triggered ("search inquiry"); and (2) whether an individual has standing to challenge a particular search ("standing inquiry"). Each inquiry fulfills a distinct purpose in the s. 8 analysis.

106 The search inquiry is objective in nature. It asks whether the subject matter of the alleged police search is private in nature, such that *someone* may, in the circumstances, hold a reasonable expectation of privacy in it: see *R. v. Wong*, [1990] 3 S.C.R. 36, at pp. 50-51; *R. v. Buhay*, 2003 SCC 30, [2003] 1 S.C.R. 631, at para. 19; *R. v. Plant*, [1993] 3 S.C.R. 281, at p. 293; *R. v. Ward*, 2012 ONCA 660, 112 O.R. (3d) 321, at para. 86. In the present case, no issue is taken with the fact

that the Winchester search amounted to a "search or seizure" within the scope of s. 8. Text message conversations are objectively private in nature and constitutionally protected by s. 8. They may, and often will, contain intimate and deeply personal information that is central to one's biographical core. When text message conversations are sheltered from public access on a personal phone, there is no basis for arguing that they are not private in nature, such that the police would be relieved from having to comply with s. 8 of the *Charter*: see *Fearon*, at paras. 51-54.

107 In cases where it is obvious that the police activity in question amounts to a search or seizure under s. 8 of the *Charter* -- such as here -- the real question is whether an individual claimant has standing to challenge the search. Homes, vehicles and computers are prime examples of objectively private subject matter that fall within the protection of s. 8 of the *Charter*. But this does not settle the question of standing, which may entail a separate inquiry. *R. v. Edwards*, [1996] 1 S.C.R. 128, serves as an example. In that case, the main issue facing the Court was whether a boyfriend had standing to challenge a search of his girlfriend's apartment. Likewise, in *R. v. Belnavis*, [1997] 3 S.C.R. 341, a passenger's standing to challenge a vehicle search was in issue. In addition, in *Cole*, the Court considered whether an employee had standing to challenge a search of his work-issued computer.

108 Standing is premised on the notion that not everyone can challenge police conduct that amounts to a search or seizure under s. 8 of the *Charter*. In *Edwards*, this Court indicated that a person must have standing to challenge a search under s. 8 because s. 8 is a personal right -- it protects people, not places (para. 45). In addition, a claim for relief under s. 24(2) of the *Charter* can only be made by the person whose *Charter* rights have been infringed (*ibid.*). As a result, a particular claimant will only have the right to challenge a search under s. 8 where he or she can establish a reasonable expectation of *personal* privacy in the subject matter of the search: *Edwards*, at paras. 45 and 51; *Pugliese*, at pp. 266-67; *R. v. Sandhu* (1993), 82 C.C.C. (3d) 236 (B.C.C.A.), at para. 26.

109 The standing requirement under s. 8 should not be confused with condonation or encouragement of *Charter* breaches by the police. Irrespective of whether an individual claimant has standing, where the police conduct amounts to a search, it remains subject to s. 8 of the *Charter*. The denial of standing to an individual claimant does not signify a grant of immunity to the police from s. 8. Rather, the denial of standing simply means that an individual claimant is not *personally* entitled to advance a challenge to the reasonableness of the police search. Another claimant may have standing to bring a s. 8 challenge against the search or seizure in his or her own criminal trial.

110 Moreover, as I will explain in due course, even where s. 8 standing is denied, ss. 7 and 11(d) of the *Charter* offer residual protection that can, in certain circumstances, provide a claimant with an alternative route to challenge police conduct in the course of a search or seizure. This ensures that the effects of the standing requirement are not exploited by the police as a loophole in *Charter* protection.

B. *Mr. Marakah Lacks Standing*

(1) The Subject Matter in This Case

111 The first step in determining whether Mr. Marakah has standing is to define the subject matter of the police search. This must be done with a careful eye to the privacy interests at stake in the subject matter - - in this case, private conversations that could reveal intimate information about the participants: see *Ward*, at para. 65; *Spencer*, at para. 26. The Chief Justice defines the subject matter of the search as an "electronic conversation" (para. 17). I take no issue with that characterization. The text message conversations between Mr. Marakah and Mr. Winchester were "what the police were really after" when they searched Mr. Winchester's phone: *Ward*, at para 67. Accordingly, and consistent with the Chief Justice's characterization, I would define the subject matter of the search as text message conversations between Mr. Marakah and Mr. Winchester.

(2) The Objective Reasonableness of Mr. Marakah's Expectation of Privacy

112 Once it is understood that the subject matter of the search in this case is the text message conversations between Mr. Marakah and Mr. Winchester, the question then becomes whether Mr. Marakah had a reasonable expectation of *personal* privacy in those conversations. In my respectful view, he did not. This is borne out by both legal and policy considerations.

113 From a legal standpoint, assessing the reasonableness of an individual's expectation of personal privacy requires examining the nature and strength of the individual's personal connection to the subject matter of the search. Control over the subject matter in the circumstances of the case is a crucial factor in evaluating the strength of an individual's connection to it. Absent exceptional circumstances, a reasonable expectation of personal privacy requires some measure of control over the subject matter of the search. In this case, Mr. Marakah had none. Granting him standing in these circumstances is unprecedented and severs the interconnected relationship between privacy and control that has long formed part of our s. 8 jurisprudence. Furthermore, granting Mr. Marakah standing endorses as "reasonable" an expectation of privacy that is at odds with the fundamental principle that individuals can and will share information as they see fit in a free and democratic society.

114 From the standpoint of policy, the Chief Justice's approach vastly expands the scope of persons who can bring a s. 8 challenge. This expansion carries with it a host of practical implications which will add to the burdens of an already overburdened criminal justice system and risk disrupting the delicate balance that s. 8 strives to achieve between privacy and law enforcement interests.

(a) *The Reasonable Expectation of Privacy Test Is Context Driven*

115 The reasonable expectation of privacy test requires looking at the totality of the circumstances in any given case. Put another way, the reasonable expectation of privacy test is

context driven: see e.g. *Edwards*, at para. 45, *Spencer*, at para. 17; *Cole*, at para. 52. The reasonableness of an accused's expectation of personal privacy depends on the nature and strength of his or her connection to the subject matter of the search in the circumstances of the case. The nature and strength of this connection will vary depending on context. As such, an accused may have a reasonable expectation of personal privacy in the subject matter of a search in one context, but not in another.

116 Countless examples illustrate this point. For instance, DNA is capable of revealing intimate details about people that are central to their biographical cores. Nonetheless, the reasonableness of an expectation of personal privacy in DNA may, and often will, vary depending on the context. While an accused may reasonably expect informational privacy in DNA when it is found on his body or stored at a hospital (*R. v. Dymont*, [1988] 2 S.C.R. 417), the same cannot be said when the same DNA is deposited on a complainant or a physical object at a crime scene in a public place: see *R. v. Stillman*, [1997] 1 S.C.R. 607, at para. 62. Similarly, a person may have a reasonable expectation of personal privacy in his or her intimate thoughts about friends, hobbies and romantic interests when they are recorded in a diary, but not when these same thoughts are shared publicly on social media or reality television. Finally, a person may have a reasonable expectation of personal privacy in the informational contents of a garbage bag when it is inside his or her home, but not when that same garbage bag is placed on the curb outside the home for collection: see *Patrick*, at para. 64.

117 In sum, an individual may have a reasonable expectation of personal privacy in the subject matter in one context, but not in another. Although the subject matter itself remains the same, the nature and strength of the person's connection to the subject matter will vary depending on the circumstances. Context is therefore necessary for determining whether a person has standing to challenge a search under s. 8 of the *Charter*. And, as I will explain, when it comes to the reasonableness of a person's expectation of privacy in a communication -- including text message conversations -- control is a crucial contextual factor.

(b) *The Relationship Between Control and Privacy*

118 Control is inseparable from the concept of privacy. As stated by Doherty J.A. in *R. v. Belnavis* (1996), 29 O.R. (3d) 321 (C.A.), at para. 33, aff'd [1997] 3 S.C.R. 341, "[c]ontrol of access is central to the privacy concept". A total absence of control is therefore a compelling indicator that there is no reasonable expectation of personal privacy. At the same time, control must not be equated with ownership and does not necessarily require formal property rights: see *Pugliese*, at pp. 265-67; *Cole*, at para. 51. Rather, control has a nuanced and functional meaning in this context -- direct or exclusive control is not necessarily required.

119 Control distinguishes a *personal desire* for privacy from a *reasonable expectation* of privacy. In a perfect world, one might desire privacy rights over the use of any and all personal information that could potentially expose, embarrass or incriminate oneself. However, s. 8 of the *Charter*

protects only a reasonable expectation of privacy. A desire to protect certain subject matter that has the capacity to reveal intimate information may be useful in identifying whether a subjective expectation of privacy exists, but control is a crucial part of what makes that expectation of privacy objectively reasonable.

120 In saying this, I do not mean to downplay the faith and trust that people place in others to maintain confidences and keep sensitive information to themselves. Depending on the nature of the relationship, a person may well have a subjective expectation of privacy in communications sent to another. For example, husbands and wives -- and parents and children -- may subjectively expect that their communications will not be betrayed -- although this will not always be the case. The same can be said about good friends and associates.

121 But we are not here concerned solely with a person's subjective expectation of privacy. We are dealing with the legal requirements of s. 8 of the *Charter*, and the balance it is meant to achieve between the privacy rights of individuals and the public interest in law enforcement. This requires that a person's subjective expectation of privacy be objectively reasonable as well.

122 When assessing the objective reasonableness of a claimant's expectation of personal privacy in the subject matter of a search, the claimant's control over the subject matter is vital. The standing inquiry is concerned with a claimant's personal connection to the subject matter in the circumstances of the case. Control plays an integral role in defining the strength of that connection.

123 The importance of control is illustrated in s. 8 cases where standing has been the key issue. For instance, in *Edwards*, there was no question that the intrusion by the police into the apartment occupied by the claimant's girlfriend amounted to a search under s. 8. The sole issue was standing -- whether the claimant himself had a reasonable expectation of *personal* privacy. In concluding that Mr. Edwards lacked standing, the Court focused on factors which related to his degree of control over the apartment, "that [Mr. Edwards] was 'just a visitor'" (para. 47), "he did not contribute to the rent or household expenses" (para. 48), and he "lacked the authority to regulate access to the premises" (para. 49). The Court summed up its rationale for denying standing as follows (paras. 49-50):

An important aspect of privacy is the ability to exclude others from the premises. This is apparent from one of the definitions of the word "privacy" found in *The Oxford English Dictionary* (2nd ed. 1989). It is set out in these terms:

b. The state or condition of being alone, undisturbed, or free from public attention, as a matter of choice or right; freedom from interference or intrusion.

The right to be free from intrusion or interference is a key element of privacy. 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. [Emphasis added.]

124 Similarly, in *Belnavis*, the main issue was whether a passenger, Ms. Lawrence, had a reasonable expectation of personal privacy in the vehicle she was in when it was stopped by the police. In concluding that Ms. Lawrence, unlike the driver, lacked standing to challenge the search, the Court highlighted the absence of control as a key factor (para. 22):

There was no evidence that she had any control over the vehicle, nor that she had used it in the past or had any relationship with the owner or driver which would establish some special access to or privilege in regard to the vehicle. Lawrence did not demonstrate any ability to regulate access to the vehicle.

125 Granted, these cases were concerned with territorial privacy in homes and vehicles. However, control remains equally important in respect of informational privacy: *Spencer*, at para. 40; *Ward*, at para. 60. Control is integral because of the ease with which information can change from private to public in nature, depending on the context. In this regard, privacy has been defined as, "the right of the individual to determine for himself when, how, and to what extent he will release personal information about himself": *R. v. Duarte*, [1990] 1 S.C.R. 30, at p. 46; see also A. F. Westin, *Privacy and Freedom* (1970), at p. 7, cited in *Tessling*, at para. 23; see also *Spencer*, at para. 40.

126 For private communications in particular, the concept of control helps explain why a claimant may have a reasonable expectation of personal privacy in a communication *while it is ongoing*, but not in the same communication *once it has been received*. The ability of an individual to control the circumstances in which something is said is central to the existence of a reasonable expectation of personal privacy in the communicative process: *Duarte*, at p. 51. In choosing *who* to speak to, *where* the conversation takes place, and the *medium* of communication, the individual exercises control over the ongoing conversation such that he or she may reasonably expect the conversation to be private.

127 That said, absolute control is not guaranteed. During a conversation, there is always a risk -- however remote -- that someone may be listening in and making a permanent record of the conversation. But this risk is not one that individuals should reasonably be required to bear: see *Duarte*, at pp. 48-49. This Court has held that people should not have to assume, as "the price of choosing to speak to another human being", the risk that every time they speak, someone -- be it the state or some other third party -- may be recording their words (*ibid.*, at p. 48). If every time people opened their mouths, they had to assume the risk that someone might be recording their words, it

would never be reasonable to expect privacy in an ongoing conversation (*ibid.*). As this Court noted in *Duarte*, a society in which individuals must bear this risk would be "one in which privacy no longer had any meaning" (p. 44). Hence, if the police were to *intercept* a text message conversation while it was ongoing, the sender would have standing to challenge the search under s. 8 of the *Charter*: see *R. v. Shayesteh* (1996), 31 O.R. (3d) 161 (C.A.), at paras. 40-41; *R. v. Rendon* (1999), 140 C.C.C. (3d) 12 (Que. C.A.); R. W. Hubbard, P. M. Brauti and S. K. Fenton, *Wiretapping and Other Electronic Surveillance: Law and Procedure* (loose-leaf), vol. 2, at p. 8-58.

128 By contrast, once a private communication is received, an individual generally retains no control over what another participant in the conversation will do with his or her record or recollection of it. In the case of an oral conversation, once the conversation is over, each participant is left with an independent recollection of it. This recollection falls within his or her exclusive control, and he or she is free to share it with anyone, at any time, and for any purpose. Similarly, in the case of a text message conversation, once a text message is received, both sender and recipient are left with an independent record of the conversation. They each have exclusive control over their own record, and can freely share it with anyone and everyone. In both scenarios, there is a complete lack of control over the other person's record or recollection of the conversation.

129 Accessing a text message conversation on a recipient's phone therefore occurs in a different context from that of an interception, one in which the sender no longer has control over the subject matter of the search. This is a compelling indicator that he or she no longer maintains a reasonable expectation of personal privacy in that conversation. The risk that a recipient may repeat what was said during a conversation, or share his or her record of the conversation with others, is a risk that individuals must reasonably assume, and thus may defeat a reasonable expectation of privacy: see *Duarte*, at p. 49. As I explain below at paras. 173-77, a person's expectation of privacy in informational subject matter that falls under another person's exclusive control cannot be reasonable in a society that values the freedom of individuals to share information.

130 That said, control is not the exclusive consideration that informs the existence of a reasonable expectation of personal privacy. And there are exceptional cases where control is not necessary. Where a loss of control over the subject matter is involuntary, such as where a person is in police custody or the subject matter is stolen from the person by a third party, then a reasonable expectation of personal privacy may persist: see *Stillman*, at paras. 61-62 (privacy may persist in a tissue discarded while in police custody); *R. v. Law*, 2002 SCC 10, [2002] 1 S.C.R. 227, at para. 28 (privacy may persist in a safe stolen by a third party). In general, however, recognizing a reasonable expectation of privacy in the face of a total absence of control is, in my view, both unprecedented and antithetical to the notion of personal privacy. Some measure of control is therefore generally necessary to establish standing.

131 In saying this, I wish to be clear that control does not necessarily need to be exclusive or direct -- other degrees or forms of control can give rise to a reasonable expectation of personal privacy.

(i) Non-Exclusive Control

132 Control does not need to be exclusive. For example, in *Cole*, this Court considered whether a teacher had a reasonable expectation of personal privacy in the informational content of his school-issued computer, over which he did not have exclusive control. The school owned the computer and retained the right to monitor its use at any point in time (paras. 50 and 55-56). In assessing whether Mr. Cole had a reasonable expectation of personal privacy, the Court concluded that his lack of exclusive control, "diminished [his] privacy interest in his laptop, at least in comparison to the personal computer at issue in [*R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253], but ... did not eliminate it entirely" (para. 58). That is consistent with this Court's prior conclusion that a reasonable expectation of privacy may exist in a hotel room, even when an individual is aware that hotel staff or other guests will have access: *Buhay*, at para. 22; *Wong*, at p. 51.

133 In short, while a lack of exclusive control may diminish the strength of a reasonable expectation of privacy, it does not necessarily eliminate it: *Cole*, at para. 58; *R. v. Gomboc*, 2010 SCC 55, [2010] 3 S.C.R. 211, at para. 41. But -- and this is critical -- the absence of exclusive control is not the same thing as a *total absence of control*.

134 In *Cole*, for example, Mr. Cole had possession of the computer, the ability to exclude persons other than his employer, and control over its informational content, as he was able to "browse the Internet and to store personal information on the hard drive" (para. 43). Crucially, he retained the ability to delete information on the computer and prevent its dissemination. Thus, it was possible for him to maintain a reasonable expectation of personal privacy in the subject matter. Likewise, in *Wong*, although a number of individuals had access to the hotel room, Mr. Wong retained the ability to regulate that access by excluding certain individuals (p. 52). Shared or qualified control is still a form of control that may ground a reasonable expectation of personal privacy.

135 If, for example, Mr. Marakah and Mr. Winchester shared control over Mr. Winchester's phone, this would change the s. 8 analysis. The same can be said if Mr. Marakah could remotely access the text message conversations on Mr. Winchester's phone. In both scenarios, Mr. Marakah would have shared control over the text message conversations on Mr. Winchester's phone, and his expectation of personal privacy in those conversations would in all likelihood be reasonable. But that is not the case here. Indeed, Mr. Marakah repeatedly asked Mr. Winchester to delete the text messages from his phone -- further evidence that Mr. Marakah had no control over the text message conversations on Mr. Winchester's phone. The situations in *Cole* and *Wong* therefore differ markedly from the present case.

(ii) Constructive Control

136 In addition, control need not always be direct. A reasonable expectation of privacy will likely arise where a claimant exercises personal control over the subject matter in issue, as in the case of one's home, possessions, and body. However, under a functional approach, constructive control may suffice to ground a reasonable expectation of personal privacy in other contexts.

137 For example, constructive control may exist by virtue of a claimant's professional or commercial relationship with another person or entity that has direct control over the subject matter in question: see *Dyment*, at para. 28; *Spencer*, at paras. 61-63; *Plant*, at p. 294; *Patrick*, at para. 67. The most obvious examples where this arises include a claimant's relationship with a lawyer, doctor, psychiatrist or another professional who owes a duty of confidentiality or trust to the claimant.

138 This list is not closed, nor is it limited to formal "trust-like, confidential or therapeutic relationships": *R. v. Quesnelle*, 2014 SCC 46, [2014] 2 S.C.R. 390, at para. 27. Accordingly, complainants may maintain a reasonable expectation of privacy in personal information contained in records held by the police, so as to trigger the third party records production regime in ss. 278.1 to 278.91 of the *Criminal Code*: *Quesnelle*. Care must be taken in making this comparison because of the different dynamics which are at play under s. 8 of the *Charter*, and those that exist in a production regime: *Quesnelle*, at paras. 28 and 35-36. Nonetheless, due to the professional status of the police, *Quesnelle* clarifies that "the subjects of police occurrence reports could reasonably expect the police to safeguard their private information, unless and until disclosure is justified" (para. 30). The Court explained the rationale for this, at paras. 39 and 43:

Where an individual voluntarily discloses sensitive information to police, or where police uncover such information in the course of an investigation, it is reasonable to expect that the information will be used for the purpose for which it was obtained: the investigation and prosecution of a particular crime... .

...

People provide information to police in order to protect themselves and others. They are entitled to do so with confidence that the police will only disclose it for good reason. The fact that the information is in the hands of the police should not nullify their interest in keeping that information private from other individuals.

139 This conclusion was based on the fact that the police, as professionals, are constrained in their ability to share and use information -- a constraint that generally holds true for professionals who collect personal information for a specific purpose: see *Dyment*, at pp. 432 and 434-35; *Law*, at paras. 22-23 and 28.

140 Similarly, an individual can maintain a reasonable expectation of privacy in personal information stored with certain commercial entities, such as telecommunication service providers: see *Jones*, at paras. 38-46 (per Côté J.); *TELUS*, at para. 32; *Spencer*, at para. 66; *R. v. Rogers Communications Partnership*, 2016 ONSC 70, 128 O.R. (3d) 692, at paras. 19-31. These

commercial entities are subject to the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 ("*PIPEDA*"). As Cromwell J. explained in *Spencer*, at para. 63:

... *PIPEDA* ... permits disclosure only if a request is made by a government institution with "lawful authority" to request the disclosure. It is reasonable to expect that an organization bound by *PIPEDA* will respect its statutory obligations with respect to personal information. [Emphasis added.]

141 As these cases illustrate, even a qualified obligation on professional and commercial entities to maintain confidentiality over personal information provides a measure of constructive control which can support a reasonable expectation of privacy. This stands in stark contrast to the unfettered discretion individuals have to share information for any reason or purpose. At a normative level, the existence of a reasonable expectation of privacy in the context of professional or commercial relationships therefore does not create the same tension with autonomy interests, which may arise in the context of ordinary interactions between private citizens: see below, at paras. 173-77.

142 Ultimately, as this Court stated in *Quesnelle*, at para. 38, "[w]hether a person is entitled to expect that their information will be kept private is a contextual inquiry." In my view, where the information in question is under the exclusive control of another person, an interest in the subject matter and a personal relationship with that person does not suffice. Something more is necessary, such as a relationship connoting some measure of constructive control or obligation, to surpass a mere hope or desire for privacy and ground a reasonable expectation of personal privacy.

143 In sum, control, like privacy, is "not an all or nothing concept": *Quesnelle*, at paras. 29 and 37. The degree and form of control that a claimant has over the subject matter of the search in the circumstances of the case is central to whether the claimant has a reasonable expectation of personal privacy. Accordingly, a total absence of any measure of control provides a compelling basis to deny standing.

(c) *Mr. Marakah had No Control Over the Text Message Conversations on Mr. Winchester's Phone*

144 The text message conversations between Mr. Marakah and Mr. Winchester were accessed by police after they had been received on Mr. Winchester's phone. The conversations were not intercepted by police during the transmission process, and they were not accessed on Mr. Marakah's phone. As I will explain, these are important contextual distinctions that show that Mr. Marakah had no control over the subject matter of the search in the circumstances of this case.

145 In this case, Mr. Winchester had exclusive control over the text message conversations accessed by the police. The conversations were stored on his phone and he had complete autonomy to disclose them to anyone, at any time, and for any purpose. Mr. Marakah had no control over the text message conversations on Mr. Winchester's phone -- a compelling indicator that he did not

have a reasonable expectation of personal privacy in them.

146 This case is thus distinct from an interception case. It is beyond question that Mr. Marakah had a reasonable expectation of personal privacy in the text message conversations while they were in the process of transmission to Mr. Winchester's phone. In that context, Mr. Marakah had control over the circumstances in which he was communicating with Mr. Winchester. He reasonably assumed that, in conversing with Mr. Winchester through text messaging, he was communicating *only* to Mr. Winchester. In these circumstances, it was reasonable for him to expect that his text message conversations with Mr. Winchester would not be clandestinely intercepted. As indicated, if the police had intercepted the conversations at that stage, Mr. Marakah would have had standing to challenge the search of Mr. Winchester's phone under s. 8 of the *Charter*.

147 This case is also distinct from one involving police access to text message conversations *on Mr. Marakah's phone*. Unquestionably, Mr. Marakah had a reasonable expectation of personal privacy in the text message conversations on his own personal phone. This is because Mr. Marakah retained control over the conversations -- he was able to delete them, or disclose them to anyone he wished. The text message conversations on Mr. Winchester's phone are contextually different from the same text message conversations on Mr. Marakah's personal phone, just as DNA found on a complainant is contextually different from the same DNA found on an accused person's body -- even though both sources may reveal identical and extremely intimate information.

148 In sum, viewed contextually, Mr. Marakah had no measure of control over the text message conversations in the circumstances of this case.

- (3) The Chief Justice's Approach to the Reasonableness of Mr. Marakah's Expectation of Privacy
 - (a) *The Place(s) of the Search and Mr. Marakah's Control Over the Text Message Conversations*

149 The Chief Justice asserts that the search may have occurred in one of two places: either the police accessed the text message conversations in what she calls a "metaphorical chat room" (para. 30), or they accessed them on Mr. Winchester's phone (para. 29). Ultimately, the Chief Justice leaves unanswered the question of where the search occurred. According to her, neither the metaphorical chat room, nor Mr. Winchester's physical phone, exclude a reasonable expectation of privacy (paras. 28-30). In either scenario, "Mr. Marakah did not give up control over the information" he sent to Mr. Winchester (para. 41). Rather, the two shared control over their text message conversations (paras. 42 and 68). With respect, the Chief Justice's approach gives rise to serious difficulties, and I cannot agree with it.

150 I begin with the Chief Justice's first proposition -- that the place of the search may be a metaphorical chat room. In her view, this "electronic world of digital communication" is "every bit as real as [a] physical space" (para. 28). This position was not advanced by any of the parties, and the Chief Justice cites no authority for it. In my view, it is a fiction which has the effect of

circumventing the overriding problem standing in the way of Mr. Marakah's bid for standing, namely: that once his messages were received by Mr. Winchester, he retained no control over them whatsoever.

151 By evaluating the reasonableness of an expectation of personal privacy in a context that is divorced from the reality of where the search actually occurred -- in this case, Mr. Winchester's phone -- the Chief Justice effectively holds that participants in a communication maintain a reasonable expectation of personal privacy in a text message conversation regardless of where that conversation is accessed in the real world. This cannot be right. The reasonable expectation of privacy analysis is context-driven, and requires looking at the totality of circumstances -- which includes the *actual* place of the search.

152 The Chief Justice also proposes that the place of the search may be the physical location where the text message conversations were accessed or stored -- in other words, Mr. Winchester's phone (para. 29). According to the Chief Justice, in this alternative situation, Mr. Marakah's expectation of privacy is reduced (paras. 30 and 54), but not defeated. The Chief Justice relies on *Cole* to support her position that even though Mr. Marakah did not control Mr. Winchester's phone, he nevertheless shared control over the text message conversations and retained a reasonable expectation of privacy in the those conversations. In my view, *Cole* does not support her conclusion.

153 The Chief Justice likens Mr. Marakah's shared control over the text message conversations with Mr. Winchester to Mr. Cole's shared control over his work-issued laptop with his employer. Her analogy appears to rest on two premises. First, Mr. Marakah, like Mr. Cole, did not have exclusive control over the subject matter of the search -- Mr. Cole's employer had access to the contents of the laptop just as Mr. Winchester had access to the text message conversations (para. 42). And second, Mr. Marakah's lack of control over Mr. Winchester's phone is irrelevant, just as Mr. Cole's lack of control over the laptop was irrelevant, because both Mr. Cole and Mr. Marakah exercised control "over the *information* reflected therein" -- in this case, the text message conversations; in *Cole*, the pornographic images (para. 43 (emphasis in original)).

154 Respectfully, I cannot agree with either premise. In *Cole*, the pornographic images were located on a laptop in Mr. Cole's possession, and Mr. Cole's employer was able to *remotely* access those images. In this case, however, the text message conversations were on Mr. Winchester's phone in Mr. Winchester's possession, and Mr. Marakah could *not* remotely access these conversations. As such, Mr. Marakah had no control over the conversations on Mr. Winchester's phone.

155 The Chief Justice's second premise -- that it does not matter whether Mr. Marakah had control over Mr. Winchester's phone -- escapes me. If Mr. Marakah shared control over Mr. Winchester's phone, or if Mr. Marakah was able to remotely access the text message conversations on Mr. Winchester's phone, he could have deleted the text message conversations or prevented their

dissemination. The ability to delete or prevent dissemination of text message conversations are telltale signs that an individual exercises control over those conversations -- a compelling indicator of a reasonable expectation of privacy. Conversely, as I explain at paras. 134-35, the fact that Mr. Marakah had absolutely no ability to delete or prevent dissemination of the text message conversations on Mr. Winchester's phone shows that Mr. Marakah had no control over the subject matter of the search in these circumstances.

156 As indicated, the Chief Justice does not decide where the police accessed the text message conversations. She nevertheless points out that Mr. Marakah's expectation of privacy would be stronger if the place of the search was the metaphorical chat room, than if the place of the search was Mr. Winchester's phone (para. 54). The Chief Justice's "either/or" approach is not only confusing, it also has serious implications for the s. 24(2) analysis.

157 The Chief Justice appears to acknowledge at para. 68 of her reasons that a diminished expectation of privacy lessens the impact of a *Charter* infringing search on a claimant's s. 8 rights, which favours admission under the second *Grant* factor: see *Cole*, at para. 92; *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, at paras. 76-78. In cases involving text message conversations, the third *Grant* factor will favour admission as well, as the communications will almost always be reliable: *Grant*, at para. 81. Consequently, the *Charter* infringing conduct would have to be very serious under the first *Grant* factor to justify exclusion: *Grant*, at para. 74. Indeed, it would likely need to amount to deliberate or serious misconduct by the police. Otherwise, the attenuated impact of the breach and society's interest in adjudication on the merits are likely to tilt the balance towards admission: see *Grant*, at paras. 85-86. However, by not identifying the actual place of the search, the Chief Justice equivocates on the strength of a claimant's expectation of privacy. As such, one is left to ask how courts are to engage in the difficult balancing of the three *Grant* factors, with a view to determining whether unconstitutionally obtained electronic communications should be excluded under s. 24(2).

(b) *Duarte Does Not Support the Chief Justice's Position*

158 The Chief Justice relies on *Duarte* to say that Mr. Marakah's inability to control what Mr. Winchester did with the conversations on his phone is irrelevant to whether Mr. Marakah had a reasonable expectation of privacy in those conversations (para. 40). In the Chief Justice's view, the fact that a person has assumed the risk that the recipient may share the communication with the public, is irrelevant to the reasonable expectation of privacy inquiry. This is because even though a participant to a conversation may share a record of the conversation with others, it is still reasonable to expect that *the state* will not gain access to this record (paras. 40 and 45). In the Chief Justice's view, the question of whether there is a reasonable expectation of privacy is answered in relation to *the state* in isolation, not against the public at large.

159 As such, Mr. Marakah's complete lack of control over the text message conversations on Mr. Winchester's phone -- which Mr. Winchester can freely share with anyone -- does not defeat the

reasonableness of Mr. Marakah's expectation of personal privacy in those conversations against the state. In support of her position, the Chief Justice relies on a single passage from *Duarte*, at p. 44:

... the regulation of electronic surveillance protects us from a risk of a different order, i.e., not the risk that someone will repeat our words but the much more insidious danger inherent in allowing the state, in its unfettered discretion, to record and transmit our words

(C.J.'s reasons, at para. 40)

160 I cannot accept this interpretation of *Duarte*. Like all *Charter* rights, s. 8 provides protection to individuals against the state. State conduct is therefore required to engage s. 8. Nonetheless, in this Court's significant body of s. 8 jurisprudence, including *Duarte*, the question of whether an individual holds a reasonable expectation of privacy in a particular subject matter is answered in relation to the world at large, not the state in isolation. If an expectation of personal privacy is unreasonable against the public, then it is also unreasonable against the state. It is unreasonable for a person to expect publicly accessible information or other subject matter to remain private against the state in isolation.

161 In *Patrick*, in finding that the accused did not have a reasonable expectation of privacy in the subject matter of the search, the Court relied heavily on the fact that the garbage bags were accessible to "street people, bottle pickers, urban foragers, nosy neighbours and mischievous children, not to mention dogs and assorted wildlife", as well as to "the garbage collectors and the police" (para. 55 (emphasis added)). No distinction was made between public access and state access for the purpose of the reasonable expectation of privacy analysis. If the public could access a garbage bag containing personal information left at the curb, so too could the police.

162 In my view, when an individual assumes the risk of public access, they are equally assuming the risk of state access. That is why the risk of publicity has featured prominently in so many of this Court's decisions applying the reasonable expectation of privacy test: see *Patrick*, at paras. 2 and 43; *Gomboc*, at paras. 33 and 41; *Tessling*, at paras. 40 and 46-47; *Plant*, at pp. 294-95; *Stillman*, at para. 62. Translated into the circumstances of this case, if Mr. Marakah assumed the risk of Mr. Winchester allowing the public to access his text message conversations -- a point which the Chief Justice appears to concede (para. 41) -- then he assumed the risk of the police accessing it. The risks of state access and public access are not distinct for the purposes of the reasonable expectation of privacy test.

163 With respect, when the passage from *Duarte* that the Chief Justice cites above is read in context, it is apparent that the Court was drawing an entirely different distinction than the one she identifies. In *Duarte*, the Court considered whether someone could hold a reasonable expectation of privacy in an ongoing conversation, despite the risk that each participant could freely share what was said after it was complete. The Court distinguished the risk that someone will repeat the

contents of the private communication after it is over, from the risk that the private communication will be intercepted. The risk that a participant to a conversation will repeat the contents of a conversation after it is complete does not diminish the reasonableness of an expectation of personal privacy in the conversation while it is ongoing. Put simply, despite the reality that someone may share information from a conversation after it is complete, it is still reasonable for people to expect that their private conversations will not be covertly intercepted and recorded. In my view, this is evident from the other excerpts from *Duarte* where these distinct risks are being discussed *without* reference to the state:

The rationale for regulating the power of the state to record communications that their originator expects will not be intercepted by anyone other than the person intended by the originator to receive it (see definition section of Part IV.1 [now Part VI] of the *Code*) has nothing to do with protecting individuals from the threat that their interlocutors will divulge communications that are meant to be private... .

...

I am unable to see any similarity between the risk that someone will listen to one's words with the intention of repeating them and the risk involved when someone listens to them while simultaneously making a permanent electronic record of them... . the law recognizes that we inherently have to bear the risk of the "tattletale" but draws the line at concluding that we must also bear, as the price of choosing to speak to another human being, the risk of having a permanent electronic recording made of our words. [Emphasis added.]

(*Duarte*, at pp. 43-44 and 48)

164 It is helpful to recall that *Duarte* was concerned with whether an interception of a private communication amounted to a search under s. 8 of the *Charter*. In this context, it makes sense to consider the intrusive effects of *state* surveillance on the communicative process. That does not mean that a person's reasonable expectation of personal privacy against the state is distinct from his or her reasonable expectation of personal privacy against the world.

165 In sum, far from supporting the Chief Justice's view, *Duarte* in fact undercuts it. *Duarte* draws a crucial distinction between the context of an interception during the communicative process and subsequent access to a recollection of a communication. In doing so, *Duarte* illustrates the idea that the reasonableness of an expectation of personal privacy will vary depending on context. *Duarte* stands for the proposition that it is reasonable for people to go about their business and carry

out their daily activities in the expectation that their private conversations will not be clandestinely intercepted and recorded. That is because in this situation, an individual has control over the circumstances in which something is said -- including the medium of the communication and who it is said to.

166 That is a far cry from a case like the present one. Here, there was no covert intrusion on the communicative process and both parties were completely aware that in texting each other, they were creating independent records of their conversations that would fall within the exclusive control of the other. *Duarte* therefore provides no support for Mr. Marakah's standing claim. If anything, the reasoning in *Duarte* implicitly suggests that no reasonable expectation of privacy exists in a record of a private communication that falls under the exclusive control of another participant and may be freely shared with others: see pp. 43-44 and 48-49; see also *Wong*, at p. 48. Indeed, the Court was unequivocal that individuals "inherently have to bear the risk of the 'tattletale'": *Duarte*, at p. 48.

(c) *The Chief Justice Attempts to Limit Her Analysis to the Facts of This Case*

167 The Chief Justice attempts to confine her analysis to the particular circumstances of this case, noting that "different facts may well lead to a different result" (para. 55). In other words, finding a reasonable expectation of privacy in this case does not mean that a text message conversation will always attract a reasonable expectation of privacy (para. 5). With respect, the Chief Justice purports to limit her analysis to the facts of this case in a way that is difficult to comprehend. If by texting each other, Mr. Marakah and Mr. Winchester created a "metaphorical chat room" over which they shared control, I fail to see how the same would not be true for any participant to a text message conversation. Similarly, if Mr. Marakah does exercise control over the text message conversations on Mr. Winchester's phone, it seems to me that any person who sends a text message will retain control over the conversation on the recipient's phone. In my view, contrary to what the Chief Justice states at para. 5 of her reasons, her approach does in fact "lead inexorably to the conclusion that an exchange of electronic messages *will always* attract a reasonable expectation of privacy".

168 In sum, as I read her reasons, the Chief Justice effectively holds that *everyone* has a reasonable expectation of privacy in text message conversations, even when those conversations are on another person's phone. As such, under her all-encompassing approach to standing, even a sexual predator who lures a child into committing sexual acts and then threatens to kill the child if he or she tells anyone will retain a reasonable expectation of privacy in the text message conversations on the child's phone. Likewise, an abusive husband who sends harassing text messages to his ex-wife and threatens to harm her and their children if she goes to the police will retain a reasonable expectation of privacy in the text message conversations on the wife's phone.

169 With respect, these examples show that the Chief Justice's approach to standing is effectively boundless. To hold that the sexual predator and the abusive spouse retain a *reasonable* expectation of privacy in the text messages once they are received by their victims is remarkable. Indeed, I am hard pressed to think of anything more *unreasonable*. This effectively eradicates the principle of

standing and renders it all but meaningless.

170 And it is no answer to say, as the Chief Justice does, that granting the sexual predator or the abusive spouse standing does not mean that the text messages on their victims' phones will necessarily be excluded from evidence; rather, it simply gives them the right to challenge the admissibility of those messages (C.J.'s reasons, paras. 49-52).

171 With respect, that response not only misses the point, it emphatically makes the point that on the Chief Justice's approach, the principle of standing is virtually limitless and, for all intents and purposes, it ceases to exist when two or more people converse with each other through text messaging or any other electronic medium. In short, it belies the Chief Justice's overriding position that standing is to be assessed on a case-by-case basis, having regard to the totality of the circumstances, and that Mr. Marakah's successful claim to standing is limited to the facts and circumstances of his case (C.J.'s reasons, paras. 5, 51 and 55).

172 But even if I have misconstrued her position on this, the Chief Justice provides no guidance as to what factors would militate against finding a reasonable expectation of privacy in an electronic communication; nor does she explain why the circumstances of this case are different than any other case where people participate in a text message conversation. Police, defence and Crown counsel, trial and appellate judges, and the public at large, are left to guess when and under what circumstances electronic messages will not attract a reasonable expectation of privacy. With respect, that is a highly unsatisfactory state of affairs.

(4) The Freedom of Individuals to Share Information Over Which They Have Exclusive Control

173 In my view, it is unreasonable to expect another individual to maintain the privacy in text message conversations over which that individual has exclusive control. This is because -- save for limited exceptions which do not apply in this case -- individuals are free to share information that falls within their control as they see fit.

174 Sharing a record of a private communication may be motivated by things as diverse as an opportunity for personal gain, a temptation to gossip, a request from a third party, or for no reason at all. At the extreme end, where a private communication takes the sinister form of a death threat or sexual luring of a child, an individual's sharing may be motivated by interests as sacrosanct as an individual's personal safety, dignity and liberty: see *R. v. Sandhu*, 2014 BCSC 303; *R. v. Lowrey*, 2016 ABPC 131, 357 C.R.R. (2d) 76; *R. v. Craig*, 2016 BCCA 154, 335 C.C.C. (3d) 28.

175 Indeed, in some cases, a private communication may involve physical violence, as in the case of a person capturing a video of verbal and physical abuse by his or her partner. It is unrealistic to say that a person will have a reasonable expectation of privacy in records of communications over which that person has no control and which are under the exclusive control of someone else. That sexual predators and abusive partners could maintain a reasonable expectation of privacy in records

of communications within the exclusive control of their victims illustrates the implausibility of this proposition.

176 Not only is this proposition implausible, it is also at odds with what this Court has recognized as a hallmark of a free and democratic society -- namely, the freedom of individuals to share information as they wish: see *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640, at paras. 48-49 and 86; *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877, at para. 125. Section 8 protects "standards of privacy that persons can expect to enjoy in a free and democratic society": see *Wong*, at p. 61. Given that our society recognizes that people may freely share information as they see fit, it is unreasonable to expect privacy in informational subject matter that falls within the exclusive control of another person. Such an expectation would run counter to what society has deemed both valuable and fundamental -- the freedom to share information.

177 It follows that the proper approach to s. 8 is one that recognizes that, absent a relationship connoting some measure of constructive control, including a legal, professional or commercial relationship of the kind described above (at paras. 137-42), each participant in a text message conversation can choose to keep his or her record of it private, or to share it freely with anyone or everyone, including with the police. To conclude otherwise would not only be inconsistent with a core Canadian value, it would also greatly expand s. 8 standing, with serious implications for the administration of criminal justice.

- (5) Practical Considerations Regarding Law Enforcement and the Administration of Criminal Justice
- (a) *Granting Mr. Marakah Standing Would Burden an Already Overburdened Criminal Justice System*

178 Since *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, courts have acknowledged that the protection guaranteed under s. 8 of the *Charter* entails striking a balance between privacy and law enforcement interests (pp. 159-60):

... an assessment must be made as to whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement.

179 The need to balance "societal interests in protecting individual dignity, integrity and autonomy with effective law enforcement" has been specifically identified as a key consideration informing the reasonable expectation of privacy test: *Patrick*, at para. 20, quoting *Plant*, at p. 293; see also *Tessling*, at paras. 17-18; *Duarte*, at pp. 45 and 49; *Dyment*, at p. 428.

180 In the present case, if it is determined that Mr. Marakah has a reasonable expectation of personal privacy in the text message conversations on Mr. Winchester's phone, I foresee a number of troubling consequences for law enforcement and the administration of criminal justice that could

disrupt this balance. Although these consequences are not determinative of the reasonableness of Mr. Marakah's expectation of privacy, their cumulative effect weighs heavily in favour of denying him standing.

181 Under the Chief Justice's approach, where police search a cellphone or other device for an electronic communication, any participant to that communication would have standing to challenge the lawfulness of the search. The same may be true even where a witness voluntarily shares an electronic communication with the police, as there remains uncertainty in the law as to whether reception by police of this evidence amounts to a search engaging s. 8 of the *Charter* (see *R. v. Orlandis-Habsburgo*, 2017 ONCA 649, at paras. 21-35 (CanLII) (per Doherty J.A.)). As such, in these circumstances, s. 8 may be engaged and a search warrant may well be necessary to comply with s. 8. Indeed, the Chief Justice appears to concede that police may require a warrant even where a victim or his or her parents voluntarily provide police with threatening or offensive text messages (see C.J.'s reasons, at para. 50).

182 The law governing third party consent presents further difficulties. In *Cole*, at paras. 74-79, this Court rejected the notion that "a third party could validly consent to a search or otherwise waive a constitutional protection on behalf of another" (para. 79). If this stands as a strict rule, then the police would never be able to obtain information about an accused through electronic communications offered by victims and witnesses on consent. Anytime this occurred, an accused person would have standing to challenge that search and it would constitute an automatic infringement of the accused's s. 8 rights. As a result, the overall number of instances where the police will be required to obtain judicial authorizations to gather evidence could increase dramatically.

183 Even if the prohibition on third party consent is relaxed, this would not solve the problem. The doctrine of consent still has onerous requirements which would undoubtedly be put to the test by accused persons seeking to exclude evidence provided by witnesses "on consent": see *R. v. Reeves*, 2017 ONCA 365, 350 C.C.C. (3d) 1, at paras. 51 and 63-71. In the absence of a warrant, any search or seizure of this evidence by the police would be presumed to be an unreasonable search and the Crown would bear the burden of demonstrating compliance with s. 8: *R. v. Nolet*, 2010 SCC 24, [2010] 1 S.C.R. 851, at para. 21; *R. v. Collins*, [1987] 1 S.C.R. 265, at pp. 277-78. This would require the Crown to establish on a balance of probabilities that the elements of fully informed and voluntary consent were met: see *R. v. Wills* (1992), 7 O.R. (3d) 337 (C.A), at pp. 353-54; *R. v. Borden*, [1994] 3 S.C.R. 145, at p. 162. And it would not be a foregone conclusion that these requirements could always be satisfied. For example, in assessing the issue of consent, it is possible that the capacity of vulnerable complainants -- including children, adults with mental disabilities, or the elderly -- could be challenged, as could the validity of consent provided by a reluctant or recanting witness.

184 Moreover, the process itself could be needlessly harmful, exposing children or other vulnerable witnesses to cross-examination about consent given to the police to search their phones

or other devices for private communications that may involve threats or sexual predation: see *Sandhu* (2014), *Lowrey* and *Craig*. Ultimately, the resulting uncertainty is likely to cause police to seek judicial authorizations in most cases out of an abundance of caution to take basic investigative steps such as obtaining records of electronic communications between witnesses and accused persons.

185 The increased need for these judicial authorizations could strain police and judicial resources in an already overburdened criminal justice system. Investigations would be slowed, more judicial officers would be required, and the administration of criminal justice as a whole will suffer. And the effects do not end at the investigative stage.

186 At the trial stage, each of the above repercussions could significantly complicate and prolong proceedings. For example, in large project prosecutions, accused persons could gain standing to challenge numerous searches conducted against collateral targets that yield records of any private communications involving the accused person: see *R. v. McBride*, 2016 BCSC 1059, at para. 2. Beyond the court time and resources required to accommodate this litigation, it could significantly expand the scope of already voluminous disclosure that would become relevant in mounting these collateral s. 8 challenges.

187 The Chief Justice does not provide any solutions to these foreseeable consequences, stating that "[i]f and when such concerns arise, it will be for courts to address them" (para. 53). But experience teaches that these concerns are real -- and we ignore them at our peril. It is only prudent for this Court to consider the predictable consequences of its decision in a case like the present one, which has major implications for the criminal justice system. This is especially so at a time where our criminal justice system is stressed to the breaking point. In this regard, I note that the Chief Justice's decision to leave for another day these obvious concerns departs from the approach taken in past criminal law matters, where she herself has engaged in elaborate forecasting of the doctrinal and practical implications arising from this Court's decisions: see e.g. *R. v. D.A.I.*, 2012 SCC 5, [2012] 1 S.C.R. 149, at paras. 64-71 (per McLachlin C.J.); *R. v. Hutchinson*, 2014 SCC 19, [2014] 1 S.C.R. 346, at paras. 19-21, 38-42, 44-49 and 52-53 (per McLachlin C.J. and Cromwell J.).

188 In my view, the cumulative effect of the practical concerns for law enforcement and the administration of criminal justice weighs heavily in favour of denying standing to claimants such as Mr. Marakah.

189 In saying this, I wish to stress that denying Mr. Marakah standing does not grant the police immunity from s. 8 of the *Charter*. Where, as here, the police activity amounts to a search or seizure, it remains subject to s. 8 and a particular claimant's standing should not be mistaken as the exclusive means of enforcement. Another claimant may have standing to bring a s. 8 challenge against the search or seizure in his or her own criminal trial, or to bring a claim for *Charter* damages: see *Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28. Moreover, as I will now explain, even where s. 8 standing is denied, ss. 7 and 11(d) of the *Charter* offer residual protection

that can, in certain circumstances, provide a claimant with an alternative route to challenge the propriety of police conduct in the course of a search or seizure.

(b) *Sections 7 and 11(d) of the Charter Ensure Protection Against Police Abuse and Charter Evasion*

190 Mr. Marakah suggests that denying him standing will create a gap in the protection guaranteed by s. 8 of the *Charter* and "[p]olice 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": A.F., at para. 61. He echoes the comments of LaForme J.A., at paras. 173-74 of his dissenting reasons at the Court of Appeal:

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.

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.

191 This concern about the police exploiting the effects of the standing requirement through targeting third party devices without lawful authority is not borne out by experience. Following this Court's decision in *Edwards*, there is no evidence of any epidemic of unlawful residential searches seeking evidence against third parties. Nor is there evidence of a flood of unlawful car searches targeting passengers after this Court's decision in *Belnavis*. As indicated, irrespective of whether a particular claimant has standing, the police remain subject to s. 8 of the *Charter* when they conduct a search of a home, a car or a cell phone.

192 More importantly, insofar as deliberate *Charter* evasion is a realistic concern, it can be fully addressed under ss. 7 and 11(d) of the *Charter*, which, in conjunction with s. 24(1), empower a trial judge to exclude evidence as a matter of trial fairness: *R. v. Bjelland*, 2009 SCC 38, [2009] 2 S.C.R. 651, at paras. 3 and 22.⁴ This Court has previously held that even where an accused person cannot invoke the protection of a *Charter* right such as s. 8, evidence may be excluded if it "is gathered in a way that fails to meet certain minimum standards": *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292, at paras. 108-9 and 111; see also *R. v. Harrer*, [1995] 3 S.C.R. 562, at paras. 13-14 (per La Forest J.) and paras. 42-46 (per McLachlin J. concurring). This ensures that the conduct of law enforcement does not go completely unchecked, even when certain *Charter* rights are not directly engaged. In my view, ss. 7 and 11(d) are equally applicable in providing residual protection against any deliberate *Charter* evasion or abuse of the limitations of s. 8 standing by the police.

193 The discretion to exclude evidence pursuant to ss. 7, 11(d) and 24(1) of the *Charter* to protect trial fairness is "flexible and contextual": *Bjelland*, at para. 18. It may be engaged if evidence is obtained through deliberate *Charter* evasion or serious misconduct by the police that rises to a level where trial fairness could be compromised by its admission. It may also arise from conduct and strategy deployed across related investigations and prosecutions. For example, it may be appropriate to exercise this discretion where the grounds for a search of an accused person derive from the fruits of a different search in a related investigation which the accused lacks standing to challenge. The same could be said where the police conduct a series of unlawful searches and seizures in related investigations and the Crown tenders only evidence which each accused person lacks standing to challenge. This list is not closed and trial judges should be trusted to exercise this discretion robustly where trial fairness is at risk.

194 At the same time, a measure of restraint is required to ensure the purpose of a s. 8 standing requirement is not rendered illusory by turning ss. 7 and 11(d) into a surrogate for its protection. A different standard applies and in some cases

evidence may be obtained in circumstances that would not meet the rigorous standards of the *Charter* and yet, if admitted in evidence, would not result in the trial being unfair.

(*Harrer*, at para. 14; see also *Hape*, at paras. 108-9)

195 In this regard, I believe that trial fairness concerns under ss. 7 and 11(d) *Charter* would rarely, if ever, be engaged in cases where evidence is voluntarily provided by a witness in response to an inquiry by the police. To avoid the practical concerns canvassed earlier in paras. 182-84 of these reasons, I wish to be clear that ss. 7 and 11(d) do not provide a vehicle for an accused person to litigate the validity of a witness's consent to a search in a context where the witness is cooperating with a police investigation. In such circumstances, the prospect of admitting evidence without scrutiny for compliance with s. 8 falls well short of compromising trial fairness.

196 In this case, the application judge found that the searches of the text message conversations stored on the phones of Mr. Marakah and Mr. Winchester both infringed s. 8 of the *Charter*. As neither claimant had standing to challenge the search of the other's phone, evidence of those text message conversations was admissible against both Mr. Marakah and Mr. Winchester. Although this result gives me pause, it has not been suggested that the police conduct giving rise to it was a product of design. Nor do the application judge's findings indicate that the police engaged in deliberate *Charter* evasion or serious misconduct in the course of either search. In these circumstances, there is no basis to conclude that the fairness of Mr. Marakah's trial was tainted by the admission of the record of the conversations obtained in the Winchester search. As a result, this is not a case in which it is appropriate to exercise the residual discretion to exclude evidence under ss. 7 and 11(d) of the *Charter*.

(6) Conclusion on Section 8 Standing

197 The Chief Justice's approach to the reasonable expectation of privacy analysis suffers from several shortcomings. First, she does not determine where the search actually occurred, despite maintaining that the strength of Mr. Marakah's expectation of privacy will vary depending on the place of the search. Without knowing whether the place of the search is a "metaphorical chat room" or Mr. Winchester's physical phone, courts have no way of knowing how to assess the strength of Mr. Marakah's expectation of privacy. This uncertainty will have serious implications when courts must assess the impact of an unlawful search on a claimant's s. 8 right for the purposes of a s. 24(2) analysis.

198 Second, although the Chief Justice purports to confine her finding of a reasonable expectation of privacy to the circumstances of this case, applying her framework leads to only two possible conclusions. Either all participants to text message conversations enjoy a reasonable expectation of privacy, or criminal justice stakeholders, including trial and appellate judges, are left to decipher on a case-by-case basis -- without any guidance -- whether a claimant has standing to challenge the search of an electronic conversation. Third, the Chief Justice does not confront the host of foreseeable, practical problems with her approach, saddling the courts with the task of sorting them out when they inevitably arise.

199 I take a different approach. In my view, divorcing privacy from any sense of control in the present context would distort and de-contextualize the concept of privacy, create tension with the autonomy of individuals to freely share information, depart from this Court's longstanding jurisprudence, and raise a host of practical concerns for law enforcement and the administration of criminal justice. Assessing the reasonableness of an expectation of personal privacy is a contextual exercise -- one which requires evaluating the nature and strength of a particular claimant's connection to the subject matter of the search. In this case, Mr. Marakah had absolutely no control over the text message conversations on Mr. Winchester's phone. As such, Mr. Marakah could not reasonably expect personal privacy in those text message conversations. As a result, while accessing the text message conversations on Mr. Winchester's phone amounted to a search under s. 8, in my view, Mr. Marakah lacked standing to challenge its reasonableness under s. 8 of the *Charter* and seek exclusion of the evidence of his conversations with Mr. Winchester discussing the purchase and sale of firearms under s. 24(2).

III. Conclusion

200 I would dismiss the appeal and uphold Mr. Marakah's convictions.

Appeal allowed, MOLDAVER and CÔTÉ JJ. dissenting.

Solicitors:

Solicitors for the appellant: Cooper, Sandler, Shime & Bergman, Toronto.

Solicitor for the respondent: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Director of Public Prosecutions: Public Prosecution Service of Canada, Toronto.

Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Victoria.

Solicitor for the intervener the Attorney General of Alberta: Attorney General of Alberta, Edmonton.

Solicitors for the intervener the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic: Presser Barristers, Toronto; Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic, Ottawa.

Solicitors for the intervener the Criminal Lawyers' Association of Ontario: Ursel Phillips Fellows Hopkinson, Toronto.

Solicitors for the intervener the British Columbia Civil Liberties Association: Stockwoods, Toronto.

Solicitors for the intervener the Canadian Civil Liberties Association: McCarthy Tétrault, Toronto.

1 I would note that, in my respectful view, the distinction between text messages in the process of transmission and those that have been received (see Moldaver J.'s reasons, at para. 146) is not relevant to the s. 8 analysis; it is the electronic conversation, not the data on one mobile device or another, that matters.

2 This should not be read as excluding other exceptional forms of lawful authorization for a search, such as under ss. 184.1 and 184.4 of the *Code*.

3 Note that standing under s. 8 is distinct from the general standing that accused persons have to contest the admissibility of evidence tendered against them: see the comments of Doherty J.A. in *R. v. Belnavis* (1996), 29 O.R. (3d) 321 (C.A.), at para. 26, aff'd [1997] 3 S.C.R. 341. Nothing prevents an accused from bringing a s. 8 argument; however that argument will not gain a foothold if the accused does not establish, as a preliminary requirement for s. 8 purposes, that he or she has a reasonable expectation of *personal* privacy in the subject matter of the alleged search or seizure. That said, as I will explain, a lack of standing for s. 8

purposes does not foreclose an accused from challenging, in appropriate circumstances, the admissibility of evidence seized by the police under ss. 7 and 11(d) of the *Charter*.

4 In addition to the exclusion of evidence, the trial judge would of course retain the discretion to stay the proceedings where the impact of the state conduct on the integrity of the justice system is so egregious as to amount to an abuse of process: see *R. v. Babos*, 2014 SCC 16, [2014] 1 S.C.R. 309, at paras. 31-32.

---- End of Request ----

Download Request: Current Document: 1

Time Of Request: Thursday, November 22, 2018 12:12:42