WARNING

The President of the panel hearing this appeal directs that the following should be attached to the file:

An order restricting publication in this proceeding under ss. 486.4 or 486.6 of the *Criminal Code* shall continue. These sections of *the Criminal Code* provide:

> 486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of
>
> (a) any of the following offences:
>
> (i) an offence under section 151, 152, 153, 153.1, 155, 160, 162, 162.1, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or
>
> (ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or
>
> (b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).
>
> (2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall
>
> (a) as soon as feasible, inform any witness under the age of 18 years and the victim of the right to make an application for the order;
>
> (b) on application made by the victim, the prosecutor or any such witness, make the order; and
>
> (c) if an order is made, as soon as feasible, inform the witnesses and the victim who are the subject of that order of its existence and of their right to apply to revoke or vary it.

(2.1) Subject to subsection (2.2), in proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.

(2.2) In proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice shall

(a) as soon as feasible, inform the victim of their right to make an application for the order;

(b) on application of the victim or the prosecutor, make the order; and

(c) if an order is made, as soon as feasible, inform the victim of the existence of the order and of their right to apply to revoke or vary it.

(3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

(3.1) If the prosecutor makes an application for an order under paragraph (2)(b) or (2.2)(b), the presiding judge or justice shall

(a) if the victim or witness is present, inquire of the victim or witness if they wish to be the subject of the order;

(b) if the victim or witness is not present, inquire of the prosecutor if, before the application was made, they determined if the victim or witness wishes to be the subject of the order; and

(c) in any event, advise the prosecutor of their duty under subsection (3.2).

(3.2) If the prosecutor makes the application, they shall, as soon as feasible after the presiding judge or justice makes the order, inform the judge or justice that they have

(a) informed the witnesses and the victim who are the subject of the order of its existence;

(b) determined whether they wish to be the subject of the order; and

(4) An order made under this section does not apply in either of the following circumstances:

(a) the disclosure of information is made in the course of the administration of justice when the purpose of the disclosure is not one of making the information known in the community; or

(b) the disclosure of information is made by a person who is the subject of the order and is about that person and their particulars, in any forum and for any purpose, and they did not intentionally or recklessly reveal the identity of or reveal particulars likely to identify any other person whose identity is protected by an order prohibiting the publication in any document or the broadcasting or transmission in any way of information that could identify that other person.

(5) An order made under this section does not apply in respect of the disclosure of information by the victim or witness when it is not the purpose of the disclosure to make the information known to the public, including when the disclosure is made to a legal professional, a health care professional or a person in a relationship of trust with the victim or witness.

486.6 (1) Every person who fails to comply with an order made under any of subsections 486.4(1) to (3) or subsection 486.5(1) or (2) is guilty of an offence punishable on summary conviction.

(1.1) A prosecutor shall not commence or continue a prosecution against a person who is the subject of the order unless, in the opinion of the prosecutor,

(a) the person knowingly failed to comply with the order;

(b) the privacy interests of another person who is the subject of any order prohibiting the publication in any document or the broadcasting or transmission in any way of information that could identify that person have been compromised; and

(c) a warning to the individual is not appropriate.

(2) For greater certainty, an order referred to in subsection (1) applies to prohibit, in relation to proceedings taken against any person who fails to comply with the order, the publication in any document or the broadcasting or transmission in any way of information that could identify a victim, witness or justice system participant whose identity is protected by the order.

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Knelsen, 2024 ONCA 501
DATE: 20240621
DOCKET: C69976

van Rensburg, Roberts and Favreau JJ.A.

BETWEEN

His Majesty the King

Respondent

and

Peter Knelsen

Appellant

Bryan Badali, for the appellant

Andrew Hotke, for the respondent

Heard: November 22, 2023

On appeal from the convictions entered on October 13, 2020 by Justice Scott K. Campbell of the Superior Court of Justice, sitting with a jury.

van Rensburg J.A.:

Overview

[1] The appellant was convicted after trial by judge and jury of sexual assault, contrary to s. 271 of the *Criminal Code*; sexual interference, contrary to s. 151; and child luring by means of telecommunication, contrary to s. 172.1(1)(b). The sexual interference conviction was stayed pursuant to *Kienapple v. R.*, [1975] 1 S.C.R. 729 and he was sentenced to 20 months in prison for sexual assault and three months for internet luring, to be served consecutively.

[2] The appellant confirmed that he is not pursuing his sentence appeal and it is accordingly dismissed as abandoned.

[3] In his conviction appeal the only issue is whether the trial judge erred in refusing to exclude from evidence at the trial text messages between the appellant and the complainant that were stored on the complainant's cell phone. The trial judge found that the text messages had been obtained in violation of the appellant's s. 8 *Charter* rights but admitted the text messages under s. 24(2). The appellant asserts that the text messages, which were retrieved by the police with the consent of the complainant and without a warrant, played an important role in his convictions because their content powerfully suggested that he knew the complainant was 15 years old when they had sexual intercourse.

[4] The appellant contends that the trial judge erred in principle in his s. 24(2) analysis by failing to consider additional relevant *Charter* breaches at the first stage

of the *Grant* inquiry (*R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353). He submits that, when all the breaches are taken into consideration, s. 24(2) compels the exclusion from evidence of the text messages. He asks this court to allow his appeal and order a new trial.

[5] The Crown contends that the trial judge erred in concluding that the appellant had a reasonable expectation of privacy in the text messages on the complainant's cell phone and in according the appellant standing to allege a s. 8 breach. In the alternative, if this court upholds the trial judge's conclusions that the appellant had standing, and that there was a s. 8 breach, the Crown submits that there was no error in the trial judge's weighing of the *Grant* factors, which is entitled to deference.

[6] For the reasons that follow, I would dismiss the appeal. In my view the trial judge erred in concluding that the appellant had standing to assert his s. 8 rights and challenge the admissibility of the text messages. As I will explain, applying the test articulated in *R. v. Marakah*, 2017 SCC 59, [2017] 2 S.C.R. 608, and *R. v. Mills*, 2019 SCC 22, [2019] 2 S.C.R. 320, and considering the totality of the circumstances, the appellant did not have a reasonable expectation of privacy in text messages he sent to the complainant – that he met only once and whom he knew was 15 – to arrange to meet for sex. Further, and in the alternative, the text messages did not attract any protection under s. 8 of the *Charter* because they were the means by which the appellant committed the offence of child luring.

[7] The text messages were accordingly admissible at trial, and there is no basis to set aside the appellant's convictions. It is therefore unnecessary to address the arguments respecting the trial judge's s. 24(2) analysis.

Facts

[8] On October 18, 2017, the complainant, who was 15 years old, was found passed out on the front porch of her family home with her clothing in disarray. Her family took her to a local hospital, where she was examined. Sexual intercourse was confirmed.

[9] The next day, the complainant provided a statement to the police: she had met the appellant three days earlier at a party, she had told him she was 15 years old and had learned he was 27, and they had exchanged phone numbers. The complainant indicated that the two communicated by text message over the next three days, planning to meet to have sex, and that they had also messaged about what they liked to do for fun and about their families. She recalled meeting up with the appellant, drinking alcohol to the point of intoxication, and then waking up in the hospital.

[10] After taking her statement, the police obtained signed consents from the complainant and her father to search her cell phone for conversations with the appellant, whose phone number she had saved in her contacts under the name "Superman". A police digital forensic technician downloaded the contents of the

complainant's phone and prepared an extraction report containing all text messages between the complainant and "Superman".

[11] The next day, the police contacted the appellant and asked him to come to the police station. When he arrived, he was arrested for sexual assault and two counts of sexual interference, but not (yet) for child luring. The police seized the appellant's cell phone, intending to obtain judicial authorization to download the messages in order to corroborate the text messages they already had.[1] After the appellant spoke to his lawyer, the police recorded an interview with him. The police subsequently laid the child luring charge.

[12] On August 15, 2018, the police submitted an information to obtain ("ITO") for a warrant for the appellant's DNA. On January 9, 2019, the police submitted an ITO for a production order to confirm the appellant's phone number. The ITO included references to the text messages from the appellant recovered from the complainant's cell phone. The police were successful in obtaining both the DNA data and confirmation of the appellant's phone number.

[13] In advance of trial the appellant brought an omnibus motion, alleging violations of his rights under ss. 8, 10(a) and 10(b) of the *Charter*. He sought the exclusion from evidence of the text messages extracted from the complainant's

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[1] However, the cell phone was returned to the appellant without applying for judicial authorization to search the messages, after the police failed to file a Report to Justice until nearly 10 months after seizing the phone.

cell phone, his police statement, the results of the DNA warrant, and his phone number.

Decision re: The Appellant's Standing to Challenge the Admissibility of the Text Messages[2]

[14] The trial judge first considered the threshold question of the appellant's standing to challenge the admissibility of the text messages on the complainant's cell phone under s. 8 of the *Charter* – that is, whether the appellant had a reasonable expectation of privacy in the messages. He approached the issue according to the four lines of inquiry articulated in the jurisprudence, and as confirmed in *Marakah*: (1) what was the subject matter of the search?; (2) did the appellant have a direct interest in the subject matter?; (3) did the appellant have a subjective expectation of privacy in the subject matter?; and (4) if so, was the appellant's subjective expectation of privacy objectively reasonable?

[15] The trial judge noted that there was no serious issue about the first three parts of the test. The Crown conceded that the appellant met the first two parts and did not seriously challenge the third. The trial judge concluded that the subject matter of the search was the text messages exchanged between the complainant and the appellant. The appellant had a direct interest in the subject matter because it was capable of describing aspects of his biographical core: in the course of the

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[2] 2019 ONSC 6168.

texts the two shared information about their lives, family and friends and discussed meeting on a specific date at a specific place for a specific purpose. The appellant had a subjective expectation of privacy: the appellant understood that at least some of his text messages with the complainant were not going to be shared because they had agreed to keep secret the meeting they were arranging.

[16] The trial judge then considered the factors identified in *Marakah* and other cases for assessing the objective reasonableness of the appellant's subjective expectation of privacy: (1) the place where the search occurred; (2) the private nature of the subject matter, and whether the informational content of the electronic conversation would be details of the complainant's lifestyle or information of a biographic nature; and (3) control over the subject matter. He noted that, as in *Marakah*, the place of the search was an electronic space accessible by only two parties; this was a text message conversation in which both participants revealed details about their personal lives; and the appellant exercised control over the information shared within the text messages.

[17] The Crown relied on *Mills*, where the Supreme Court concluded that messages between an offender and a person he believed was a child during a police sting operation were admissible in evidence in the offender's trial for child luring. In that case Brown J. stated that "adults cannot reasonably expect privacy online with children they do not know": at para. 23.

[18] The trial judge distinguished *Mills*, stating that, while in that case the police had used an investigative technique allowing them to know from the outset that the accused was conversing with a child who was a stranger, here, by contrast, the police had a "mere theory about a relationship between the conversants", without a thorough examination of the text conversation. Further, the complainant and the appellant were known to each other and had interacted before the text messages began. The trial judge concluded that, on the "totality of the circumstances", the appellant had met the burden of establishing a reasonable expectation of privacy in the text messages retrieved from the complainant's cell phone. He therefore had standing to challenge their admission in evidence at trial, as a breach of his s. 8 *Charter* rights.

The Balance of the *Charter* Motion and the Trial

[19] It is unnecessary for the purpose of this appeal to provide a detailed summary of the balance of the trial judge's decision on the *Charter* motion.[3] First, following the decision on standing, the Crown conceded that the warrantless seizure and search of the text messages on the complainant's cell phone violated the appellant's s. 8 rights. The Crown also conceded that the police had breached the appellant's s. 8 rights when they failed to file a Report to Justice after seizing the appellant's phone.

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[3] 2020 ONSC 186.

[20] The trial judge also found that the appellant's s. 10(a) rights had been violated by the police when they questioned him without first advising that he was under investigation for child luring. The trial judge concluded that the appellant's police statement, while voluntary, was inadmissible because of this *Charter* breach. The trial judge excluded the statement from evidence under s. 24(2) of the *Charter*.

[21] With the statement excluded, and references to the text messages excised, the ITO for the production order for the appellant's phone number did not contain sufficient reliable evidence for the authorizing justice to have concluded that the warrant should issue. Accordingly, the appellant's phone number was obtained in violation of s. 8 and was also excluded.

[22] As for the admissibility of the text messages on the complainant's cell phone, the trial judge concluded that the appellant had a lessened expectation of privacy in the messages because "any person in the [appellant's] position could expect that a person in the complainant's position might share the information with others". He rejected the contention that the *Charter*-breaching conduct was systemic or part of a pattern of *Charter* breaches. The trial judge concluded that, while the breach was serious, obtaining the text messages without a warrant or the appellant's consent was consistent with the law at the time (the seizure occurred roughly two months before the release of the Supreme Court's decision in *Marakah*), and the police acted in good faith. The trial judge added that society's

interest in adjudication on the merits was strong, particularly on the child luring count, where "[t]o exclude the text messages would effectively gut the Crown's case on this count". The text messages retrieved from the complainant's cell phone were accordingly admissible at trial.

[23] The appellant's trial proceeded before the trial judge and a jury. He was convicted of sexual assault and sexual interference in relation to the incident of sexual intercourse on October 18, 2017, and child luring. He was acquitted of sexual interference in relation to having kissed the complainant on October 15, 2017, the day they first met.

Positions of the Parties

[24] The appellant asserts that the trial judge made no reversible error in concluding that his rights under s. 8 of the *Charter* had been breached in relation to the text messages he sent to the complainant that were retrieved by the police from the complainant's cell phone. It is conceded by the appellant that if this court concludes that he did not have a reasonable expectation of privacy in the text messages, then there was no basis for their exclusion.

[25] If the trial judge's finding of a s. 8 breach is upheld, then the appellant argues that the trial judge erred when he adopted a "siloed" approach in his *Grant* analysis of the various *Charter* breaches and refused to exclude the text messages from evidence under s. 24(2).

[26] For the purpose of the appeal, the Crown does not challenge the trial judge's conclusion that the appellant had a subjective expectation of privacy in the text messages he exchanged with the complainant. The Crown contends that the trial judge erred in concluding that the appellant had standing to assert his s. 8 rights and that there was a s. 8 breach in relation to the text messages based on his erroneous conclusion that the appellant had an objectively reasonable expectation of privacy in the messages. That is, the Crown argues that the appellant had no reasonable expectation of privacy in the messages because it was not objectively reasonable for him to expect privacy in the totality of the circumstances.

[27] The Crown submits that the determination of what is objectively reasonable is not a purely descriptive or factual inquiry. It is also normative, answered by the court in determining when Canadians ought to expect privacy from state intrusion, in light of competing interests and considerations: *Mills*, at para. 20; *R. v. El-Azrak*, 2023 ONCA 440, 167 O.R. (3d) 241, at para. 31. Here, the competing social interest is the protection of children. The Crown contends that the nature of the relationship between the appellant and the complainant when the messages were exchanged, and how the police came into possession of the messages, are relevant factors in considering the totality of the circumstances.

[28] In the alternative, the Crown argues that this court should follow the decision of Trotter J.A. in *R. v. Campbell*, 2022 ONCA 666, 163 O.R. (3d) 355, at paras. 62 and 73, stating that the Supreme Court's decision in *Mills* "carved out an exception

[to the broad holding in *Marakah*] in circumstances where the electronic communications themselves constitute a crime against the recipient". The Crown asserts that the appellant did not have a reasonable expectation of privacy in the messages extracted from the complainant's cell phone because the messages constituted the offence of child luring and were used in facilitating a sexual assault and sexual interference.

[29] Finally, if this court upholds the trial judge's decision that the appellant had standing to assert his s. 8 rights under the *Charter*, the Crown does not challenge the conclusion that the police unlawfully seized the text messages (which was conceded at first instance) but contends that there was no error in the trial judge's s. 24(2) analysis and the admission of the messages.

[30] There is no dispute that the subject text messages (in which the appellant refers to the complainant's age and proposed sexual activities) were key to the appellant's convictions. As such, if this court determines that the messages were not properly admitted in evidence at trial, the appeal must be allowed, and a new trial ordered.

Applicable Legal Principles

[31] Whether an object or a place gives rise to a reasonable expectation of privacy is a question of law, reviewable on a standard of correctness. Deference is owed to the relevant factual findings made by the trial judge, but not to the trial

judge's determination of whether a reasonable expectation of privacy was engaged by the facts: *R. v. Chow*, 2022 ONCA 555, 163 O.R. (3d) 241, at paras. 24-25.

[32] Before considering whether the trial judge erred in this case in concluding that the appellant had a reasonable expectation of privacy in the text messages he exchanged with the complainant, it is helpful to summarize the guiding legal principles.

[33] The point of departure is the Supreme Court's decision in *Marakah*, a case that dealt with the warrantless search and seizure by the police of text messages between two individuals suspected of engaging in illegal firearms transactions. *Marakah* cited and built upon many prior authorities of the Supreme Court in addressing whether the sender of an electronic message retained a reasonable expectation of privacy in messages after they were sent.

[34] To establish a reasonable expectation of privacy and engage s. 8 of the *Charter*, a s. 8 claimant must establish an expectation of privacy in the subject matter at issue that is "objectively reasonable" given "the totality of the circumstances": *Marakah*, at para. 10. As McLachlin C.J. stated at para. 11, there are four lines of inquiry that guide the court's analysis: (1) the subject matter of the alleged search; (2) whether the claimant had a direct interest in the subject matter; (3) whether the claimant had a subjective expectation of privacy in the subject

matter; and (4) if so, whether the claimant's subjective expectation of privacy was objectively reasonable.

[35] *Marakah* recognizes that the expectation of privacy is in the electronic conversation itself and not the electronic device: at paras. 16-19. This is a question of "informational privacy", which has been defined as the claim of individuals, groups or institutions to determine for themselves when, how and to what extent information about them is communicated to others: *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432, at para. 23. The electronic conversation 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": *Marakah*, at para. 20.

[36] *Marakah* also confirms that a reasonable expectation of privacy can exist in a conversation even after the message is no longer in the sender's control, and irrespective of the potential for disclosure by the recipient. Although recognizing that control is a factor to be considered in the totality of the circumstances, McLachlin C.J. concluded that the risk that the recipient of the subject text messages could have disclosed them did not negate the reasonableness of Mr. Marakah's expectation of privacy against state intrusion: at paras. 44-45.

[37] A reasonable expectation of privacy can exist even when it shelters illegal activity: *R. v. Edwards*, [1996] 1 S.C.R. 128, at para. 43; *R. v. Spencer*, 2014 SCC

43, [2014] 2 S.C.R. 212, at para. 36; and *R. v. Reeves*, 2018 SCC 56, [2018] 3 S.C.R. 531, at para. 28. The focus is not on the actual contents of the message seized by the police, but on the potential of a given electronic conversation to reveal private information: *Marakah*, at para. 32. This is the principle of "content neutrality" applied in the context of s. 8, also expressed as the inability of the state to justify a s. 8 intrusion *ex post facto*, based on the results of the search: see *Marakah*, at para. 48. See also *R. v. Duarte*, [1990] 1 S.C.R. 30, at pp. 45-47, 54-56.

[38] There is no automatic standing to assert a s. 8 right in respect of text messages that have been sent and received. "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": *Marakah*, at para. 5 (emphasis in original). Whether there is a reasonable expectation of privacy depends on the "totality of the circumstances" to be assessed in each case based on its own unique facts: *Edwards*, at para. 45; *Marakah*, at para. 11. The question is whether a reasonable and informed person in the position of the accused would expect privacy in the subject matter of the search: *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34, at para. 35.

[39] The "totality of the circumstances" test depends on a non-exhaustive list of factors, including (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 would be details of the claimant's lifestyle or information of a biographic nature; and (3) control over the subject matter: *Marakah*, at para. 24.

[40] The evaluation of the totality of the circumstances is not a purely factual inquiry; it is also normative. This has been expressed as the need to balance "societal interests in protecting individual dignity, integrity and autonomy with effective law enforcement": *R. v. Plant*, [1993] 3 S.C.R. 281, at p. 293. In *Reeves*, at para. 11, the Supreme Court noted that the question is "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".

[41] In *Mills* the Supreme Court expressly recognized societal interests other than those underlying an individual's interest in privacy and the state's interest in law enforcement in determining whether an expectation of privacy is reasonable. *Mills* involved the admissibility of text messages sent by an adult during a police sting operation to a recipient who had assumed the identity of a child. Brown J.'s majority reasons[4] noted that the determination of whether an expectation of privacy

[4] The Court was unanimous in upholding the admission of the text messages as evidence at trial and dismissing the appeal from conviction. While all seven justices concurred in the result, Gascon and Abella JJ. signed on to Brown J.'s reasons, Wagner C.J. signed on to Karakatsanis J.'s reasons, Martin J. wrote separate reasons, and Moldaver J. indicated that he agreed with the reasons of both Brown and Karakatsanis JJ.

is objectively reasonable is “not purely a descriptive question, but rather a normative question about when Canadians *ought* to expect privacy, given the applicable considerations”: at para. 20 (emphasis in original). In that case, the societal interest to be balanced against the individual’s right to privacy was the protection of vulnerable children. Brown J. acknowledged that the offender had instructed the person he believed was a child to delete their messages regularly and to keep their relationship hidden. Nevertheless, he held that, in the totality of the circumstances, “any subjective expectation of privacy the [offender] might have held [in the messages] would not be objectively reasonable”: at para. 20.

[42] Observing that the Internet allows for greater opportunities to sexually exploit children, and that enhancing protection to children from becoming victims of sexual offences is vital in a free and democratic society, Brown J. concluded that “on the normative standard of expectations of privacy … adults cannot reasonably expect privacy online with children they do not know”: at para. 23. He noted that, while many adult-child relationships are also worthy of s. 8’s protection, the relationship between the offender and the person he believed was a child was not one of them, and that this conclusion “may or may not apply to other types of relationships, depending on the nature of the relationship in question and the circumstances surrounding it at the time of the alleged search”: at para. 26.

[43] In her concurring reasons in *Mills*, Karakatsanis J. also spoke of the need to balance individual privacy with the protection of children. In rejecting a reasonable

expectation of privacy in the offender's online conversation with a police officer posing as a child, she stated, at para. 52, that "[t]he alternative conclusion would significantly and negatively impact police undercover operations, including those conducted electronically … [and it] simply does not strike an appropriate balance between individual privacy and the safety and security of our children".

[44] In the recent Supreme Court decision in *R. v. Bykovets*, 2024 SCC 6, 489 D.L.R. (4th) 1, Karakatsanis J. observed, at para. 71, that defining a reasonable expectation of privacy "is an exercise in balance", and that while individuals are entitled to insist on their right to be left alone by the state, "[a]t the same time, social and economic life creates competing demands.… The community wants privacy but it also insists on protection". See also this court's decisions in *El-Azrak*, where Fairburn A.C.J.O. observed, at para. 62, that "[p]roperly viewed through a normative lens, privacy interests will rise to constitutional status when those interests reflect the 'aspirations and values' of the society in which we live", and *R. v. Singh*, 2024 ONCA 66, 432 C.C.C. (3d) 527, where Doherty J.A. noted, at para. 66, that the reasonable expectation of privacy constitutionally protected by s. 8 of the *Charter* is "intended to reflect and reinforce sometimes competing societal values".

[45] Accordingly, in considering whether the appellant had a reasonable expectation of privacy in the text messages on the complainant's cell phone, it is

appropriate for the court to consider the competing societal value of the protection of vulnerable children from exploitation through the use of electronic media.

[46] Before moving to the application of the law to the facts of this case, I pause to note that there have been a number of reported cases involving the admissibility of electronic messages sent to a complainant where the messages in which a privacy interest was claimed had been voluntarily provided to the police by the complainant. In some, as here, the courts have applied a "totality of the circumstances" test: see, for example, *R v. K.A. and A.S.A.*, 2022 ONSC 1241, 504 C.R.R. (2d) 1, and *R. v. C.M.*, 2022 ONCJ 372, 515 C.R.R. (2d) 100. In others, courts have found that s. 8 was not engaged because there was no state intrusion or seizure by the police, or that, if s. 8 was engaged, the search was reasonable in part because the messages were turned over voluntarily.[5]

[47] In this case, the Crown did not argue that, because of the consent of the complainant and her father, there was no police seizure, or that, if the appellant had a reasonable expectation of privacy, the seizure of the text messages with the consent of the complainant was reasonable. Accordingly, it is beyond the scope of

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[5] See, for example, *R. v. Amdurski #4*, 2022 ONSC 1338, where Molloy J. concluded that messages between an adult offender and a child victim that were provided to the police with the consent of the child and her parent were admissible on four alternative grounds: (1) s. 8 was not engaged because there was no seizure of the messages when they were voluntarily turned over to police; (2) even if there was a seizure of the messages, there was no reasonable expectation of privacy in the "totality of the circumstances"; (3) any seizure was not unreasonable, and therefore did not violate s. 8, because of the victim's consent; and (4) the messages were admissible in any event under s. 24(2) of the *Charter*. See also the cases cited in Robert Diab, "'Must the Police Refuse to Look?' Resolving the Emerging Conflict in Search and Seizure Over Civilian Disclosure of Digital Evidence", (2023) 68:4 McGill LJ 369 at 392-96.

these reasons to consider whether such arguments might succeed in another case.[6] The focus for the disposition of this appeal is on whether the appellant's subjective expectation of privacy in the messages he exchanged with the complainant, on the totality of the circumstances, including normative considerations, was objectively reasonable.

Application of the Principles to This Case

[48] I begin by summarizing what is not in dispute in this case: the parties agree that, subject to whether the appellant had a reasonable expectation of privacy in the text messages on the complainant's cell phone, their access by the police

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[6] Indeed, whether s. 8 is engaged in cases of voluntary turnover of text messages by their recipient has not yet been conclusively decided by the Supreme Court. As Paciocco J.A. noted in *R. v. Lambert*, 2023 ONCA 689, 169 O.R. (3d) 81, at para. 54, it is arguable that the Supreme Court's decision in *Cole* supports the proposition that it is possible for s. 8 to be engaged – and breached – even where electronic data is "handed over" to the police. Nevertheless, in *Reeves*, Karakatsanis J. stated that "[t]he issue of whether s. 8 is engaged when a citizen voluntarily brings an item to the police remains for another day". Beyond *Cole*, the closest that the Supreme Court has come to addressing this issue is in *obiter* in *Marakah*. Again, the text messages in *Marakah* were accessed by the police without a warrant or the consent of either party to the communications. McLachlin C.J., at para. 50, responding to concerns raised by the dissent about the implications of the broad acceptance of s. 8 standing for the sender of text messages on the other party's cell phone, suggested three ways in which a breach could be avoided "[a]ssuming that s. 8 is engaged when police access text messages volunteered by a third party" (emphasis added). She cited to *R. v. Orlandis-Habsburgo*, 2017 ONCA 649, 352 C.C.C. (3d) 525, at paras. 21 to 35, where Doherty J.A. considered the Crown's argument that there was no s. 8 breach where information had been brought to the police voluntarily. After canvassing the case law, which was unsettled, he stated at para. 34:

> I have considerable difficulty with the submission that s. 8 is engaged if the police look at information in which an accused has a legitimate privacy interest, even if that information is brought to the police by an independent third party acting on its own initiative…. [I]t is one thing to say that Canadian values dictate that the state's power to decide when and how it will intrude upon personal privacy must be carefully circumscribed, and quite another to say that an individual's private information is cloaked in the protection of s. 8 no matter how that information comes to the police.

McLachlin C.J. also recognized that, even if there were a reasonable expectation of privacy that gave an accused person standing to argue that a text message should be excluded from evidence, it did not follow that the accused's argument would succeed or that the search would be found to violate s. 8: at para. 51.

constituted a seizure. In other words, there was a “state action” that is subject to s. 8. The parties also agree that, as at first instance, if the appellant had a reasonable expectation of privacy, then the police ought to have obtained a warrant before they looked at the text messages. That is, the fact that the text messages were voluntarily provided to the police by their recipient, while relevant to the objective reasonableness of the expectation of privacy (according to the Crown), does not by itself render the seizure reasonable.

[49] It is accepted here, as in the court below, that the subject matter of the search is the communications by text between the complainant and the appellant; that the appellant had a direct interest in the messages because he co-authored them; and that he had a subjective expectation of privacy because the messages were sent privately to the complainant to her cell number and both had agreed to keep their planned meeting a secret. It is only the fourth part of the totality of the circumstances test that is at issue: whether there was an objectively reasonable expectation of privacy.

[50] As I will explain, on a consideration of the totality of the circumstances of this case, the appellant had no reasonable expectation of privacy in the messages he exchanged with the complainant that were retrieved by the police from her cell phone.

[51] First, as in *Mills*, it is important to consider the nature of the relationship between the complainant and the appellant. The appellant acknowledges that this is relevant as part of the totality of the circumstances in determining whether his subjective expectation of privacy in the messages was objectively reasonable. However, he contends that in order for the assessment to be "content neutral", one must disregard the fact that the text messages were exchanged between a child and an adult and treat them as though they were simply messages between two persons who had met at a party and were communicating with a view to having sex.

[52] I disagree. What the appellant proposes ignores a fundamental aspect of the context and the relationship between the appellant and the complainant that was known to the police before they accessed the text messages. While the principle of "content neutrality" prevents the police from relying on the contents of messages that are seized to justify a search *ex post facto*, here the police had interviewed the complainant prior to accessing the messages. She told them that she had met the appellant, who had told her he was 27, only three days earlier; that she had told him she was 15; and that they were texting about meeting to have sex. And the police knew that, by the time she attended at the police station and before the messages were accessed, sexual contact had in fact taken place. Nothing about the principle of content neutrality would preclude consideration of these facts, as they were all known to the police before the messages were

extracted and accessed. What was known by the police about the relationship between the parties and the context of their text communications was directly relevant in determining whether there was an objective expectation of privacy in the totality of the circumstances, with appropriate regard to normative considerations.

[53] Again, in *Mills* the Supreme Court recognized that "on the normative standard of expectations of privacy described by [that court], adults cannot reasonably expect privacy online with children they do not know": at para. 23. The Court acknowledged that, in most situations, the police are unlikely to know in advance of any privacy breach, the nature of the relationship between the conversants – for example, whether the child is truly a stranger to the adult – but that this difficulty did not arise in that case because of the investigative technique the police were using in creating a conversation between a child who was a stranger and the offender. Brown J. contrasted cases where, at most, police had a "mere theory" about the relationship between the conversants and where "[i]t would only be through an examination of the conversation that the true nature of the relationship could have been definitively known": at para. 28. In *Mills*, however, there was "no risk of [a] potential privacy breach – for example, police sifting various communications before being able to ascertain the relationship": at para. 29.

[54] Brown J. also recognized that, although there are many relationships between children and adults that are worthy of protection, the relationship between the offender and the fictional person the police had created was not one of them. Consistent with the normative value of the protection of vulnerable children from online exploitation, an adult would not have a reasonable expectation of privacy in communications with children who were strangers.

[55] The appellant asserts that the trial judge did not err in distinguishing *Mills* on the basis that the police had a “mere suspicion” rather than a certainty about the relationship between the complainant and the appellant, and that the trial judge was correct to observe that the two were “not strangers”.

[56] I disagree. In my view the trial judge erred in his interpretation and application of *Mills* when he concluded, without a thorough examination of the information known to the police about the appellant and the complainant, that the police “merely had a theory” about the relationship. Given this conclusion the trial judge effectively treated the text messages between the appellant and the complainant as communications between two adults rather than between an adult and a child.

[57] As I have already explained, before they accessed the messages the police knew that the appellant had communicated with someone he knew was underage, for the purpose of arranging to have sex. And, whether or not the complainant and

the appellant were “strangers” is not determinative. Again, as Brown J. noted at para. 26 in *Mills*, not all adult-child relationships are worthy of s. 8’s protection. It depends on the nature of the relationship in question and the circumstances surrounding it at the time of the alleged search.

[58] I conclude therefore that, based on what the police knew before they accessed the text messages about the nature of the relationship between the complainant and the appellant (that they were practically strangers who had met only once) and the circumstances surrounding it (that the appellant knew the complainant was a child and he was communicating to arrange to meet for sex), there was no reasonable expectation of privacy in the text messages. Any subjective expectation of privacy the appellant might have had in the messages he was exchanging with the complainant was not objectively reasonable given the totality of the circumstances and the important societal interest in protecting vulnerable children from sexual exploitation.

[59] A further factor that the Crown submits is relevant to the totality of the circumstances is that the messages were provided voluntarily by the complainant to the police. *Marakah* confirms that, while there is no automatic forfeiture of the reasonable expectation of privacy in private online communications, a person’s “control” over what is searched continues to be “one element to be considered in the totality of the circumstances in determining the objective reasonableness of a subjective expectation of privacy”: at para. 38. As I stated earlier, it is not the

position of the Crown in this case that there was no search or that any search was conducted reasonably because the messages were turned over voluntarily. What is relevant is whether it would have been reasonable for the appellant to have expected that the messages he exchanged with the complainant would remain private.

[60] In his s. 24(2) analysis the trial judge observed that the appellant's expectation of privacy was greatly reduced because "any person in the [appellant's] position could expect that a person in the complainant's position might share the information with others". That is, the appellant ought to have expected that, given her age and the circumstances, the complainant would not have kept their messages secret. I agree with these observations. It should come as no surprise to someone communicating for a sexual purpose with a child they had only met once, that such messages could readily be shared, including with the police. The appellant's greatly reduced subjective expectation of privacy in the messages on the complainant's cell phone is a further circumstance that renders any expectation of privacy unreasonable in the circumstances of this case.

An Alternative Approach

[61] The Crown's alternative argument proposes a second and narrower approach, which I will address briefly in the event I am wrong in my conclusion that

the "totality of the circumstances" does not support the appellant's reasonable expectation of privacy in the text messages.

[62] The Crown submits that this court should adopt in the alternative the interpretation of *Mills* that was offered by Trotter J.A. in *Campbell*, a 2022 decision of this court. In that case, while they were arresting a known drug dealer, G, the police seized two cell phones, one of which lit up with text messages that the police believed revealed a drug transaction in progress. The police impersonated G with the aim of having drugs delivered to his residence. When Mr. Campbell arrived at the residence with drugs, he was arrested for various offences. He was ultimately convicted. On appeal, this court concluded that the trial judge erred in failing to find a reasonable expectation of privacy in Mr. Campbell's text messages with G, but ultimately upheld the decision to admit the evidence on the basis of the exigent circumstances doctrine.[7]

[63] Similar to *Mills*, *Campbell* was a case in which the police had employed an investigative technique where they had accessed an offender's electronic messages without prior authorization and impersonated the person with whom the offender was communicating. In the course of his reasons, Trotter J.A. rejected the Crown's argument that *Mills* had recognized that there is no true search – and

[7] The Supreme Court granted leave to appeal, and the appeal was heard on March 21, 2024, with judgment reserved.

therefore no reasonable expectation of privacy – in electronic communications where, as a result of an investigative technique, the police initiated or became involved in the exchange. Rather, he interpreted *Mills* as having "carved out an exception in circumstances where the electronic communications themselves constitute a crime against the recipient" – in that case, the victimization of children: at para. 62. See also *Lambert*, at para. 60, where Paciocco J.A., in *obiter*, similarly suggested that there is no reasonable expectation of privacy in an electronic message sent by a *Charter* claimant to a victim where the electronic messages are used to commit the offence.

[64] To the extent that *Mills* carves out an exception that there is no reasonable expectation of privacy in text messages where the messages themselves constitute a crime against the recipient, this case falls squarely within that exception. The text messages sent by the appellant to the complainant constituted the offence of child luring: they were sent to the complainant to further the commission of the offences of sexual assault and sexual interference. As such, the appellant had no reasonable expectation of privacy in the messages.

[65] Accordingly, I accept the Crown's alternative argument for concluding that the appellant lacked standing under s. 8 of the *Charter* to challenge the admissibility of the text messages at his trial.

Conclusion and Disposition

[66] For these reasons I have concluded that the trial judge erred in finding that the appellant had standing to challenge the admissibility of the subject text messages under s. 8 of the *Charter*. I would therefore dismiss the appeal.

Released: June 21, 2024 “K.M.v.R.”

“K. van Rensburg J.A.”
“I agree. Roberts J.A.”
“I agree. L. Favreau J.A.”