COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Suman, 2026 ONCA 378[1]
DATE: 20260601
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Rouleau, Huscroft and Trotter JJ.A.

BETWEEN

His Majesty the King

Appellant

and

Shane Suman

Respondent

Andrew Hotke, for the appellant

Bryan Badali, for the respondent

Heard: September 18, 2025

On appeal from the acquittals entered by Justice Scott Bergman of the Ontario Court of Justice on May 28, 2024.

Huscroft J.A.:

OVERVIEW

[1] A mother found that her 17-year-old daughter, K.G., had snuck out of the family home late one night and returned at 2:30 a.m. She was concerned and

[1] This appeal is subject to a publication ban pursuant to s. 486.4 of the *Criminal Code*, R.S.C. 1985, c. C-46.

checked her daughter's cell phone. She discovered that her daughter had been texting with someone named "Rico" about providing sex in exchange for money.

[2] The mother took action to protect her daughter. She took screenshots of the communications and called the police. The police began to review the text messages but stopped because they considered that K.G.'s privacy was at stake. Initially K.G. did not want to involve the police, but she changed her mind subsequently. She provided a videotaped statement outlining her relationship with the respondent and consented to a search of her cellphone. The information the police obtained led to charges against the respondent – "Rico" – including child luring, obtaining sexual services for consideration from a person under 18 years of age, and obtaining sexual services for consideration.

[3] The application judge accepted the respondent's argument that he had a reasonable expectation of privacy in his text messages to K.G. and excluded the messages from trial, along with evidence obtained as a result of those messages.

[4] I conclude that he erred in doing so.

[5] The law governing the freedom from unreasonable search and seizure is not so doctrinaire as to prevent the police from receiving and acting on text message evidence *per se*. A normative evaluation is required, and in my view the respondent cannot establish that he has a reasonable expectation of privacy in the circumstances of this case. Moreover, because the respondent's text messages

constitute the means of committing the offence against the recipient, they have no claim to s. 8 protection in any event.

[6] I would allow the Crown's appeal for the reasons that follow.

BACKGROUND

[7] There is no substantial dispute as to the facts.

[8] K.G., then 17 years old, lived at home with her parents and attended grade 12. She created a profile on "seekingarrangements.com", a website that connects "younger women with older men." She listed her age as 18 or 19 years old and matched with the respondent, a 47-year-old man who was using the name "Rico".

[9] Rico communicated by text and agreed to pay K.G. $300 for sex. At approximately 1:00 a.m. on November 19, 2019, he sent an Uber to K.G.'s home to pick her up and bring her to his condominium. Before having sex, Rico suggested to K.G. that she was not actually 18 years old. K.G. confirmed that she was only 17. Nevertheless, he gave K.G. some alcoholic drinks and had sex with her. Rico paid her $300 and told her to bring identification next time she came so that he could confirm her age.

[10] On November 25, 2019, Rico again sent an Uber to pick up K.G. from her family home and bring her to his condominium. K.G. did not bring identification as he had requested. Again, they had drinks and then had sex. Rico paid K.G. $150 on this occasion.

[11] When K.G. returned home in the early morning hours of November 25, her mother searched her cellphone and found the messages with Rico. She took screenshots of some of the communications and called the police. The police attended at the family home and began reviewing some of the texts but stopped after determining that K.G.'s privacy was at stake. The police removed the SIM card and seized the phone as evidence, "possibly to obtain a warrant".

[12] Initially, K.G. did not want to speak to the police or involve them in the matter. However, on February 19, 2020, following conversations with a social worker at her high school, K.G. provided a videotaped statement to police and consented to the police searching her phone. Police searched her phone and discovered the address for the respondent's condominium building and the license plates of the Uber cars that had been sent to pick her up. Subsequently, the police obtained a production order for records Uber held relating to the two trips. These records revealed the email address linked to the Uber account associated with those trips. A second production order for the condominium records led the police to the respondent, Shane Suman.

[13] The respondent was arrested on June 17, 2020. A search of his condominium was conducted pursuant to a search warrant and the police seized several of the respondent's devices. At the time the search warrant was executed, a 22-year-old woman was also present in the respondent's condominium. She

informed the police that the respondent had paid her for sex. This woman became a second complainant in the case.

[14] On June 25, 2020, counsel for the respondent informed the Crown it was likely that privileged solicitor-client communications were on his seized devices. Crown counsel instructed the police not to search the seized devices but these instructions were not communicated to all officers, and as a result an overbroad production order was prepared for records from TextNow, an application the respondent was thought to have used to communicate with the complainants. Over 42,000 messages were received pursuant to this production order, 91 of which were between the respondent and his counsel. This represented 10 conversations, 4 of which involved communications over which the respondent asserted solicitor-client privilege.

[15] The respondent brought an application alleging that the warrantless search of the text message conversation on K.G.'s phone breached his rights under s. 8 of the *Canadian Charter of Rights and Freedoms* and that the seizure of privileged communications breached his ss. 7 and 8 *Charter* rights. He sought a stay of proceedings and, in the alternative, exclusion of evidence under s. 24(2) of the *Charter*.

The application judge's decision

[16] The Crown conceded that the respondent's s. 8 *Charter* rights were breached by the manner in which the police obtained and treated the TextNow messages and the manner in which they searched the respondent's phone. The Crown conceded that the messages obtained through the production order should be excluded pursuant to s. 24(2). However, the Crown maintained that the search of K.G.'s phone was legal and that evidence obtained directly and indirectly from that search should not be excluded.

[17] The application judge concluded that the respondent had standing to challenge the search of messages on K.G.'s phone. He found that the respondent had a direct interest in the subject matter of the search – the text message conversation between K.G. and the respondent – and a subjective expectation that the messages, in which the two discussed sex in exchange for money, would be kept private. The application judge found, further, that the respondent's expectation of privacy was objectively reasonable. This conclusion was based on the private nature of information shared through text conversations and, at least in part, on the fact that K.G. had originally presented herself as an adult and that, unlike in *R. v. Mills*, 2019 SCC 22, [2019] 2 S.C.R. 320, K.G. was not a creation of the police. The application judge held that the content neutral approach to s. 8 requires that privacy rights attach to illegal and exploitative communications, and

that content neutrality precluded consideration of the normative desirability of s. 8 protection in the circumstances of the respondent's relationship with K.G.

[18] The Crown conceded that K.G.'s phone was seized and searched and the application judge found that the warrantless search of her phone was not authorized by law. Thus, the search breached s. 8.

[19] Turning to s. 24(2), the application judge found that the breach was serious and that the officers had displayed a flagrant disregard for the respondent's *Charter* rights. Although the respondent had, at most, shared control of his conversation with K.G. and as a result, a diminished expectation of privacy, the impact on his *Charter*-protected interests was considerable. The application judge found that the evidence sought to be excluded was highly reliable and that society's interest in adjudication on the merits favoured admission.

[20] Balancing the three factors, the application judge held that admission of the messages would bring the administration of justice into disrepute. As the search of K.G.'s phone led to the Uber records, the condo records, and the search of the respondent's residence and devices, the application judge excluded the evidence. He declined to issue the stay of proceedings sought by the respondent because he found that the police neither intended to seize solicitor-client communications, nor considered the possibility that the TextNow production order would produce solicitor-client communications. Although the police conduct was very serious, it

was an isolated incident and the application judge concluded that a stay of proceedings was not warranted.

DISCUSSION

[21] The Crown argues, first, that the application judge erred in finding a violation of s. 8 of the *Charter* in relation to the search of text messages found on K.G.'s phone. Specifically, the Crown submits that the application judge incorrectly found the respondent had a reasonable expectation of privacy that gave him standing to challenge the police's warrantless search of the messages. Second, the Crown argues that even assuming a violation of s. 8, the application judge erred in excluding the evidence under s. 24(2) of the *Charter*.

[22] As I will explain, I accept the first argument. It is therefore unnecessary to address the second. The respondent raises additional grounds to preserve the exclusion of text message evidence or stay the proceedings, but these grounds must also be rejected.

Standing to challenge a search

[23] In order to have standing to assert a breach of s. 8, the burden is on the respondent to establish, on a balance of probabilities, that he has a reasonable expectation of privacy in the subject matter of the putative search or seizure. The court considers the subject matter of the search; whether the claimant has a direct interest in the subject matter; whether the claimant has a subjective expectation of

privacy in the subject matter; and, if so, whether that expectation was objectively reasonable in all the circumstances: see e.g., *R. v. Marakah*, 2017 SCC 59, [2017] 2 S.C.R. 608, at paras. 10-11. Only if the expectation of privacy was objectively reasonable will the respondent have standing to challenge the search on s. 8 grounds: *Marakah*, at para. 12.

[24] It is well established that the reasonable expectation of privacy is a normative concept: *R. v. Bykovets*, 2024 SCC 6, 489 D.L.R. (4th) 1, at para. 7; *Mills*, at para. 20; *R. v. Le*, 2019 SCC 34, [2019] 2 S.C.R. 692, at paras. 136-37; and *R. v. Reeves*, 2018 SCC 56, [2018] 3 S.C.R. 531, at para. 28. This means that it is an expectation of privacy that *ought* to be respected in particular circumstances because it *deserves* to be respected and, as a result, constitutionally protected. Whether an expectation of privacy deserves to be protected can be answered only following identification and careful consideration of the interests and values of a free and democratic society – the aspirational context in which normativity is determined.

[25] The analysis is content neutral in this sense: the existence of a reasonable expectation of privacy does not turn on what a search reveals. Searches are not to be justified after the fact: *R. v. Campbell*, 2024 SCC 42, 498 D.L.R. (4th) 195, at paras. 50-52 ("*Campbell SCC*"); *R. v. Knelsen*, 2024 ONCA 501, 439 C.C.C. (3d) 378, at para. 52, leave to appeal refused, [2024] S.C.C.A. No. 369.

[26] An accused individual's dignity, integrity, and autonomy are important considerations in determining whether a reasonable expectation of privacy should be recognized but, as the Supreme Court has emphasized, so too are the goals of effective law enforcement: *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at pp. 159-60; *R. v. Plant*, [1993] 3 S.C.R. 281, at p. 293. As the court said in *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432, at para. 17: "Safety, security and the suppression of crime are legitimate countervailing concerns." This court has also affirmed the importance of public safety and security: see e.g., *R. v. Chow*, 2022 ONCA 555, 163 O.R. (3d) 241, at para. 34; *R. v. Singh*, 2024 ONCA 66, 432 C.C.C. (3d) 527, at para. 63. The question is not whether these competing goals should be balanced but how that balance is to be determined.

Electronic communications

Supreme Court of Canada

[27] The Supreme Court addressed the reasonable expectation of privacy in the context of electronic communications in *Marakah*. That case involved text messages concerning illegal firearms transactions sent by the accused to an accomplice. The court began from the premise that the subject matter of the search was the conversation between the sender of the communication and the recipient – not simply whether the conversation had occurred, but the identities of the participants, the information they shared, and the inferences that can be drawn from that information: *Marakah*, at para. 20. There was no question that the sender

of the communications had a direct interest in them and a subjective expectation that the communications were private. This will be so in most cases involving electronic communications. The real issue was whether the expectation of privacy in the communications was objectively reasonable.

[28] A majority of the court in *Marakah* concluded that the accused had a reasonable expectation of privacy in his text messages despite the illegality they revealed. The majority noted that the focus was not on the content of the messages but, instead, on their potential to reveal personal or biographical information: *Marakah*, at paras. 32, 37. That the conversation was accessed through a phone that did not belong to the accused did not render the expectation of privacy unreasonable, nor did the shared nature of the accused's "control" over the conversation: *Marakah*, at paras. 25-30, 38-45.

[29] That being said, the majority was careful to note that an exchange of electronic messages does not automatically give rise to a reasonable expectation of privacy. Rather, whether a claimant has a reasonable expectation of privacy in a given conversation falls to be assessed on the facts of each case; different facts may lead to different results. The reasonable expectation of privacy must be assessed in the totality of the circumstances: *Marakah*, at paras. 5, 10, and 55.

[30] McLachlin C.J. rejected concerns raised by Moldaver J. in dissent that her approach to standing was "effectively boundless" because it meant that a sexual

predator victimizing children would have a reasonable expectation of privacy in their conversations on a child's device: *Marakah*, at paras. 168-69. McLachlin C.J. noted that such communications might be admitted into evidence despite the existence of a reasonable expectation of privacy: the police could obtain a warrant before reviewing the messages; the Crown could establish that a warrantless search was otherwise authorized by law, was reasonable and carried out reasonably; or the court could admit messages obtained in violation of s. 8 pursuant to s. 24(2) of the *Charter*: *Marakah*, at paras. 49-52. However, as Moldaver J. observed, none of these hypotheticals contemplate a participant in an electronic conversation lacking a reasonable expectation of privacy in that conversation, nor do they provide guidance on the circumstances that would weigh against finding a reasonable expectation of privacy in an electronic conversation, despite the majority's instruction that standing is to be assessed on a case-by-case basis: *Marakah*, at paras. 171-72.

[31] Subsequently, the court was required to address text messaging in the context of sexual offences against children in *Mills*. In that case, the accused asserted that he had a reasonable expectation of privacy in his electronic conversation with an undercover police officer posing as a 14-year-old girl. The result was a fractured court. Writing for three members of a seven-member panel, Brown J. concluded that an adult could not reasonably expect privacy with someone he believed to be a child, who was a stranger to him, in the context of an

undercover police sting. Karakatsanis J., writing for two members of the court, concluded that it was not reasonable to expect text messages would be kept private from the intended recipient, “Leann” (the fictional child created by the police). Moldaver J. concurred with both decisions, while Martin J. found a breach of s. 8 but would have admitted the evidence under s. 24(2). *Mills* reveals considerable disquiet about the state of the law and concerns about excluding text messages from the evidence where a reasonable expectation of privacy has been found, but the police have reviewed the messages without first obtaining a search warrant.

[32] In this court’s decision in *R. v. Campbell*, 2022 ONCA 666, 163 O.R. (3d) 355, at para. 62 (“*Campbell ONCA*”), aff’d 2024 SCC 42, 498 D.L.R. (4th) 195, Trotter J.A. suggested that *Mills* had carved out an exception to the reasonable expectation of privacy in electronic communications established in *Marakah* “where the electronic communications themselves constitute a crime against the recipient – in [*Mills*], the victimization of children.” Writing for a majority of the Supreme Court in *Campbell SCC*, at para. 78, Jamal J. expressed the view that *Marakah* remains the governing authority on text messages and that it was not necessary to decide whether *Mills* created an exception or departed from the content neutral approach.

Court of Appeal for Ontario

[33] This court has considered the reasonable expectation of privacy in the context of text messages in two recent judgments. In *Knelsen*, the court held that the appellant, a 27-year-old man, had no reasonable expectation of privacy in text messages he exchanged with the complainant, whom he knew to be 15 years old, for purposes of committing sexual offences. His expectation of privacy was not objectively reasonable given "the totality of the circumstances and the important societal interest in protecting vulnerable children from sexual exploitation": *Knelsen*, at para. 58. In the alternative to this normative argument, van Rensburg J.A. said that the case, involving the offence of child luring, fell squarely within the exception carved out in *Mills*: there is no reasonable expectation of privacy in text messages that themselves constitute a crime against the recipient: *Knelsen*, at para. 64.

[34] In *R. v. P.M.*, 2025 ONCA 208, 176 O.R. (3d) 193, this court held that the societal interest in protecting children from sexual offences facilitated by electronic communications meant that an adult man had no reasonable expectation of privacy in text messages sent to his 10-year-old niece that facilitated the alleged sexual abuse. This court accepted the application judge's analysis that it would have been obvious to a reasonable person that the cell phone would have been provided by the child's parents and that they would have exercised control over it,

and there was no obligation of privacy between the complainant, nor her parents, and the appellant: *P.M.*, at para. 32.

[35] The decisions of this court in *Knelsen* and *P.M.* reinforce the notion that the reasonable expectation of privacy is context specific and emphasize the importance of protecting children from sexual exploitation. They also demonstrate that the content neutrality principle does not preclude reliance on information confirmed by the search of electronic communications *per se*. When analyzing the totality of the circumstances, courts may rely on information about the nature of the parties' relationship as it was known to police prior to reviewing the communications. The consent of recipients to the police reviewing communications and the control over the communications exercised by the child's parent are also relevant considerations.

[36] The normative rationale for the approach in *Knelsen* and *P.M.* is strong: children are vulnerable to sexual abuse and text messaging affords perpetrators the opportunity to contact victims in secrecy. Adults have no strong claim to communicate with children in secrecy, while parents have every right to control their children's use of texting and social media in order to keep their children safe.

[37] But *Knelsen* also confirms the existence of an exception to any broad reasonable expectation of privacy in electronic communications based on the analysis in *Marakah*: there is no reasonable expectation of privacy in electronic

communications that are the means of committing the offence against the recipient. In *R. v. Gauthier*, 2024 ONCA 621, 173 O.R. (3d) 561, leave to appeal refused, [2024] S.C.C.A. No. 436, a case that did not involve sexual offences against children, this court applied the exception identified by Trotter J.A. in *Campbell ONCA*, and described as arguable by Paciocco J.A. in *R. v. Lambert*, 2023 ONCA 689, 169 O.R. (3d) 81, at para. 60, holding that there is no reasonable expectation of privacy where the communication is the means of committing the offence against the recipient – in *Gauthier*, criminal harassment and harassing communications. As Coroza J.A. put it, "a reasonable person in Canada ought not to expect privacy in leaving a voicemail for a recipient that itself constitutes a crime": *Gauthier*, at para. 51.

[38] This line of authority was not available to the application judge; it post-dates his decision in this case. It has not been endorsed by the Supreme Court, but neither has it been countermanded. Although a majority of that court stated in *Campbell SCC* that *Marakah* remains the governing authority, the court denied leave to appeal in both *Knelsen* and *Gauthier*. If the Supreme Court considers this authority inconsistent with *Marakah*, it is incumbent on that court to resolve the matter. Unless it does so, this court's authority must be followed.

The respondent had no reasonable expectation of privacy in this case

[39] Both *Knelsen* and *P.M.* concluded that privacy claims were not objectively reasonable in the context of text messages sent by adults to children. The only

difference in this case is that K.G.'s status as a minor was not known to the respondent when he began texting with her. In my view, that difference does not determine the outcome in this case. Whether as a normative matter or as an exception to the *Marakah* approach, the respondent had no reasonable expectation of privacy in his electronic communications with K.G.

The normative analysis

[40] There is no doubt that the respondent was directly interested in the privacy of his text messages with K.G. and had a subjective expectation of privacy in them. Text messaging has the potential to reveal deeply personal and biographical information about the participants in a conversation: *Campbell SCC*, at para. 59; *Marakah*, at para. 37. In this case, the text messages revealed the respondent's sexual preferences and desire to pay for sex, intimate details that can be said to be part of his biographical core of personal information. That is on one side of the scale in evaluating his claim to a reasonable expectation of privacy. But on the other side are interests of considerable importance.

[41] The nature of the relationship between the parties to a conversation is an important factor in assessing the reasonable expectation of privacy: *Knelsen*, at paras. 51-52. So is the social value of protecting vulnerable children from exploitation through the use of electronic communications: *Knelsen*, at para. 45. On a normative standard, adults who are communicating with children they do not know to arrange sexual encounters cannot reasonably expect privacy in those

communications: *Mills*, at para. 23; *Knelsen*, at para. 58. In this case, the respondent, an adult, was conversing online with K.G., a minor who was a stranger to him, about transactions for sex.

[42] Although K.G. initially told the respondent that she was 18, this does not tip the balance in favour of a normative justification for a reasonable expectation of privacy. The respondent chose to communicate with a stranger in order to exchange sex for money. He did so knowing that K.G. was young: he was looking for a young woman to exploit for sex and met her on a website designed to connect "younger women with older men". He took a chance, and he continued communicating with K.G. after she confirmed she was 17. The respondent did not know K.G. except in a commercial, transactional sense. He cannot reasonably rely on any information she provided to him to establish that he was entitled to a reasonable expectation of privacy in the circumstances.

[43] The right – indeed, the moral duty – of a parent to protect his or her child weighs heavily against recognizing a reasonable expectation of privacy in the communications. As is common, K.G.'s mother owned and paid for her cellphone and had the password to it. Parents often retain control over cellphones in order to protect their children from the range of harms that may occur through Internet usage. Having found the messages to her daughter from the respondent soliciting sex, K.G.'s mother did what any parent would do – what any parent *should* do. She passed them on to the police to investigate the offence she thought had been

committed against her daughter. It would be more than surprising if the reasonable expectation of privacy should preclude the police from acting on this information, which was voluntarily shared with them. That would be so even if K.G. refused to cooperate, but she did not; she sought the protection of law herself and authorized the police to search her cellphone.

[44] The messages were provided voluntarily by K.G. and her mother to the police. The respondent exercised a degree of control over the conversation to the extent that he chose to send messages directly to K.G., one-on-one: *Marakah*, at para. 39. But K.G. and her mother were free to disclose those messages to others, and they chose to do so. It is not reasonable, as a descriptive or normative matter, for the respondent to expect confidentiality in his conversation with K.G., such that third parties could not look at the communications even when invited to do so. To be sure, the possibility of disclosure does not negate a reasonable expectation of privacy against *state* intrusion in the electronic conversation: *Marakah*, at para. 45. But it does reduce the reasonableness of the expectation of privacy against voluntary disclosure of the conversation, which is what happened in this case: *Knelsen*, at paras. 59-60; *P.M.*, at para. 39. The “investigative technique” employed by the police – reviewing text messages voluntarily provided to them – was not intrusive, and this supports the conclusion that the respondent’s expectation of privacy was not objectively reasonable: *Tessling*, at para. 50; *Campbell SCC*, at para. 62.

[45] This is not a case in which the Crown seeks to justify a search after the fact of the search based on the evidence the search revealed. The police did not learn of the respondent's conduct solely as a result of a search. As in *Knelsen*, much was known to the police about the context and the relationship between the respondent and K.G. well before the text messages were read.

[46] Among other things, the police knew, based on interviews with both K.G. and her mother, that K.G. was a 17-year-old high school student; that she had met the respondent, an adult man, on the website "seekingarrangements.com"; that they had texted about meeting to have sex; and that sex had already taken place. The police knew that K.G. and the respondent were strangers in an exploitative relationship.

[47] The police also knew that K.G.'s mother owned and paid for her cellphone, that she had the password, and that she monitored her daughter's text messages. And they knew that K.G. had specifically authorized the police to review her text messages.

[48] In all of these circumstances, the respondent's subjective expectation of privacy in his conversation with K.G. was not objectively reasonable.

The exception analysis

[49] A more straightforward route to the same conclusion is possible based on the exception recognized in *Knelsen* and in *Gauthier*.

[50] It is an offence pursuant to s. 172.1(1) of the *Criminal Code*, R.S.C. 1985, c. C-46, to communicate by means of telecommunications with a person under the age of 18 to facilitate the commission of an offence with respect to that person under s. 286.1(2) – specifically, obtaining for consideration, or communicating with anyone for the purpose of obtaining for consideration, the sexual services of a person under the age of 18. These offences reflect Canadian public policy, which among other things is designed to protect people from sexual exploitation, an approach Parliament adopted following the Supreme Court's decision in *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101. As this court explained in *R. v. N.S.*, 2022 ONCA 160, 169 O.R. (3d) 401, at para. 21, leave to appeal refused, [2022] S.C.C.A. No. 281:

> While some advocated for the decriminalization and regulation of the sex trade, Parliament adopted a variant of the so-called "Nordic Model", which had been adopted in several other countries. The Nordic Model views the sex trade as a form of sexual exploitation. It targets those who create the demand for prostitution and those who capitalize on it. Parliament did not accept that persons who provide sexual services for consideration should be viewed as "workers" and that prostitution should be legal sex "work"[.] [Citation omitted].

[51] As in *Gauthier*, the communication is the means of committing the offence against the recipient, and as a result there can be no reasonable expectation of privacy in the communication. To conclude otherwise is, in effect, to conscript the

recipient of an electronic message – the victim of the offence – into protecting the privacy of the person who seeks to shield their commission of the offence.

[52] In summary, on either approach the respondent did not have a reasonable expectation of privacy in his text messages with K.G. Accordingly, he does not have standing under s. 8.

The respondent's alternative arguments

[53] It follows that the respondent's argument that his s. 8 right was violated by police failure to file a report to a justice after seizing K.G.'s phone must be rejected. The respondent had no reasonable expectation of privacy in the messages, and therefore no standing to challenge the lawfulness of the seizure of the phone and its contents.

[54] The respondent also argues the text messages with K.G. should be excluded because they were causally and contextually connected to the conceded *Charter* breaches that occurred in the search of his phone and his TextNow messages. That is, they were still "obtained in a manner" that infringed his *Charter* rights.

[55] I do not agree.

[56] The review of the text messages on K.G.'s phone by the police was not part of the same transaction or course of conduct as the overbroad production order or search of the respondent's phone, both of which occurred long after the search of

K.G.'s phone and the collection of information the text messages revealed – almost seven months, in the case of the production order, and over one year in the case of the search of the respondent's phone. These were different investigative steps, aimed at gathering information from different sources, connected only insofar as they were part of the same investigation. It cannot be said that the text messages from K.G.'s phone were "obtained in a manner" that infringed the *Charter*.

[57] Finally, I reject the respondent's argument that the text messages from K.G.'s phone should be excluded as a remedy for abuse of process. The application judge's decision to exclude evidence obtained through the overbroad production order remains undisturbed on appeal. He found that the *Charter*-infringing conduct in this case was adequately addressed by the exclusion of that evidence. I see no basis to disturb the application judge's determination.

[58] Accordingly, the text message evidence retrieved from K.G.'s phone should not have been excluded.

The respondent's s. 11(b) application is not properly before the court

[59] Under the "additional issues" heading of his factum, the respondent argues that if this court allows the Crown's appeal it should consider whether the application judge (a different judge than the one who decided the *Charter* application concerning the text message evidence) erred in dismissing his

application to stay the proceedings because his right under s. 11(b) to be tried within a reasonable time was violated.

[60] The respondent argues the court's jurisdiction to enter a stay of proceedings is located in s. 686(8) of the *Criminal Code*, which provides that where the court exercises any of the powers to allow an appeal from acquittal conferred by subsection (4), it may "make any order, in addition, that justice requires." He argues that it is in the interests of justice that this court consider his appeal from the dismissal of his s. 11(b) application if the Crown is successful in its appeal.

[61] This argument must be rejected.

[62] The *Criminal Code* does not permit cross-appeals. The respondent is not entitled to revisit the application judge's ruling on the s. 11(b) application by raising it as an additional issue, contingent on the outcome of an appeal to which he is responding. He is not seeking to defend the order below on a different basis. He is seeking a new order – a stay under s. 24(1) of the *Charter*. Section 686(8) establishes a residual discretion in the court of appeal to make any order that justice requires in resolving an appeal. It does not create a platform to seek *Charter* relief in the event of a successful Crown appeal. The respondent retains the ability to assert a s. 11(b) claim at his retrial.

CONCLUSION

[63] The application judge erred in concluding that the respondent had a reasonable expectation of privacy. As the respondent lacked standing to challenge the search of the text messages on K.G.'s phone, they should have been admitted into evidence.

[64] I would allow the appeal and order a new trial.

Released: June 1, 2026 "P.R."

"Grant Huscroft J.A."
"I agree. Paul Rouleau J.A."
"I agree. Gary Trotter J.A."