SUPREME COURT OF CANADA

CITATION: R. *v.* Campbell, 2024 SCC 42

APPEAL HEARD: March 21, 2024
JUDGMENT RENDERED: December 6, 2024
DOCKET: 40465

BETWEEN:

Dwayne Alexander Campbell
Appellant

and

His Majesty The King
Respondent

- and -

Attorney General of Ontario, Director of Criminal and Penal Prosecutions, Attorney General of Alberta, National Council of Canadian Muslims, Criminal Lawyers' Association (Ontario), Canadian Civil Liberties Association, Criminal Trial Lawyers' Association, British Columbia Civil Liberties Association, Trial Lawyers Association of British Columbia and Independent Criminal Defence Advocacy Society
Interveners

CORAM: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ.

REASONS FOR JUDGMENT: (paras. 1 to 146)	Jamal J. (Wagner C.J. and Kasirer and O'Bonsawin JJ. concurring)
CONCURRING REASONS: (paras. 147 to 167)	Rowe J.
CONCURRING REASONS: (paras. 168 to 237)	Côté J.
JOINT DISSENTING REASONS: (paras. 238 to 358)	Martin and Moreau JJ. (Karakatsanis J. concurring)

Dwayne Alexander Campbell *Appellant*

v.

His Majesty The King *Respondent*

and

Attorney General of Ontario,
Director of Criminal and Penal Prosecutions,
Attorney General of Alberta,
National Council of Canadian Muslims,
Criminal Lawyers' Association (Ontario),
Canadian Civil Liberties Association,
Criminal Trial Lawyers' Association,
British Columbia Civil Liberties Association,
Trial Lawyers Association of British Columbia and
Independent Criminal Defence Advocacy Society *Interveners*

Indexed as: R. *v.* Campbell

2024 SCC 42

File No.: 40465.

2024: March 21; 2024: December 6.

Present: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law — Charter of Rights — Search and seizure — Text message conversation — Reasonable expectation of privacy — Exigent circumstances — Police using cellphone seized during arrest of drug dealer to impersonate him and continue text message conversation between him and accused without obtaining warrant — Police arresting accused upon delivery of drugs arranged during text message conversation — Whether accused had reasonable expectation of privacy in text message conversation — Whether warrantless search justified by law — Canadian Charter of Rights and Freedoms, s. 8 — Controlled Drugs and Substances Act, S.C. 1996, c. 19, s. 11(7).

Police lawfully seized a cellphone during a search incident to the arrest of G, a known drug dealer. A few minutes after G's arrest, four text messages from a sender, D, lit up the lock screen of the phone, appearing to offer to sell drugs to G. Over the next 2 hours and 15 minutes, the police, without a warrant, replied to the texts by impersonating G and encouraged the sender to come to G's residence to deliver the drugs. When the accused came to G's residence that evening, he was arrested and found in possession of heroin laced with fentanyl and was charged with drug trafficking and possession offences. The accused claimed that he did not send the first four texts and that D had given him the phone to arrange the delivery of the drugs to G. However, the accused did acknowledge that he sent and received the later texts about the drug delivery to G.

The accused applied to exclude the texts from evidence. The trial judge found that because the accused did not have a reasonable expectation of privacy in the texts, he lacked standing to argue that his s. 8 *Charter* rights had been infringed. The trial judge added that even had he concluded that the accused had standing, the warrantless search would have been justified by exigent circumstances under s. 11(7) of the *Controlled Drugs and Substances Act* ("*CDSA*"). He also rejected the accused's argument that the police had conducted an unlawful interception of his electronic communications contrary to Part VI of the *Criminal Code*. In the further alternative, he would not have excluded the texts from evidence under s. 24(2) of the *Charter*. The accused was subsequently convicted of the charges against him and appealed his convictions. The Court of Appeal accepted that the accused had a reasonable expectation of privacy in his text message conversation and thus had standing to argue that the police violated his rights under s. 8. However, it concluded that the search was justified by exigent circumstances under s. 11(7) of the *CDSA*. Accordingly, it dismissed the appeal.

Held (Karakatsanis, Martin and Moreau JJ. dissenting): The appeal should be dismissed.

Per Wagner C.J. and Kasirer, **Jamal** and O'Bonsawin JJ.: The accused had a reasonable expectation of privacy in his text message conversation with the user of G's phone and had standing to challenge the search under s. 8 of the *Charter*. The warrantless search of the accused's text message conversation was justified by "exigent

circumstances" that made it "impracticable" to obtain a warrant under s. 11(7) of the *CDSA*. The search was thus reasonable and justified by law and did not breach s. 8.

The main purpose of s. 8 of the *Charter*, which guarantees that everyone has the right to be secure against unreasonable search or seizure, is to protect the right to privacy from unjustified state intrusion. A claimant seeking standing to argue that their rights under s. 8 were infringed must show that they subjectively expected the subject matter of the search would remain private, and that their expectation was objectively reasonable having regard to the totality of the circumstances. In making this evaluation, courts are guided by four lines of inquiry: (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) whether the claimant's subjective expectation of privacy was objectively reasonable.

First, when the state examines text messages, the subject matter of the alleged search is properly characterized as the electronic conversation between two or more people. The subject matter of the search 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. Second, a claimant would have a direct interest in a text message conversation if they participated in the conversation and wrote several of the texts at issue. Third, a claimant's burden of establishing a subjective expectation of privacy in the subject

matter of the alleged search is not a high hurdle. It can be presumed or inferred in the circumstances in the absence of the claimant's testimony or admission at the *voir dire*. Fourth, in determining whether a subjective expectation of privacy is objectively reasonable, courts must employ an approach that is both normative and content-neutral.

There is no closed or definitive list of factors relevant to whether a claimant's subjective expectation of privacy in the subject matter of a search is objectively reasonable. However, the private nature of the subject matter is a critical factor in establishing a reasonable expectation of privacy. Courts must focus on whether the subject matter of the search at issue has the potential or tendency to reveal private information about the claimant. With respect to text messages in particular, 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, such as intimate details of the lifestyle and personal choices of the individual. In addition, the intrusiveness of the police technique in relation to the privacy interest at issue can be another important factor in assessing whether a claimant's subjective expectation of privacy is objectively reasonable. This is a distinct consideration from whether the police acted lawfully at the second stage of the s. 8 inquiry.

In contrast, the level of control a claimant has over information is not determinative of the question of standing. Control is not an absolute indicator of a reasonable expectation of privacy, nor is lack of control fatal to a privacy interest. A

person does not lose control of information for the purposes of s. 8 simply because another person possesses it or can access it. As a result, text message conversations may be protected by a zone of privacy that extends beyond a person's own mobile device to the recipient of the message, even when the person shares private information with others. The zone of privacy protected by s. 8 of the *Charter* involves the right to keep personal information safe from state intrusion.

Once a claimant has established standing to argue that their rights under s. 8 were infringed, the next step is to determine whether the police acted lawfully, which is relevant to whether the state conduct was unreasonable. A search is reasonable under s. 8 if it is authorized by a reasonable law and conducted in a reasonable manner. However, a warrantless search is presumptively unreasonable, shifting the burden of persuasion to the Crown to establish, on a balance of probabilities, that the search was reasonable.

Parliament enacted Part VI of the *Criminal Code* as a comprehensive regime to address the interception of private communications by balancing the individual right to privacy with the collective need for law enforcement. Under Part VI, s. 184(1)(a) creates an indictable offence punishable by up to five years imprisonment if a person knowingly intercepts a private communication by use of any electro-magnetic, acoustic, mechanical, or other device. For there to be an interception under Part VI, the police must use a device employing intrusive surveillance

technology. Unless the police use intrusive surveillance technology, police deception or trickery does not amount to an interception under Part VI.

The police have authority at common law to search a person incident to a lawful arrest and to seize anything in their possession or in the surrounding area of the arrest. This power is extraordinary because it does not require a warrant or reasonable and probable grounds. It simply requires some reasonable basis for what the police did. A search incident to arrest is lawful if: (1) the arrest itself was lawful; (2) the search was truly incidental to the arrest, in that it was for a valid law enforcement objective connected to the arrest; and (3) the search was conducted reasonably. Valid law enforcement objectives include ensuring the safety of the police or the public, preventing the destruction of evidence, and uncovering evidence that could be used at trial.

Section 11(1) of the *CDSA* authorizes a justice to issue a warrant to search a place for a controlled substance and to seize it. By exception, s. 11(7) authorizes a peace officer to search the place without a warrant, if the conditions for a warrant exist but exigent circumstances make it impracticable to obtain one. Section 11(7) thus has two requirements. First, it must be shown that there were exigent circumstances, which denote not merely convenience, propitiousness, or economy, but rather urgency, arising from circumstances calling for immediate police action to preserve evidence, officer safety, or public safety. Second, it must be shown that the conditions for obtaining a warrant existed, but that exigent circumstances rendered it impracticable to obtain a

warrant, meaning that it was impossible in practice or unmanageable to obtain a warrant. Regarding the evidentiary threshold, the police must have reasonable and probable grounds, rather than merely reasonable suspicion, for the claimed exigency under s. 11(7). The Crown must establish the reasonable probability of the claimed exigency, based on the experience and expertise of the police and the relevant facts before them. As for the standard of appellate review, a trial judge's assessment of the evidence and findings of fact in applying s. 11(7) attract substantial deference on appeal; however, whether the facts as found by the trial judge meet the legal standard for exigency under s. 11(7) is a question of law reviewable for correctness.

In the instant case, the four lines of inquiry under s. 8 establish the accused's reasonable expectation of privacy in his text message conversation with who he thought was G. Specifically, in regard to the only disputed point, it has been established that the accused's subjective expectation of privacy was objectively reasonable. First, concerning the private nature of the subject matter, the alleged search of the accused's text message conversation intruded into a medium of communication in which a reasonable person would ordinarily expect the utmost privacy. Second, the police used an especially intrusive investigative technique by inserting themselves into a conversation that was already underway, between two real people with a pre-existing relationship, essentially hijacking the identity of one of the participants. Third, regarding the level of control over the information, the accused did not lose the protection of s. 8 of the *Charter* simply by sharing private information with the other party to his text message conversation or by using the phone of an acquaintance.

With respect to the reasonableness of the search, the police's investigative technique of engaging in a text message conversation with the accused from G's phone was not an interception under Part VI of the *Criminal Code* since the police did not use a device employing an intrusive surveillance technology. They simply responded to text messages received on G's phone, the same medium of communication or device the accused had used to make the communication. However, the search of G's cellphone was not incident to a lawful arrest as it was not a search strictly related to G's arrest or the offence for which he was arrested. Instead, it was a search to collect evidence against D, who turned out to be the accused. Nonetheless, the police had authority for a warrantless search under s. 11(7) of the *CDSA* due to exigent circumstances. The police reasonably believed that they faced an urgent situation involving a suspected drug sale calling for immediate police action to prevent the drugs from being trafficked in the community imminently. The police also had reasonable and probable grounds to believe the transaction specifically involved heroin laced with fentanyl, which posed a grave risk to public safety. Although the police had grounds to obtain a warrant, it was impracticable to obtain one as only a telewarrant would have been available at that time of day and it would likely arrive too late to complete this transaction. Since the police did not infringe s. 8 of the *Charter*, it is not necessary to address whether the evidence should have been excluded under s. 24(2) of the *Charter*.

Per **Rowe** J.: There is full agreement with Jamal J. in his reasons and in the result. However, a response to the dissenting judges is necessary with regard to their

treatment of exigent circumstances and their analysis on whether the evidence should be excluded under s. 24(2) of the *Charter*.

Section 11(7) of the *CDSA* authorizes peace officers to conduct a warrantless search if the conditions for a warrant exist, but exigent circumstances render it impracticable to obtain one. Proper effect must be given to the governing precedent on exigent circumstances under s. 11(7) of the *CDSA*, *R. v. Paterson*, 2017 SCC 15, [2017] 1 S.C.R. 202. *Paterson* sets out a definitive statement of the doctrine of exigent circumstances, which statement continues to govern. While earlier case law can provide a degree of insight into exigent circumstances, it is not a basis to sidestep the law as stated in *Paterson*. Such an approach would undermine precedent and invite sophistry in legal argument.

Under *Paterson*, one way urgency can arise is when immediate police action is needed to preserve public safety. The facts in this case come within exigent circumstances as described in *Paterson*. The harm to the public was imminent as there was a narrow window of opportunity for police to prevent what they reasonably believed was the sale by D of a significant quantity of drugs containing fentanyl. If the police failed, they believed it could well lead to deaths in the community. This was a now-or-never situation. The Crown did not have to establish that D had another transaction lined up if the transaction with G fell through. This would implicitly elevate the evidentiary requirements for exigent circumstances beyond reasonable and probable grounds.

With respect to the s. 24(2) *Charter* analysis, the evidence demonstrates that the police actively turned their mind to the question of judicial authorization before concluding that they had no time to obtain a warrant. While the communications between the police and the accused ultimately extended over two hours, the police had no way to know this. In a volatile and uncertain situation, minutes could well have made the difference between intercepting the fentanyl or having the opportunity to do so slip through their fingers.

Per **Côté** J.: The police conduct did not amount to a search for the purposes of s. 8 of the *Charter*. Applying the totality of the circumstances test and having regard for the normative approach that informs s. 8 *Charter* jurisprudence and for the factual record in this case, the accused's subjective expectation of privacy in the electronic communications between him and G was not objectively reasonable.

The determination of whether the police have conducted a search for the purposes of s. 8 directly hinges on the presence of a claimant's reasonable expectation of privacy within the specific circumstances of the case. Courts must balance sometimes conflicting interests in the privacy necessary for personal dignity and autonomy and the need for a secure and safe society. Not every government examination or investigatory technique will constitute a search under the *Charter*. It is only if the police activity invades a reasonable expectation of privacy that the activity is a search. For claimants to benefit from s. 8 protection against unreasonable state conduct, they must have a subjective expectation of privacy in the putative search, and

their subjective expectation must be objectively reasonable. Courts must make this assessment having regard to the totality of the circumstances of a given case. The Court's decision in *R. v. Marakah*, 2017 SCC 59, [2017] 2 S.C.R. 608, did not create a categorical rule that all text message conversations or other electronic communications inherently attract a reasonable expectation of privacy. The totality of the circumstances test mandates an individualized and case-by-case analysis, requiring a court to treat an assessment under s. 8 as a contextual, fact-based inquiry. While the normative approach to privacy is important to help ascertain the free and democratic society that reasonable and informed Canadians expect to live in, courts cannot lose sight of the totality of the circumstances of the specific cases before them and, accordingly, the police conduct therein.

The police cannot peruse the contents of a phone at liberty and without any limits; however, their actions may be appropriate if they limit and circumscribe the scope of their conduct to the investigation before them. In the instant case, the police were at liberty to view and respond to the four text messages from D that they passively received and observed on G's lawfully seized phone. Indeed, the police were conducting an undercover investigation into criminal activity directly associated with the purpose underlying G's arrest — a drug transaction. On a holistic view of the matter, it is clear that from the time they observed those four messages, the officers reasonably suspected that they were dealing with a drug transaction that was sufficiently connected to the arrest of G that had just been made. There was no pre-existing conversation between the accused and G that the police searched. Instead,

the police participated in the electronic exchange as part of an undercover drug investigation. Where the police execute a search warrant and the target's phone rings, there is nothing wrong with the police answering that phone. The fact that text messages create a permanent record does not transform the analogous conduct in this case into a search or seizure.

Beyond the undercover nature of the investigation, there are multiple factors that support the conclusion that the accused's subjective expectation of privacy was not objectively reasonable. The first factor is the circumscribed nature and lack of intrusiveness of the police conduct. The way the police carried out the conversation with the accused, making sure not to ask any probing questions or deviate from facilitating the drug deal, ensured that no biographical core information was obtained through the conversation aside from what was already lawfully known to police from the first four messages. The police also did not intrusively search the contents of G's phone, nor did they unlock it. The police were only focused on facilitating and completing the drug transaction.

The second factor is the ownership of and control over the device and the electronic communications therein, which are relevant but not determinative concepts in the context of s. 8 protection. The accused's lack of total control over the conversation and ownership of the phone support a significantly diminished expectation of privacy, which is not objectively reasonable in the circumstances of this case. The accused had, at best, a shared control with D over the phone. The place where

the conversation occurs remains as one of several factors that must be weighed. The evidence is to the effect that the phone was D's and was given to the accused to facilitate the drug transaction. The accused's lack of ownership over both the phone and the first four messages is closely related to his lack of control over them. The four text messages did not come from the accused but were sent by D to G. The borrowed phone was also to be returned to D following the completed delivery.

The third factor is the distinction between the circumstances of the present case and those existing in *Marakah*. The more people that are involved in a conversation and the less control one has over who might see it, the more likely it is that one's subjective expectation of privacy will not be objectively reasonable. In *Marakah*, that accused's reasonable expectation of privacy was diminished due to his lack of control in a two-party electronic conversation on cell phones that were owned by the parties to the conversation. The fact that there was even less control in the present case suggests that the accused's expectation of privacy was significantly diminished and, indeed, entirely negated when the totality of the circumstances are considered. Furthermore, the accused barely knew G. Unlike the accused in *Marakah*, the accused here never asked G to keep their electronic communications private; nor did he ask him to delete any of the messages.

The electronic communications therefore did not reveal any information that implicated the biographical core of the accused, nor were they likely, based on the

normative nature of the s. 8 inquiry, to reveal any, given the circumscribed nature of the police investigation.

There is disagreement with aspects of the dissent's analysis. In particular, the consequences of the implied conclusion that the investigation in this case amounted to an interception are significant. This would require a Part VI *Criminal Code* authorization rather than a general warrant, thus imposing greater requirements for obtaining authorization, and creating significant hurdles for law enforcement investigations. With respect to exigent circumstances, the Court should avoid speculating about what other potential investigative techniques would have succeeded in the absence of a proper evidentiary foundation, such as applying for a production order. It is also unclear whether a production order would be enough to locate whoever was using D's phone. Finally, the perceived intrusiveness of the police technique should not colour the Court's analysis of the facts in the s. 24(2) *Charter* analysis. The law in Ontario at the time was that there was no reasonable expectation of privacy in a co-accused's cell phone. There was consequently no reason at all for police to think that interjecting themselves into the conversation was a problem. The police also already lawfully knew from the first four messages that whoever responded was involved in criminal activity, which should lessen the impact on the accused's privacy interests. Where the circumstances of the police investigation significantly increase the reasonableness of the police conduct at the time, this should be considered in the analysis of whether the administration of justice would be brought into disrepute by the admission of the evidence.

Per Karakatsanis, **Martin** and **Moreau** JJ. (dissenting): The appeal should be allowed, the convictions set aside, and acquittals entered. The warrantless police actions engaged and breached the accused's s. 8 *Charter* right to be free from unreasonable search and seizure. The police actions cannot be justified by the power to search incident to arrest or exigent circumstances, and the admission of the evidence obtained would bring the administration of justice into disrepute according to the factors considered under s. 24(2) of the *Charter*.

The accused had a reasonable expectation of privacy in his electronic communications and his s. 8 *Charter* right was engaged. The totality of the circumstances remains the correct approach to assessing whether a claimant has a reasonable expectation of privacy, including in cases where there is an undercover aspect to the police conduct. Even if there are features of the investigative technique that do not breach the individual's privacy rights, the focus must remain on the potential of a given technique to reveal private information in the totality of the circumstances. Given the nature of the police conduct at issue, the breach of this privacy interest should be understood as involving a high degree of intrusion. The technique of hijacking an existing identity is predicated on exploiting an existing relationship between private actors, which has the potential to reveal to police deeply personal information. In contrast to a phone conversation, where the police's ability to impersonate a person known to the caller is limited, within a text conversation, the potential for police to impersonate the recipient and deceive the sender is limited only by their opportunities to do so and the strictures of the law. It would gravely impact one's trust in general,

and one's trust in the state, if the last text received from an acquaintance or family member was, instead, from the police in disguise. Recognizing that in a free and democratic society the privacy claim in personal text message conversations between individuals known to one another must be beyond state intrusion absent constitutional justification does not thwart the ability of police to investigate crimes and uncover evidence through searches. It simply requires police to have lawful authority to do so.

Parliament has set out various ways in which prior judicial authorization may be sought for state action which threatens a person's reasonable expectation of privacy. Here the police did not seek or obtain any such authorization and their warrantless search was therefore a *prima facie* breach of s. 8, unless they could establish the existence of special circumstances recognized in law as justifying their actions, and that both the authorizing law and manner in which the search was conducted was reasonable. Courts have defined these situations with care and specificity. In the instant case, the search was not reasonable.

First, the warrantless investigative technique was not a search incident to arrest because the police did not conduct it for a valid law enforcement purpose connected to the reasons for the arrest. The power to search incident to arrest does not authorize police to use a lawfully seized cell phone to communicate with another person. G's arrest was not tied to the impending drug transaction with the accused. This transaction constituted a probe into a distinct potential offence committed by another person, which cannot be truly incidental to the reasons for G's arrest.

Second, the warrantless search by the police was also not justified by the exigent circumstances doctrine, when properly understood in light of its limited purpose and cautious jurisprudential evolution. This doctrine cannot be understood separate from the longstanding normative approach of the law of search and seizure that, whenever feasible, intrusions upon property, privacy and dignity, should be authorized in advance. From the Court's jurisprudence in the years after the *Charter* was first enacted, it is clear that exigent circumstances is a determination to be made with care and that the Court has consistently taken a narrow approach to this doctrine. A serious crime is not enough to establish exigency under a s. 8 analysis. Rather, it must be determined according to the parameters of the law. Where individual privacy interests are higher, such as in a home, the Court has delineated specific situations where exigency could justify intrusion in a given case, declining to recognize a general common law power. Privacy interests in electronic devices should be approached with similar care.

Since Parliament codified certain warrantless powers to search in exigent circumstances, and despite the absence of a statutory definition for such circumstances in s. 11(7) of the *CDSA* and s. 487.11 of the *Criminal Code*, the requirements for establishing exigent circumstances may be distilled into three elements: the existence of grounds for obtaining a warrant; the existence of exigent circumstances; and whether those exigent circumstances rendered it impracticable for the police to obtain a warrant. The jurisprudence recognizes the main categories of exigency as loss or destruction of evidence, officer or public safety, and hot pursuit. While the safety branch is

non-controversial as the societal interest in protection of human life is strong, it has only been applied to override the requirement for prior authorization where the threat to safety is imminent, clear, and concrete. The jurisprudence supports a narrow and strict application of the safety branch. A generalized, societal safety concern cannot be sufficient to justify warrantless action unless it poses an imminent threat.

The facts of this case do not establish an imminent safety risk justifying warrantless police action and there were therefore no exigent circumstances that justified the warrantless search. Regardless of whether or not the investigative technique in the instant case could have been authorized by s. 11(7) of the *CDSA*, which involves a lower standard of exigency than required under more rigorous authorities permitting warrantless acquisition of real-time communications, the circumstances of this case extend well beyond the recognized safety branch of the doctrine of exigent circumstances. Even accepting that the quantity and type of drugs involved posed a risk of potential harm to public safety, the circumstances fall well short of the requirement of an imminent risk to an individual or group. The jurisprudence does not support a conclusion that the potential sale and subsequent use of a harmful drug constitutes exigency in the absence of a risk of imminent danger to police or public safety. To define these as exigent circumstances is to invite such a characterization whenever a potential drug transaction involves a dangerous substance regardless of the absence of imminent harm. This wrongly elevates the appropriate and ever-present concern over public safety into exigent circumstances because of the health risks associated with the use of unregulated illicit drugs. The result will be to authorize invasive and extensive

police conduct outside of those rare instances in which the harm to public safety is so imminent and immediate, a *prima facie* unreasonable warrantless search is judged to be reasonable. This approach waters down the statutory regimes Parliament has enacted to regulate and restrict warrantless searches, and the protection of s. 8, which is both embodied in those regimes and exists independently of them. It is not the impracticability of obtaining the warrant that supports a finding of exigent circumstances. That it would be difficult or inconvenient to obtain a warrant is not sufficient to meet this legal standard. Rather, the exigency must be shown to cause impracticability. Since there were no exigent circumstances here, it follows that the practicable option was for the police to obtain a warrant to search G's phone or pursue other investigative steps.

Under s. 24(2) of the *Charter*, whether the admission of evidence obtained in breach of the *Charter* would bring the administration of justice into disrepute engages three avenues of inquiry: (1) the seriousness of the *Charter*-infringing state conduct; (2) the impact of the breach on the accused's *Charter*-protected interests; and (3) society's interest in the adjudication of the case on its merits. The first factor favours exclusion of the evidence: the absence of exigency or impracticability, combined with a legally questionable police technique, and the additional breach of the accused's s. 8 rights following arrest cumulatively militate against admission of the evidence. The second factor also favours exclusion. The accused had a substantial *Charter*-protected privacy interest in the conversation he had with G, which revealed private information that went to the accused's biographical core. The impact of the breach on this interest

was aggravated by the intrusive nature of the investigative technique. The strong causal connection between the *Charter* breach and the evidence obtained amplifies the impact on the accused. The third factor favours admission of the evidence. While the seriousness of the offence of fentanyl trafficking is not determinative of the analysis at the third stage, here, the evidence obtained is reliable evidence of a serious crime and its exclusion would effectively gut the prosecution against the accused. In such circumstances, society has a strong interest in the adjudication of the case on its merits. Where both the first and second factors strongly favour exclusion of the evidence, the third factor will seldom if ever tip the balance in favour of admissibility. On balance, the administration of justice would be brought into disrepute by the admission of the evidence.

Cases Cited

By Jamal J.

Applied: *R. v. Marakah*, 2017 SCC 59, [2017] 2 S.C.R. 608; *R. v. Paterson*, 2017 SCC 15, [2017] 1 S.C.R. 202; **considered:** *R. v. Mills*, 2019 SCC 22, [2019] 2 S.C.R. 320; *R. v. Wong*, [1990] 3 S.C.R. 36; *R. v. Beairsto*, 2018 ABCA 118, 68 Alta. L.R. (6th) 207; **referred to:** *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34; *R. v. Bykovets*, 2024 SCC 6; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *R. v. Plant*, [1993] 3 S.C.R. 281; *R. v. Jones*, 2017 SCC 60, [2017] 2 S.C.R. 696; *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432; *R. v. Dyment*, [1988] 2 S.C.R. 417; *R. v. Edwards*, [1996] 1 S.C.R. 128; *R. v. Spencer*, 2014 SCC 43, [2014] 2 S.C.R. 212; *R. v. TELUS*

Communications Co., 2013 SCC 16, [2013] 2 S.C.R. 3; *R. v. Patrick*, 2009 SCC 17, [2009] 1 S.C.R. 579; *R. v. Reeves*, 2018 SCC 56, [2018] 3 S.C.R. 531; *R. v. Gomboc*, 2010 SCC 55, [2010] 3 S.C.R. 211; *R. v. Duarte*, [1990] 1 S.C.R. 30; *R. v. Baldree*, 2013 SCC 35, [2013] 2 S.C.R. 520; *R. v. Fliss*, 2002 SCC 16, [2002] 1 S.C.R. 535; *R. v. Collins*, [1987] 1 S.C.R. 265; *R. v. Fearon*, 2014 SCC 77, [2014] 3 S.C.R. 621; *R. v. Caslake*, [1998] 1 S.C.R. 51; *Wakeling v. United States of America*, 2014 SCC 72, [2014] 3 S.C.R. 549; *Imperial Oil v. Jacques*, 2014 SCC 66, [2014] 3 S.C.R. 287; *R. v. McQueen* (1975), 25 C.C.C. (2d) 262; *Lyons v. The Queen*, [1984] 2 S.C.R. 633; *R. v. Pires*, 2005 SCC 66, [2005] 3 S.C.R. 343; *R. v. Tse*, 2012 SCC 16, [2012] 1 S.C.R. 531; *R. v. Hafizi*, 2023 ONCA 639, 168 O.R. (3d) 435; *R. v. Bordage* (2000), 146 C.C.C. (3d) 549; *R. v. Largie*, 2010 ONCA 548, 101 O.R. (3d) 561; *R. v. Araujo*, 2000 SCC 65, [2000] 2 S.C.R. 992; *R. v. Stairs*, 2022 SCC 11, [2022] 1 S.C.R. 169; *Cloutier v. Langlois*, [1990] 1 S.C.R. 158; *R. v. Grant*, [1993] 3 S.C.R. 223; *R. v. MacDonald*, 2014 SCC 3, [2014] 1 S.C.R. 37; *R. v. Hobeika*, 2020 ONCA 750, 153 O.R. (3d) 350; *R. v. Beaver*, 2022 SCC 54; *R. v. Pawar*, 2020 BCCA 251, 393 C.C.C. (3d) 408; *R. v. McCormack*, 2000 BCCA 57, 133 B.C.A.C. 44; *R. v. Cornell*, 2010 SCC 31, [2010] 2 S.C.R. 142; *R. v. Shepherd*, 2009 SCC 35, [2009] 2 S.C.R. 527; *R. v. Dussault*, 2022 SCC 16, [2022] 1 S.C.R. 306; *R. v. Chehil*, 2013 SCC 49, [2013] 3 S.C.R. 220; *Crampton v. Walton*, 2005 ABCA 81, 40 Alta. L.R. (4th) 28; *R. v. Silveira*, [1995] 2 S.C.R. 297; *R. v. Phoummasak*, 2016 ONCA 46, 350 C.R.R. (2d) 370; *R. v. Webster*, 2015 BCCA 286, 374 B.C.A.C. 129; *R. v. Hunter*, 2015 BCCA 428, 378 B.C.A.C. 165; *R. v. Parranto*, 2021 SCC 46, [2021] 3 S.C.R. 366; *R. v. Kelsy*, 2011 ONCA 605, 280 C.C.C. (3d) 456; *R. v. Feeney*, [1997] 2 S.C.R. 13; *R. v. J.F.*, 2022 SCC 17, [2022] 1

S.C.R. 330; *Guindon v. Canada*, 2015 SCC 41, [2015] 3 S.C.R. 3; *Ontario (Attorney General) v. Restoule*, 2024 SCC 27.

By Rowe J.

Applied: *R. v. Paterson*, 2017 SCC 15, [2017] 1 S.C.R. 202; **referred to:** *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11, [2021] 1 S.C.R. 175; *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401; *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353.

By Côté J.

Applied: *R. v. Marakah*, 2017 SCC 59, [2017] 2 S.C.R. 608; **considered:** *R. v. Mills*, 2019 SCC 22, [2019] 2 S.C.R. 320; *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432; *R. v. Reeves*, 2018 SCC 56, [2018] 3 S.C.R. 531; *R. v. Baldree*, 2013 SCC 35, [2013] 2 S.C.R. 520; **referred to:** *R. v. McNeil*, 2009 SCC 3, [2009] 1 S.C.R. 66; *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 S.C.R. 743; *R. v. Hafizi*, 2023 ONCA 639, 168 O.R. (3d) 435; *R. v. Evans*, [1996] 1 S.C.R. 8; *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34; *R. v. Wise*, [1992] 1 S.C.R. 527; *R. v. Patrick*, 2009 SCC 17, [2009] 1 S.C.R. 579; *R. v. Colarusso*, [1994] 1 S.C.R. 20; *R. v. Edwards*, [1996] 1 S.C.R. 128, aff'g (1994), 73 O.A.C. 55; *R. v. Jones*, 2017 SCC 60, [2017] 2 S.C.R. 696; *R. v. Buhay*, 2003 SCC 30, [2003] 1 S.C.R. 631; *R. v. J.J.*, 2022 SCC 28; *R. v. Knelsen*, 2024 ONCA 501; *R. v. Rafferty*, 2018 ONCJ 881, 424 C.R.R. (2d) 88; *R. v. Devic*, 2018 BCPC 318; *R. v. Bear-Knight*, 2021 SKQB 258, [2022] 2 W.W.R.

537; *R. v. Findlay*, 2023 MBPC 17, 529 C.R.R. (2d) 284; *R. v. Spencer*, 2014 SCC 43, [2014] 2 S.C.R. 212; *R. v. M. (M.R.)*, [1998] 3 S.C.R. 393; *R. v. Bykovets*, 2024 SCC 6; *R. v. Labelle*, 2019 ONCA 557, 379 C.C.C. (3d) 270; *R. v. Collins*, [1987] 1 S.C.R. 265; *R. v. Caslake*, [1998] 1 S.C.R. 51; *R. v. Friesen*, 2020 SCC 9, [2020] 1 S.C.R. 424; *R. v. Liew*, [1999] 3 S.C.R. 227; *R. v. Ramelson*, 2022 SCC 44; *R. v. Fearon*, 2014 SCC 77, [2014] 3 S.C.R. 621; *R. v. Howell*, 2011 NSSC 284, 313 N.S.R. (2d) 4; *R. v. Chehil*, 2013 SCC 49, [2013] 3 S.C.R. 220; *R. v. Wong*, [1990] 3 S.C.R. 36; *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425; *R. v. Plant*, [1993] 3 S.C.R. 281; *R. v. Vu*, 2013 SCC 60, [2013] 3 S.C.R. 657; *R. v. Singh* (1998), 127 C.C.C. (3d) 429; *R. v. Ramsum*, 2003 ABQB 45, 329 A.R. 370; *R. v. Ahmad*, 2020 SCC 11, [2020] 1 S.C.R. 577; *R. v. Storrey*, [1990] 1 S.C.R. 241; *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442; *R. v. TELUS Communications Co.*, 2013 SCC 16, [2013] 2 S.C.R. 3; *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353; *R. v. Marakah*, 2016 ONCA 542, 131 O.R. (3d) 561.

By Martin and Moreau JJ. (dissenting)

R. v. Marakah, 2017 SCC 59, [2017] 2 S.C.R. 608; *R. v. Duarte*, [1990] 1 S.C.R. 30; *R. v. Mills*, 2019 SCC 22, [2019] 2 S.C.R. 320; *R. v. Hart*, 2014 SCC 52, [2014] 2 S.C.R. 544; *R. v. Baldree*, 2013 SCC 35, [2013] 2 S.C.R. 520; *R. v. Bykovets*, 2024 SCC 6; *R. v. Reeves*, 2018 SCC 56, [2018] 3 S.C.R. 531; *R. v. Ward*, 2012 ONCA 660, 112 O.R. (3d) 321; *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*,

[1999] 1 S.C.R. 743; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *R. v. Vu*, 2013 SCC 60, [2013] 3 S.C.R. 657; *R. v. Paris*, 2015 ABCA 33, 320 C.C.C. (3d) 102; *R. v. TELUS Communications Co.*, 2013 SCC 16, [2013] 2 S.C.R. 3; *R. v. Noseworthy* (1997), 33 O.R. (3d) 641; *R. v. Lucas*, 2014 ONCA 561, 121 O.R. (3d) 303; *R. v. Ly*, 2016 ABCA 229; *R. v. Jones*, 2017 SCC 60, [2017] 2 S.C.R. 696; *R. v. Wong*, [1990] 3 S.C.R. 36; *R. v. Finlay* (1985), 23 C.C.C. (3d) 48; *R. v. Beairsto*, 2018 ABCA 118, 68 Alta. L.R. (6th) 207; *R. v. Beairsto*, 2016 ABQB 216, 37 Alta. L.R. (6th) 379; *R. v. Mills*, 2017 NLCA 12, 1 C.A.N.L.R. 488; *R. v. Collins*, [1987] 1 S.C.R. 265; *R. v. Tim*, 2022 SCC 12, [2022] 1 S.C.R. 234; *R. v. Fearon*, 2014 SCC 77, [2014] 3 S.C.R. 621; *R. v. Tse*, 2012 SCC 16, [2012] 1 S.C.R. 531; *R. v. Grant*, [1993] 3 S.C.R. 223; *R. v. Shepherd*, 2009 SCC 35, [2009] 2 S.C.R. 527; *Kentucky v. King*, 563 U.S. 452 (2011); *R. v. Rao* (1984), 12 C.C.C. (3d) 97; *Colet v. The Queen*, [1981] 1 S.C.R. 2; *Entick v. Carrington* (1765), 2 Wils. K.B. 275, 95 E.R. 807; *Eccles v. Bourque*, [1975] 2 S.C.R. 739; *Semayne's Case* (1604), 5 Co. Rep. 91a, 77 E.R. 194; *R. v. Cornell*, 2010 SCC 31, [2010] 2 S.C.R. 142; *R. v. Feeney*, [1997] 2 S.C.R. 13; *R. v. Macooh*, [1993] 2 S.C.R. 802; *R. v. Silveira*, [1995] 2 S.C.R. 297; *R. v. Landry*, [1986] 1 S.C.R. 145; *R. v. Kelsy*, 2011 ONCA 605, 280 C.C.C. (3d) 456; *R. v. Paterson*, 2017 SCC 15, [2017] 1 S.C.R. 202; *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57, [2015] 3 S.C.R. 615; *R. v. Hobeika*, 2020 ONCA 750, 153 O.R. (3d) 350; *R. v. MacDonald*, 2014 SCC 3, [2014] 1 S.C.R. 37; *R. v. Waterfield*, [1963] 3 All E.R. 659; *R. v. Golub* (1997), 34 O.R. (3d) 743; *R. v. Godoy*, [1999] 1 S.C.R. 311; *L'Espérance v. R.*, 2011 QCCA 237; *R. v. Parranto*, 2021 SCC 46, [2021] 3 S.C.R. 366; *R. v. Wiles*, 2005 SCC 84, [2005] 3 S.C.R. 895; *R. v. Johnson*, 2003 SCC 46, [2003] 2 S.C.R. 357; *R. v. Jones*,

[1994] 2 S.C.R. 229; *R. v. Hilbach*, 2023 SCC 3; *R. v. Noble* (1984), 16 C.C.C. (3d) 146; *R. v. Laliberte*, 2007 SKCA 7, 289 Sask. R. 253; *R. v. Bakal*, 2021 ONCA 584, 157 O.R. (3d) 401; *R. v. Shomonov*, 2019 ONCA 1008; *R. v. Buhay*, 2003 SCC 30, [2003] 1 S.C.R. 631; *R. v. Mercer* (1992), 70 C.C.C. (3d) 180; *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353; *R. v. Le*, 2019 SCC 34, [2019] 2 S.C.R. 692; *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432; *R. v. Marakah*, 2016 ONCA 542, 131 O.R. (3d) 561; *R. v. McColman*, 2023 SCC 8; *R. v. Patrick*, 2009 SCC 17, [2009] 1 S.C.R. 579; *R. v. Beaver*, 2022 SCC 54; *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 8, 24(2).

Controlled Drugs and Substances Act, S.C. 1996, c. 19, ss. 5(1), (2), 11.

Criminal Code, R.S.C. 1985, c. C-46, ss. 117.02, Part VI, 183 "electro-magnetic, acoustic, mechanical or other device", "intercept", "private communication", 184(1), (2), 184.2, 184.4, 185, 186, 188, 487.01, 487.015, 487.016, 487.11, 529.3.

Narcotic Control Act, R.S.C. 1985, c. N-1 [rep. 1996, c. 19, s. 94].

Authors Cited

Biddulph, Michelle. "The Privacy Paradox: *Marakah*, *Mills*, and the Diminished Protections of Section 8" (2020), 43:5 *Man. L.J.* 161.

Canada. House of Commons. *House of Commons Debates*, vol. IV, 1st Sess., 29th Parl., May 8, 1973, p. 3538.

Ewaschuk, E. G. *Criminal Pleadings & Practice in Canada*, 3rd ed. Toronto: Thomson Reuters, 2022 (loose-leaf updated October 2024, release 8).

Fontana, James A., and David Keeshan. *The Law of Search and Seizure in Canada*, 13th ed. Toronto: LexisNexis, 2024.

Foster, W. F., and Joseph E. Magnet. "The Law of Forcible Entry" (1977), 15 *Alta. L. Rev.* 271.

Hasan, Nader, et al. *Search and Seizure*. Toronto: Emond Montgomery, 2021.

Hubbard, Robert W., Mabel Lai and Daniel Sheppard. *Wiretapping and Other Electronic Surveillance: Law and Procedure*. Toronto: Thomson Reuters, 2024 (loose-leaf updated October 2024, release 5).

Hutchison, Scott C., et al. *Search and Seizure Law in Canada*. Toronto: Thomson Reuters, 2024 (loose-leaf updated October 2024, release 9).

Jochelson, Richard, and David Ireland. *Privacy in Peril: Hunter v Southam and the Drift from Reasonable Search Protections*. Vancouver: UBC Press, 2019.

MacFarlane, Bruce A., Robert J. Frater and Croft Michaelson. *Drug Offences in Canada*, 4th ed. Toronto: Thomson Reuters, 2024 (loose-leaf updated October 2024, release 4).

Penney, Steven. "Consent Searches for Electronic Text Communications: Escaping the Zero-Sum Trap" (2018), 56 *Alta. L. Rev.* 1.

Penney, Steven, Vincenzo Rondinelli and James Stribopoulos. *Criminal Procedure in Canada*, 3rd ed. Toronto: LexisNexis, 2022.

Pomerance, Renee M. "Parliament's Response to R. v. Feeney: A New Regime for Entry and Arrest in Dwelling Houses" (1998), 13 C.R. (5th) 84.

Quigley, Tim. "The Impact of the Charter on the Law of Search and Seizure" (2008), 40 *S.C.L.R.* (2d) 117.

Stewart, Hamish. "Normative Foundations for Reasonable Expectations of Privacy" (2011), 54 *S.C.L.R.* (2d) 335.

Stuart, Don. *Charter Justice in Canadian Criminal Law*, 7th ed. Toronto: Thomson Reuters, 2018.

Vauclair, Martin, Tristan Desjardins and Pauline Lachance. *Traité général de preuve et de procédure pénales 2024*, 31st ed. Montréal: Yvon Blais, 2024.

APPEAL from a judgment of the Ontario Court of Appeal (Lauwers, Roberts and Trotter JJ.A.), 2022 ONCA 666, 163 O.R. (3d) 355, 418 C.C.C. (3d) 279,

517 C.R.R. (2d) 338, [2022] O.J. No. 4276 (Lexis), 2022 CarswellOnt 13763 (WL), affirming the convictions of the accused for drug trafficking and possession offences. Appeal dismissed, Karakatsanis, Martin and Moreau JJ. dissenting.

Stephen Whitzman and *Carson Hurley*, for the appellant.

Jennifer Conroy and *David Quayat*, for the respondent.

Emily Marrocco and *Matthew Asma*, for the intervener the Attorney General of Ontario.

Lina Thériault and *Pauline Lachance*, for the intervener the Director of Criminal and Penal Prosecutions.

Christine Rideout, K.C., for the intervener the Attorney General of Alberta.

Mannu Chowdhury and *Karine Devost*, for the intervener the National Council of Canadian Muslims.

Gerald Chan and *Riaz Sayani*, for the intervener the Criminal Lawyers' Association (Ontario).

Stephen Aylward, for the intervener the Canadian Civil Liberties Association.

Derek Jugnauth and *Tania Shapka*, for the intervener the Criminal Trial Lawyers' Association.

Daniel J. Song, K.C., and *Veronica Martisius*, for the intervener the British Columbia Civil Liberties Association.

Eric V. Gottardi, K.C., and *Sarah Pringle*, for the intervener the Trial Lawyers Association of British Columbia.

Matthew A. Nathanson and *Rachel M. Wood*, for the intervener the Independent Criminal Defence Advocacy Society.

The judgment of Wagner C.J. and Kasirer, Jamal and O'Bonsawin JJ. was delivered by

JAMAL J. —

I. Introduction

[1] At issue in this appeal is whether the police had lawful authority to use the cellphone of an arrested drug dealer without a warrant to continue a text message conversation with another drug dealer. The police did so to stop what they reasonably believed was the deadly cocktail of heroin laced with fentanyl from being trafficked imminently in the community.

[2] To resolve this issue, the following elements must be addressed: (1) when a person has a reasonable expectation of privacy in their text message conversation; (2) whether the search of such a conversation by the police is an "interception" under Part VI of the *Criminal Code*, R.S.C. 1985, c. C-46; (3) the scope of the police power to conduct a warrantless search of a text message conversation incident to a lawful arrest; and (4) when the warrantless search of a text message conversation may be justified by "exigent circumstances" under s. 11(7) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 ("*CDSA*").

[3] Police lawfully seized a cellphone during a search incident to the arrest of Kyle Gammie, a known drug dealer. Minutes after Mr. Gammie's arrest, four text messages from a sender named "Dew" lit up the lock screen of the phone, appearing to offer to sell drugs to Mr. Gammie. Based on several factors, including the proposed weight and price, the police believed that the texts likely revealed an in-progress drug transaction for the sale of heroin laced with fentanyl. The police feared that the drugs would be sold elsewhere in the community soon if they did not intervene, and so they began replying to the texts by impersonating Mr. Gammie and encouraging the sender to come to Mr. Gammie's residence to deliver the drugs.

[4] The appellant, Dwayne Alexander Campbell, claimed that he did not send the first four texts and that another drug dealer named Dew had given him the phone to deliver the drugs. Even so, Mr. Campbell acknowledged that he continued the text message conversation, which he expected would remain private. When Mr. Campbell

came to Mr. Gammie's residence later that day, he was arrested and found in possession of 14.33 grams of heroin laced with fentanyl. He was charged with trafficking and possession offences under the *CDSA*.

[5] The trial judge rejected Mr. Campbell's application to exclude the texts from evidence on the basis that the police investigative technique of engaging in a text message conversation with him from Mr. Gammie's phone was a "search" that infringed his right to be free from unreasonable search or seizure under s. 8 of the *Canadian Charter of Rights and Freedoms*. The trial judge found that because Mr. Campbell did not have a reasonable expectation of privacy in the texts, the police did not conduct a "search" under s. 8 and hence Mr. Campbell lacked standing to argue that his s. 8 rights had been infringed. The trial judge added that even had he concluded that Mr. Campbell had standing, the warrantless search would have been justified by exigent circumstances under s. 11(7) of the *CDSA*. He also rejected Mr. Campbell's argument that the police had conducted an unlawful "interception" of his electronic communications contrary to Part VI ("Invasion of Privacy") of the *Criminal Code*. In the further alternative, the trial judge would not have excluded the evidence under s. 24(2) of the *Charter*. As a result, the trial judge convicted Mr. Campbell of trafficking and possession offences under the *CDSA* and sentenced him to a term of imprisonment.

[6] The Court of Appeal for Ontario accepted that Mr. Campbell had a reasonable expectation of privacy in his text message conversation, but concluded that

the search was justified by exigent circumstances under s. 11(7) of the *CDSA*. Accordingly, the court dismissed the appeals from conviction and sentence.

[7] I agree with the Court of Appeal that Mr. Campbell had a reasonable expectation of privacy in his text message conversation with the user of Mr. Gammie's phone. The police conducted a "search" of that conversation and hence Mr. Campbell has standing to challenge the search under s. 8 of the *Charter*. Nevertheless, the search was not an "interception" of electronic communications under Part VI of the *Criminal Code*, nor was it incidental to the lawful arrest of Mr. Gammie.

[8] Even so, the warrantless search of Mr. Campbell's text message conversation was justified by exigent circumstances under s. 11(7) of the *CDSA*. The trial judge found that the police reasonably believed that they faced an urgent situation calling for their immediate intervention to protect public safety based on two considerations. First, the police reasonably believed that the drugs being sold were heroin laced with fentanyl, an especially deadly mix that has killed many vulnerable individuals struggling with drug abuse across the country. Second, the police also reasonably believed that, if they did not intervene immediately, these drugs would be sold imminently to vulnerable individuals in the community and hence posed a grave risk to public safety. These findings cumulatively established the exigent circumstances in this case and made it impracticable to obtain a warrant. The trial judge was entitled to make these findings based on the evidence before him and correctly concluded that

they met the legal standard for a warrantless search under s. 11(7) of the *CDSA*. Accordingly, I would dismiss the appeal.

II. Facts

[9] On June 13 and 14, 2017, based on information obtained from confidential informers, five members of the Guelph Police Service Drug Unit conducted surveillance of Mr. Gammie, a known drug dealer. The informers had advised the police that Mr. Gammie was trafficking in drugs, including heroin and fentanyl. On June 13, the police saw what they believed was Mr. Gammie transacting with known drug users. On June 14, the police applied for and obtained a warrant to search Mr. Gammie's residence and arrested Mr. Gammie and a woman at 4:25 p.m. as they tried to leave the residence in a car. Mr. Gammie had cocaine and $2,295 in cash on him.

[10] During the arrest, Mr. Gammie threw two cellphones onto the passenger seat of the car. One of the arresting officers, Officer Kendall Brown, lawfully seized the cellphones incident to arrest. A few minutes later, between 4:31 p.m. and 4:51 p.m., one of the phones lit up with four text messages that were visible in plain view on the cellphone's lock screen. The texts were from a sender identified as Dew. They read:

> [4:31:23 p.m.] Family I need 1250 for this half tho
>
> [4:50:26 p.m.] Yooo
>
> [4:50:48 p.m.] What you gonna need that cause I don't want to drive around with it

[4:50:59 p.m.] What time you gonna need it

(A.R., at p. 221)

[11] Officer Brown brought the texts to the attention of Officer Andrew Orok and Sergeant Ben Bair, an experienced drug investigator and the officer-in-charge of the Guelph police drug squad. Sergeant Bair believed that the texts involved a drug transaction in progress, likely for heroin laced with fentanyl. He inferred this because the phrase "1250 for this half" was consistent with a cheap price for half an ounce of heroin, which suggested that the heroin was likely mixed with fentanyl. He also knew that, in 2017, 75 percent of the heroin seized by the Guelph police contained fentanyl. He was concerned that if the police did not obtain control of these drugs, they would be sold in the community imminently and jeopardize public safety.

[12] Two other officers also suspected that the drugs involved heroin laced with fentanyl. Officer Orok suspected that the drugs were heroin based on the price of the drugs and confidential informer information that Mr. Gammie was dealing in heroin, while Officer Dale Hunt had been told by two confidential informers that Mr. Gammie was trafficking in cocaine, heroin, and crystal methamphetamine, along with fentanyl.

[13] Sergeant Bair instructed Officer Orok to respond to the texts by pretending to be Mr. Gammie and asking Dew to deliver the drugs to Mr. Gammie's residence. He believed that Dew had no reasonable expectation of privacy in the texts sent to Mr. Gammie's phone, and therefore concluded that it was lawful for the police to impersonate Mr. Gammie without a warrant.

[14] Over the next 2 hours and 15 minutes, Officer Orok exchanged 35 texts with Dew about the delivery. He did so directly from the cellphone's lock screen but did not examine any other information on the cellphone.

[15] On the *voir dire*, Mr. Campbell testified that a drug dealer named Dew had given him the cellphone to deliver drugs to Mr. Gammie. Mr. Campbell claimed that he did not send the original four texts, but acknowledged that he sent and received the later texts about the drug delivery to Mr. Gammie.

[16] Just after 7:00 p.m., Mr. Campbell arrived at Mr. Gammie's residence and was arrested. During a search of Mr. Campbell's person incident to arrest, the police found $40 in cash and 14.33 grams of heroin mixed with fentanyl. They also seized Mr. Campbell's cellphone and photographed the screen to capture the text message conversation with Mr. Gammie's phone. The police subsequently obtained warrants to search and download the texts from Mr. Gammie and Dew's phones.

III. Judicial History

A. *Ontario Superior Court of Justice, Voir Dire Ruling (Lemon J.)*

[17] The trial judge held that Mr. Campbell lacked standing to claim that the police violated his rights under s. 8 of the *Charter* by using Mr. Gammie's phone to text him. He ruled that Mr. Campbell had no reasonable expectation of privacy when texting the user of Mr. Gammie's phone. Both parties agreed that the relevant authority

was this Court's decision in *R. v. Marakah*, 2017 SCC 59, [2017] 2 S.C.R. 608, released a few months after Mr. Campbell's arrest, which considered whether an accused had a reasonable expectation of privacy in a text message conversation with an accomplice to an illegal firearms transaction. This Court held that text messages can attract a reasonable expectation of privacy when the claimant has a subjective expectation of privacy and the subjective expectation is objectively reasonable in all the circumstances.

[18] The trial judge accepted that Mr. Campbell had a subjective expectation of privacy in his text message conversation. He noted that "conversations between two drug traffickers would, as between the two of them, be expected to be kept private" (*voir dire* reasons (reproduced in A.R., at pp. 1-36), at para. 39). At the same time, he found that this expectation was not objectively reasonable. The texts "did not reveal any personal or biographical information" about Mr. Campbell and involved "mundane comments that . . . could have been overheard on a public bus" (para. 44). As a result, Mr. Campbell lacked standing to allege that his rights under s. 8 of the *Charter* had been infringed.

[19] Although this conclusion was sufficient to dismiss Mr. Campbell's arguments under s. 8 of the *Charter*, the trial judge observed that the jurisprudence in this area of the law was rapidly evolving, and therefore considered Mr. Campbell's other arguments on the basis that he had standing.

[20] The trial judge accepted that the police searched Mr. Gammie's phone and rejected the Crown's submission that the entire text message conversation was in "plain view". He found that although the first four texts from Dew may have been in plain view, the later texts between Officer Orok and Mr. Campbell were produced by using the phone itself as part of the investigation. These texts were "effectively a search of the phone" (para. 63).

[21] The trial judge ruled that the warrantless search of Mr. Gammie's phone was justified by exigent circumstances under s. 11(7) of the *CDSA*. He accepted the evidence of the police officers that they reasonably believed the drugs Dew was offering to sell to Mr. Gammie involved heroin laced with fentanyl. He also found that, "[w]ithout immediate action, the transaction and the drugs were at risk" (para. 100). The texts showed that Dew was impatient and a telewarrant "would likely arrive too late to complete this transaction" (para. 100). As a result, "[t]he likelihood that the transaction involved fentanyl and its dramatic effects on the community ma[de] this a matter of public safety" (para. 100). The police were therefore justified under s. 11(7) in engaging in a text message conversation with Mr. Campbell without a warrant.

[22] The trial judge rejected Mr. Campbell's argument that the police had undertaken an "interception" of his electronic communications requiring prior judicial authorization under Part VI ("Invasion of Privacy") of the *Criminal Code*. He noted that Part VI was designed to regulate the use of intrusive technologies to surveil and interfere with communications between a sender and a recipient. Although the police

engaged in a deception by impersonating Mr. Gammie, they did not undertake an "interception" under Part VI. As a result, the police did not require prior judicial authorization before using Mr. Gammie's phone to text Mr. Campbell.

[23] Nevertheless, the trial judge accepted that the police breached Mr. Campbell's rights under s. 8 of the *Charter* when they scrolled through and took photographs of the texts on Dew's phone upon Mr. Campbell's arrest. (This point was not pursued before the Court of Appeal or this Court. As noted, the police later obtained a valid warrant to search and download the contents of Dew's phone.)

[24] Finally, the trial judge held that even had he found each of the claimed breaches of Mr. Campbell's rights under s. 8, he would not have excluded the texts from evidence under s. 24(2) of the *Charter*.

[25] With the texts and drugs admitted into evidence, Mr. Campbell was convicted of trafficking in heroin and fentanyl and possession of heroin and fentanyl for the purpose of trafficking, contrary to s. 5(1) and (2) of the *CDSA*. He was sentenced to six years of imprisonment, less credit of four months for restrictive bail conditions and pre-trial custody.

B. *Court of Appeal for Ontario, 2022 ONCA 666, 163 O.R. (3d) 355 (Trotter J.A., Lauwers and Roberts JJ.A. Concurring)*

[26] The Court of Appeal dismissed Mr. Campbell's appeals from conviction and sentence. The court agreed with the trial judge's conclusion that there was no breach of s. 8 of the *Charter,* but did so for different reasons. It also dismissed the other grounds of appeal.

[27] The court ruled that Mr. Campbell had standing to argue that the police violated his rights under s. 8. Applying *Marakah,* the court accepted that Mr. Campbell had an objectively reasonable expectation of privacy in the circumstances. The comments made in Mr. Campbell's texts were not "mundane", but rather were about a drug deal, "something one might make efforts to prevent from being overheard on a bus" (para. 40).

[28] The court also rejected the Crown's argument that *R. v. Mills*, 2019 SCC 22, [2019] 2 S.C.R. 320 — in which the police had posed online as a 14-year-old girl as part of an internet child luring investigation — should alter the application of *Marakah* to this case. The court interpreted *Mills* as having carved out an "exception" to *Marakah* when the electronic communications themselves constitute a crime against the recipient — in that case, the victimization of children — which was far removed from this case (para. 62). Here, the court noted, the police "inserted themselves into a conversation that was already underway, between two real people with a pre-existing relationship, essentially hijacking the identity of one of the participants. . . . [T]he police became part of the exchange, but unbeknownst to the appellant" (para. 71).

[29] Finally, the court held that it was open to the trial judge to find no breach of s. 8 of the *Charter* because the police had acted under exigent circumstances. The police had to act immediately to protect public safety and it was impracticable to obtain a warrant. The police officers believed that the texts conveyed an in-progress transaction for heroin laced with fentanyl and without immediate action by the police the drugs would have been trafficked in the community. The police officers' evidence, combined with "the notoriously harmful nature of fentanyl", amounted to exigent circumstances (para. 83). The court stated that "[a]lthough the trial judge's conclusion relied on some contingencies, it was not unduly speculative, nor was it unreasonable" (para. 83). The court ruled that it was open to the trial judge to conclude that "*immediate* action was required" and "it was impracticable to obtain a warrant, even a telewarrant" (para. 84 (emphasis in original)).

[30] Counsel for Mr. Campbell did not press in oral argument before the Court of Appeal whether the police had conducted an "interception" under Part VI of the *Criminal Code*, and as a result, the court did not address this point.

[31] Having found no s. 8 breach, the court did not address whether to exclude the evidence under s. 24(2) of the *Charter*.

IV. Issues

[32] This appeal raises the following questions:

1. Does Mr. Campbell have standing to allege that the police conducted a "search" that violated his rights under s. 8 of the *Charter*?

2. Was the search not authorized by law, and therefore "unreasonable" under s. 8? In particular, was the search: (a) an "interception" under Part VI of the *Criminal Code*; (b) not incident to a lawful arrest; or (c) not justified by "exigent circumstances" that made it "impracticable" to obtain a warrant under s. 11(7) of the *CDSA*?

3. Should the evidence obtained be excluded under s. 24(2) of the *Charter*?

V. Analysis

A. *Did Mr. Campbell Have a Reasonable Expectation of Privacy in His Text Message Conversation?*

[33] The first issue is whether Mr. Campbell has standing to allege that the police infringed his rights under s. 8 of the *Charter* by using Mr. Gammie's phone to engage in the text message conversation that led to Mr. Campbell's arrest. Mr. Campbell testified at the *voir dire* that he was not Dew and that he did not send the first four texts from Dew's phone to Mr. Gammie's phone. At the same time, he admitted that he sent the later texts to Mr. Gammie's phone, and therefore claimed

standing to challenge the admission of these later texts into evidence. Both courts below evaluated Mr. Campbell's standing on that basis. I will do likewise.

[34] Mr. Campbell has standing if he establishes that he had a reasonable expectation of privacy in his text message conversation with who he thought was Mr. Gammie, in which case the police conducted a "search" under s. 8 of the *Charter*. It would then be necessary to consider whether the search was "unreasonable" under s. 8 of the *Charter* (see *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34, at paras. 35-36; *Marakah*, at paras. 10 and 12; *R. v. Bykovets*, 2024 SCC 6, at para. 30).

[35] As I will explain, I agree with the Court of Appeal that Mr. Campbell had a reasonable expectation of privacy in his text message conversation, and he therefore has standing to allege that the police infringed his rights under s. 8 of the *Charter*.

(1) Legal Principles

[36] Section 8 of the *Charter* guarantees that "[e]veryone has the right to be secure against unreasonable search or seizure." The main purpose of s. 8 is to protect the right to privacy from unjustified state intrusion (*Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 160; *R. v. Plant*, [1993] 3 S.C.R. 281, at p. 291; *Bykovets*, at para. 29).

[37] The right to privacy is foundational to a free and democratic society. It is essential to "individual dignity, autonomy, and personal growth" (*Bykovets*, at para. 29; see also *Plant*, at p. 292; *R. v. Jones*, 2017 SCC 60, [2017] 2 S.C.R. 696, at para. 38),

and to "the relationship between the state and the citizen" (*R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432, at para. 12). In an oft-quoted passage in *R. v. Dyment*, [1988] 2 S.C.R. 417, at pp. 427-28, La Forest J. wrote that "[t]he restraints imposed on government to pry into the lives of the citizen go to the essence of a democratic state." A similar sentiment was echoed by Binnie J. in *Tessling*, who observed that "[f]ew things are as important to our way of life as the amount of power allowed the police to invade the homes, privacy and even the bodily integrity of members of Canadian society without judicial authorization" (para. 13).

[38] A central preoccupation of this Court's s. 8 jurisprudence has been to balance the often competing aims of personal privacy and the public interest. This quest for balance reflects the constitutional imperative in s. 8 itself, which, expressed negatively, protects against an *unreasonable* search and seizure or, expressed positively, safeguards only a *reasonable* expectation of privacy (*Hunter*, at p. 159). In *Hunter*, Dickson J., as he then was, explained that s. 8 requires "an assessment . . . 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" (pp. 159-60). In *Tessling*, Binnie J. added that "[t]he community wants privacy but it also insists on protection. Safety, security and the suppression of crime are legitimate countervailing concerns" (para. 17; see also *Plant*, at pp. 291-92).

[39] Section 8 of the *Charter* is engaged 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" (*Marakah*, at para. 10, quoting *Cole*, at para. 34). A claimant seeking standing to argue that their rights under s. 8 were infringed must show that they subjectively expected the subject matter of the search would remain private, and that their expectation was objectively reasonable having regard to "the totality of the circumstances" (*Marakah*, at para. 10, quoting *R. v. Edwards*, [1996] 1 S.C.R. 128, at paras. 31 and 45; see also *R. v. Spencer*, 2014 SCC 43, [2014] 2 S.C.R. 212, at paras. 17-18; *Jones*, at para. 13). In making this evaluation, courts are guided by four lines of inquiry: (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) whether the claimant's subjective expectation of privacy was objectively reasonable (*Marakah*, at para. 11; *Cole*, at para. 40; *Spencer*, at para. 18; *Bykovets*, at para. 31).

(2) Application

[40] I agree with the Crown that this Court has held that there is no "automatic" rule of standing for text messages. As McLachlin C.J. recognized in *Marakah*, text message conversations "*can*, in some circumstances, attract a reasonable expectation of privacy", but this "does not lead inexorably to the conclusion that an exchange of electronic messages *will always* attract a reasonable expectation of privacy" (para. 5 (emphasis in original)). Whether an individual has a reasonable expectation of privacy

in a text message conversation must be assessed based on the totality of the circumstances in each case.

[41] In my view, the four lines of inquiry under s. 8 establish that Mr. Campbell had a reasonable expectation of privacy in his text message conversation with who he thought was Mr. Gammie. Although the only disputed point is the objective reasonableness of his subjective expectation of privacy, I will briefly address each of the other points as well.

(a) *What Was the Subject Matter of the Alleged Search?*

[42] When the state examines text messages, the subject matter of the alleged search is properly characterized as "the electronic conversation between two or more people" (*Marakah*, at para. 19; see also *Jones*, at para. 14; *R. v. TELUS Communications Co.*, 2013 SCC 16, [2013] 2 S.C.R. 3, at para. 5). As noted in *Marakah*, "[t]his 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" (para. 20).

[43] Here, the subject matter of the alleged search was Mr. Campbell's text message conversation with who he believed was Mr. Gammie.

(b) *Did Mr. Campbell Have a Direct Interest in the Subject Matter?*

[44] The Crown does not dispute that Mr. Campbell had a direct interest in his text message conversation. He participated in the conversation and wrote several of the texts at issue (see *Marakah*, at para. 21; *Jones*, at para. 15).

(c) *Did Mr. Campbell Have a Subjective Expectation of Privacy in the Subject Matter?*

[45] A claimant's burden of establishing a subjective expectation of privacy in the subject matter of the alleged search "is not 'a high hurdle'" (*Marakah*, at para. 22, quoting *R. v. Patrick*, 2009 SCC 17, [2009] 1 S.C.R. 579, at para. 37; see also *Jones*, at para. 20). The necessary evidentiary foundation is "modest", reflecting how "s. 8's normative import transcends an individual claimant's subjective expectations" (*Jones*, at para. 21). "A subjective expectation of privacy can be presumed or inferred in the circumstances in the absence of the claimant's testimony or admission at the *voir dire*" (para. 21).

[46] The trial judge accepted Mr. Campbell's evidence that he had a subjective expectation of privacy. He found that, "[g]iven the nature of the conversation, and the low threshold", he could "presume that conversations between two drug traffickers would, as between the two of them, be expected to be kept private" (*voir dire* reasons, at para. 39). This finding is not challenged before this Court.

(d) *Was Mr. Campbell's Subjective Expectation of Privacy Objectively Reasonable?*

[47] In determining whether a subjective expectation of privacy is objectively reasonable, courts must employ an approach that is both normative and content-neutral. Several interveners urge this Court to affirm these basic postulates of the s. 8 analysis. I agree that it is useful to do so.

(i) Section 8 Requires a Normative Approach

[48] Whether there is a reasonable expectation of privacy "is not a purely factual inquiry"; the inquiry "is normative rather than simply descriptive" (*Spencer*, at para. 18; see also *Tessling*, at para. 42). Although the inquiry must be sensitive to the factual context, it is inevitably laden with value judgments about the sort of free and democratic society that reasonable and informed Canadians expect to live in, based on concerns about the long-term consequences of tolerating state intrusion into individual privacy (*Spencer*, at para. 18; *Patrick*, at para. 27; *Bykovets*, at para. 52; see also H. Stewart, "Normative Foundations for Reasonable Expectations of Privacy" (2011), 54 *S.C.L.R.* (2d) 335, at pp. 342-47; S. Penney, V. Rondinelli and J. Stribopoulos, *Criminal Procedure in Canada* (3rd ed. 2022), at ¶3.38).

[49] The normative approach to s. 8 "demands we take a broad, functional approach to the subject matter of the search and that we focus on its *potential* to reveal personal or biographical core information" (*Bykovets*, at para. 7 (emphasis in original), citing *Marakah*, at para. 32; see also *R. v. Reeves*, 2018 SCC 56, [2018] 3 S.C.R. 531, at para. 28; *Tessling*, at para. 42; *Spencer*, at para. 18; Stewart, at pp. 335 and 342-43).

(ii) The Approach to Section 8 Must Also Be Content-Neutral

[50] It is also settled that "the s. 8 analysis must be content-neutral" (*Marakah*, at para. 48). Thus, "the fruits of a search cannot be used to justify an unreasonable privacy violation" (para. 48). This Court's precedents on the content-neutral approach hold that people do not deserve lesser privacy protection under s. 8 of the *Charter* because they were engaged in criminal activity at the time of the search or seizure.

[51] A leading authority on the content-neutral approach to s. 8 is *R. v. Wong*, [1990] 3 S.C.R. 36. This Court held that the accused had a reasonable expectation of privacy in a hotel room in which the police had installed a video camera without judicial authorization during an investigation of a "floating" gaming house. The Court emphasized that whether a person has a reasonable expectation of privacy "must be framed in broad and neutral terms" (p. 50). The question is not "whether persons who engage in illegal activity behind the locked door of a hotel room have a reasonable expectation of privacy" (a content-driven approach), but rather "whether in a society such as ours persons who retire to a hotel room and close the door behind them have a reasonable expectation of privacy" (a content-neutral approach) (p. 50).

[52] Under the content-neutral approach to s. 8, the existence of a reasonable expectation of privacy does not turn on "the legal or illegal nature of the items sought" (*Spencer*, at para. 36; see also *Reeves*, at para. 28; *Patrick*, at para. 32; *R. v. Gomboc*, 2010 SCC 55, [2010] 3 S.C.R. 211, at para. 39; D. Stuart, *Charter Justice in Canadian Criminal Law* (7th ed. 2018), at p. 307; Penney, Rondinelli and Stribopoulos, at ¶3.37).

The question under s. 8 "is not whether the claimant broke the law, but rather whether the police exceeded the limits of the state's authority" (*Reeves*, at para. 2).

(iii) Mr. Campbell's Subjective Expectation of Privacy Was Objectively Reasonable

[53] There is no closed or definitive list of factors relevant to whether a claimant's subjective expectation of privacy in the subject matter of a search is objectively reasonable (*Bykovets*, at para. 45; *Cole*, at para. 45; *Marakah*, at para. 24). The relevant factors include, but are not limited to:

(i) whether the information would tend to reveal intimate or biographical details of the lifestyle and personal choices of the individual subject to the alleged search;

(ii) the place where the alleged search took place;

(iii) whether the subject matter of the alleged search was in public view;

(iv) whether the subject matter had been abandoned;

(v) whether the information was already in the hands of third parties, and if so, whether it was subject to an obligation of confidentiality;

(vi) whether the police technique was intrusive in relation to the privacy interest;

(vii) whether the individual was present at the time of the alleged search;

(viii) the possession, control, ownership, and historical use of the property or place said to have been searched; and

(ix) the ability to regulate access to the place of the search, including the right to admit or exclude others from the place (*Plant*, at p. 293; *Tessling*, at para. 32; *Edwards*, at para. 45).

[54] The parties focussed their submissions before this Court on three factors: (1) the private nature of the subject matter; (2) the intrusiveness of the police technique in relation to the privacy interest; and (3) the level of control over the information.

1. *The Private Nature of the Subject Matter*

[55] The private nature of the subject matter is a critical factor in establishing a reasonable expectation of privacy. 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" (*Plant*, at p. 293; see also *Marakah*, at para. 31; *Bykovets*, at para. 51). As this Court has recognized, "all information about a person is in a fundamental way his own, for him to communicate or retain for himself as he sees fit" (*Dyment*, at p. 429, quoting the Task Force established jointly by the Department of Communications/Department of Justice, *Privacy and Computers* (1972), at p. 13; see also *Spencer*, at para. 40; *Jones*, at para.

39; *Tessling*, at para. 23). In this vein, s. 8 of the *Charter* has been described as protecting "informational self-determination" (*Jones*, at para. 39).

[56] In keeping with the normative, content-neutral approach to s. 8, a court must focus on "'whether people generally have a privacy interest' in the subject matter of the state's search" (*Bykovets*, at para. 53, quoting *Patrick*, at para. 32). The question is whether the subject matter of the search at issue has the *potential* or *tendency* to reveal private information about the claimant (*Marakah*, at para. 31).

[57] With respect to text messages in particular, "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"; the focus is on whether the participants in the conversation "have a reasonable expectation of privacy in its contents, whatever they may be" (*Marakah*, at para. 32). The protection of s. 8 includes "information which tends to reveal intimate details of the lifestyle and personal choices of the individual" (para. 32, quoting *Plant*, at p. 293).

[58] This Court has recognized that few if any types of conversation or communication can "promis[e] more privacy than text messaging. There is no more discreet form of correspondence" (*Marakah*, at para. 35; see also *TELUS Communications*, at para. 1). "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" (*Marakah*, at para. 36).

[59] Here, the alleged search of Mr. Campbell's text message conversation intruded into a medium of communication in which a reasonable person would ordinarily expect the utmost privacy. A text message conversation has the potential or tendency to reveal deeply personal and biographical information about the participants. This is the type of information that anyone would reasonably expect to be kept private from the state.

[60] Although I agree with the Court of Appeal that the trial judge erred in finding that Mr. Campbell had no reasonable expectation of privacy in the circumstances, in my respectful view, both courts erred by focussing on the actual contents of the text messages at issue, rather than the potential or tendency for the conversation to reveal deeply personal and biographical core information about the participants. The trial judge stated that Mr. Campbell's text message conversation "did not reveal any personal or biographical information about him nor was it likely to" because it involved "mundane comments that, in another age, could have been overheard on a public bus" (*voir dire* reasons, at para. 44). For its part, the Court of Appeal focussed on how the conversation was "about a drug deal, something one might make efforts to prevent from being overheard on a bus" (para. 40). As this Court has stated, however, the longstanding content-neutral approach to s. 8 requires a court to analyze whether the type of information at issue has the potential or tendency to reveal private information about the claimant, whatever the actual contents of the conversation may be (*Marakah*, at paras. 31-32).

[61] In my view, the private nature of the subject matter at issue has the potential or tendency to reveal private information about Mr. Campbell, and therefore supports his claim to a reasonable expectation of privacy in his text message conversation.

2. *Intrusiveness of the Police Technique in Relation to the Privacy Interest*

[62] The intrusiveness of the police technique in relation to the privacy interest at issue can be important in assessing whether a claimant's subjective expectation of privacy is objectively reasonable (*Tessling*, at paras. 32 and 50; *Plant*, at p. 295). This is a distinct consideration from whether the police acted lawfully, which is relevant to whether the state conduct was "unreasonable" at the second stage of the s. 8 inquiry (*Edwards*, at para. 33).

[63] In this case, the police investigative technique was especially intrusive. The police did not simply review texts that Mr. Campbell sent to Mr. Gammie's phone, nor was Mr. Campbell texting a complete stranger. As the Court of Appeal stated, "the police became part of the exchange, but unbeknownst to the appellant" (para. 71). The police "'intrude[d] on a private conversation'. They inserted themselves into a conversation that was already underway, between two real people with a pre-existing relationship, essentially hijacking the identity of one of the participants" (para. 71). This factor also supports Mr. Campbell's claim to a reasonable expectation of privacy in all the circumstances.

3. *Control Over the Information*

[64] The Crown highlights that Mr. Campbell was using a borrowed phone, which it says undercuts his claim to a reasonable expectation of privacy. The Crown asserts that it was not objectively reasonable for Mr. Campbell to expect that his conversation with Mr. Gammie would remain private because he insisted that the phone belonged to Dew and that he was merely borrowing it to complete the drug delivery (R.F., at paras. 41-42). It cites McLachlin C.J.'s observation in *Marakah*, that a reasonable expectation of privacy "may exist on a spectrum or in a 'hierarchy' of places" (para. 29, quoting *Tessling*, at para. 22). A person may have a high expectation of privacy on their own phone, which they "completely control, a lesser expectation of privacy in [a] friend's phone", which the friend controls, and no reasonable expectation of privacy at all if the claimant "expect[s] the text message to be displayed to the public" (para. 29). The Crown says that Mr. Campbell could not possibly have had an objectively reasonable expectation of privacy on a borrowed phone with a "virtual stranger" (R.F., at para. 29).

[65] I do not accept this submission. Mr. Campbell testified that even though he did not know Dew's full name, he knew Dew and had made several drug deliveries for him in the past. Mr. Campbell was therefore using the phone of someone with whom he had a prior relationship.

[66] The Crown's position also fails to appreciate that control is not determinative of the question of standing. As McLachlin C.J. emphasized in *Marakah*, "control is not an absolute indicator of a reasonable expectation of privacy, nor is lack

of control fatal to a privacy interest" (para. 38; see also *Reeves*, at para. 37). "[A] person does not lose control of information for the purposes of s. 8 simply because another person possesses it or can access it" (*Marakah*, at para. 41; see also para. 68). Sharing control of the information at issue may diminish without necessarily eliminating a person's reasonable expectation of privacy. As a result, text message conversations may be protected by a "zone of privacy" that extends beyond one's own mobile device to the recipient of the message, even when "one shares private information with others" (para. 37).

[67] Mr. Campbell's reasonable expectation of privacy thus extended from the use of Dew's phone to the texts that he sent and received as part of his electronic conversation with who he believed was Mr. Gammie. He did not lose the protection of s. 8 of the *Charter* simply by sharing private information with the other party to his text message conversation or by using the phone of an acquaintance.

[68] The relevant question under s. 8 is not whether the individual reasonably expected the subject matter of the search to remain private from just anybody; what matters is whether they reasonably expected it would remain private from *state intrusion* (*R. v. Duarte*, [1990] 1 S.C.R. 30, at p. 46; *Wong*, at pp. 43-44 and 47-48; *Plant*, at p. 291; *Tessling*, at para. 18; *Marakah*, at paras. 40-45). The "zone of privacy" protected by s. 8 of the *Charter* involves the right to keep "personal information . . . safe from state intrusion" (*Marakah*, at para. 37). In my view, in all the circumstances,

Mr. Campbell had a reasonable expectation of privacy from state intrusion into his text message conversation.

(e) *Undercover Police Work Is Not Imperilled*

[69] The Crown further argues that the police impersonation of Mr. Gammie was simply an undercover police investigation, and was therefore not a search under s. 8. It cites the comments of Karakatsanis J. on behalf of a minority of the Court in *Mills*, that "s. 8 does not prevent police from communicating with individuals in the course of an undercover investigation", and that "an individual cannot reasonably expect their words to be kept private from the person with whom they are communicating" (para. 42). The Crown says that simply because an interlocutor turns out to be an undercover police officer does not convert a text message conversation into a search, and that accepting Mr. Campbell's privacy claim would lead to "a society bereft of undercover police work" (R.F., at para. 55).

[70] Like the Court of Appeal, I would reject this argument. I accept that there is nothing necessarily improper in the police answering the phone of an arrested person and speaking with an unsuspecting caller, as occurred in *R. v. Baldree*, 2013 SCC 35, [2013] 2 S.C.R. 520. But speaking with a caller on a telephone is constitutionally different from creating a permanent electronic record of the communication through a surreptitious sound recording or by using the medium of text messaging. The surreptitious recording of a communication by the police is a search and seizure for constitutional purposes. As La Forest J. stated in *Duarte*, "[a] conversation with an

informer does not amount to a search and seizure within the meaning of the *Charter*. Surreptitious electronic interception and recording of a private communication does" (p. 57). Likewise, as Arbour J. stated in *R. v. Fliss*, 2002 SCC 16, [2002] 1 S.C.R. 535, at para. 12, "a conversation with an informer, or a police officer, is not a search and seizure. Only the recording of such conversation is".

[71] In this case, the police did not surreptitiously record Mr. Campbell's conversation. Instead, the medium of communication of text messaging itself generated the record of the conversation (*TELUS Communications*, at para. 34). That medium potentially gives rise to a reasonable expectation of privacy, but this does not in itself prevent undercover police work. Instead, it merely imposes constitutional constraints on police investigations involving text messaging by requiring the police to comply with s. 8 of the *Charter* (see *Marakah*; *Jones*).

(f) *It Is Not Necessary To Decide Whether Mills Created an "Exception" to Marakah or Departed From the Content-Neutral Approach to Section 8*

[72] Lastly, the Crown submits that the Court of Appeal erred when it said that "*Mills* carved out an exception [to *Marakah*] in circumstances where the electronic communications themselves constitute a crime against the recipient — in that case, the victimization of children" (C.A. reasons, at para. 62; see also paras. 34 and 73). Instead, the Crown submits that *Marakah* and *Mills* "demonstrate how the totality of the circumstances test is sufficiently fluid to allow the Court to adapt it to a changing [technological] landscape while staying true to the principles that s. 8 seeks to protect"

(R.F., at para. 36). Several interveners similarly caution that characterizing *Mills* as an "exception" to *Marakah* would dilute the content-neutral approach to s. 8 of the *Charter*, inviting courts to find that communications between parties do not deserve s. 8 protection when police suspect that their relationship involves a crime. Such a characterization, they warn, would lead courts to ask whether particular relationships are morally deserving of protection under s. 8, undercutting decades of *Charter* jurisprudence.

[73] *Mills* involved an undercover sting operation in which the police posed as a 14-year-old girl to investigate child luring on the internet. The police communicated with the accused online and used screen capture software to record the communications without judicial authorization. The communications led to an arranged meeting at which the police arrested the accused and charged him with child luring. When the Crown sought to introduce the electronic communications into evidence at trial, the accused claimed that the police had infringed his rights under s. 8 of the *Charter* by intercepting his private electronic communications without judicial authorization. A majority of this Court found no breach of s. 8.

[74] Four sets of reasons were issued in *Mills*, with no majority decision. Justice Brown, for a plurality of the Court, expressly applied the "totality of circumstances" and normative approach to objective reasonableness under s. 8 and concluded that the accused had no reasonable expectation of privacy in all the circumstances (paras. 13 and 20). He rested his conclusion on what he described as a "modest" proposition that

the accused could not establish "an objectively reasonable expectation of privacy in these particular circumstances, where he conversed with *a child* online who was *a stranger* to him and, *most importantly*, where the police knew this when they created her" (para. 30 (emphasis in original)). In the course of his reasons, Brown J. also cited *Marakah* approvingly (paras. 12-14 and 16).

[75] Justice Karakatsanis, for a minority of the Court, concluded that the accused had no reasonable expectation of privacy since he was like someone who "unwittingly speaks to an undercover officer in person" (para. 44). She found that because the accused "had no reasonable expectation that his messages would be kept private from the intended recipient, s. 8 is not engaged" (para. 44). The accused had chosen to use a written medium to communicate and knew that a permanent electronic record of his communications existed (paras. 48 and 55). Justice Karakatsanis similarly did not depart from the totality of the circumstances approach to s. 8 and also cited *Marakah* approvingly (paras. 49 and 60).

[76] Justice Moldaver, concurring in the result, stated that each of the reasons of Brown J. and Karakatsanis J. was "sound in law" (para. 66).

[77] Finally, Martin J., also concurring in the result, would have found a breach of s. 8, but would not have excluded the evidence under s. 24(2) of the *Charter*.

[78] As a result, there was no majority decision in *Mills*. As the Court of Appeal correctly noted, however, neither Brown J. nor Karakatsanis J. "attempted to distance

themselves" from *Marakah* (para. 60). In my view, *Marakah* remains the governing authority on when a text message conversation attracts a reasonable expectation of privacy under s. 8. It is thus not necessary to decide whether *Mills* is properly characterized as creating an "exception" to *Marakah* or as departing from the content-neutral approach to s. 8 of the *Charter*.

(3) Conclusion

[79] Mr. Campbell had an objectively reasonable expectation of privacy in his text message conversation with who he thought was Mr. Gammie. The police intruded upon Mr. Campbell's reasonable expectation of privacy by pretending to be Mr. Gammie to continue that conversation. As a result, the police conducted a "search" under s. 8, which Mr. Campbell has standing to challenge.

B. *Was the Search Unreasonable?*

[80] The next issue is whether the warrantless search conducted by the police was "unreasonable" and therefore contrary to s. 8 of the *Charter*.

[81] A warrantless search is presumptively unreasonable, shifting the burden of persuasion to the Crown to establish, on a balance of probabilities, that the search was reasonable (*R. v. Collins*, [1987] 1 S.C.R. 265, at p. 278). A search is reasonable under s. 8 if it is authorized by a reasonable law and conducted in a reasonable manner (p.

278; *R. v. Fearon*, 2014 SCC 77, [2014] 3 S.C.R. 621, at para. 12; *R. v. Caslake*, [1998] 1 S.C.R. 51, at para. 10).

[82] Mr. Campbell argues that the search was not authorized by law, and was therefore unreasonable, on two grounds. He says that the deceptive text messaging by the police was an "interception" under Part VI of the *Criminal Code* because it allowed the police to acquire his texts in real time. He also contends that the warrantless search was not justified by exigent circumstances under s. 11(7) of the *CDSA*. In his view, the Court of Appeal took a lax approach to exigency that would relieve the police of the duty to obtain a warrant in any case involving dangerous drugs such as fentanyl. The Crown disagrees with these arguments, and adds that the search of Mr. Campbell's text message conversation was authorized as incident to the lawful arrest of Mr. Gammie.

[83] In my view, the police investigative technique was neither an interception under Part VI of the *Criminal Code* nor a search incident to the lawful arrest of Mr. Gammie. At the same time, I accept that the search was justified by exigent circumstances under s. 11(7) of the *CDSA*. The search was therefore reasonable and justified by law and did not breach s. 8 of the *Charter*. I will address each point in turn.

(1) <u>The Search Was Not an Interception Under Part VI of the *Criminal Code*</u>

[84] Mr. Campbell says that the police investigative technique of engaging in a text message conversation with him from Mr. Gammie's phone was an "interception" under the wiretapping regime in Part VI of the *Criminal Code* and hence required

judicial authorization. He claims that this violated his rights under s. 8 of the *Charter* and exacerbated the seriousness of the breach of s. 8 under the s. 24(2) analysis.

[85] I disagree. The police investigative technique was not an "interception" under Part VI because it did not involve the use of a device employing an intrusive surveillance technology.

(a) *Legal Principles*

[86] Parliament enacted Part VI of the *Criminal Code*, "Invasion of Privacy" (ss. 183 to 196.1), as a comprehensive regime to address the interception of private communications by balancing the individual right to privacy with the collective need for law enforcement (*Wakeling v. United States of America*, 2014 SCC 72, [2014] 3 S.C.R. 549, at para. 26; *Duarte*, at p. 45; *Imperial Oil v. Jacques*, 2014 SCC 66, [2014] 3 S.C.R. 287, at para. 39). Part VI creates offences, establishes procedures for the authorized interception of private communications in the investigation of certain crimes, and delineates when intercepted communications may be admissible in evidence.

[87] Part VI (then Part IV.1) was enacted in 1974 at a time of widespread concern about the use of intrusive surveillance technologies, such as wiretapping and bugging, to eavesdrop on citizens (*Duarte*, at pp. 38-39 and 43-44; *Jones*, at para. 73; *R. v. McQueen* (1975), 25 C.C.C. (2d) 262 (Alta. S.C. (App. Div.)), at p. 268). When introducing the legislation, Minister of Justice Otto E. Lang stated that "the key and

central portion of this bill is an attempt to increase the protection of privacy in Canada by making illegal in a general way the use of a whole series of devices, particularly mechanical and electrical devices, that can intercept conversations of people who do not want them to be intercepted" (*House of Commons Debates*, vol. IV, 1st Sess., 29th Parl., May 8, 1973, at p. 3538, addressing Bill C-176).

[88] Soon after Part VI was enacted, the Alberta Supreme Court, Appellate Division, in *McQueen*, described the legislation as "the culmination of widespread and protracted efforts to impose some measure of statutory control over indiscriminate resort to practices popularly known as wiretapping or bugging, which involves special equipment . . ., the use of which is unknown to the person under surveillance" (p. 268). As Côté J. noted more recently in this Court's decision in *Jones*, "the policy motivating Part VI was a concern with the use of intrusive surveillance technologies and their impact on citizens' privacy" (para. 73; see also *Duarte*, at pp. 43-44; *Lyons v. The Queen*, [1984] 2 S.C.R. 633, at p. 664; *R. v. Pires*, 2005 SCC 66, [2005] 3 S.C.R. 343, at para. 8; *R. v. Tse*, 2012 SCC 16, [2012] 1 S.C.R. 531, at para. 26; *TELUS Communications*, at paras. 2 and 45). Modern electronic surveillance technologies "have the potential, if uncontrolled, to annihilate privacy" (*Jones*, at para. 74, quoting *Wong*, at p. 47; see also *R. v. Hafizi*, 2023 ONCA 639, 168 O.R. (3d) 435, at paras. 110-13). The purpose of Part VI is thus to impose controls on the use of intrusive surveillance technologies that threaten to impinge upon the privacy of individuals.

[89] Under Part VI, s. 184(1)(a) creates an indictable offence punishable by up to five years imprisonment if a person "knowingly intercepts a private communication" by use of "any electro-magnetic, acoustic, mechanical or other device". Section 183 defines "electro-magnetic, acoustic, mechanical or other device", "intercept", and "private communication" for the purpose of Part VI as follows:

> ***electro-magnetic, acoustic, mechanical or other device*** means any device or apparatus that is used or is capable of being used to intercept a private communication, but does not include a hearing aid used to correct subnormal hearing of the user to not better than normal hearing;
>
> ***intercept*** includes listen to, record or acquire a communication or acquire the substance, meaning or purport thereof;
>
> . . .
>
> ***private communication*** means any oral communication, or any telecommunication, that is made by an originator who is in Canada or is intended by the originator to be received by a person who is in Canada and 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, and includes any radio-based telephone communication that is treated electronically or otherwise for the purpose of preventing intelligible reception by any person other than the person intended by the originator to receive it;

[90] Section 184(2) provides an exemption from criminal liability under s. 184(1) in certain circumstances, including when a party to the private communication consents to, or there is judicial authorization for, the interception (s. 184(2)(a) and (b); see E. G. Ewaschuk, *Criminal Pleadings & Practice in Canada* (3rd ed. (loose-leaf)), at § 4:3; M. Vauclair, T. Desjardins and P. Lachance, *Traité général de preuve et de procédure pénales 2024* (31st ed. 2024), at paras. 12.2 and 12.12).

[91] Even when one participant consents to the interception, prior judicial authorization is required under s. 184.2 to use so-called "participant surveillance" as an investigative technique. Where neither participant to a private communication consents to the interception, ss. 185 and 186 set out requirements for an application for judicial authorization for so-called "third-party electronic surveillance" under Part VI (see Vauclair, Desjardins and Lachance, at para. 12.54; *R. v. Bordage* (2000), 146 C.C.C. (3d) 549 (Que. C.A.); *R. v. Largie*, 2010 ONCA 548, 101 O.R. (3d) 561, at paras. 39-58).

[92] As this Court has noted, "[c]ompared with other search and seizure and warrant provisions in the [*Criminal*] *Code*, the provisions in Part VI contain more stringent requirements to safeguard privacy interests" (*TELUS Communications*, at para. 27, per Abella J.). For example, s. 186(1)(b) requires that "other investigative procedures have been tried and have failed, other investigative procedures are unlikely to succeed or the urgency of the matter is such that it would be impractical to carry out the investigation of the offence using only other investigative procedures". The police must show that there was "no other reasonable alternative method of investigation, in the circumstances of the particular criminal inquiry" (*R. v. Araujo*, 2000 SCC 65, [2000] 2 S.C.R. 992, at para. 29 (emphasis deleted), quoted in *TELUS Communications*, at para. 28).

[93] Under s. 184.4, the "emergency wiretap provision", a police officer may intercept a private communication without prior judicial authorization if: (a) the officer

believes on reasonable grounds that the interception is immediately necessary to prevent an unlawful act that would cause serious harm to any person or property; (b) judicial authorization could not be obtained with reasonable diligence; and (c) either the person who sent the communication or the person intended to receive it would commit the unlawful act or be harmed by it (see *Tse*, at paras. 1-2).

(b) *Application*

[94] Mr. Campbell says that the police investigative technique of engaging in a text message conversation with him by impersonating Mr. Gammie was an "interception" of Mr. Campbell's private communications using a device, namely, Mr. Gammie's cellphone. He argues that this Court should take a broad and functional approach to determining whether Part VI of the *Criminal Code* is engaged. Under this argument, the police in this case committed a criminal offence by using Mr. Gammie's phone to continue the text message conversation with Dew.

[95] I accept that the scope of an "interception" should not be approached technically to render Part VI "irrelevant to the protection of the right to privacy in new, electronic and text-based communications technologies, which generate and store copies of private communications as part of the transmission process" (*TELUS Communications*, at para. 33; see also para. 34). Even so, in my view, Part VI is not engaged here because the police did not use a device employing intrusive surveillance technology. This is a prerequisite for an interception under Part VI.

[96] As Côté J. highlighted in *Jones*, "interception relates to actions by which a third party interjects itself into the communication process in real-time through technological means" (para. 72 (emphasis added)). Part VI requires "the use of an 'electromagnetic, acoustic, mechanical or other device' other than a hearing-aid (*i.e.*, not merely the naked ear)" (Ewaschuk, at § 4:7 (emphasis deleted); see also S. C. Hutchison et al., *Search and Seizure Law in Canada* (loose-leaf), at §§ 4:15 and 4:17; Vauclair, Desjardins and Lachance, at para. 12.2 ([TRANSLATION] "by means of a technical device")).

[97] To illustrate, in *R. v. Beairsto*, 2018 ABCA 118, 68 Alta. L.R. (6th) 207, which was cited approvingly by the trial judge here (*voir dire* reasons, at para. 104) and has similar facts to the present case, the Alberta Court of Appeal held that unless the police use intrusive surveillance technology, police deception or trickery does not amount to an interception under Part VI. In *Beairsto*, the police had seized a cellphone from a suspect incident to his arrest. During the seizure, an officer noticed that the phone was not locked and saw an ongoing text message conversation that suggested drug trafficking. The officer engaged in text message conversations on the seized phone and another device, tricking the other party into sending the officer a kilogram of cocaine and leading to that party's arrest. The Alberta Court of Appeal ruled that the police conduct was not an interception under Part VI because, absent the use of an intrusive surveillance technology, "deception does not amount to an interception" (para. 24). As the court explained:

> . . . it is important to distinguish between the disclosure of found private communications and the interception of same. Where an investigation involves a basic deception as to whom the appellant is communicating with, absent intrusive technologies amounting to an "interference" between the recipient and the sender, no interception is made out. [para. 25]

[98] The need for a separate "device or apparatus" that effects the interception by surreptitious technological means can also be seen in the surrounding legislative context, such as the provision for judicial authorization, s. 186. Section 186(5.1) provides that "an authorization that permits interception by means of an electro-magnetic, acoustic, mechanical or other device includes the authority to install, maintain or remove the device covertly". Similarly, s. 186(5.2) adds that the judge who gave the authorization under s. 186(5.1) may later give a further authorization "for the covert removal" of the device after the expiry of the original authorization. A "device or apparatus" can only be installed, maintained, or removed if it is distinct from the medium of communication it is used to intercept.

[99] In communicating with Mr. Campbell, the police did not use an intrusive "electro-magnetic, acoustic, mechanical or other device" that could be "used or is capable of being used to intercept a private communication". They simply responded to text messages received on Mr. Gammie's phone, the same medium of communication or device Mr. Campbell had used to make the communication. Although this was *prima facie* an intrusion upon Mr. Campbell's reasonable expectation of privacy, it did not involve the use of covert surveillance technology, as required under Part VI.

(c) *Conclusion*

[100] The police did not engage in an interception under Part VI of the *Criminal Code*.

(2) The Search Was Not Incident to a Lawful Arrest

[101] The Crown submits that the police did not infringe s. 8 of the *Charter* because the investigative technique of engaging in a text message conversation with Mr. Campbell using Mr. Gammie's phone was a lawful search incident to the arrest of Mr. Gammie. The Crown says that the police were entitled to search Mr. Gammie's phone incident to his arrest in order to locate and arrest another suspect after becoming aware of an impending drug transaction.

[102] I do not accept this submission, which does not appear to have been raised in the courts below. In my view, the search of Mr. Gammie's phone was not a lawful search incident to arrest because it was not strictly incidental to Mr. Gammie's arrest or for the purpose of collecting evidence against another perpetrator of the offence for which Mr. Gammie was arrested.

(a) *Legal Principles*

[103] The police have authority at common law to search a person incident to a lawful arrest and to seize anything in their possession or in the surrounding area of the

arrest to ensure the safety of the police and the arrested person, prevent the person's escape, or provide evidence against them (*R. v. Stairs*, 2022 SCC 11, [2022] 1 S.C.R. 169, at para. 34; *Cloutier v. Langlois*, [1990] 1 S.C.R. 158, at pp. 180-81). This power is "extraordinary" because it does not require a warrant or reasonable and probable grounds (*Stairs*, at para. 34, quoting *Fearon*, at paras. 16 and 45). It simply requires "some reasonable basis" for what the police did (*Caslake*, at para. 20).

[104] A search incident to arrest is lawful if: (1) the arrest itself was lawful; (2) the search was truly incidental to the arrest, in that it was for a valid law enforcement objective connected to the arrest; and (3) the search was conducted reasonably (*Fearon*, at paras. 21 and 27; *Stairs*, at para. 35). Valid law enforcement objectives include ensuring the safety of the police or the public, preventing the destruction of evidence, and uncovering evidence that could be used at trial (*Fearon*, at para. 75; *Stairs*, at para. 36).

[105] In *Fearon*, Cromwell J. held that the police power to search a cellphone incident to a lawful arrest "must be used with great circumspection" (para. 80), and is permitted only under limited circumstances (para. 83). The police may search a cellphone incident to arrest "provided that the search — both what is searched and how it is searched — is strictly incidental to the arrest and that the police keep detailed notes of what has been searched and why" (para. 4 (emphasis added)). Justice Cromwell highlighted that the search must be "linked to a valid law enforcement objective relating

to the offence for which the suspect has been arrested", which "prevents routine browsing through a cell phone in an unfocussed way" (para. 57 (emphasis added)).

(b) *Application*

[106] The Crown asserts that the police pursued the law enforcement objective of preserving public safety because the first four texts on Mr. Gammie's phone alerted the police to a possible sale of heroin laced with fentanyl, which posed a grave public safety risk. The Crown submits that the subsequent text message conversation between the police and Mr. Campbell was incident to the lawful arrest of Mr. Gammie and in pursuit of this public safety objective. The Crown cites in support the comments of Cromwell J. in *Fearon*, that "[a] prompt search of a cell phone may lead investigators to other perpetrators and to stolen and easily disposed of property" (para. 67 (emphasis added)). The Crown says that this is what happened here.

[107] I disagree. The search of Mr. Gammie's cellphone was not a search "strictly" related to his arrest or the offence for which he was arrested. It was a search to collect evidence against another suspected drug trafficker, Dew, who turned out to be Mr. Campbell. Nor was Mr. Campbell "another perpetrator" of the offence for which Mr. Gammie was arrested. Instead, Mr. Campbell was arrested for separate drug trafficking and possession offences.

(c) *Conclusion*

[108] The police's text message conversation with Mr. Campbell using Mr. Gammie's phone was not a lawful search incident to the arrest of Mr. Gammie.

(3) The Search Was Justified by "Exigent Circumstances" That Made It "Impracticable" To Obtain a Warrant

[109] Finally, the Crown argues that the search of Mr. Gammie's cellphone was justified by "exigent circumstances" that made it "impracticable" to obtain a warrant under s. 11(7) of the *CDSA*. The Crown submits that the police were required to take immediate action because they reasonably suspected that the drugs offered for sale by Dew were heroin laced with fentanyl, and that had they not intervened, these drugs would have been trafficked imminently in the community. Mr. Campbell responds that the trial judge and Court of Appeal erred in how they applied the test for exigency under s. 11(7), as interpreted in this Court's governing decision in *R. v. Paterson*, 2017 SCC 15, [2017] 1 S.C.R. 202.

[110] I agree with the Crown. In my view, the trial judge's findings were grounded in the evidence and cumulatively met the legal threshold under s. 11(7).

(a) *Legal Principles*

(i) Section 11(7) of the *CDSA*

[111] Section 11(1) of the *CDSA* authorizes a justice to issue a warrant to search a place for a controlled substance and to seize it. By exception, s. 11(7) authorizes a

peace officer to search the place without a warrant, if the conditions for a warrant exist but "exigent circumstances" make it "impracticable" to obtain one. Section 11(1) and (7) provides:

> **11 (1)** A justice who, on *ex parte* application, is satisfied by information on oath that there are reasonable grounds to believe that
>
> **(a)** a controlled substance or precursor in respect of which this Act has been contravened,
>
> **(b)** any thing in which a controlled substance or precursor referred to in paragraph (a) is contained or concealed,
>
> **(c)** offence-related property, or
>
> **(d)** any thing that will afford evidence in respect of an offence under this Act or an offence, in whole or in part in relation to a contravention of this Act, under section 354 or 462.31 of the *Criminal Code*
>
> is in a place may, at any time, issue a warrant authorizing a peace officer, at any time, to search the place for any such controlled substance, precursor, property or thing and to seize it.
>
> . . .
>
> **(7)** A peace officer may exercise any of the powers described in subsection (1), (5) or (6) without a warrant if the conditions for obtaining a warrant exist but by reason of exigent circumstances it would be impracticable to obtain one.

(ii) Two Requirements Under Section 11(7)

[112] In *Paterson*, Brown J. interpreted s. 11(7) as having two requirements. First, it must be shown that there were "exigent circumstances", which "denot[e] not merely convenience, propitiousness or economy, but rather *urgency*, arising from circumstances calling for immediate police action to preserve evidence, officer safety

or public safety" (para. 33 (emphasis in original)). Second, it must be shown that the conditions for obtaining a warrant existed, but that exigent circumstances "render[ed] it 'impracticable' to obtain a warrant", meaning that it was "impossible in practice or unmanageable to obtain a warrant" (paras. 34 and 36; see also para. 28). Thus, the "exigent circumstances must be shown to cause impracticability" (para. 34). Justice Brown summarized the two requirements of s. 11(7) as follows:

> . . . for a warrantless entry to satisfy s. 11(7), the Crown must show that the entry was compelled by urgency, calling for immediate police action to preserve evidence, officer safety or public safety. Further, this urgency must be shown to have been such that taking the time to obtain a warrant would pose serious risk to those imperatives. [para. 37]

(iii) The Evidentiary Threshold: Reasonable and Probable Grounds

[113] As urged by the Crown and the intervener Criminal Lawyers' Association (Ontario), the police must have reasonable and probable grounds, rather than merely reasonable suspicion, for the claimed exigency under s. 11(7). The higher standard of reasonable and probable grounds helps ensure that the police are not relieved too readily of the obligation to obtain a warrant, given the privacy and liberty interests engaged when weighed against the needs of law enforcement (see *R. v. Grant*, [1993] 3 S.C.R. 223, at pp. 240-43; *R. v. MacDonald*, 2014 SCC 3, [2014] 1 S.C.R. 37, at paras. 31 and 41; *Tse*, at para. 33; *Fearon*, at paras. 69-73; *R. v. Hobeika*, 2020 ONCA 750, 153 O.R. (3d) 350, at para. 43).

[114] The standard of reasonable and probable grounds requires the Crown to establish the reasonable probability of the claimed exigency, based on the experience and expertise of the police and the relevant facts before them; it does not require the Crown to establish the exigency on the balance of probabilities (see *R. v. Beaver*, 2022 SCC 54, at para. 72, discussing the standard of reasonable and probable grounds for a warrantless arrest). The Crown must show that the officers' reasonable belief in the exigency was "objectively grounded in the circumstances of the case" (*R. v. Pawar*, 2020 BCCA 251, 393 C.C.C. (3d) 408, at para. 73; see also para. 79; *Beaver*, at para. 72; *Hobeika*, at para. 45). The subjective views of the police must have been objectively reasonable (*Beaver*, at para. 72; *R. v. McCormack*, 2000 BCCA 57, 133 B.C.A.C. 44, at para. 25). A vague, speculative, or general concern that delaying a search to obtain a warrant would risk the loss of evidence does not meet the exigency threshold (*Pawar*, at para. 72).

(iv) The Standard of Appellate Review

[115] A trial judge's assessment of the evidence and findings of fact in applying s. 11(7) attract "substantial deference" on appeal (see *R. v. Cornell*, 2010 SCC 31, [2010] 2 S.C.R. 142, at para. 25; *Hobeika*, at para. 45). But whether the facts as found by the trial judge meet the legal standard for exigency under s. 11(7) is a question of law reviewable for correctness (*R. v. Shepherd*, 2009 SCC 35, [2009] 2 S.C.R. 527, at para. 20; *R. v. Dussault*, 2022 SCC 16, [2022] 1 S.C.R. 306, at para. 26; *R. v. Chehil*, 2013 SCC 49, [2013] 3 S.C.R. 220, at para. 60). As this Court has emphasized,

"[w]hether there existed reasonable grounds for concern about safety or destruction of evidence must not be viewed 'through the "lens of hindsight"'" (*Cornell*, at para. 23, quoting *Crampton v. Walton*, 2005 ABCA 81, 40 Alta. L.R. (4th) 28, at para. 45). Courts should not second-guess reasonable operational decisions taken by the police (*Hobeika*, at para. 52, citing *Cornell*, at paras. 24 and 36).

(b) *Application*

[116] As the Court of Appeal noted, "[t]he trial judge thoroughly reviewed the evidence" regarding the exigent circumstances and impracticability of obtaining a warrant, as required by s. 11(7) of the *CDSA* (para. 76). Applying this Court's decision in *Paterson*, the trial judge concluded:

> . . . I find that there were exigent circumstances in this case. Without immediate action, the transaction and the drugs were at risk. The texts show that "Dew" was already impatient. At that time of day, only a telewarrant would have been available, but in any event it would likely arrive too late to complete this transaction. The likelihood that the transaction involved fentanyl and its dramatic effects on the community makes this a matter of public safety.
>
> (*voir dire* reasons, at para. 100)

[117] Like the Court of Appeal, I see no error in the trial judge's analysis. The trial judge made specific findings relating to the need for immediate police action to protect public safety and the impracticability of obtaining a warrant, which cumulatively met the legal standard under s. 11(7). I will address each finding in turn.

(i) The Situation Involved a Suspected Drug Sale Calling for Immediate Police Action

[118] The trial judge accepted that the police officers reasonably believed that they faced an urgent situation involving a suspected drug sale calling for immediate police action. Had the police not intervened, Mr. Campbell would have aborted the sale to Mr. Gammie and sold the drugs elsewhere in the community imminently. This required the police to act quickly. As the trial judge found, "[w]ithout immediate action, the transaction and the drugs were at risk. The texts show that 'Dew' was already impatient" (*voir dire* reasons, at para. 100).

[119] The trial judge's findings were supported by the officers' evidence at the *voir dire*. For example, Officer Orok testified that, based on the first four texts from Dew and his experience in investigating drug transactions, the situation was urgent. Officer Orok highlighted that Dew had texted that he did not want to drive around with the drugs, and that once he learned that Mr. Gammie had been arrested, he would not contact Mr. Gammie or bring the drugs to Guelph to sell them to him:

> Q. There's nothing of urgency in the text message.
>
> A. Other than the person said they don't want to drive around with it, that would be an urgency.
>
> Q. Okay, but that could mean that that person is going to drive around with it for a month, two weeks, right?
>
> A. Well, [in] my experience a drug dealer does not want to drive around with heroin in his pockets, or vehicle for months, or hours for that matter.
>
> . . .

> Q. Okay. You'd agree with me that there was no urgency in terms of your investigation at this point in time.
>
> A. I would say there would be urgency. Once Mr. Gammie was known to be arrested this person would not attend Guelph, would not contact Mr. Gammie anymore. [Emphasis added.]
>
> (A.R., part V, vol. I, at pp. 241-42)

[120] Sergeant Bair agreed. He testified that Dew's texts suggested that he was impatient and did not want to drive around with the drugs, and that if Mr. Gammie took too long to respond, Dew would sell the drugs elsewhere in the community, since traffickers "don't just traffic to one person" (A.R., part V, vol. I, at p. 59). He explained that it was "likely that Dew didn't just traffic to Gammie", and that like most drug traffickers, Dew "likely trafficked to other people" (p. 96). In his view, Dew was "likely to traffic this drug either to Gammie, or if not Gammie it'd be to somebody else, and that that would cause death in our community" (p. 96).

[121] Based on this evidence, I see no basis to impugn the trial judge's finding that the situation required immediate police action because it involved an impatient drug dealer who expected to sell his drugs imminently, either to Mr. Gammie or to somebody else. The police had interrupted Dew's planned sale to Mr. Gammie and were faced with Dew's expressed impatience and desire not to drive around with the drugs. Had the police not acted immediately, the drugs would have been trafficked elsewhere in the community imminently.

[122] Nor do I accept Mr. Campbell's argument that the Court of Appeal reviewed the trial judge's reasons under the wrong legal standard for exigency under s. 11(7). The Court of Appeal said that had the police not intercepted this transaction, "[t]he drugs would have been outside the reach of the police and sold to someone else at another time, ultimately reaching users on the street" (para. 83 (emphasis added)). Mr. Campbell submits that the words "at another time" and "ultimately" fall short of the high standard outlined in *Paterson,* under which the exigent circumstances must call for "immediate police action" (para. 33) to prevent an "imminent danger" (para. 32, quoting *Grant*, at p. 243).

[123] I agree that, read in isolation, the words "at another time" and "ultimately" do not correctly express the legal threshold for exigency contemplated in *Paterson*. Nevertheless, the Court of Appeal proceeded to apply the correct legal standard, which asks whether the circumstances called for immediate police action. In the very next paragraph, the Court of Appeal accepted that "the trial judge found that immediate action was required" (para. 84 (emphasis in original)). The trial judge himself had applied the exigency standard from *Paterson* and concluded that "[w]ithout immediate action, the transaction and the drugs were at risk" (*voir dire* reasons, at para. 100 (emphasis added)). I therefore see no error in how the Court of Appeal applied the exigency standard articulated in *Paterson*.

[124] Here, the police needed to act immediately to intercept the sale of these drugs to prevent them from being trafficked in the community imminently. The Crown

did not have to establish that the police had evidence that Dew had another specific sale lined up if the sale to Mr. Gammie fell through.

[125] Finally, I accept that the police cannot devise an investigative strategy to create circumstances of exigency in order to proceed without a warrant. In some cases, "[i]f the police strategy creates the supposed urgency, the circumstances are not 'exigent', but are anticipated, if not planned for, by the police" (*Hobeika*, at para. 49, per Doherty J.A., citing *R. v. Silveira*, [1995] 2 S.C.R. 297, at paras. 49-53 and 84-86, per La Forest J., dissenting, and *R. v. Phoummasak*, 2016 ONCA 46, 350 C.R.R. (2d) 370, at paras. 15-18). In this case, however, after Dew's first four text messages, the police "were faced with an active, unfolding crime" (*R. v. Webster*, 2015 BCCA 286, 374 B.C.A.C. 129, at para. 90; see also *R. v. Hunter*, 2015 BCCA 428, 378 B.C.A.C. 165, at para. 30). As a result, the police responded to, but did not create, the situation of exigency.

(ii) The Police Suspected the Drugs Were Heroin Laced With Fentanyl, Which Posed a Grave Risk to Public Safety

[126] The trial judge found that "all of the evidence supports a finding that the officers thought that they were dealing with a transaction related to heroin, likely laced with fentanyl" (*voir dire* reasons, at para. 92). He stated that "[t]he three officers that saw [Dew's four] texts and spoke about them always considered the product in question to be heroin and fentanyl. Their credibility was not attacked in cross-examination. There is no reason to reject their evidence" (para. 93). He found that the police believed

there was a "likelihood that the transaction involved fentanyl", which given "its dramatic effects on the community ma[de] this a matter of public safety" (para. 100).

[127] The trial judge's finding that Dew's first four texts, referring to "1250 for this half", likely involved heroin laced with fentanyl was supported by the evidence. Sergeant Bair reasonably inferred that the phrase "1250 for this half" was consistent with a cheap price for heroin. He testified that half an ounce of heroin was selling for about $1,400, while cocaine was selling for $1,800 an ounce and crystal methamphetamine was selling for between $600 and $900 an ounce (*voir dire* reasons, at para. 54). He also knew that, based on his experience, 75 percent of the heroin seized by police in the Guelph area in 2017 was laced with fentanyl. In addition, two confidential informers had advised the police that Mr. Gammie was selling heroin or perhaps heroin and fentanyl. As a result, Sergeant Bair reasonably believed that it was "highly likely" this was a transaction for heroin laced with fentanyl (A.R., part V, vol. I, at p. 20).

[128] Similarly, Officer Hunt testified that two reliable confidential informers had advised him that Mr. Gammie was trafficking in cocaine, heroin, and crystal methamphetamine, and that one confidential informer had included fentanyl on the list. Officer Orok testified that, based on the confidential informer information, he believed that Mr. Gammie was dealing in heroin.

[129] I see no merit in Mr. Campbell's argument that the trial judge made "questionable" inferences by finding that the police had reasonable and probable

grounds to believe the transaction involved heroin laced with fentanyl (A.F., at para. 47). Mr. Campbell says that the police "did not know who 'Dew' was, or anything about him as a drug trafficker", and "had no way of knowing if this heroin contained fentanyl and, if so, how much" (para. 47 (emphasis deleted)). This argument would erroneously require the police to establish a certainty that the drugs involved fentanyl, rather than reasonable and probable grounds. In my view, the police had such grounds.

[130] I therefore see no basis to impugn the trial judge's finding that "[o]n this evidence, . . . the officers believed that the drug transaction was for heroin laced with fentanyl" (*voir dire* reasons, at para. 96).

[131] Equally unassailable is the trial judge's finding that the officers reasonably believed that this drug transaction raised a need to protect public safety because of "[t]he likelihood that the transaction involved fentanyl and its dramatic effects on the community" (*voir dire* reasons, at para. 100). Sergeant Bair highlighted the devastation wrought by fentanyl in Ontario, and more specifically, in Guelph. In 2017, more people died in Ontario from fentanyl overdoses than from car crashes. Guelph also had higher rates of death and hospitalization from opioid overdoses than the provincial average, with 65 percent of opioid deaths in Guelph being fentanyl-related. The Guelph police took a particular interest in fentanyl investigations to "save people's lives" (A.R., part V, vol. I, at p. 11).

[132] The severe dangers posed by fentanyl trafficking were highlighted by Moldaver J. in *R. v. Parranto*, 2021 SCC 46, [2021] 3 S.C.R. 366, at paras. 94-97, but

bear repeating. Fentanyl is a highly addictive and extremely powerful opioid pain reliever and sedative intended to be administered in medical settings. It is estimated to be up to 100 times more potent than morphine and about 25 to 50 times more potent than heroin. A lethal dose can be less than two milligrams, or about the size of a single grain of salt. Fentanyl is also much cheaper than other drugs, and so drug dealers will often mix small amounts of it with other drugs to create a cheaper product with similar effects, thus significantly increasing their profits. Because fentanyl is visually indistinguishable from other hard drugs, it exposes vulnerable drug users to the risk of serious harm, including brain damage, organ damage, coma, and death. Over the past decade, fentanyl-related deaths have increased dramatically across Canada, leading to what various courts have described as a "national crisis" (para. 96). As Moldaver J. warned, "[a]s grave a threat as drugs such as heroin and cocaine pose, that threat pales in comparison to the one posed by fentanyl and its analogues. . . . [F]entanyl has altered the landscape of the substance abuse crisis in Canada, revealing itself as public enemy number one" (para. 93).

[133] Although Mr. Campbell does not dispute the dangers of fentanyl, he advances two objections to the conclusion that exigent circumstances existed.

[134] First, Mr. Campbell says that the Court of Appeal reviewed the trial judge's conclusion on exigency under a standard of reasonableness rather than correctness. He impugns the Court of Appeal's statement that "[a]lthough the trial judge's conclusion

relied on some contingencies, it was not unduly speculative, nor was it unreasonable" (para. 83 (emphasis added)).

[135] I would not give effect to this submission. The Court of Appeal's focus in the impugned paragraph was whether the evidence before the trial judge provided a basis for him to find, as a fact, that the police acted to protect public safety. The court concluded that the trial judge's finding was one "that was available to him on the evidence" (para. 83). Although the use of the word "unreasonable" may not have conveyed that the applicable standard of review was palpable and overriding error, I see no basis for appellate intervention. Because the trial judge's conclusion was neither unduly speculative nor unreasonable, it was not a palpable and overriding error.

[136] Second, Mr. Campbell asserts that the reasoning of the trial judge effectively creates a "fentanyl exception" to the standard for exigency that would be met in every case of suspected trafficking of serious drugs. He claims that a finding of exigent circumstances must be extraordinary, and that "if the standard for exigent circumstances applied in the present case were to be validated, the police would never need a warrant in any case involving a serious drug" (A.F., at para. 48).

[137] I accept that, "[b]y their nature, exigent circumstances are extraordinary and should be invoked to justify violation of a person's privacy only [when] necessary" (*R. v. Kelsy*, 2011 ONCA 605, 280 C.C.C. (3d) 456, at para. 35, per Rosenberg J.A., referring to *R. v. Feeney*, [1997] 2 S.C.R. 13, at para. 52). At the same time, I do not share Mr. Campbell's fear that the suspected presence of fentanyl alone will amount to

exigent circumstances in every case. The trial judge's finding of exigency was based on *both* the reasonably suspected presence of fentanyl *and* the need for the police to act immediately given the impatience that Dew had expressed in his text messages. In all the circumstances, the trial judge was entitled to conclude that the police were reasonably justified in seeing this as a now-or-never situation requiring them to act immediately to protect public safety.

[138] Different facts might have yielded a different conclusion. For example, had Dew texted to set up a drug transaction the next day or week, the same urgency might not have been present. Depending on the circumstances, the police may have been able, and required, to obtain a warrant. But that is not what happened here. Had the police not intervened immediately, the deadly drugs Mr. Campbell was trafficking would have been out of their reach and would have been trafficked to vulnerable drug users in the community imminently.

[139] In my view, therefore, the trial judge correctly found that the legal standard for exigent circumstances was met because the police faced an urgent situation calling for immediate police action to protect public safety.

(iii) <u>The Circumstances for Obtaining a Warrant Existed but It Was Impracticable To Obtain One</u>

[140] Mr. Campbell does not seriously dispute that the police had grounds to obtain a warrant. Based on the first four texts from Dew that the police saw on

Mr. Gammie's phone, the police had reasonable and probable grounds to believe that Dew intended to traffic heroin laced with fentanyl to Mr. Gammie. Mr. Campbell also conceded that it was impracticable for the police to obtain a warrant in the circumstances (transcript, at p. 7). As the trial judge found, late in the afternoon on June 14, 2017, "only a telewarrant would have been available, but in any event it would likely arrive too late to complete this transaction" (*voir dire* reasons, at para. 100). I see no basis to intervene with these findings.

(c) *Conclusion*

[141] I conclude that the trial judge did not err in holding that the police had authority for a warrantless search under s. 11(7) of the *CDSA*. As a result, the police did not infringe s. 8 of the *Charter*.

(4) This Court Should Decline To Entertain Mr. Campbell's New Argument That Section 11(7) of the *CDSA* Does Not Apply to the Search of a Text Message Conversation

[142] At the oral argument of this appeal, counsel for Mr. Campbell briefly raised a new argument that had not been raised in the courts below or in the written arguments before this Court. He argued that s. 11(7) of the *CDSA* only authorizes the search of a "place", which he said did not extend to the search of Mr. Campbell's text message conversation. He asserted that the search in this case could only have been authorized by a general warrant issued under s. 487.01 of the *Criminal Code*, which does not authorize a warrantless search under exigent circumstances (transcript, at pp. 20 and

131-32). Counsel for the Crown responded that had a general warrant been required, the search would have been justified under the common law doctrine of exigent circumstances (pp. 105-6).

[143] In my view, this Court should decline to entertain this new argument raised for the first time during oral argument before this Court. As this Court has repeatedly affirmed, appellate courts are generally reluctant to entertain new arguments when "they are deprived of the trial court's perspective" (*R. v. J.F.*, 2022 SCC 17, [2022] 1 S.C.R. 330, at para. 40). Parties can raise new arguments on appeal only in exceptional circumstances, having regard to, among other things, "the state of the record, fairness to all parties, the importance of having the issue resolved by th[e] [c]ourt, its suitability for decision and the broader interests of the administration of justice" (para. 41, quoting *Guindon v. Canada*, 2015 SCC 41, [2015] 3 S.C.R. 3, at para. 20; see also *Ontario (Attorney General) v. Restoule*, 2024 SCC 27, at para. 204).

[144] Here, Mr. Campbell's new argument was not raised in the courts below or in his written submissions before this Court. The question of exigency was argued at all levels of court based solely on s. 11(7) of the *CDSA*. Recasting the case at this late stage would be inappropriate given the broader interests of the administration of justice, including the value of this Court having the benefit of the reasons of the lower courts and the written submissions of parties and interveners on disputed points of law.

C. *It Is Not Necessary To Address Section 24(2) of the Charter*

[145] Because I conclude that the police did not infringe s. 8 of the *Charter*, it is not necessary to address whether the evidence should have been excluded under s. 24(2) of the *Charter*.

VI. Disposition

[146] I would dismiss the appeal.

The following are the reasons delivered by

ROWE J. —

[147] I agree fully with my colleague, Justice Jamal, in his reasons and in the result. I write separately only in response to the treatment of exigent circumstances and the analysis under s. 24(2) of the *Canadian Charter of Rights and Freedoms* by my colleagues, Justice Martin and Justice Moreau, in their dissenting reasons.

I. *Paterson* Is the Governing Case on "Exigent Circumstances"

[148] As Justice Jamal sets out, s. 11(7) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 ("*CDSA*"), authorizes peace officers to conduct a warrantless search if the conditions for a warrant exist, but "exigent circumstances" render it "impracticable" to obtain one (para. 111).

[149] *R. v. Paterson*, 2017 SCC 15, [2017] 1 S.C.R. 202, is the governing precedent on exigent circumstances under s. 11(7). My colleagues, in their dissenting reasons, trace the development of the doctrine of exigent circumstances in the pre- and post-*Charter* era. They characterize *Paterson* as a summary of the existing jurisprudence, and state that the case did not set out "a new test or alte[r] the standards required to establish exigency in established categories" (para. 310). My colleagues rely on paras. 32-33 in *Paterson* to support this view (para. 310).

[150] Respectfully, this does not give proper effect to *Paterson*. Rather, it has the effect of *Paterson* being replaced by my colleagues' preferred formulation of the law. This is problematic methodologically. Let us assume that I prefer jurisprudence that preceded the *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11, [2021] 1 S.C.R. 175 ("*GHG References*"). Applying the methodology used by my colleagues, I could sidestep the precedent that I do not prefer by saying, "The *GHG References* simply applied *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401. Therefore, I will rely on *Crown Zellerbach* as the guiding jurisprudence and not the *GHG References*." Such an approach would undermine precedent and invite sophistry in legal argument.

[151] While Justice Brown in *Paterson* referred to cases on exigency in his interpretation of s. 11(7) of the *CDSA*, as one would expect, he went on to set out a framework for exigent circumstances that continues to govern (paras. 32-33 and 37).

[152] The two paragraphs in *Paterson* which my colleagues have identified — paras. 32-33 — need to be read in the context of the decision as a whole. When this is done, it is clear that the Court in *Paterson* had two objectives: (1) to respond to an argument raised by the appellant about the relationship between s. 11(7) of the *CDSA* and s. 529.3(2) of the *Criminal Code*, R.S.C. 1985, c. C-46 (paras. 29-31); and (2) to set out a "common theme" of "urgency" for exigent circumstances under s. 11(7) (para. 33 (emphasis deleted)).

[153] As to the first objective, the appellant in *Paterson* urged the Court to import the definition of "exigent circumstances" at s. 529.3(2) of the *Criminal Code* into s. 11(7) of the *CDSA* (para. 30). This submission was rejected (para. 31).

[154] At paragraph 32, Justice Brown acknowledged that the circumstances in which exigent circumstances have been recognized bore "close resemblance" to the definitional categories in s. 529.3(2). It was in this context that he proceeded to review the existing case law:

> All that said, circumstances in which "exigent circumstances" have been recognized have borne close resemblance to the definitional categories in s. 529.3(2). This Court's jurisprudence considering s. 10 of the *Narcotic Control Act*, R.S.C. 1985, c. N-1 (which was repealed and replaced by the *CDSA*), which permitted a peace officer to search a place that was not a dwelling-house without a warrant so long as he or she believed on reasonable grounds that a narcotic offence had been committed, is instructive. That provision was held in *R. v. Grant*, [1993] 3 S.C.R. 223 ("*Grant* 1993"), to be consistent with s. 8 of the *Charter* if it were read down to permit warrantless searches only where there were exigent circumstances. Such exigent circumstances were then described to exist where there is an "imminent danger of the loss, removal, destruction or disappearance of the evidence if the search or seizure is delayed" (*Grant*

> 1993, at p. 243; *R. v. Feeney*, [1997] 2 S.C.R. 13, at para. 153, per L'Heureux-Dubé J., dissenting; and *R. v. Silveira*, [1995] 2 S.C.R. 297, at para. 51, per La Forest J., dissenting). Similarly, circumstances in which "immediate action is required for the safety of the police" were also found to qualify as "exigent" (*Feeney*, at para. 52; see also, in respect of searches to preserve officer safety, this Court's statement in *R. v. MacDonald*, 2014 SCC 3, [2014] 1 S.C.R. 37, at para. 32, that such searches will be responsive to "dangerous situations created by individuals, to which the police must react 'on the sudden'"). In *Feeney*, at para. 47, exigency was also said to possibly arise when police officers are in "hot pursuit" of a suspect (see also *R. v. Macooh*, [1993] 2 S.C.R. 802, at pp. 820-21). [Emphasis added; para. 32.]

[155] Turning to the second objective, Justice Brown's review of the jurisprudence led him to set out a "common theme" of "urgency" (para. 33):

> The common theme emerging from these descriptions of "exigent circumstances" in s. 11(7) denotes not merely convenience, propitiousness or economy, but rather *urgency*, arising from circumstances calling for immediate police action to preserve evidence, officer safety or public safety. This threshold is affirmed by the French version of s. 11(7), which reads "*l'urgence de la situation*".

[156] Justice Brown then set out a concise statement of the law on exigent circumstances under s. 11(7) of the *CDSA* (para. 37):

> In sum, I conclude that, in order for a warrantless entry to satisfy s. 11(7), the Crown must show that the entry was compelled by urgency, calling for immediate police action to preserve evidence, officer safety or public safety. Further, this urgency must be shown to have been such that taking the time to obtain a warrant would pose serious risk to those imperatives.

[157] *Paterson* is not merely a summary of the cases that came before. Rather, it sets out a definitive statement of the doctrine of exigent circumstances, which statement continues to govern.

[158] My colleagues seek to go behind *Paterson* and rely on earlier cases in order to advance their own view of "a narrow and strict application of the safety branch, or indeed any category of exigent circumstances" (para. 318). While I agree that earlier case law can provide a degree of insight into exigent circumstances (e.g., what constitutes a risk to officer safety), it is not a basis to sidestep the law as stated in *Paterson*.

II. There Was "Imminent" Risk of Harm to Public Safety

[159] Under *Paterson*, one way "urgency" can arise is when "immediate police action" is needed to preserve public safety (paras. 33 and 37).

[160] My colleagues, in their dissenting reasons, suggest that a "safety risk" to the public must be "imminent" (para. 319), but found that it was not so here as two events were needed for the risk to public safety to materialize: first, Mr. Campbell would need to sell the drugs to a street dealer; then, the street dealer would need to sell the drugs to those who would consume them (para. 321).

[161] Respectfully, this comports with neither the jurisprudence nor the trial judge's findings. The harm to the public was "imminent" as there was a narrow window

of opportunity for police to prevent what they reasonably believed was the sale by Dew of a significant quantity of drugs containing fentanyl (*voir dire* reasons (reproduced in A.R., at pp. 1-36), at paras. 96 and 100). If the police failed to prevent this sale, they believed it could well lead to deaths in the community. As Justice Jamal describes it, the police were faced with a "now-or-never" situation (para. 137).

[162] This was a dynamic and time-sensitive situation. First, Dew's texts displayed impatience about the sale (*voir dire* reasons, at para. 100), and the police believed if they took too long to reply, they would lose contact as Dew would assume Mr. Gammie was arrested (A.R., part V, vol. I, at pp. 59 and 241-42). Second, Sergeant Bair testified that he did not know who Dew was, and he was in no position to find Dew otherwise (p. 96). Third, multiple officers testified that they believed if this deal was not completed, the drugs would be trafficked elsewhere in the community (pp. 59, 96, 182-83 and 241-42). Finally, the police were aware of the potentially fatal consequences of fentanyl in their jurisdiction, thereby making this a matter of public safety (*voir dire* reasons, at para. 100).

[163] My colleagues implicitly elevate the evidentiary requirements for exigent circumstances. They state there was nothing in the record to suggest that there was "another prospective buyer immediately waiting in the wings, making the potential sale imminent" (para. 327). Respectfully, the Crown did not have to establish that Dew had another transaction lined up if the transaction with Mr. Gammie fell through. As Justice Jamal correctly states, the standard for establishing exigent circumstances is

"reasonable and probable grounds" (para. 113). The trial judge found that this was met; his findings are supported by the record.

[164] The facts in this case come within "exigent circumstances" under s. 11(7) as described in *Paterson*. There is no basis to disturb the trial judge's conclusion that, "[w]ithout immediate action, the transaction and the drugs were at risk" (*voir dire* reasons, at para. 100). The police had a limited window of opportunity to apprehend Mr. Campbell. Waiting for a telewarrant would have seriously undermined the police's objective to protect the public (A.R., part V, vol. I, at pp. 59, 95-96 and 183).

[165] One can readily contemplate comparable circumstances of a "now-or-never" situation in which police have a very limited opportunity to prevent a threat to public safety, e.g. to thwart the transfer of arms or explosives intended for use in a politically-motivated attack in a public place on a later significant date, like July 1.

III. Section 24(2) Analysis

[166] On the issue of s. 24(2) of the *Charter*, I agree with Justice Côté in her concurring reasons. I would add only the following.

[167] In relation to the first factor in *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, my colleagues, in their dissenting reasons, are of the view that none of the police officers attempted "to obtain judicial authorization in the approximately two-hour

timeframe during which they communicated with Mr. Campbell" (para. 342). However, this overlooks the finding by the trial judge that the police engaged in a discussion about what they should do before texting Mr. Campbell (*voir dire* reasons, at paras. 68, 72-73 and 132). This finding is supported by the evidence, as multiple police officers testified that they actively turned their mind to the question of judicial authorization before concluding that they had no time to obtain a warrant (A.R., part V, vol. I, at pp. 95-96, 125-26, 179-80 and 242-43). Further, while we now know that the communications between the police and Mr. Campbell extended over two hours, the police had no way to know this at the time. In a volatile and uncertain situation, minutes could well have made the difference between intercepting the fentanyl or having the opportunity to do so slip through their fingers.

The following are the reasons delivered by

CÔTÉ J. —

I. Introduction

[168] I agree with my colleague Jamal J. that the appeal should be dismissed. However, I would arrive at my conclusion for reasons more closely aligned with those of the trial judge. In my opinion, the police conduct did not amount to a search for the purposes of s. 8 of the *Canadian Charter of Rights and Freedoms*. Indeed, not all undercover police investigations result in a search or seizure within the meaning of s. 8 of the *Charter*.

[169] While I would find that the appellant, Mr. Campbell, had a subjective expectation of privacy in the subject matter at issue, his expectation of privacy was not objectively reasonable in the totality of the circumstances of this case. It is quite clear that our Court's decision in *R. v. Marakah*, 2017 SCC 59, [2017] 2 S.C.R. 608, did not create a categorical rule that all text messages or other electronic communications inherently attract a reasonable expectation of privacy. The "totality of the circumstances" test, which was endorsed in *Marakah* and in other cases involving s. 8, mandates an individualized and case-by-case analysis, requiring a court to treat an assessment under s. 8 as a "contextual, fact-based inquiry" (*R. v. McNeil*, 2009 SCC 3, [2009] 1 S.C.R. 66, at para. 12).

[170] Assessed in the totality of the circumstances of this case, any subjective expectation of privacy that the appellant may have possessed was significantly diminished and did not attract s. 8 protection. The police were at liberty to view and respond to the four text messages they passively received and observed on Mr. Gammie's lawfully seized phone. Indeed, the police were conducting an undercover investigation into criminal activity directly associated with the purpose underlying the arrest of Mr. Gammie — a drug transaction. As our Court has recognized, "[i]t is antithetical to our system of justice to proceed on the basis that the police, and other authorities, should only search for evidence which incriminates their chosen suspect" (*CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 S.C.R. 743, at para. 24).

[171] Beyond the undercover nature of the investigation, there are multiple factors that support the Crown's submission that the appellant's subjective expectation of privacy was not objectively reasonable. These factors include, but are not limited to, the circumscribed nature and lack of intrusiveness of the police conduct, the ownership of and control over the device and the electronic communications therein, and the distinction between the circumstances of the present case and those existing in *Marakah*. Like the trial judge held on the *voir dire*, I am also of the opinion that the electronic communications did not reveal any information that implicated the biographical core of the appellant, nor were they likely, based on the normative nature of the s. 8 inquiry, to reveal any, given the circumscribed nature of the police investigation.

[172] This is the basis on which I reach the same outcome as my colleague Justice Jamal and dismiss the appeal.

II. Analysis

A. *Searches for the Purposes of Section 8*

[173] It is well established that the determination of whether the police have conducted a search for the purposes of s. 8 of the *Charter* directly hinges on the presence of a reasonable expectation of privacy within the specific circumstances of the case. It is essential for courts, when conducting this assessment, to balance "sometimes conflicting interests in the privacy necessary for personal dignity and

autonomy and the need for a secure and safe society" (*R. v. Mills*, 2019 SCC 22, [2019] 2 S.C.R. 320, at para. 38, per Karakatsanis J., concurring). The assessment involves a careful equilibrium "between privacy and law enforcement interests" (*Marakah*, at para. 100, per Moldaver J., dissenting, but not on this point; see also *R. v. Hafizi*, 2023 ONCA 639, 168 O.R. (3d) 435, at para. 115).

[174] Not every government examination or investigatory technique will constitute a search under the *Charter* (*Mills*, at para. 41, per Karakatsanis J.; see also *R. v. Evans*, [1996] 1 S.C.R. 8, at para. 11; *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432, at para. 18; *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34, at para. 34). In the context of s. 8, a search "is the examination by state officials of matters over which the person enjoys a reasonable expectation of privacy" (N. Hasan et al., *Search and Seizure* (2021), at p. 2). As our Court confirmed in *Tessling*, "[i]t is only '[i]f the police activity invades a reasonable expectation of privacy [that] the activity is a search'" (para. 18, citing *R. v. Wise*, [1992] 1 S.C.R. 527, at p. 533). An inspection is therefore only deemed a search "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" (*Cole*, at para. 34).

[175] For claimants to benefit from this s. 8 protection against unreasonable state conduct, they must establish a reasonable expectation of privacy in the subject matter of the "putative" search (see *Mills*, at para. 12, citing *Marakah*, at para. 10). More specifically, they must have a subjective expectation of privacy, and their subjective

expectation must be objectively reasonable. Courts must make this assessment having regard to "the totality of the circumstances" of a given case. The assessment proceeds with the following four lines of inquiry:

> 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?
>
> (*Marakah*, at para. 11)

[176] Whether one's subjective expectation of privacy is objectively reasonable will "vary with the nature of the matter sought to be protected, the circumstances in which and the place where state intrusion occurs, and the purposes of the intrusion" (*R. v. Patrick*, 2009 SCC 17, [2009] 1 S.C.R. 579, at para. 38, citing *R. v. Colarusso*, [1994] 1 S.C.R. 20, at p. 53). Indeed, there is no "definitive list of factors that must be considered in answering this question" (*Cole*, at para. 45). Since factual circumstances differ between cases, such variation requires courts to place emphasis on different factors depending on the circumstances of a case (*R. v. Edwards*, [1996] 1 S.C.R. 128, at para. 45; *R. v. Jones*, 2017 SCC 60, [2017] 2 S.C.R. 696, at para. 13). Some examples include the place where the search occurred (see *Tessling*; *Patrick*); control over the subject matter (see *Marakah*; *Cole*; *R. v. Buhay*, 2003 SCC 30, [2003] 1 S.C.R. 631);

and shared use and ownership of a device (see *R. v. Reeves*, 2018 SCC 56, [2018] 3 S.C.R. 531).

B. *Electronic Communications and Section 8*

[177] The appellant suggests that the factual circumstances at issue in the present case are identical to those that our Court observed in *Marakah*. He submits that the facts of the two cases display "no legally significant differences" (A.F., at para. 28). I respectfully disagree and believe it is important to explain my reasoning to properly situate these reasons within our Court's jurisprudence.

[178] I do not question the idea that *Marakah* represented a groundbreaking development in our s. 8 jurisprudence and supported the fact that electronic communications may contain private content (see *Marakah*, at para. 36, per McLachlin C.J., and at para. 92, per Moldaver J.; *R. v. J.J.*, 2022 SCC 28, at para. 238, per Brown J., dissenting in part). The majority's decision in that case has undoubtedly had a profound impact on judicial decision-making across Canada for both trial and appellate courts. Indeed, it has served as a catalyst and has paved the way for strengthened legal protections under the *Charter*, allowing some senders of text messages to maintain a reasonable expectation of privacy in their electronic communications.

[179] But that is not always the case. It must be remembered that *Marakah* did not set out a categorical proposition that all senders of text messages retain a reasonable

expectation of privacy over their electronic communications, nor did it suggest that all text message conversations would attract such a reasonable expectation. The Crown in this case asserts that *Marakah* "did not create a rule of automatic standing for all communications in written electronic form" (R.F., at para. 3). I cannot agree more. Indeed, the Court of Appeal for Ontario recently proceeded on the same understanding in *R. v. Knelsen*, 2024 ONCA 501, at para. 38, where van Rensburg J.A. wrote that "[t]here is no automatic standing to assert a s. 8 right in respect of text messages that have been sent and received" (emphasis deleted). It is imperative to provide this clarification given the evolving jurisprudence referenced by the Crown, which seemingly equates a private communication with inherent standing under s. 8 in any context (R.F., at para. 34; see also *R. v. Rafferty*, 2018 ONCJ 881, 424 C.R.R. (2d) 88, at para. 23; *R. v. Devic*, 2018 BCPC 318, at paras. 29-31; *R. v. Bear-Knight*, 2021 SKQB 258, [2022] 2 W.W.R. 537, at paras. 18-31; *R. v. Findlay*, 2023 MBPC 17, 529 C.R.R. (2d) 284, at paras. 7-9).

[180] Writing for the majority in *Marakah*, McLachlin C.J. expressly rejected the proposition that text message communications would *always* attract a reasonable expectation of privacy. She underscored that this notion would not invariably hold true in every case, and explained that "depending on the totality of the circumstances", text message conversations "may in some cases" attract protection for the sender under s. 8 (para. 4). She clarified this point at para. 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. [Underlining added.]

[181] Implicit in McLachlin C.J.'s conclusion is the recognition that the "totality of the circumstances" test is contingent upon the unique details and context of each case. The then-Chief Justice understood that each case will involve its own distinct factual scenario, requiring an assessment within the circumstances of that case. In a concurring opinion, Rowe J. recognized the same principle in *Marakah*, namely that whether a subjective expectation is objectively reasonable "is assessed by a number of considerations that vary according to the circumstances of each case" (para. 84 (emphasis added)). For his part, Moldaver J. echoed this sentiment in his dissenting analysis (see para. 98; see also *Knelsen*, at para. 38).

[182] In my view, the "totality of the circumstances" test would be rendered meaningless if courts were not permitted to evaluate a case within the context of its unique circumstances. The connection between an individual and the subject matter of the search "must be examined by looking at the totality of the circumstances in a particular case" (*Marakah*, at paras. 98 and 113, per Moldaver J., dissenting, but not on this point; see also *R. v. Spencer*, 2014 SCC 43, [2014] 2 S.C.R. 212, at para. 17). In this regard, I would reiterate what I wrote in *Reeves*: "Expectations of privacy in respect of certain objects or spaces may be recognized as objectively reasonable in some circumstances, but not in others" (para. 110, citing *R. v. M. (M.R.)*, [1998] 3 S.C.R.

393, at para. 33). While general rules surrounding s. 8 protections have developed in the jurisprudence (for a recent example, see *R. v. Bykovets*, 2024 SCC 6, at para. 14), it is critical that the focus remain on the totality of the circumstances in each case.

[183] Contrary to some lower court findings that a reasonable expectation of privacy will almost always attach to text message conversations (see, e.g., *Rafferty*, at para. 23), our Court's decision in *Marakah* did not create any such rule. Rather, the protection was expressly circumscribed as one that "may" apply "in some cases" (para. 4). I share my colleague Rowe J.'s sense — expressed during the hearing in the instant appeal — that once the totality of the circumstances test was adopted, a case-by-case assessment became necessary given that each case represents its own facts, circumstances, challenges, and nuances (transcript, at pp. 87-89). Depending on the facts of a case, a court will be required to focus on certain factors (*Mills*, at para. 31, per Brown J., and at para. 62, per Karakatsanis J.). In this regard, I would agree with the Crown's characterization of the law during oral argument that "*Marakah* does not stand for the proposition that there is automatic standing when we are talking about text messages" (transcript, at p. 78). With great respect, and as I discuss below, reasoning that rests largely on the proposition that text messaging is a medium of communication associated with the "utmost privacy" and has the potential to disclose intimate personal details effectively implies that all such communications, by their very nature, attract a reasonable expectation of privacy. That is not an accurate reflection of our Court's decision in *Marakah*, and goes beyond the actual state of the law.

C. *Application*

[184] The Crown concedes, before our Court and the courts below, that the subject matter of the search is the electronic communications between the appellant and Mr. Gammie. The Crown further concedes that the appellant had a direct interest in those electronic communications. These matters are not disputed.

[185] I agree with my colleague Jamal J. that the appellant had a subjective expectation of privacy in the subject matter at issue. As he has noted and as the jurisprudence reflects, the threshold to establish this subjective expectation is low (see Jamal J.'s reasons, at para. 45, *Marakah*, at para. 22; *Reeves*, at para. 32; see also *R. v. Labelle*, 2019 ONCA 557, 379 C.C.C. (3d) 270, at para. 31, citing *Jones*). The trial judge was entitled to accept some, all, or none of the appellant's evidence on this issue and found that the two individuals generally expected their conversation to be kept private (*voir dire* reasons (reproduced in A.R., at pp. 1-36), at para. 39; see also C.A. reasons, 2022 ONCA 666, 163 O.R. (3d) 355, at para. 36).

[186] However, I would respectfully part ways with Jamal J. and the Court of Appeal below with respect to whether the appellant's subjective expectation of privacy was objectively reasonable. My analysis focuses on that issue only. Given my conclusion in this regard, I need not address whether the search was authorized by law, whether the law itself was reasonable, and whether the manner in which the search took place was reasonable (see *R. v. Collins*, [1987] 1 S.C.R. 265; *R. v. Caslake*, [1998] 1 S.C.R. 51). It is only necessary to consider those questions after a court finds that an

applicant has established the test for standing to challenge what would correspondingly be deemed a search for the purposes of s. 8. Unlike *Marakah* and the investigatory technique employed in that case, the circumstances in the present appeal do not support an objectively reasonable expectation of privacy.

[187] My analysis is based on the "totality of the circumstances" test as well as the understanding that assessments under s. 8 are informed by a normative approach rather than one that is purely descriptive (see *Mills*, at para. 20; *Tessling*, at para. 42). However, it is noteworthy that the normative approach should be considered in light of the totality of circumstances specific to the case.

[188] The totality of the circumstances approach has served as the cornerstone of our Court's s. 8 jurisprudence for many years (see, e.g., *Patrick*; *Reeves*; *Mills*; *Cole*). This approach cannot be ignored in favour of "value judgments". While the normative approach is important to help ascertain the free and democratic society that reasonable and informed Canadians expect to live in (Jamal J.'s reasons, at para. 48), courts cannot lose sight of the totality of the circumstances of the specific cases before them and, accordingly, the police conduct therein. The totality of the circumstances test has had and continues to have precedential value. For the purposes of the present appeal, it is true that the police cannot peruse the contents of a phone at liberty and without any limits. But their actions may be appropriate if they limit and circumscribe the scope of their conduct to the investigation before them. The holding in *Marakah* that a text message conversation *can* attract a reasonable expectation of privacy in some cases (at

paras. 4-5) necessarily leads to the conclusion that there will be situations where a text message conversation does not do so. This is one such case.

[189] I turn now to discuss the several factors in this case that support the fact that the appellant's subjective expectation of privacy was not objectively reasonable.

(1) Undercover Police Investigations

[190] First, I begin by considering the undercover nature of the investigation.

[191] On numerous occasions, our Court has recognized the important function that undercover police techniques fulfil for the effective operation of our criminal justice system. For example, in the child luring context, the Court described undercover sting operations as "an important tool — if not the most important tool — available to the police in detecting offenders who target children and preventing them from doing actual harm to children" (*R. v. Friesen*, 2020 SCC 9, [2020] 1 S.C.R. 424, at para. 94). The protection under s. 8 "does not prevent police from communicating with individuals in the course of an undercover investigation" (*Mills*, at para. 42, per Karakatsanis J.). Indeed, in some circumstances the police must result to subterfuge to combat criminal activity (see *R. v. Liew*, [1999] 3 S.C.R. 227, at para. 45). This is especially the case as our world faces the evolution of technology in the information age and of the devices we use, where "[s]ome of the most pernicious crimes are the hardest to investigate" (*R. v. Ramelson*, 2022 SCC 44, at para. 1). As our Court has indicated, "[c]ell phones are used to facilitate criminal activity" and are the "'bread and

butter' of the drug trade and the means by which drugs are marketed on the street" (*R. v. Fearon*, 2014 SCC 77, [2014] 3 S.C.R. 621, at para. 48, citing *R. v. Howell*, 2011 NSSC 284, 313 N.S.R. (2d) 4, at para. 39).

[192] I disagree with my colleagues Martin and Moreau JJ. when they say that the police were engaged in a technique that was "not analogous to an undercover officer operating under the auspice of a fictional persona" (para. 259). In my respectful view, this is exactly what the police were engaged in here. At the *voir dire*, the trial judge found, and the appellant conceded, that the police lawfully seized Mr. Gammie's cell phone incident to arrest (paras. 7 and 32). After the police seized the phone, they observed the phone light up and receive four text messages that were visible on the lock screen. The appellant testified that he did not send the first four text messages, which were sent by "Dew", and that the phone was not his. In fact, the appellant "acknowledged that [he] has no standing to object to the [first four] texts between 'Dew' and Mr. Gammie" (*voir dire* reasons, at para. 34; see also transcript, at pp. 4 and 75-76).

[193] These first four text messages that the police observed triggered their subsequent actions. The record illustrates that when the police observed these messages, which appeared when they were in lawful possession of Mr. Gammie's phone, they evidently developed some suspicion. It is important to reiterate that the officers had just then arrested Mr. Gammie for drug-related activity:

> Mr. Gammie was known to the police. He had many convictions for drug offences. He had been arrested and convicted for selling cocaine. Sgt. Bair had known Mr. Gammie since he was 17 years of age. He was known as a street-level dealer or enforcer. Mr. Gammie had been released from custody in April 2017. When he came out of jail, he apparently continued with the same business.
>
> (*voir dire* reasons, at para. 49)

[194] The substance of the four text messages that were received was consistent with a drug transaction, namely heroin laced with fentanyl, according to the officer's testimony accepted at trial (see *voir dire* reasons, at paras. 58, 92 and 96). In addition, the confidential informant involved in the investigation advised the police that Mr. Gammie was dealing in heroin (para. 58). To the police, "Mr. Gammie [had been] leaving to pick up the drugs that were being offered when he was arrested" (para. 57). On a holistic view of the matter, it is clear that from the time they observed the first four text messages, the officers reasonably suspected that they were dealing with a drug transaction that was sufficiently connected to the arrest that had just been made (see, generally, *Fearon*, at para. 21 (discussing searches incident to arrest)).

[195] Once again, the evidence accepted at trial was that the appellant did not send the first four text messages — Dew sent them. Thus, the appellant had not yet engaged in any conversation with Mr. Gammie (or the police). If there was any conversation at all, at that point it was between Dew and Mr. Gammie, not the appellant. According to the evidence, the conversation between the appellant and the police only began when the police, following receipt of Dew's four text messages, commenced an undercover investigation. As a result, the police became involved in a

conversation that was not previously taking place between the appellant and Mr. Gammie; the conversation had just started. In fact, even if there was any pre-existing conversation, it did not involve the appellant. The police participated in a conversation because they had, on the evidence, formed a suspicion based on objectively discernible facts (see *R. v. Chehil*, 2013 SCC 49, [2013] 3 S.C.R. 220, at para. 3).

[196] Unlike in *Marakah*, where officers searched a suspect's phone and found incriminating messages that were *already* exchanged, the present matter involved police participating in the electronic exchange as part of an undercover drug investigation. They did not search a pre-existing conversation, because there *was no* pre-existing conversation between the appellant and Mr. Gammie. That was readily apparent from the introductory messages that Dew sent to Mr. Gammie's phone. Dew had commenced the conversation at that time. While I recognize that *Mills* involved the police's creation of a completely fictitious person, the appellant in the present appeal happened to be sending text messages to someone whose phone was lawfully in the hands of the police (see *Mills*, at paras. 44 and 50). As one author points out, this was important for our Court's decision in *Mills*:

> For the majority in *Mills*, this possibility of police "interception" through police participation in the conversation was, in fact, determinative of the reasonableness of Mr. Mills' expectation of privacy. This is because, though Mr. Mills was unaware that he was conversing with a police officer, the police knew that he was conversing with a police officer. The fact that the police were always aware that Mr. Mills was not communicating with an actual child was determinative of the objective reasonableness of his expectation of privacy. In effect, it was <u>because</u> the messages were directly

> "intercepted" by the police that Mr. Mills could not reasonably expect that the messages would be kept private from the state.
>
> (M. Biddulph, "The Privacy Paradox: *Marakah, Mills*, and the Diminished Protections of Section 8" (2020), 43:5 *Man. L.J.* 161, at p. 187 (emphasis in original).)

(2) Intrusiveness of Police Conduct

[197] Second, the officers' "lack of intrusiveness is a factor in the assessment" (*Tessling*, at para. 50, citing *R. v. Wong*, [1990] 3 S.C.R. 36, at p. 43; see also *Buhay*, at para. 36; *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425, at p. 594; *R. v. Plant*, [1993] 3 S.C.R. 281, at p. 295). It is true that cell phones are capable of revealing deeply private information and that a search of a cell phone "implicates important privacy interests which are different in both nature and extent from the search of other 'places'" (*Fearon*, at para. 51, citing *R. v. Vu*, 2013 SCC 60, [2013] 3 S.C.R. 657, at paras. 38 and 40-45). From a normative perspective, there is no question that the electronic conversations therein *may* reveal "details about [individuals'] activities, their relationships, and even their identities that they would never reveal to the world at large" (*Marakah*, at para. 36). But strict reliance on this reasoning without considering the totality of the circumstances would lead to the conclusion that all electronic conversations will attract a reasonable expectation of privacy. That cannot be the case.

[198] The fact that electronic communications *can* reveal a wealth of biographical core information does not mean that every police intrusion into electronic communications will reveal such information. *Tessling* is a great illustration of that rationale. In that case, Binnie J., writing for the Court, held that the accused had no reasonable expectation of privacy over the heat activity emanating from his home. While there is a clear and longstanding privacy interest in the activities that go on in one's home, the FLIR technology used by police in that case, which records images of heat radiating from a building, revealed little about these activities. It offered "no insight into [the accused's] private life, and reveal[ed] nothing of his 'biographical core of personal information'" (para. 63). Although the surveillance technology revealed some information related to activities within the accused's home, a place where "our most intimate and private activities are most likely to take place" (para. 22), there was no search within the meaning of s. 8 because of the limitations on the type of information that could be gathered through FLIR technology. In other words, there was no search because of the lack of intrusiveness of the police technique. In the same vein, the way in which the police carried out the conversation with the appellant in the instant case, making sure not to ask any probing questions or deviate from facilitating the drug deal, ensured that no biographical core information was obtained through the conversation aside from what was already lawfully known to police from the first four messages.

[199] My colleagues take the position that the police investigative technique was especially intrusive in this case (Jamal J.'s reasons, at para. 63; Martin and

Moreau JJ.'s reasons, at paras. 258-60). Respectfully, my colleagues focus too narrowly and categorically on the fact that the appellant thought he was texting Mr. Gammie without examining the broader circumstances of the investigative technique.

[200] To the contrary, the totality of the evidence in this case indicates that the police did not intrusively search Mr. Gammie's phone. They did not unlock the phone, nor did they search its contents. I agree with the Crown that in this case, the nature of the undercover police technique was narrowly circumscribed after the police lawfully observed the first four text messages. Not only was the nature of the communications apparent to the police from those messages (i.e., that a conversation was initiated for the purpose of facilitating a drug deal), but they also did not ask any probing questions when they chose to respond to the messages. In other words, the police did not seek to elicit any response that would have shed light on the appellant's biographical core, nor did they search the contents of the phone or any pre-existing communications. *Instead*, they carefully sought to instruct the appellant as to where they should meet and inquire about how long he would take to arrive. Indeed, the police were only focused on facilitating and completing the drug transaction. The police learned nothing new about the appellant from the ensuing conversation, nor did they attempt to. In these circumstances, where police take great caution not to discover any new biographical core information, the conversation between the appellant and police can even sometimes be *less* intrusive than, to take my colleagues' example, answering an

arrestee's phone and pretending to be a fictional person (Martin and Moreau JJ.'s reasons, at para. 259).

[201] I note here that my analysis considers the information known to the police before the conversation between the officer and the appellant occurred, such as the nature of the conversation, which was revealed in the first four text messages. In contrast, despite purporting to give consideration to the "totality of the circumstances", my colleague Jamal J.'s approach would have the police and courts turn a blind eye to information lawfully known by police ahead of time for the purposes of the reasonable expectation of privacy analysis, given that the focus is on the potential for the *type* of information or the general subject matter of the search (i.e., a text message conversation) to reveal biographical core information is relevant (para. 57). This is a fundamental distinction between our positions.

[202] Keeping the normative approach in mind, there was *no* potential for personal information revealing core biographical information about the appellant to be transmitted. It is true that our Court has recognized criminal activity to also be of a private nature, citing the content neutrality involved in assessments under s. 8 (*Marakah*, at paras. 31-32). But we must be careful not to suggest that, in the context of a text message conversation, if the accused was engaged in criminal activity, their expectation of privacy is *automatically* objectively reasonable. It is reasonable to suggest that where there is a putative search, there will *always* be suspected criminal activity on the other end. The logic would therefore be that the text message

communications within the context of a criminal investigation would *always* reveal private information (i.e., criminal activity), thereby once again suggesting that an accused has a reasonable expectation of privacy in all such communications.

[203] Indeed, Jamal J.'s approach actually goes beyond the conclusion that every putative search of a text message conversation will attract a reasonable expectation of privacy. His reliance on content neutrality leads to the logical conclusion that *every* text message conversation will attract a reasonable expectation of privacy regardless of the content within it, because it is a conversation that "has the potential or tendency to reveal deeply personal and biographical information about the participants" (para. 59). This reasoning would once again cut against McLachlin C.J.'s point in *Marakah* that a text message conversation *can* attract a reasonable expectation of privacy in some, but not all, cases (para. 4).

[204] I find it important to emphasize and reiterate that in this case, the police were able to participate in the text conversation on the lock screen without unlocking the phone or viewing any of its other contents (C.A. reasons, at para. 13; R.F., at paras. 43 and 79). The police did not review pre-existing text messages exchanges between Mr. Gammie and anyone else; the first four messages clearly marked the beginning of a conversation, one that the appellant joined only after it had already begun. In my view, the police's participation in the conversation on the lock screen was akin to the police having lawful possession of a locked cell phone and answering a phone call to further an undercover investigation. I respectfully disagree with my

colleague's characterization of the difference between the two (see Jamal J.'s reasons, at para. 70), as I explain further below. In fact, it is reasonable to suggest that an undercover officer likely has *less* control over the circumscribed nature of a phone conversation than that of a text message conversation. Unlike a phone conversation, a text message conversation gives the officer time to prudently prepare a response that would not be probing and that would be narrower in its focus. I agree with the Crown that where the police execute a search warrant and the target's phone rings, there is nothing wrong with the police answering that phone, which has been lawfully secured.

[205] This is not unheard of in the jurisprudence and, as the Court of Appeal below found and my colleague Jamal J. concludes, is not necessarily improper (C.A. reasons, at para. 67; Jamal J.'s reasons, at para. 70). In *R. v. Singh* (1998), 127 C.C.C. (3d) 429, the British Columbia Court of Appeal found that the police did not intercept a private communication but rather simply received a call "from the appellant despite the fact that the appellant was not of the view that he was speaking to a peace officer" (para. 4). In *R. v. Edwards* (1994), 73 O.A.C. 55, a decision subsequently affirmed by this Court ([1996] 1 S.C.R. 128), the Court of Appeal for Ontario saw no issue with the police answering a seized phone several times or even calling numbers they retained from a pager. The factual circumstances in the case of *R. v. Baldree*, 2013 SCC 35, [2013] 2 S.C.R. 520, also permitted such police conduct. In that case, the police arrested the accused and seized his cell phone, which received a phone call while it was being held at the police station. An officer answered the call and facilitated a drug transaction

(see paras. 13-15; see also *R. v. Ramsum*, 2003 ABQB 45, 329 A.R. 370, at paras. 30-31).

[206] Indeed, it is also noteworthy that our Court has not treated as a search the police's ability to *themselves* call phone numbers suspected to be associated with the drug trade (see *R. v. Ahmad*, 2020 SCC 11, [2020] 1 S.C.R. 577). In the case law considering the law on entrapment, our Court has held that, while reasonable suspicion is required before police can present a person with an opportunity to commit an offence, police are permitted to develop this reasonable suspicion once they are actually engaged in a conversation with the suspect (*Ahmad*, at para. 54). Police are permitted to provide a "drop name" to put the seller at ease, by suggesting they are associated with a person known to them. This is done partially in order to increase the likelihood that the suspect will trust them. In contrast, the conversation between the appellant and police here involved no deceptive technique aside from responding by text from Mr. Gammie's phone; the police simply responded to facilitate a transaction that was evidently already planned. Although reasonable suspicion was not required in these circumstances, the police certainly had it in this case.

[207] The fact that text messages themselves inherently create a permanent record is simply a result of one's choice to use a written medium; that does not transform the officers' conduct "into a search or seizure" (see *Mills*, at paras. 45 and 48, per Karakatsanis J.). Once again, the police in this case did not unlock the phone to review its contents or other phone records. They passively received four messages that

had the hallmarks of a drug deal involving the known suspect whom they had arrested. After considering any potentially engaged privacy rights, they responded on the lock screen and did not review any contents of the phone. They were not after any record of the conversation or any information it could provide. Rather, they participated in the conversation for the limited and circumscribed purpose of facilitating the drug delivery, nothing more (R.F., at para. 49). Nothing they did would "offend society's notions of decency and fair play" such as impersonating a therapist or a prison chaplain (*Mills*, at para. 63).

[208] The fact that the police *could* have — if they so chose — answered a phone call from Dew's phone and facilitated a drug transaction should not change the analysis. Aside from the practical fact that this may have jeopardized their investigation, as the appellant could have recognized it was not Mr. Gammie's voice, there is no meaningful distinction between answering a phone call from Dew's phone and conversing via text where the record of the conversation is not what police were after.

[209] My colleague Jamal J. concludes that his recognition of a privacy interest in the circumstances of this case would not prevent undercover police work — it would "merely impos[e] constitutional constraints on police investigations involving text messaging by requiring that the police comply with s. 8 of the *Charter*" (para. 71). My colleague does not explain why this is the case. Indeed, my colleagues Martin and Moreau JJ. make a similar point, stating that recognizing a privacy interest here "does not thwart the ability of police to investigate crimes and uncover evidence through

searches" (para. 261). It just requires them to "have lawful authority to do so" — which, in most cases, would require the police to obtain a warrant (para. 261). With respect, I disagree. To the contrary, adding new "constraints" by requiring police to obtain a search warrant will of course impede the ability of police to investigate in a greater amount of cases. Furthermore, this misses the point: the problem is that my colleagues' approaches make an unprincipled distinction about when s. 8 of the *Charter* should apply. Section 8 is engaged if this police investigation occurs over text, yet there are no impediments to investigating if the police carry on the same investigation over a phone call. As technology and online communications become more ubiquitous, the ways in which crimes are committed in the online world also evolve (see *Mills*, at para. 39), be it via phone calls, text messages, or other mediums of communication. The police must be permitted to adapt (see *Ahmad*, at para. 147).

(3) Control and Ownership

[210] Third, the concepts of control and ownership are relevant to the circumstances of this case and have both "long been considered relevant" in the context of s. 8 protection (*Marakah*, at para. 38). It is true that one's lack of control over the subject matter of a putative search is not dispositive of the s. 8 inquiry (para. 38). As both McLachlin C.J., for the majority, and Moldaver J., dissenting, separately recognized in *Marakah*, a lack of exclusive control over the subject matter does not necessarily eliminate a reasonable expectation of privacy. It is "one element to be considered in the totality of the circumstances in determining the objective

reasonableness of a subjective expectation of privacy" (para. 38; see also paras. 130-31). Similarly, "ownership is relevant, but not determinative" in the inquiry (*Reeves*, at para. 39). In *Reeves*, the accused shared a home computer with his spouse. His spouse discovered child pornography on it, then consented to police entry into the home and the taking of the home computer. However, our Court determined that the accused maintained a reasonable expectation of privacy in that computer.

[211] Given that a reasonable expectation of privacy may exist on a spectrum (*Marakah*, at para. 29), I am of the view that the appellant's lack of total control over the conversation and ownership of the phone, as reflected in the record, support a significantly diminished expectation of privacy which is not objectively reasonable in the circumstances of this case. With respect to control, the appellant had, at best, a shared control with Dew over the phone that he was using to communicate with Mr. Gammie. While it is true that the subject matter is the electronic communication at issue and not the phone itself, I agree with the Crown that the place where that conversation occurs remains as "one of several factors that must be weighed" (*Marakah*, at para. 30; R.F., at para. 40; see also Jamal J.'s reasons, at para. 53). Indeed, as McLachlin C.J. recognized in *Marakah*, "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" (para. 29 (emphasis added)). In the present case, the evidence is to the effect that the phone was Dew's and was given to the appellant to facilitate the drug transaction.

[212] To that end, the factor of ownership plays an equally important role in this case. The appellant's evidence was that the phone he was using was not his own; it belonged to Dew and he only borrowed it when he was delivering drugs. In addition, the four text messages did not come from him but were sent by Dew to Mr. Gammie. The phone itself was also to be returned to Dew following the completed delivery (*voir dire* reasons, at para. 33). The appellant's lack of ownership over both the phone and the first four messages is closely related to his lack of control over them. At best, the appellant was borrowing Dew's phone, and the two had a shared control over the communications that came after the first four messages. This diminishes the appellant's claim to an objectively reasonable expectation of privacy.

[213] In *Marakah*, McLachlin C.J. expressly contemplated that, while there was a reasonable expectation of privacy in the electronic conversation between Mr. Marakah and his accomplice, which was accessed on the latter's device, "different facts may well lead to a different result" (para. 55). McLachlin C.J. noted that it was not a case of "messages posted on social media, conversations occurring in crowded Internet chat rooms, or comments posted on online message boards" (para. 55). These examples illustrate that the more people that are involved in a conversation and the less control one has over who might see it, the more likely it is that one's subjective expectation of privacy will not be objectively reasonable.

[214] Mr. Marakah's reasonable expectation of privacy was diminished due to his lack of control in a *two-party* electronic conversation on cell phones that were

owned by the parties to the conversation. From the appellant's own evidence, we can gather that at least three people had access to the conversation here: Mr. Gammie, who owned the phone; Dew, who sent the first four text messages; and the appellant. The appellant decided to continue the conversation despite his suspicion that he was texting someone else because the messages sent were out of character for Mr. Gammie (A.R., part V, vol. I, at pp. 312-16). This added a potential fourth party to the conversation from his perspective. All of this occurred on a phone that the appellant borrowed only for the purpose of carrying out drug deliveries and that he expected to return after the deal had been concluded (pp. 305-10). If Mr. Marakah's expectation of privacy was already diminished in his case, the fact that there was even less control in the present case suggests that the appellant's expectation of privacy was *significantly* diminished and, indeed, entirely negated when we consider the totality of the circumstances.

[215] Furthermore, the analysis of both control and ownership in this case must be tied to the relationship between the individuals involved. Our Court has said that the relationship between the parties to the conversation may too factor into the s. 8 analysis (see *Plant*, at p. 293). In *Mills*, the Court placed significant emphasis on the lack of a relationship between Mr. Mills and the "child" who happened to be the police. For example, Brown J. repeatedly highlighted the fact that Mr. Mills was dealing with someone "who was a stranger to him" (paras. 4, 22, 24, 27 and 30). In my opinion, he focused on the relationship for the limited purpose of emphasizing that the police created a fictitious person; the relationship was therefore known to them, and there was no risk that the police would breach the boundaries of that pre-existing conversation.

[216] It is then important to highlight the evidence of the existing relationship in the present case, which shows that the appellant barely knew Mr. Gammie. Unlike the accused in *Marakah*, the appellant here never asked Mr. Gammie to keep their electronic communications private; nor did he ask him to delete any of the messages. As the Crown appropriately emphasized, the appellant's evidence was unclear about whether or not he knew Mr. Gammie (R.F., at para. 40). In the appellant's testimony, he suggested that he had never met Mr. Gammie, yet he later admitted to having delivered drugs to him before. His evidence was inconsistent. Perhaps more important, however, is the fact that he suspected that the person he was sending text messages to may not have been Mr. Gammie (see I.F., Attorney General of Ontario, at para. 25).

[217] Viewing the matter normatively, I would return to my earlier comments about the nature of the text messages, the locked screen, and the circumscribed nature of the police investigation and text message responses. These circumstances would have made clear to the police the fact that they were not breaching the confines of a given relationship or reviewing any prior conversations. To reiterate, the police knew the text messages related to a drug transaction involving Mr. Gammie, whom they had just arrested for drug-related activity. They did not attempt to unlock the phone. And they responded without probing for further information. Instead, they simply and carefully sought to instruct the appellant as to where they should meet and to inquire about how long he would take to arrive. Having regard to what the first four messages revealed, "[t]he police could, therefore, confidently and accurately conclude that no s. 8 concern would arise from their reviewing these particular communications" given

the circumscribed nature of the police investigation and their associated text messages sent from the phone's lock screen to the appellant (see *Mills*, at para. 27, per Brown J.). Indeed, "what the police were really after" was the facilitation of the drug transaction (see *Reeves*, at para. 29, regarding how to define the subject matter of a putative search).

(4) Conclusion on Reasonable Expectation of Privacy

[218] Applying the totality of the circumstances test as well as having regard for the normative approach that informs our s. 8 jurisprudence and for the factual record in this case, I find that the appellant's subjective expectation of privacy was not objectively reasonable. In my view, suggesting that the police should have simply closed their eyes to the first four text messages and not investigated after having lawful possession of the phone would cut against the "essential role of the police . . . to investigate crimes" (*R. v. Storrey*, [1990] 1 S.C.R. 241, at p. 254) and "the maintenance of law and order and the security of Canadian society" (*R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442, at para. 51). It remains important that "principle and practicality must not be strangers in the application of s. 8" (*Marakah*, at para. 89, per Rowe J.). In the present case, the police were permitted to carry out an undercover investigation by participating in a conversation in the circumscribed and focused manner in which they did.

(5) Comments on Interception, Exigency, and Section 24(2) of the *Charter*

[219] Given that I have found that the appellant had no reasonable expectation of privacy in the circumstances, my analysis ends here. However, I find it necessary to comment on a few aspects of the analysis of my colleagues Martin and Moreau JJ. that may have consequences for future cases.

(a) *Interception*

[220] After concluding that the appellant had a reasonable expectation of privacy in the circumstances, my colleagues Martin and Moreau JJ. state that "this Court lacks the requisite basis to pronounce conclusively on which statutory provision would permit a court to authorize [the police] conduct", given the absence of full argument and of the benefit of the consideration of the Court of Appeal on this issue (para. 277). Nevertheless, they say this immediately after several paragraphs of analysis that imply clearly that the actions of police in this case would amount to an interception.

[221] In my respectful view, generally speaking, where it is acknowledged that our Court should not rule on an issue without the benefit of full argument and consideration from the Court of Appeal below, we should be careful not to nonetheless provide a significant analysis of the issue. Though Martin and Moreau JJ. may not intend to rule definitively on the issue, I believe that caution is warranted in the circumstances. In my view, it is enough for the purposes of their analysis to only say that no warrant was obtained.

[222] More importantly, however, I wish to comment on the consequences that my colleagues' implicit finding — that is, that the investigation in this case amounted to an interception — would have on law enforcement efforts. This implicit finding would go above and beyond the consequences of finding only that there is a reasonable expectation of privacy in circumstances where police assume the identity of a third party in a text message conversation.

[223] Finding that the conduct of police here required some form of Part VI authorization rather than a general warrant under s. 487.01 of the *Criminal Code*, R.S.C. 1985, c. C-46, is not merely a matter of choosing which type of authorization is needed between two similar provisions with nearly identical requirements. Part VI imposes greater hurdles to obtaining authorization. Martin and Moreau JJ.'s description of the police "interject[ing] themselves into the communication process between Mr. Campbell and Mr. Gammie in real time" suggests that third-party wiretap authorization would be required in the circumstances (para. 272 (emphasis added)). Pursuant to s. 186 of the *Criminal Code*, this would require the police to establish, among other things, investigative necessity in order to obtain authorization to carry on the conversation.

[224] Even where police are not assuming an identity and are instead creating a fictitious one, applying my colleagues' logic would mean that in any situation where police are carrying on a text message conversation with a suspect, this would constitute participant surveillance under Part VI, and would therefore require judicial

authorization. Police could not, for example, text a suspected "dial-a-dope" line to investigate, or engage in any text conversation investigation with a suspect unless they obtained prior judicial authorization under Part VI of the *Criminal Code*. Authorization for participant surveillance does not have the same investigative necessity requirement as third-party wiretaps (see *Criminal Code*, s. 184.2; R. W. Hubbard, M. Lai and D. Sheppard, *Wiretapping and Other Electronic Surveillance: Law and Procedure* (loose-leaf), at § 2:8). Nonetheless, it still requires more from police than a general warrant would (*R. v. TELUS Communications Co.*, 2013 SCC 16, [2013] 2 S.C.R. 3, at para. 27). This would undoubtedly create significant hurdles for law enforcement investigations.

(b) *Exigent Circumstances*

[225] Within their exigent circumstances analysis, my colleagues comment that police should have pursued alternative investigative techniques, given that there was no imminent safety risk. They note that "[p]olice were in a position to locate Dew as they could have sought judicial authorization for a production order to obtain the information associated with Dew's cell phone number" (Martin and Moreau JJ.'s reasons, at para. 331).

[226] In my view, this Court should avoid speculating about what other potential investigative techniques would have succeeded in the absence of a proper evidentiary foundation to support it. Even if police could have hypothetically applied for a production order to obtain the information associated with Dew's cellphone number, it

is not necessarily true that they could have done this quickly enough to continue this investigation successfully. By the time police obtained a production order, the person using Dew's phone might have heard about Mr. Gammie's arrest, might have done something else with the drugs or abandoned the deal, or might have gotten rid of the phone itself. It is also unclear whether obtaining the information related to the owner of the phone would be enough to *locate* whoever was using Dew's phone.

(c) *Section 24(2)*

[227] Furthermore, I take issue with the way in which my colleagues Martin and Moreau JJ. carry out their s. 24(2) *Charter* analysis. In my view, some of the factors that would clearly mitigate the seriousness of the *Charter*-infringing state conduct or the impact of the breach on the appellant's *Charter*-protected interests are either not considered as mitigating, or are instead considered as aggravating factors. My colleagues' perception of the intrusiveness of the police technique seems to have coloured their analysis of the facts.

[228] For example, with respect to the first factor in *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, my colleagues state that the police officers' experience and familiarity with the law in this case aggravates the seriousness of the breach, as "the law on warrantless searches is well settled and the officers involved had decades of experience" (para. 341).

[229] The officers' knowledge must be placed in the appropriate context. Recall that this investigation occurred in June 2017, before our Court's decision in *Marakah*. At that time, the law in Ontario was that there was no reasonable expectation of privacy in a co-accused's cell phone, per the Court of Appeal for Ontario's decision in 2016 (*R. v. Marakah*, 2016 ONCA 542, 131 O.R. (3d) 561).The officers considered whether the appellant had a privacy interest in the text message conversation, and concluded that he did not, given that it was a conversation on Mr. Gammie's phone (*voir dire* reasons, at paras. 69 and 72). This was entirely in accordance with the law of Ontario at the time.

[230] If the police believed there was no reasonable expectation of privacy in the text message conversation, because that *was*, in fact, the law, it is unclear why they would think that a privacy interest would materialize if they replied to the messages. This is especially so because the police would have also known at that time that they were permitted to answer phone calls on seized phones and talk to the person on the other end. There was consequently no reason at all for police to think that interjecting themselves into that conversation was a problem at the time. They also knew that they were only replying to the texts without unlocking the phone (*voir dire* reasons, at para. 68). Most importantly, the police believed that the situation was urgent (paras. 69 and 72).

[231] In light of this situation, we cannot fault the police for their knowledge that warrantless searches are presumed to be unconstitutional. They would of course know

this. But the officers also thought that they did not have time to obtain a warrant, that there was no reason to obtain one as the appellant had no reasonable expectation of privacy in the text messages on Mr. Gammie's phone, and that the circumstances were urgent. Furthermore, contrary to what Martin and Moreau JJ. say, at para. 342 of their reasons, it is completely understandable that none of these officers testified as to which warrant would have been required to authorize their investigative technique — they did not think there was a "search" to authorize to begin with.

[232] With respect to the second *Grant* factor, the fact that the conversation "taken as a whole" reflected the appellant's criminal lifestyle should not have increased the impact of the breach on his *Charter*-protected interests (Martin and Moreau JJ.'s reasons, at para. 348). This is because the police already lawfully knew from the first four messages, which established the nature of the conversation, that whoever responded to that conversation was involved in criminal activity. This should lessen the impact on the appellant's privacy interests.

[233] As to the assessment of whether the administration of justice would be brought into disrepute by the admission of evidence, where the circumstances of the police investigation significantly increase the reasonableness of the police conduct at the time, this should be considered in the analysis.

[234] Furthermore, I also agree with my colleague Justice Rowe's comments on Martin and Moreau JJ.'s s. 24(2) analysis in his concurring reasons.

III. Conclusion

[235] Whether parties to text messages conversations have a reasonable expectation of privacy in their electronic communications will vary on a case-to-case basis. Courts must conduct inquiries under s. 8 with a view to considering the totality of the circumstances of a given case. Indeed, those circumstances will more often than not be unique to a particular case. While the normative function of the inquiry is important, the record and circumstances of a case must not and cannot be ignored; doing so would ignore the totality of the circumstances test that has been the cornerstone of our Court's s. 8 jurisprudence.

[236] In this case, the police passively received four text messages on a phone which was in their lawful possession after they arrested the owner of the phone, Mr. Gammie, for drug-related activity. They believed that those text messages were tied to the arrest they had just made. After contemplating the privacy interests at stake, they conducted an undercover investigation by responding to the text messages on a locked screen, in a circumscribed manner, and without any inquiries beyond how long the appellant was going to take to arrive at the agreed-upon destination. The police did not conduct a search of Mr. Gammie's phone. Rather, they participated in the text message conversation for the narrow purpose of facilitating the suspected drug transaction.

[237] For these reasons, I would dismiss the appeal.

The reasons of Karakatsanis, Martin and Moreau JJ. were delivered by

MARTIN AND MOREAU JJ. —

I. Overview

[238] This appeal involves police conduct during a drug investigation and asks the Court to assess whether a particular investigative technique engaged the accused's reasonable expectation of privacy under s. 8 of the *Canadian Charter of Rights and Freedoms*; clarify the scope and proper application of the doctrine of exigent circumstances in a manner consonant with s. 8 of the *Charter*; and determine the admissibility of the evidence obtained under s. 24(2) of the *Charter*.

[239] The nature of the impugned state action plays an important role in analyzing and addressing these important legal issues. The police arrested Kyle Gammie for drug trafficking, seized his phone and saw part of a text message conversation between him and "Dew". Subsequently, and without any form of prior judicial authorization, the police decided to use the seized cell phone. For approximately two hours, the police took control of the phone and pretended to be Mr. Gammie in a series of text message communications with "Dew". During that time, "Dew", who turned out to be the appellant, Dwayne Campbell, was unaware he was communicating with the police and not Mr. Gammie. The police asked Dew to deliver heroin worth $1250 to Mr. Gammie's house, where the police were at the time. When

Mr. Campbell arrived at Mr. Gammie's residence with the requested drugs, the police arrested him and charged him with the offences at issue on this appeal.

[240] Mr. Campbell challenges the legality of the manner in which the police used Mr. Gammie's phone to communicate with him to arrange this drug transaction. He seeks the exclusion of the evidence obtained by police on the basis that their chosen investigative technique did not respect his s. 8 *Charter* rights or comply with this Court's jurisprudence on lawful search and seizure.

[241] The Court is therefore called upon to consider, for the first time, circumstances in which, following the arrest of their targeted suspect in a drug trafficking investigation, the police operated a seized phone, impersonated its owner, engaged in extensive text messaging, and embarked upon a separate investigation into a distinct drug deal involving a new and previously unknown suspect. In prompting and exchanging messages with Mr. Campbell while impersonating Mr. Gammie, a real person known to Mr. Campbell, the police facilitated a fresh and different drug transaction, acquiring private, real-time communications on an ongoing basis. Because the communications took the form of text messages, the police understood they were also creating a written record of everything said in their text-based conversation. The police explained that they shifted their focus after Mr. Gammie's arrest to the person sending text messages to his phone because they believed the heroin may have contained fentanyl and wanted to prevent its sale to someone other than the police.

[242] We agree that Mr. Campbell had a reasonable expectation of privacy in his communications and that his s. 8 *Charter* right was engaged. Conversations that take place over text messaging promise participants a high degree of privacy and are capable of revealing a great deal of personal information (*R. v. Marakah*, 2017 SCC 59, [2017] 2 S.C.R. 608). Parliament has set out various ways in which prior judicial authorization may be sought for state action which threatens a person's reasonable expectation of privacy. Here the police did not seek or obtain any such authorization and their warrantless search was therefore a *prima facie* breach of s. 8 — unless they could establish the existence of special circumstances recognized in law as justifying their actions. Courts have understandably defined these situations with care and specificity.

[243] We agree with Jamal J. that the impugned investigative technique of impersonating Mr. Gammie in a text message conversation could not be justified by the common law power of search incident to arrest.

[244] We also reject the Crown's argument, based on a consistent line of authority that supports the exceptional use of warrantless search powers in situations of true urgency, that this warrantless search was lawful because the police thought there were "exigent circumstances" and could not obtain a warrant in time. In our view, when properly understood in light of its limited purpose and cautious jurisprudential evolution, the doctrine of exigent circumstances does not justify the search in this case.

[245] Even accepting that the quantity and type of drugs involved posed a potential risk of harm to public safety, we find the circumstances fall well short of the

requirement of an *imminent* risk to an individual or group. Any claimed risk was not imminent or immediate in the legally required senses and could only have materialized after two or more subsequent possible events occurred. Simply stated, the jurisprudence does not support a conclusion that the potential sale and subsequent use of a harmful drug constitutes exigency in the absence of a risk of imminent danger to police or public safety. The facts of this case do not establish an *imminent* safety risk justifying warrantless police action and there were therefore no exigent circumstances that justified the warrantless search under s. 11(7) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 ("*CDSA*").

[246] For the reasons that follow, we conclude that the police actions breached Mr. Campbell's s. 8 *Charter* rights and that to admit the evidence derived from the electronic conversation would bring the administration of justice into disrepute under s. 24(2) of the *Charter*. We would therefore allow the appeal, set aside the appellant's convictions, and enter acquittals.

II. Background

[247] On the afternoon of June 14, 2017, members of the Guelph Police Service's Drug Unit arrested Mr. Gammie for drug offences outside his residence. Mr. Gammie was known to police as a "street-level dealer or enforcer" (*voir dire* reasons (reproduced in A.R., at pp. 1-36), at para. 49). Based on confidential information that Mr. Gammie was involved in drug trafficking, police placed him under surveillance and obtained a search warrant for his apartment. He was arrested at approximately

4:25 p.m. as he was leaving the apartment building. During the arrest, a member of the surveillance team, Officer Kendall Brown, noticed Mr. Gammie toss two cellphones on the passenger seat of his car and seized them incident to arrest. Officer Brown gave the cellphones to the exhibits officer, Officer Andrew Orok. They were brought into Mr. Gammie's residence where the search warrant was being executed.

[248] Around 4:50 p.m., police became aware that one of the seized cellphones was displaying incoming, unread text messages from someone named "Dew" on the locked screen. Counsel for the appellant conceded in oral submissions that Dew was Mr. Campbell. Four messages were visible:

> Family I need 1250 for this half tho
>
> Yooo
>
> What you gonna need that cause I don't want to drive around with it
>
> What time you gonna need it
>
> (*voir dire* reasons, at para. 10)

[249] The first message had arrived at approximately 4:31 p.m., and the next three at 4:50 p.m. Officer Orok brought the messages to the attention of Sergeant Ben Bair, the senior officer in charge of the investigation. Sgt. Bair testified that, based on his experience in drug investigations in the Guelph area and the comparatively lower price of $1250 for such quantity, he believed that the messages related to a drug transaction for heroin laced with fentanyl, and not the sale of pure heroin. During the *voir dire* he also explained how, at the time, 75 percent of the heroin in Guelph was

believed to be laced with fentanyl. He was concerned that if they lost the sale, the drugs would cause deaths "either in our community or elsewhere" (A.R., part V, vol. I, at p. 59).

[250] The three officers had a short conversation lasting a minute or a minute and a half and came to believe there were exigent circumstances allowing them to continue the conversation with Dew from Mr. Gammie's phone. In their discussion, they considered that they had seized Mr. Gammie's phone legally incident to arrest, and had not attempted to unlock it. They believed that only Mr. Gammie had a reasonable expectation of privacy in the phone, but did not think the search warrant obtained earlier in the day for the apartment would permit them to search a phone seized from the car. They also considered whether following up on the information on the screen would be entrapment, but ultimately thought it was not. Because the texts suggested to the officers that Dew was impatient and the transaction involved heroin containing fentanyl, the police wanted to ensure delivery of the drugs "to take [it] off the street before it was sold to someone else" (*voir dire* reasons, at para. 69).

[251] The police testified that at that time of day, they would have had to obtain a telewarrant, but they felt they did not have time to do so as it would risk losing the potential sale. Sgt. Bair testified that he felt that they did not have time to obtain a warrant, because if it took too long for Mr. Gammie to respond to the messages, Dew would assume he had been arrested and traffic the drugs to someone else.

[252] Sgt. Bair instructed Officer Orok to participate in the conversation with Dew by impersonating Mr. Gammie. The objective of this chosen investigative technique was to ensure the delivery of the drugs to Mr. Gammie's residence. The police were able to see and respond to the messages from the locked screen without further accessing the phone's content. Sgt. Bair confirmed in his testimony that police began participating in the conversation with Dew at approximately 4:50 p.m. and Mr. Campbell was ultimately arrested at 7:05 p.m.

[253] During this approximately two-hour period, Officer Orok exchanged 35 messages with Dew, who was in fact Mr. Campbell as he later confirmed. Impersonating Mr. Gammie, Officer Orok first responded to Mr. Campbell at 4:51 p.m. In his messages to Mr. Campbell, Officer Orok confirmed interest in the new heroin transaction, and directed Mr. Campbell to bring the drugs to Mr. Gammie's residence. He followed up a number of times to find out how long it would take for Mr. Campbell to arrive. When Mr. Campbell wanted to speak on the phone, and called another of Mr. Gammie's phones unprompted, Officer Orok stated that someone else had the phone in order to allay Mr. Campbell's suspicion. Officer Orok's messages were aimed at ensuring the delivery would be completed, and provided instructions to the residence and about where to enter the building.

[254] All three officers waited in the residence for the approximately two hours until Mr. Campbell arrived. Sgt. Bair cancelled the arrival of additional officers to Mr. Gammie's residence while they waited and the execution of the warrant was

paused. Officer Orok engaged in the text communications and, apart from discussing the incoming texts, there was little other activity in the residence. There is no evidence in the record indicating that any further consideration was given to obtaining a warrant.

[255] When Mr. Campbell arrived at the side door of Mr. Gammie's apartment building, he removed a red running shoe that had been placed to leave the door ajar, as discussed in his messages with Officer Orok. He arrived at the door of Mr. Gammie's residence holding the shoe, where officers were waiting in uniform and informed him he was under arrest. Mr. Campbell attempted to run away, but was apprehended, arrested, and searched. Police seized a cellphone, 14.33 grams of heroin mixed with fentanyl, and $40 cash. The phone seized from Mr. Campbell was still displaying messages on screen from the conversation with Officer Orok. The police then scrolled through Mr. Campbell's phone and took photographs of the text messages, triggering a subsequent breach under s. 8 of the *Charter*.

[256] What happened and the precise nature of the police conduct at issue bears on the central legal questions in this case, specifically, whether this state action engaged and breached Mr. Campbell's right to be free from unreasonable search and seizure under s. 8 of the *Charter*; whether the police can justify their actions based on what they argue were "exigent circumstances"; and whether the admission of the evidence so obtained would bring the administration of justice into disrepute according to the factors our Court must consider under s. 24(2) of the *Charter*.

III. Analysis

A. *Mr. Campbell Had a Reasonable Expectation of Privacy in the Electronic Communications*

[257] We agree with our colleague Jamal J. and the Court of Appeal that Mr. Campbell had a reasonable expectation of privacy in his electronic communications with the police (Jamal J.'s reasons, at para. 41; C.A. reasons, 2022 ONCA 666, 163 O.R. (3d) 355, at para. 33). We further agree that the totality of the circumstances remains the correct approach to assessing whether a claimant has a reasonable expectation of privacy (Jamal J.'s reasons, at para. 40), including in cases where there is an undercover aspect to the police conduct (*R. v. Duarte*, [1990] 1 S.C.R. 30). Even if there are features of the investigative technique that do not breach the individual's privacy rights (e.g., the plain view of incoming text messages), the court cannot rely on those features to justify aspects of the investigation which do have an impact on privacy. Rather, the focus must remain on the potential of a given technique to reveal private information in the totality of the circumstances.

[258] Given the nature of the police conduct at issue, we add that the breach of this privacy interest should be understood as involving a high degree of intrusion. By choosing, creating and employing this specific investigative technique, the police did not merely search a phone or passively monitor private text communications: they actively inserted themselves into a conversation "between two real people with a pre-existing relationship, essentially hijacking the identity of one of the participants" (C.A. reasons, at para. 71).

[259] The technique of hijacking an existing identity in such circumstances creates a particularly insidious invasion by police. It is not a technique our Court has previously considered in the context of s. 8 of the *Charter* and it is not analogous to an undercover officer operating under the auspice of a fictional persona (see, e.g., *R. v. Mills*, 2019 SCC 22, [2019] 2 S.C.R. 320; *R. v. Hart*, 2014 SCC 52, [2014] 2 S.C.R. 544). Nor is it the same as an officer answering an arrestee's phone and, again, pretending to be a fictional person (see, e.g., *R. v. Baldree*, 2013 SCC 35, [2013] 2 S.C.R. 520, where the Court considered whether an officer's testimony regarding a drug purchase call was inadmissible hearsay).

[260] Further, in phone conversations the ability to impersonate a person known to the caller is limited and there is a real risk the caller will recognize the deception. This is well illustrated by the police's efforts to avoid answering calls from Mr. Campbell. In contrast, within a text conversation, the potential for police to impersonate the recipient and deceive the sender is limited only by their opportunities to do so and the strictures of the law. Under the normative inquiry for assessing a reasonable expectation of privacy, the state should not be allowed to penetrate our personal relationships and then manipulate the bonds of those relationships to elicit information or specific conduct, absent lawful authority (*R. v. Bykovets*, 2024 SCC 6, at paras. 7 and 52-53). The deception (and effectiveness) of this technique is predicated on exploiting an existing relationship between private actors, which has the potential to reveal to police deeply personal information. It would gravely impact our trust in general, and in the state, if the last text we received from an acquaintance or family

member was, instead, from the police in disguise. This investigative technique corrodes the dignity and autonomy established through personal, private relationships.

[261] Recognizing that in a free and democratic society the privacy claim in personal text conversations between individuals known to one another must be "beyond state intrusion absent constitutional justification" does not thwart the ability of police to investigate crimes and uncover evidence through searches (*R. v. Reeves*, 2018 SCC 56, [2018] 3 S.C.R. 531, at para. 28, quoting *R. v. Ward*, 2012 ONCA 660, 112 O.R. (3d) 321, at para. 87, per Doherty J.A.). It simply requires police to have lawful authority to do so. Once police have already obtained a search warrant, as was the case in *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 S.C.R. 743, or have other lawful authority, police are permitted to "unearth and preserve as much relevant evidence as possible" (para. 22) within the parameters of the relevant authority.

[262] In sum, Mr. Campbell had a reasonable expectation of privacy in these circumstances and therefore s. 8 of the *Charter* is engaged. We turn now to the police's actions and what authority, if any, they had to act as they did.

B. *This Was a Warrantless Search*

[263] Our law of search and seizure recognizes the importance of privacy rights and has consistently favoured a system of accountability requiring justification of their transgression prior to an intrusion by the state (*Hunter v. Southam Inc.*, [1984] 2 S.C.R.

145, at pp. 160-61; *R. v. Vu*, 2013 SCC 60, [2013] 3 S.C.R. 657, at paras. 22-24; *Bykovets*, at para. 88).

[264] In this case, the police did not attempt to secure any form of judicial authorization before they decided to impersonate Mr. Gammie and use his phone to participate in a real-time text message conversation with Mr. Campbell.

[265] Factually, no evidence clarifies which particular type of warrant they believed they would have needed. Legally, this case has been argued in relation to s. 11(7) of the *CDSA*, but it is unclear how the investigative technique used in this case could have been authorized under s. 11(1). It would have been plain to the police that they were about to engage in the search and seizure of real-time communications on an ongoing basis. Acquisition of such evidence exceeds the powers described in s. 11 of the *CDSA*. Subsections (1), (5) and (6) of s. 11 allow the police to search for and seize evidence or things they believe to already exist (e.g., evidence that "is in a place" (s. 11(1)), or evidence that the person searched "has on their person" (s. 11(5)), or existing evidence that may not be mentioned in the warrant (s. 11(6))) (see *R. v. Paris*, 2015 ABCA 33, 320 C.C.C. (3d) 102, at para. 17; S. C. Hutchison et al., *Search and Seizure Law in Canada* (loose-leaf), at § 16:10).

[266] While the *Criminal Code*, R.S.C. 1985, c. C-46, provides certain options, we heard little argument about the types of authorization which may have been sought for such police conduct. Whether this conduct was an interception under Part VI of the *Criminal Code* was raised by Mr. Campbell in the courts below, and before this Court

in oral argument. Mr. Campbell also suggested for the first time before this Court that a general warrant should have been sought by the police before embarking on and engaging in this particular conduct (transcript, at pp. 20 and 131-32).

[267] The unusual nature of the technique may require authorization under a general warrant pursuant to s. 487.01 of the *Criminal Code*. The general warrant provides a path to police to obtain prior authorization for techniques or procedures not specified in the *Criminal Code*, where no other provision would provide for the search (*R. v. TELUS Communications Co.*, 2013 SCC 16, [2013] 2 S.C.R. 3, at paras. 16 and 51; see also Hutchison et al., at § 16:26, and J. A. Fontana and D. Keeshan, *The Law of Search and Seizure in Canada* (13th ed. 2024), at pp. 675-76). In contrast with s. 11 of the *CDSA*, a general warrant may be issued with respect to an anticipatory offence and evidence that does not yet exist (*R. v. Noseworthy* (1997), 33 O.R. (3d) 641 (C.A.); *R. v. Lucas*, 2014 ONCA 561, 121 O.R. (3d) 303, at paras. 110 and 113-14; *R. v. Ly*, 2016 ABCA 229; B. A. MacFarlane, R. J. Frater and C. Michaelson, *Drug Offences in Canada* (4th ed. (loose-leaf)), at § 25:39).

[268] We do not endorse the view that the investigative technique crafted and adopted by the police here cannot be an "intercept" within the meaning of Part VI of the *Criminal Code*. Jamal J.'s analysis runs counter to this Court's broad interpretation of Part VI (*TELUS*, at paras. 23-25, 40 and 43). Respectfully, a narrow focus on the "need for a separate 'device or apparatus'" (Jamal J.'s reasons, at paras. 98-99) fails to meaningfully grapple with "the substance of the police investigative technique"

(*TELUS*, at para. 62). Instead, the analysis concentrates on the technique's "formal trappings" (paras. 62 and 77). This Court has cautioned against a formalistic interpretation of Part VI that considers the "technical differences" between various modes of acquisition too narrowly (paras. 3-5 and 24-25).

[269] The *Criminal Code* does not require the use of a separate device to constitute an intercept. Section 184(1) makes it an offence to knowingly intercept a private communication "by means of any electro-magnetic, acoustic, mechanical or other device". Section 183 of the *Criminal Code* defines "electro-magnetic, acoustic, mechanical or other device" as "any device or apparatus that is used or is capable of being used to intercept a private communication". The phrase encompasses a wide variety of devices from the "most complex satellite surveillance system to a glass pressed up against a wall to hear a conversation in the next room" (R. W. Hubbard, M. Lai and D. Sheppard, *Wiretapping and Other Electronic Surveillance: Law and Procedure* (loose-leaf), at § 1:4). In drafting the definition, Parliament intended to cover "all possible methods of intercepting private communications with the exception of normal human hearing" (*ibid.*). This is confirmed by a purposive and contextual interpretation of the provisions, including the broad definition of "intercept" in s. 183 of the *Criminal Code*, which "includes listen to, record or acquire a communication or acquire the substance, meaning or purport thereof".

[270] On a plain reading of s. 183, a "recipient's device (after it has been appropriated by police) is one that can be used to 'intercept a private communication'"

(S. Penney, "Consent Searches for Electronic Text Communications: Escaping the Zero-Sum Trap" (2018), 56 *Alta. L. Rev.* 1, at p. 25).

[271] In addition, the fact that an authorization issued under Part VI includes the authority to install or remove a device covertly (*Criminal Code*, s. 186(5.1)) does not mean that only interceptions involving a separate device distinct from the medium of communication used are subject to Part VI. Part VI was enacted to deal with the heightened privacy concerns engaged by the police act of "intercepting" private communications (*TELUS*, at paras. 23-24). Installing a separate device is simply one method of executing an intercept.

[272] When discussing non-participant surveillance, this Court said in *R. v. Jones*, 2017 SCC 60, [2017] 2 S.C.R. 696, that an "interception relates to actions by which a third party interjects itself into the communication process in real-time through technological means" (para. 72, cited in Jamal J.'s reasons, at para. 96). Notably absent in *Jones* is any pronouncement on the need for a separate device in all cases. This statement was responsive to the facts before the Court in *Jones* and, in our view, applies to the circumstances of this case. The police here used text messages (actions) to interject themselves into the communication process between Mr. Campbell and Mr. Gammie in real time through the use of a cell phone (technological means). Additionally, those technological means produced a record of the conversation.

[273] While the relevant *Criminal Code* provisions are "laws that were a product of the 1970s", in *TELUS* this Court stated that Part VI must be interpreted in light of

s. 8 of the *Charter*, "which in turn must remain aligned with technological developments" (paras. 33 and 53, citing *R. v. Wong*, [1990] 3 S.C.R. 36, at p. 44; *Bykovets*, at para. 11). The clear message is that emerging police investigatory techniques must adapt in a manner that accords with *Charter* rights. Often the need for new techniques arises precisely because there has been a technological innovation that requires an inventive response in the public interest. In this case, the technological development is how a cell phone allows both text and voice conversations and automatically creates a record of text messages sent and received. The manner in which such a device can now operate therefore leads to new ways in which conversations can be recorded or acquired under s. 183 of the *Criminal Code*. In *Jones*, this Court cautioned courts to be "alert to . . . modern methods of electronic surveillance" as the state may be "tempted to embark on forward-looking, 'fishing expedition[s] in the hope of uncovering evidence of crime'" (para. 74, quoting *Wong*, at p. 47, and *R. v. Finlay* (1985), 23 C.C.C. (3d) 48 (Ont. C.A.), at p. 70).

[274] From a normative privacy perspective, there is also no meaningful distinction between the recording of a private phone call conversation by police and a text message exchange of that same conversation which creates its own record. Private conversations should not attract diminished privacy protections from the state merely because a separate police-initiated device is not being used to record it. Such an interpretation ignores the purpose behind Part VI, which was enacted precisely to protect against "unauthorized intrusions upon our privacy by the agents of the state,

whatever technical form the means of invasion may take" (*TELUS*, at para. 33 (emphasis added), quoting *Wong*, at p. 44).

[275] It is obvious that if the police's conversation with Mr. Campbell took place through a phone call, and the police had used a recording device to memorialize that conversation, a Part VI authorization would have been necessary. However, we do not accept that when, in the present circumstances, the same conversation took place over a medium known to create its own record there is somehow a lesser level of state intrusion into privacy rights and no authorization was necessary. With respect, this overly rigid approach makes little sense, provides undersized protections to privacy rights, and ignores how frequently personal, private conversations now take place using text messaging rather than traditional telephone calls.

[276] No reliance should be placed on the Court of Appeal of Alberta's decision in *R. v. Beairsto*, 2018 ABCA 118, 68 Alta. L.R. (6th) 207, to support the proposition that there was no interception in this case. First, the trial judge in that case relied on an unduly restrictive interpretation of this Court's holding from *Duarte* as being concerned *only* with a "recording" of private communications, rather than on the state's ability to *access* what was intended to be a private conversation between private citizens (*R. v. Beairsto*, 2016 ABQB 216, 37 Alta. L.R. (6th) 379, at paras. 59-61; *Duarte*, at pp. 43-44; Penney, at p. 23). Second, the trial judge recycled the same type of risk-assumption analysis that was rejected in *Duarte*. Finally, the Court of Appeal in *Beairsto* relied exclusively on the decision of the Court of Appeal of Newfoundland and Labrador in

R. v. Mills, 2017 NLCA 12, 1 C.A.N.L.R. 488, to support the proposition that deception does not amount to interception (para. 25). However, the Court of Appeal's reasoning in *Mills* largely relied on the involvement of a third party to constitute an intercept (paras. 13-14). An "interception" does not require a third party in cases of participant surveillance (*Mills* (SCC), at para. 139, per Martin J.).

[277] While we do not endorse Jamal J.'s conclusion that this could not be an interception requiring a Part VI authorization, in the absence of full argument on and the benefit of the Court of Appeal's consideration of the proper authorizing provision, this Court lacks the requisite basis to pronounce conclusively on which statutory provision would permit a court to authorize this conduct. We therefore prefer to leave this issue for another day. However, under either Part VI or s. 487.01 of the *Criminal Code*, Parliament has signalled that police must adhere to more rigorous standards in order to obtain evidence by "intercepting" private communications, or using novel techniques that are not otherwise provided for in the *Criminal Code* (see the statutory requirements for urgent intercepts in ss. 184.4 and 188, and the general warrant in s. 487.01(1)). As the trial judge's findings in this case do not meet the legal standard for exigency justifying a warrantless search under s. 11(7) of the *CDSA*, it is preferable that the determination of the proper authorizing provision be based on full and thorough argument.

[278] Regardless of the precise *Criminal Code* provision required to authorize the police's chosen investigatory technique, we are left with a search for which no

warrant was obtained. As *Hunter* made perfectly clear, a warrantless search is *prima facie* unreasonable (p. 161). In order for the Crown to discharge its onus to demonstrate that a warrantless search is nonetheless reasonable within the meaning of s. 8 of the *Charter*, it must establish that the search is authorized by law, and that both the authorizing law and manner in which the search is conducted are reasonable (*R. v. Collins*, [1987] 1 S.C.R. 265, at pp. 277-78; *R. v. Tim*, 2022 SCC 12, [2022] 1 S.C.R. 234, at paras. 45-46). For the reasons that follow, we conclude that this search was not reasonable: it was not a search incident to arrest and the lack of imminent harm means there were no exigent circumstances.

C. *The Investigative Technique Was Not a Search Incident to Arrest*

[279] We agree with Jamal J. that the police officer's communications with the appellant do not fall within the scope of a search incident to arrest because the police did not conduct it for a valid law enforcement purpose connected or related to the reasons for the arrest. The framework set out in *R. v. Fearon*, 2014 SCC 77, [2014] 3 S.C.R. 621, which narrowly constrains this power, does not authorize police to use a lawfully seized cell phone to communicate with another person as a part of the power to search incident to arrest. Several portions of the *Fearon* decision suggest that the Court's analysis is limited to a consideration of police accessing or viewing existing content, and it does not extend to all of the ways in which a police officer might use or search a cell phone (see para. 76).

[280] In the case before us, while the police arrested Mr. Gammie for drug trafficking, that arrest was not tied to the impending drug transaction with Mr. Campbell. This transaction constituted a distinct potential offence. The police only became aware of it after reading the first four messages on Mr. Gammie's phone while he was under arrest. Thus, a probe into a separate potential offence committed by another person cannot be truly incidental to the reasons for Mr. Gammie's arrest.

D. *The Actions Taken by the Police Were Not Justified by the Exigent Circumstances Doctrine*

[281] We turn to the Crown's argument that the police's warrantless search was nonetheless reasonable because it involved exigent circumstances. "Exigent circumstances" has been described as "a test to be applied to determine the justification for a warrantless search" (Fontana and Keeshan, at p. 1753). Where a warrantless search falls within the proper scope of the exigent circumstances doctrine and is conducted in a reasonable manner, it may comply with s. 8 of the *Charter* (*R. v. Tse*, 2012 SCC 16, [2012] 1 S.C.R. 531, at para. 18; *R. v. Grant*, [1993] 3 S.C.R. 223 ("*Grant* 1993"), at p. 250).

[282] In the courts below, this issue was considered under s. 11(7) of the *CDSA* (*voir dire* reasons, at paras. 98-100; C.A. reasons, at paras. 77-80). In our view, whether or not this investigative technique could have been authorized by s. 11 of the *CDSA*, we are persuaded that Mr. Campbell's s. 8 rights were breached in any event as the facts found by the trial judge did not, in law, amount to exigent circumstances.

Section 11(7) involves a lower standard than required under more rigorous authorities permitting warrantless acquisition of real-time communications. Even assuming the police conduct could fall within the warrantless search powers under s. 11(7), the circumstances of this case extend well beyond the recognized safety branch of the doctrine of exigent circumstances.

[283] To explain this conclusion, we briefly address the appropriate standard of review, canvass the origins and scope of the doctrine of exigent circumstances, and establish why it was not correctly applied in this case.

(1) Exigent Circumstances Involves the Application of a Legal Standard to the Facts of the Case

[284] We agree with our colleague Jamal J. that whether the factual findings in this case meet the requirements of the exigent circumstances doctrine is a question of law (*R. v. Shepherd*, 2009 SCC 35, [2009] 2 S.C.R. 527, at para. 20). Factual matters relating to what occurred, and the basis for the police's belief that urgent warrantless action was required, are indeed "grounded in the factual findings of the trial judge" reviewable on a standard of palpable and overriding error (*ibid.*; see also para. 18). However, the question of whether those facts amount, at law, to exigent circumstances rendering a warrantless search reasonable under s. 8 of the *Charter* involves "the application of a legal standard to the facts of the case" (para. 20).

[285] The appellant argues that the Court of Appeal applied the wrong standard of review when it considered whether the trial judge's findings of fact legally "amounted to exigent circumstances" (para. 83). We agree. Consistent with *Shepherd*, the task of the reviewing court was to determine whether the facts found by the trial judge met the legal standard of exigent circumstances set out in statute and the jurisprudence. With respect, the Court of Appeal erroneously focused on whether the trial judge's factual findings regarding the claimed urgency of the situation and impracticability were "unreasonable" or were "unduly speculative" or "open to [him] to make" (paras. 83-84). The Court of Appeal failed to consider whether, at law, the facts as found met the legal standard for exigent circumstances. As we explain, the circumstances of this case did not rise to the type of imminent safety risk that constitutes exigent circumstances at law.

(2) The Origins of the Exigent Circumstances Doctrine

[286] "Exigent circumstances" as a legal term has its roots in American jurisprudence (Fontana and Keeshan, at p. 1753; W. F. Foster and J. E. Magnet, "The Law of Forcible Entry" (1977), 15 *Alta. L. Rev.* 271, at p. 289; see *Kentucky v. King*, 563 U.S. 452 (2011)). However, the notion of an exceptional power to conduct a search or seizure without a warrant in extenuating circumstances has a distinct history under the Anglo-Canadian common law. As history demonstrates, such powers have consistently been construed narrowly. Indeed, the doctrine of exigent circumstances cannot be understood separate from the longstanding normative approach of the law of

search and seizure that, whenever feasible, intrusions upon property, privacy and dignity, should be authorized in advance. Of particular relevance to this appeal is how, since the adoption of the *Charter*, this Court has consistently taken a careful and narrow approach to the doctrine of exigent circumstances.

[287] Exceptional powers reserved for urgent circumstances emerged in the context of the common law's focus on protecting individuals against unjustified intrusions onto private property. Historically, at common law there was no power to enter private property and search without legal authority under a warrant, except incident to arrest (*R. v. Rao* (1984), 12 C.C.C. (3d) 97 (Ont. C.A.), at pp. 110 and 120; *Colet v. The Queen*, [1981] 1 S.C.R. 2, at pp. 8-9; *Hunter*, at p. 160; *Entick v. Carrington* (1765), 2 Wils. K.B. 275, 95 E.R. 807, at pp. 817-18; Fontana and Keeshan, at pp. 1149-50).

[288] The phrase "exigent circumstances" appeared for the first time in this Court's jurisprudence in *Eccles v. Bourque*, [1975] 2 S.C.R. 739, an action in trespass. At issue in *Eccles* was whether police officers were authorized to enter a private apartment to apprehend the subject of three arrest warrants. The Court affirmed both "the basic principle" established in *Semayne's Case* (1604), 5 Co. Rep. 91a, 77 E.R. 194, at p. 195, that "the house of every one is to him as his castle and fortress", as well as a limitation on that principle that entry may exceptionally be permitted in the public interest to execute criminal process, such as in search of a fugitive (*Eccles*, at pp. 742-43).

[289] The Court nevertheless also clarified that the power to enter private property to execute a warrant was not unrestricted: police were required to have reasonable and probable grounds to believe that the person sought was within the premises; and "[e]xcept in exigent circumstances, the police officers must make an announcement prior to entry" (pp. 745-47 (emphasis added)). *Eccles* thus affirmed the "knock and announce" rule — a principle that gives weight to property, privacy, and dignity interests (*R. v. Cornell*, 2010 SCC 31, [2010] 2 S.C.R. 142, at para. 19) — while acknowledging the possibility of exceptions based on exigency.

[290] No exigent circumstances existed in *Eccles*, and the Court made a summary reference to situations where entry without notice could be justified: ". . . there will be occasions on which, for example, to save someone within the premises from death or injury or to prevent destruction of evidence or if in hot pursuit notice may not be required" (p. 747 (emphasis added)).

[291] The hot pursuit exception to the sanctity of the home is well established at common law and has survived the requirement established by this Court in *R. v. Feeney*, [1997] 2 S.C.R. 13, that police have a warrant to enter a home to execute an arrest (paras. 47 and 51; *Semayne's Case*, at p. 198; *R. v. Macooh*, [1993] 2 S.C.R. 802, at pp. 813-15). In *Macooh*, the Court defined hot pursuit, noting that "the essence of fresh pursuit is that it must be continuous pursuit conducted with reasonable diligence, so that pursuit and capture along with the commission of the offence may be considered as forming part of a single transaction" (p. 817, citing R. E. Salhany, *Canadian*

Criminal Procedure (5th ed. 1989), at p. 44). With fresh knowledge of the commission of an offence, police could therefore lawfully pursue the suspect and enter into a home to ensure an offender could not evade justice by simply retreating into their home (*Macooh*, at pp. 815-16).

[292] The scenarios envisioned in these examples necessarily involve consequences that would unfold in close temporal nexus to the police action — that is, immediately or very soon after. If the consequences were distant from the immediate situation, there would be no need or basis for a sudden entry into a home. There are therefore two temporal aspects of exigent circumstances that emerge from these examples: first, the police action is required immediately; second, the police action is necessary *because* the specified harm will occur imminently. Without *imminent* harm, the need for immediate warrantless police action vanishes.

(3) The Evolution of Exigent Circumstances Post-*Charter*

[293] The advent of the *Charter* required the Court to grapple with how the doctrine of exigent circumstances would fit into a constitutional framework placing a stronger emphasis on providing protections to privacy interests. In a number of significant decisions, discussed below, this Court was careful to articulate exigent circumstances as narrow exceptions to the rule that warrantless searches are *prima facie* unreasonable under s. 8 of the *Charter*. Following those decisions, Parliament enacted statutory provisions permitting warrantless entries or searches in exigent

circumstances, capturing principles set down in the cases and in some instances adding to them.

(a) *Early Cases: Recognition of a Narrow Exception and Statutory Amendments*

[294] This Court's pivotal decision in *Hunter* established the framework for how warrantless searches in exigent circumstances should be examined. *Hunter* recognized that the purpose of s. 8 of the *Charter* was "to protect individuals from unjustified state intrusions upon their privacy", to be accomplished by a system of prior judicial authorization (pp. 157-58 and 160-61). While not dealing expressly with exigent circumstances, Dickson J. (as he was then) recognized that "it may not be reasonable in every instance to insist on prior authorization in order to validate governmental intrusions upon individuals' expectations of privacy", but nevertheless required that, "where it is feasible to obtain prior authorization, I would hold that such authorization is a precondition for a valid search and seizure" (p. 161 (emphasis added)).

[295] A focused analysis of exigent circumstances was not undertaken until *Grant* 1993, where the Court considered the legality of warrantless searches of the perimeter of a home pursuant to s. 10 of the *Narcotic Control Act*, R.S.C. 1985, c. N-1. Section 10 allowed police to conduct warrantless searches of places other than a dwelling-house based on reasonable grounds. The Court read the provision down, holding that it was in violation of s. 8 of the *Charter* and inoperable to the extent that

it purported to authorize a warrantless search absent exigent circumstances in which it was impracticable — that is, not feasible — to obtain a warrant (pp. 228 and 243-44).

[296] Writing on behalf of the Court, Sopinka J. observed that deviations from *Hunter* standards would be rare, but acknowledged the need to balance the societal interest in law enforcement (pp. 240-41). The Court emphasized that this exception to the general rule proscribing warrantless searches was to be "narrowly construed" (p. 241):

> In general, the test will only be satisfied where there exists an imminent danger of the loss, removal, destruction or disappearance of the evidence sought in a narcotics investigation if the search or seizure is delayed in order to obtain a warrant. [pp. 241-42]

[297] The Court thus recognized a narrow exigent circumstances exception for narcotics investigations. It also declined to recognize a blanket exception for the presence of narcotics on a moving conveyance, concluding that it would depend on the facts of each case (p. 242).

[298] Two years later, this Court held in *R. v. Silveira*, [1995] 2 S.C.R. 297, that a warrantless entry into a home for the purpose of preserving evidence pending the issuance of a search warrant breached s. 8 of the *Charter*. The Crown had conceded that the entry and securing of the premises violated s. 8 of the *Charter* (at para. 140), and the main issue was whether the evidence should be excluded under s. 24(2) of the *Charter*.

[299] Both the majority and La Forest J. in dissent concluded that the breach arose from the police's entry into the home in direct contravention of s. 10 of the *Narcotic Control Act*, which only permitted warranted entry into a dwelling-house (paras. 41, 49 and 141-42). L'Heureux-Dubé J., concurring in the result and writing alone, concluded there was no breach of s. 8 on the basis that a general "common law exception of exigent circumstances" existed despite the statutory warrant requirement (para. 105).

[300] Despite the majority's conclusion that this was a very serious breach, the Court upheld the decision of the courts below to admit the evidence under s. 24(2). Writing for the majority, Cory J. accepted the trial judge's findings that arrests that had occurred publicly in the neighbourhood and the need to preserve evidence constituted exigent circumstances mitigating the seriousness of the breach (paras. 150-51).

[301] A final significant case from this period is *Feeney*, in which this Court reconsidered the common law in *Eccles* and *R. v. Landry*, [1986] 1 S.C.R. 145, on warrantless arrest following a forced entry into private premises. The facts in *Feeney* unfolded in the aftermath of a violent crime. After an elderly man was violently beaten to death in his home with an iron bar or similar object, the police acted on tips and entered the accused's dwelling, detained him, and subsequently arrested him after seeing blood on his shirt. Observing that the common law had to be "adjusted to comport with *Charter* values" (para. 42), Sopinka J. confirmed for the majority that, generally, both an arrest warrant and a warrant authorizing entry into a home would be

required to effect an arrest therein, reflecting the greater weight of privacy interests in the post-*Charter* era (paras. 42-45 and 48-51).

[302] Significantly, the majority again declined to recognize a general exigent circumstances exception to the warrant requirement. Sopinka J. accepted that there should be an exception for hot pursuit, but chose to "leave for another day" whether exigent circumstances other than hot pursuit could justify warrantless entry to arrest in a home (para. 47). He disagreed with L'Heureux-Dubé J.'s conclusion, in dissent, that "exigent circumstances generally necessarily justify a warrantless entry", and considered it an open question (*ibid.* (emphasis in original)).

[303] The decisions in *Silveira* and *Feeney* prompted legislative action. Parliament amended the *Criminal Code* and the *CDSA* (which replaced the repealed *Narcotic Control Act*) to allow warrantless searches in exigent circumstances. Section 487.11 of the *Criminal Code* allows police to "exercise any of the powers described in subsection 487(1) or 492.1(1)" — the standard search warrant and tracking warrant provisions, respectively — "without a warrant if the conditions for obtaining a warrant exist but by reason of exigent circumstances it would be impracticable to obtain a warrant". Unlike the *Narcotic Control Act*, the *CDSA* no longer distinguishes between dwelling-houses and other places in authorizing searches by police. Using language similar to s. 487.11 of the *Criminal Code*, s. 11(7) of the *CDSA* allows police to search "a place" without a warrant in exigent circumstances for any prohibited controlled substance, precursor, offence-related property, or thing that will afford evidence of an

offence (see s. 11(1)). Neither s. 487.11 of the *Criminal Code* nor s. 11(7) of the *CDSA* provide a definition of exigent circumstances.

[304] Following *Feeney*, Parliament enacted a statutory regime for judicial pre-authorization of entry into a dwelling-house to effect arrests (see Hutchison et al., at § 3:23). Included in the amendments to the *Criminal Code* was s. 529.3, which permitted warrantless entry in exigent circumstances. Unlike s. 487.11 of the *Criminal Code* and s. 11(7) of the *CDSA*, s. 529.3(2) defined exigent circumstances as including circumstances in which the officer:

> (a) has reasonable grounds to suspect that entry into the dwelling-house is necessary to prevent imminent bodily harm or death to any person; or
>
> (b) has reasonable grounds to believe that evidence relating to the commission of an indictable offence is present in the dwelling-house and that entry into the dwelling-house is necessary to prevent the imminent loss or imminent destruction of the evidence.

[305] Section 529.3 does not limit any other authority that might permit warrantless entry into a dwelling-house, such as hot pursuit, opening with the words: "[w]ithout limiting or restricting any power a peace officer may have to enter a dwelling-house under this or any other Act or law. . . ." Additional statutory powers to search in exigent circumstances are found in s. 117.02 (search and seizure in relation to weapons and firearm offences) and s. 184.4 (emergency wiretap to prevent serious harm; see *Tse*).

[306] What we take from this Court's jurisprudence in the years after the *Charter* was first enacted, leading to partial codification, is that "exigent circumstances" is a determination to be made with care. It is a narrow power to be used in extraordinary circumstances (see *R. v. Kelsy*, 2011 ONCA 605, 280 C.C.C. (3d) 456, at para. 35) that allows for s. 8's default requirement of prior judicial authorization to be dispensed with. A serious crime is not enough to establish exigency under a s. 8 analysis (*Feeney*, at paras. 52-53) — whether exigent circumstances exist must be determined according to the parameters of the law. Where individual privacy interests are higher, such as in a home, the Court has delineated specific situations where exigency could justify intrusion in a given case, declining to recognize a general common law power. We would approach privacy interests in electronic devices with similar care.

(b) *More Recent Articulation of Requirements Under the Exigent Circumstances Doctrine*

[307] Since Parliament codified certain warrantless powers to search in exigent circumstances, and despite the absence of a statutory definition in s. 11(7) of the *CDSA* and s. 487.11 of the *Criminal Code*, the requirements for establishing exigent circumstances are clear. Commentators have noted that this Court has been faithful to the *Hunter* framework in its consideration of police powers to search in exigent circumstances (T. Quigley, "The Impact of the Charter on the Law of Search and Seizure" (2008), 40 *S.C.L.R.* (2d) 117, at pp. 130 and 138; R. Jochelson and D. Ireland, *Privacy in Peril: Hunter v Southam and the Drift from Reasonable Search Protections* (2019), at p. 134). Professor Jochelson and Professor Ireland (writing extra-judicially

before his appointment to the bench) suggest that this may be because the "concept of exigence is clear and limited in the common law" and Parliament has legislated in the area (p. 134).

[308] The requirements set out in statute and case law for a warrantless search to be justified by reason of exigent circumstances may be distilled into three required elements: the existence of grounds for obtaining a warrant; the existence of exigent circumstances; and whether those exigent circumstances rendered it impracticable for the police to obtain a warrant (*CDSA*, s. 11(7); *Criminal Code*, s. 487.11; *R. v. Paterson*, 2017 SCC 15, [2017] 1 S.C.R. 202, at paras. 28 and 32-37; *Grant* 1993, at pp. 241-43; *Kelsy*, at paras. 24-35; Fontana and Keeshan, at pp. 1753-55).

[309] In *Paterson*, Brown J., for the majority, rejected Mr. Paterson's invitation to the Court to import the definition of "exigent circumstances" found in s. 529.3(2) of the *Criminal Code* into "exigent circumstances" as it appears in s. 11(7) of the *CDSA* (para. 30). This argument was rejected based on the absence of express language in s. 11 that defined exigent circumstances in the same manner as s. 529.3(2) (para. 31). As a matter of statutory interpretation, Brown J. concluded that there was "no good reason to believe that Parliament intended the definition of 'exigent circumstances' in s. 529.3(2) of the *Criminal Code* to be read into s. 11(7) of the *CDSA*" (*ibid.*). On this basis alone, he declined to "do by 'interpretation' what Parliament chose not to do by enactment" (*ibid.*, quoting *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57, [2015] 3 S.C.R. 615, at para. 53).

[310] After rejecting this argument based on settled principles of statutory interpretation, Brown J. summarized the jurisprudence recognizing the main categories of exigency as loss or destruction of evidence, officer or public safety, and hot pursuit. Brown J. concluded that the "common theme" emerging from descriptions of exigent circumstances in the cases was one of "*urgency*, arising from circumstances calling for immediate police action to preserve evidence, officer safety or public safety" and "not merely convenience, propitiousness or economy" (*Paterson*, at paras. 32-33 (emphasis in original)). Reading *Paterson* as a whole and in context, by describing the common theme emerging from the cases in this way, Brown J. was not setting out a new test or altering the standards required to establish exigency in established categories. He pointed to the Court's jurisprudence which has over the years clarified these requirements.

[311] With respect to concerns about evidence, Brown J. endorsed the standard set out by the Court in *Grant* 1993 as "imminent danger of the loss, removal, destruction or disappearance of the evidence if the search or seizure is delayed" (para. 32, quoting *Grant* 1993, at p. 243). This language was mirrored by Doherty J.A. in *R. v. Hobeika*, 2020 ONCA 750, 153 O.R. (3d) 350, when setting out the applicable legal standard: "The urgency component of s. 11(7), as described in *Paterson*, was made out if . . . the police have reasonable grounds to believe there was an imminent risk that evidence in the unit would be destroyed before the police could obtain and execute a warrant" (paras. 43 and 45 (emphasis added)). Accordingly, the governing standard from *Grant* 1993, as described in *Paterson*, still applied.

[312] The safety branch of exigent circumstances was accepted by the courts below as the basis for the warrantless search in this case (C.A. reasons, at para. 83). As Rosenberg J.A. observed in *Kelsy*, the jurisprudence related to safety searches has developed largely in relation to the common law ancillary powers doctrine (para. 58). Safety has also been considered in the context of search incident to arrest.

[313] We observe that in cases related to safety, there are strict temporal constraints, as immediate action is needed to address imminent harm to safety. The potential volatility surrounding an arrest or 911 call gives rise to safety concerns that are tightly circumscribed to the time period of the arrest or emergency. For example in *R. v. MacDonald*, 2014 SCC 3, [2014] 1 S.C.R. 37, cited by this Court at para. 32 of *Paterson* in the safety category, the Court found that the *Waterfield* doctrine (*R. v. Waterfield*, [1963] 3 All E.R. 659 (C.C.A.)) justified a police officer's conduct when responding to a noise complaint. The officer pushed open the accused's partially opened door after seeing something "black and shiny" in his hand, which turned out to be a loaded gun (*MacDonald*, at paras. 6-8). *Paterson*, at para. 32, also cited the statement in *MacDonald*, at para. 32, that searches to preserve officer safety will be responsive to "dangerous situations created by individuals, to which the police must react 'on the sudden'".

[314] This language echoes the comments of Doherty J.A. in *R. v. Golub* (1997), 34 O.R. (3d) 743 (C.A.), that where immediate action is required to secure the safety of those at the scene of an arrest in potentially dangerous situations, "a search

conducted in a manner which is consistent with the preservation of the safety of those at the scene is justified" (p. 758).

[315] This Court has also cited *R. v. Godoy*, [1999] 1 S.C.R. 311, as an example of exigent circumstances (*Tse*, at para. 18), where the issue was whether the *Charter* precluded warrantless entry and search in responding to emergency 911 calls. The Court concluded that "the importance of the police duty to protect life warrants and justifies a forced entry into a dwelling in order to ascertain the health and safety of a 911 caller", but emphasized that "the intrusion must be limited to the protection of life and safety", providing police only with "authority to investigate the 911 call and, in particular, to locate the caller and determine his or her reasons for making the call and provide such assistance as may be required" (*Godoy*, at para. 22).

[316] In *Tse*, this Court considered the constitutionality of the emergency wiretap provision, and concluded that this warrantless authority is only available on an urgent basis to prevent harm that is both serious and imminent, subject to "strict inherent time restrictions" (para. 27).

[317] *Feeney* also instructs that a safety risk must be specific, exceptional, and concrete (paras. 52-53). The majority rejected the notion that a general risk from a dangerous person being on the loose would suffice, finding that "[t]o define these as exigent circumstances is to invite such a characterization of every period after a serious crime" (para. 53). Likewise, in *L'Espérance v. R.*, 2011 QCCA 237, the Court of Appeal of Quebec rejected the notion that exigent circumstances could be established

given that [TRANSLATION] "safety concerns are often present *in drug cases*" (para. 31 (emphasis in original)).

[318] Accordingly, while the safety branch is "non-controversial" as the societal interest in protection of human life is strong (R. M. Pomerance, "Parliament's Response to R. v. Feeney: A New Regime for Entry and Arrest in Dwelling Houses" (1998), 13 C.R. (5th) 84, at p. 92), it has only been applied to override the requirement for prior authorization where the safety interest is sufficiently compelling — that is, where the threat to safety is imminent, clear, and concrete. In our view, the jurisprudence supports a narrow and strict application of the safety branch, or indeed any category of exigent circumstances, in order for the warrantless search under scrutiny to be constitutionally compliant.

(4) The Warrantless Investigative Technique in This Case Was Not Justified by the Exigent Circumstances Doctrine

[319] For the reasons that follow, we conclude that the warrantless investigative technique used by police in this case breached Mr. Campbell's s. 8 *Charter* rights. In our view, the search in this case could not be authorized by s. 11(7) of the *CDSA* because there was no imminent safety risk that compelled the police to take immediate and warrantless action.

(a) *The Circumstances of This Case Do Not Fall Within the Safety Branch*

[320] The trial judge's conclusions on the issue of exigent circumstances, relying on *Paterson*, are found in the *voir dire* reasons, at paras. 100-101:

> On this authority, I find that there were exigent circumstances in this case. Without immediate action, the transaction and the drugs were at risk. The texts show that "Dew" was already impatient. At that time of day, only a telewarrant would have been available, but in any event it would likely arrive too late to complete this transaction. The likelihood that the transaction involved fentanyl and its dramatic effects on the community makes this a matter of public safety.
>
> Accordingly, it was open to the officers to search the phone to the extent of entering into the conversation with Mr. Campbell. [Emphasis added.]

[321] As the Court of Appeal identified, the police's public safety concern depended on separate transactions unfolding in the future — first Mr. Campbell would be required to sell the half ounce of heroin "to someone else at another time", and subsequently, the drugs would be sold to others, "ultimately reaching users on the street" (para. 83). The harm envisaged depended upon these two events materializing at some point.

[322] The safety concern articulated does not meet the legal standard for exigent circumstances: it cannot be characterized as imminent on a plain understanding of that word and it is unsupported by the jurisprudence.

[323] Society's interest in public safety is relevant to numerous areas of criminal law and *Charter* jurisprudence. Assessing whether a particular safety concern is legally relevant to the application of the exigent circumstances doctrine is distinct from

consideration of community safety in the sentencing context. The former requires courts to assess whether a specific safety concern was so pressing and fast approaching that it justified bypassing the default s. 8 requirement of prior, judicial authorization. Advancing public safety is also a goal of sentencing law, and in that context courts address safety concerns as societal ills implicated in the case before them (*R. v. Parranto*, 2021 SCC 46, [2021] 3 S.C.R. 366, at para. 60; *R. v. Wiles*, 2005 SCC 84, [2005] 3 S.C.R. 895, at para. 9; *R. v. Johnson*, 2003 SCC 46, [2003] 2 S.C.R. 357, at paras. 19-20). In sentencing an offender, courts consider public safety interests alongside the particular circumstances of a case to tailor an appropriate sentence (*R. v. Jones*, [1994] 2 S.C.R. 229, at pp. 288-90; *R. v. Hilbach*, 2023 SCC 3, at para. 92). The Court of Appeal's reliance on this Court's decision in *Parranto* to establish the factual underpinnings of the safety risk in this case is consequently misplaced (C.A. reasons, at para. 83). Moreover, *Parranto* considered the appropriate sentence for individuals involved in commercial wholesale fentanyl trafficking operations, which is different than the situation in this case (para. 2).

[324] In the application of the doctrine of exigent circumstances, a generalized, societal safety concern cannot be sufficient to justify warrantless action unless it poses an imminent threat. As Martin J.A. observed in *R. v. Noble* (1984), 16 C.C.C. (3d) 146 (Ont. C.A.), setting the standard for exigent circumstances too low presents a danger of the exception consuming the general rule requiring a warrant (p. 171).

[325] The potential risk of harm that might arise from an individual's use of a drug after intervening events is inconsistent with the types of imminent safety risks that courts have recognized as exigent. As described above, imminent safety risks are those that may occur so quickly that immediate action is required, such as in cases requiring a rapid forced entry to ensure the life and safety of those within, or where there is the possibility that a sudden move in a volatile situation could be a threat to the safety of a police officer. Such a notion of imminence has been consistently applied in the key cases described above, as well as in other decisions of appellate courts (see *R. v. Laliberte*, 2007 SKCA 7, 289 Sask. R. 253; *R. v. Bakal*, 2021 ONCA 584, 157 O.R. (3d) 401; *R. v. Shomonov*, 2019 ONCA 1008). The authors of *Drug Offences in Canada* provide the example of the police having grounds to believe "that there are volatile and dangerous chemicals in a drug production lab" as one possible "safety" search that may relate to a drug offence (§ 25:35).

[326] We reject the view that the police's belief that, because the relevant drugs were "at risk" without their intervention, s. 11(7)'s threshold for urgency was met (Jamal J.'s reasons, at paras. 118-24). The claimed need to interrupt an impending drug deal of this amount and type of drug did not arise from or result in a fast approaching danger to public safety. The situation lacked "*urgency*, arising from circumstances calling for immediate police action to preserve evidence, officer safety or public safety" (*Paterson*, at para. 33 (emphasis in original)). In other words, it falls within the category or conduct Brown J. labelled as mere "convenience, propitiousness or economy"

(*ibid.*). No *imminent* safety risk justified the police's warrantless action as any risk of harm could only have manifested itself after at least two intervening events.

[327] While the police testified that it was likely Dew trafficked to people other than Mr. Gammie, contrary to Jamal J.'s conclusions, there is nothing in the record to suggest that Dew would have *imminently* moved on to sell the drugs to someone else. Neither the trial judge nor the Court of Appeal drew this conclusion from the evidence — nor is it an inescapable one. There is no evidence of another prospective buyer immediately waiting in the wings, making the potential sale imminent. The evidence was that one police officer believed that the transaction was going to occur in the "near future", while another agreed that there was nothing in the text messages that indicated that the transaction was going to happen immediately (A.R., part V, vol. I, at pp. 184 and 240-41). This does not meet the legal threshold for imminence. We accept that the police were not aware of Dew before they saw the four messages on the screen of Mr. Gammie's phone and made investigative decisions in response to an unexpected situation. However, that situation did not justify warrantless police action because it did not meet the required legal standard necessary to comply with s. 8. Under the aegis of the safety branch of the exigent circumstances doctrine, it is the risk of harm from safety threats that must be imminent to necessitate warrantless action. In our view, the factual findings of the trial judge did not reach the legal standard of exigency to justify a warrantless search under s. 8 of the *Charter*.

[328] The general desire to keep drugs off the street and out of the hands of potential users will properly be common to all police investigations involving dangerous substances. Certain drugs, like the fentanyl found in the heroin sold in this case, produce tragic consequences for individuals and communities in Canada. This complex societal problem requires a multifaceted response. However, stretching the exigent circumstances doctrine beyond what has previously, and can credibly, qualify as imminent harm opens the door to warrantless searches almost anytime police have an opportunity to seize drugs or whenever a potentially serious offence is being investigated. To paraphrase *Feeney*, to define these as exigent circumstances is to invite such a characterization whenever a potential drug transaction involves a dangerous substance regardless of the absence of imminent harm (see para. 53). This wrongly elevates the appropriate and ever-present concern over public safety into exigent circumstances because of the health risks associated with the use of unregulated illicit drugs. The result will be to authorize invasive and extensive police conduct outside of those rare instances in which the harm to public safety is so imminent and immediate, a *prima facie* unreasonable warrantless search is judged to be reasonable.

[329] Not only does this approach run afoul of the requirement in *Feeney* that the risk must be specific, exceptional, and concrete, it also allows the exception to swallow the rule in the manner Martin J.A. warned against in *Noble*, at p. 171. It waters down the statutory regimes Parliament has enacted to regulate and restrict warrantless searches, and the protection of s. 8, which is both embodied in those regimes and exists independently of them.

(b) *In the Absence of Exigency, the Requirement of Impracticability Is Not Established*

[330] The legal requirement of impracticability received little consideration in this case. The trial judge found that a telewarrant "would likely arrive too late to complete this transaction" (*voir dire* reasons, at para. 100) and counsel for the appellant has not argued that it was feasible for the police to have obtained one to engage in the conversation with Mr. Campbell (transcript, at pp. 7 and 20). However, the inquiries into exigency and impracticability are related and cannot be considered in isolation. As this Court emphasized in *Paterson*, it is not the impracticability of obtaining the warrant that supports a finding of exigent circumstances. That it would be difficult or inconvenient to obtain a warrant is not sufficient to meet this legal standard. Rather, the exigency "must be shown to cause impracticability" (para. 34 (emphasis added)). In this case, it would be necessary to show that an imminent safety risk rendered it impracticable to obtain a warrant before taking steps to ensure that the risk did not materialize. Respectfully, the Court of Appeal erroneously failed to consider whether the trial judge's *finding* that immediate action was required met the requisite legal standard for exigency and impracticability. It simply concluded that the finding was "open to the trial judge to make" (para. 84).

[331] As we have concluded, the circumstances of a potential, sometime subsequent sale of a small quantity of a dangerous drug that would likely later reach users on the street did not reach the threshold of an imminent safety risk. Since there were no exigent circumstances here, it follows that the practicable option was for the

police to obtain a warrant to search Mr. Gammie's phone or pursue other investigative steps. The objectives of such an investigation may have been different, including efforts to identify and locate Dew, and perhaps the larger source of the half ounce of heroin laced with fentanyl. Police were in a position to locate Dew as they could have sought judicial authorization for a production order to obtain the information associated with Dew's cell phone number (A.R., part V, vol. I, at pp. 184-85; *Criminal Code*, ss. 487.015 and 487.016). When the requirements of a recognized authority for police to conduct a warrantless search are not met, this "confirms that the invasion of privacy is not permissible", in which case "the avenues open to law enforcement authorities are to continue to investigate by methods less intrusive than a search and to seek to obtain a search warrant should the proper grounds upon which to do so materialize" (*R. v. Buhay*, 2003 SCC 30, [2003] 1 S.C.R. 631, at para. 36, quoting *R. v. Mercer* (1992), 70 C.C.C. (3d) 180 (Ont. C.A.), at p. 189).

[332] The record indicates that the police considered whether they required or had authority to engage in the conversation with Mr. Campbell and that they did not believe they had time to obtain a warrant (A.R., part V, vol. I, at pp. 94-96). As previously noted, the chosen technique may have required authorization under Part VI or s. 487.01 of the *Criminal Code*, and in this case we do not need to pronounce conclusively on the proper authorizing provision.

[333] However, we also note that, despite three officers waiting in Mr. Gammie's apartment for approximately two hours while Officer Orok communicated with

Mr. Campbell, and an additional two officers attending the building to wait for Mr. Campbell's arrival, there is no evidence that police consulted on the appropriate authorization or attempted to obtain any type of telewarrant, even as circumstances unfolded. The trial judge accepted the police's conclusion that a telewarrant would not have been secured in time, but the only evidence in the record providing a basis for this conclusion was the police's assertion. There was no practical information about how authorizations could be obtained in that jurisdiction. As a *Charter* application relating to exigent circumstances will only ever be an after-the-fact analysis of whether the search was reasonable, there must be a clear evidentiary basis relating to impracticability to allow courts to assess this legal requirement. Along with detailed notes taken by the officers, courts would benefit from a complete picture of the asserted exigency and impracticability.

[334] It may very well be that the available judicial resources or the type of warrant required to conduct this type of search would have made it difficult or impossible for police to obtain authorization to search in time had there been the required level of urgency. However, where no exigent circumstances exist and a search or investigative technique engages s. 8 of the *Charter*, it is not for the courts as guardians of the fundamental rights of Canadians to effectively expand warrantless search powers (see *Wong*, at pp. 56-57). A shortage of resources to ensure that investigative techniques can be carried out in a timely, *Charter*-compliant manner cannot become the basis for diluted *Charter* protections.

E. *The Evidence Should Be Excluded Under Section 24(2) of the Charter*

[335] The appellant seeks the exclusion of all text messages obtained pursuant to the police's investigative technique (other than the first four messages initially viewed by police on the phone screen), as well as the evidence of him arriving at Mr. Gammie's apartment with the drugs. The evidence was undoubtedly part of a single transaction and obtained in a manner that breached the *Charter*. Having found the threshold requirement is met, we turn to the evaluative component of s. 24(2) of the *Charter*.

[336] Section 24(2) of the *Charter* mandates that evidence shall be excluded if, having regard to all the circumstances, its admission would bring the administration of justice into disrepute. Whether the admission of evidence obtained in breach of the *Charter* would bring the administration of justice into disrepute engages three avenues of inquiry: (1) the seriousness of the *Charter*-infringing state conduct; (2) the impact of the breach on the accused's *Charter*-protected interests; and (3) society's interest in the adjudication of the case on its merits (*R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353 ("*Grant* 2009"), at para. 71).

[337] In this case, the trial judge conducted an analysis in the alternative under s. 24(2) and concluded that the evidence should be admitted (*voir dire* reasons, at paras. 129-39). In light of its conclusion on exigent circumstances, the Ontario Court of Appeal declined to address the s. 24(2) issue (para. 85). Although a trial judge's s. 24(2) analysis normally attracts deference as to the supporting findings of fact made, given our disagreement with the trial judge's conclusion, in this case the s. 24(2)

analysis can be conducted anew (*Grant* 2009, at para. 129; *R. v. Le*, 2019 SCC 34, [2019] 2 S.C.R. 692, at para. 138; *Tim*, at para. 72).

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

[338] Our task at this stage is to situate the police's conduct on a "scale of culpability", ranging from inadvertent, technical, or otherwise minor infringements on one end, to conduct that demonstrates a wilful or reckless disregard of *Charter* rights on the other (*Paterson*, at para. 43; *Le*, at para. 143). We characterize the police conduct as falling on the more serious end and therefore find the first *Grant* 2009 factor favours the exclusion of the evidence.

[339] A number of factors weigh heavily against admission of the evidence: the police's conduct in the absence of exigent circumstances; the legal uncertainty surrounding the nature of the investigative technique; and the multiple *Charter* breaches.

[340] The law has been clear for some time that warrantless searches are presumptively unreasonable (see, e.g., *Hunter*; *Collins*; *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432, at para. 33). As discussed earlier in these reasons, the factual findings in this case do not support an imminent risk to the safety of the public or the police — the legal standard required for the doctrine of exigent circumstances to justify a warrantless search. Rather, the police's references to the urgency of the situation were primarily tied to the investigative convenience of intercepting the drugs, based on the

seriousness of the offence, the fact that drug dealers like Dew typically did not want to drive around with product, and the fact that he appeared impatient (A.R., part V, vol. II, at pp. 179, 181 and 242). In the face of no real evidence to support a finding of imminent risk to safety, it is troubling that police did not even attempt to obtain a telewarrant, whether at the beginning or as time passed and events unfolded. In sum, the police relied on exigency for the warrantless search without a valid basis, rendering the *Charter*-infringing conduct more serious (*Paterson*, at para. 47).

[341] The police officers' experience and familiarity with the law further aggravates the seriousness of the *Charter* breach as Mr. Campbell's warrantless search did not take the police into "uncharted legal waters" (*Le*, at para. 149). This Court has been clear that the exclusion of evidence is warranted "for clear violations of well-established rules governing state conduct" (*Tim*, at para. 85, quoting *Paterson*, at para. 44). In our respectful view, the breaches were, taken in their best light, negligent as to *Charter* standards. Sgt. Bair testified that he had been with the Guelph Police Service for over 20 years, that he had investigated drugs for "more than half" of his career and that he had been a "sergeant in charge" of a drug unit since 2013 (A.R., part V, vol. I, at pp. 3-4). Officer Orok was a qualified level V undercover officer, which was the "highest" qualification possible, and had been specifically part of the drug unit for approximately four and a half years (pp. 193-94). Similarly, Officer Brown had been with the drug unit for over five years (p. 114). As in every case, police are "rightly expected to know what the law is", particularly when, as here, the law on

warrantless searches is well settled and the officers involved had decades of experience (*Grant* 2009, at para. 133).

[342] We would also note that none of these experienced officers testified at the *voir dire* as to which warrant would have been required to authorize their investigative technique (A.R., part V, vol. I, at pp. 59, 96, 183 and 185). Nor did any of these officers attempt to obtain judicial authorization in the approximately two-hour timeframe during which they communicated with Mr. Campbell, arranged the drug sale and waited for him to arrive. In these circumstances, the lack of any demonstrated effort to even attempt to obtain any judicial authorization was particularly puzzling considering that one of the officers at the scene was the same officer who had drafted the search warrant for Mr. Gammie's residence (p. 118).

[343] As of the date of Mr. Campbell's arrest, the law in Ontario, per the Court of Appeal of Ontario's decision in *R. v. Marakah*, 2016 ONCA 542, 131 O.R. (3d) 561, was that there was no reasonable expectation of privacy in a co-accused's cell phone. This point was reversed by this Court in *Marakah* (A.R., part V, vol. I, at pp. 95-97 and 180-83).

[344] However, even though the police may have operated under the existing law with respect to Mr. Campbell's privacy interest when they *viewed* Mr. Gammie's phone, their legal authority to *impersonate* Mr. Gammie (by virtue of his arrest and without his knowledge) and usurp control of a private, ongoing, conversation remained wholly unclear at the time of the investigation. When faced with such uncertainty, "the

police would do well to err on the side of caution" (*TELUS*, at para. 80; *R. v. McColman*, 2023 SCC 8, at paras. 60 and 63). The police testified that they had concerns regarding whether there was proper authorization for them to engage and respond to the incoming messages, but instead quickly decided to proceed without authorization. In the face of clear uncertainty, the police should have exercised caution, and not opted to engage in an intrusive and prospective investigative technique. We have found that there were no exigent circumstances and that this technique could not be authorized pursuant to s. 11 of the *CDSA*. These findings exacerbate the seriousness of the *Charter*-infringing conduct.

[345] A final factor is that the multiple *Charter* breaches in this case further aggravate the seriousness of the police's conduct. Although the trial judge found no s. 8 breach in respect of the police's text message conversation with Mr. Campbell, he did find that the police engaged in an unauthorized search of Mr. Campbell's phone following his arrest, despite there being no compelling risk at the time that the evidence on the phone would be lost or destroyed. This constituted a separate breach of Mr. Campbell's s. 8 rights (*voir dire* reasons, at paras. 124-28). This Court has previously situated police misconduct on the graver end of the scale where there are multiple "serious *Charter* breaches throughout the investigative process" (*Reeves*, at para. 65).

[346] The absence of exigency or impracticability, combined with a legally questionable technique, and the additional breach of Mr. Campbell's s. 8 rights cumulatively militate against admission of the evidence.

(2) The Impact of the Breach on the Accused's *Charter*-Protected Interests

[347] The second *Grant* 2009 factor strongly favours exclusion of the evidence.

[348] From a reasonable expectation of privacy perspective, Mr. Campbell had a substantial *Charter*-protected interest in the conversation he had with Mr. Gammie. The conversation revealed private information that went to Mr. Campbell's biographical core. We would reject the respondent's invitation to find that the impact of the breach on Mr. Campbell's privacy interests was diminished because the conversation "did not reveal intimate details" about him (R.F., at para. 110). Although the text messages pertained to directions and updates on the estimated time of arrival, taken as a whole, they clearly reflected Mr. Campbell's criminal "lifestyle and personal choices", something that was obvious to police at the time of their use of the investigative technique (*Marakah* (SCC), at paras. 32 and 54; *R. v. Patrick*, 2009 SCC 17, [2009] 1 S.C.R. 579, at para. 32). Communicating by text message automatically creates a written record of our conversations — and the *Charter* is designed to protect against the insidious possibility that the state may, "in its unfettered discretion", access those records (*Marakah* (SCC), at para. 40; see also *Duarte*, at p. 44).

[349] The impact of the breach on Mr. Campbell's *Charter*-protected privacy interest was aggravated by the intrusive nature of the investigative technique. As noted by the Court of Appeal below, the police technique employed here was "far more intrusive" than merely inspecting a conversation between two other individuals, which is what occurred in *Marakah* (SCC) (para. 71). Here, the police actively participated in creating the record of the criminal prosecution against Mr. Campbell by posing as another individual with whom he understood to be having a private conversation. We have highlighted why this police technique results in a particularly high degree of intrusion in our analysis on the reasonable expectation of privacy.

[350] Discoverability may be useful for assessing the impact of the breach. It allows a court to assess the strength of the causal connection between the resultant evidence and the *Charter* infringement (see *R. v. Beaver*, 2022 SCC 54, at para. 125, citing *Grant* 2009, at para. 122). In the present case, it is solely through impersonating Mr. Gammie that police caused the incriminating texts to be sent and manufactured the drug transaction. The text message evidence was *only* discoverable through the *Charter* breach, which results in a greater impact on the accused's *Charter*-protected interests (*Tim*, at para. 94) The strong causal connection between the *Charter* breach and the evidence obtained amplifies the impact on Mr. Campbell.

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

[351] The third *Grant* 2009 factor favours admission of the evidence (A.F., at para. 64).

[352] The evidence obtained pursuant to the police's investigative technique — the text message conversation, as well as the appearance of Mr. Campbell with the drugs at the residence — is reliable evidence of a serious crime (*Grant* 2009, at para. 81). Exclusion of this evidence would "effectively gu[t] the prosecution" against Mr. Campbell (para. 83). In such circumstances, society has a strong interest in the adjudication of the case against Mr. Campbell on its merits.

[353] Nevertheless, we stress that the seriousness of the offence in this case — fentanyl trafficking — is not determinative of the analysis at the third stage of *Grant* 2009. In the sentencing context, fentanyl trafficking has been recognized as an extremely serious offence given the potency and potential lethality of the drug — which, logically within the sentencing realm of law, leads to increases in penalties for this crime (see, e.g., *Parranto*). However, in the context of s. 24(2) of the *Charter*, the seriousness of the offence "has the potential to cut both ways" (*Grant* 2009, at para. 84). While the public's interest in a determination on the merits is heightened where the offence charged is serious, "it also has a vital interest in having a justice system that is above reproach, <u>particularly where the penal stakes for the accused are high</u>" (*ibid.* (emphasis added)). In line with this principle, this Court has excluded evidence under s. 24(2) even where there was reliable evidence of extremely serious offences — including trafficking 35 kilograms of cocaine (*R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494); trafficking in firearms (*Marakah* (SCC)); and possessing and accessing child pornography (*Reeves*). Mr. Campbell was found trafficking half an ounce of heroin laced with fentanyl. Arguing that admission will always be the result

where the evidence is reliable and the charge is serious is clearly "not the law" (*Harrison*, at para. 40).

[354] While the third *Grant* 2009 factor overall favours admission, this is not the end of the inquiry. We must balance all three factors to determine whether admission of the evidence would bring the administration of justice into disrepute.

(4) Balancing the Factors

[355] We are of the view that the evidence should be excluded. Police bypassed the prospect of even attempting to obtain a warrant despite there being no evidence that obtaining a warrant was impracticable in the circumstances. The purpose of exclusion of evidence under s. 24(2) of the *Charter* is not "to punish police or compensate for a rights infringement" (*Le*, at para. 139). Rather, s. 24(2) directs that "evidence *must* be excluded" if doing so is necessary to "maintain the 'integrity of, and public confidence in, the justice system'" (*ibid.* (emphasis in original), citing *Grant* 2009, at paras. 68-70).

[356] The protections afforded by s. 8 of the *Charter* — including the high bar for exigent circumstances that can justify a warrantless search — do not automatically fall by the wayside just because police believe fentanyl is likely to be involved in a drug transaction. Although the police's belief proved correct in Mr. Campbell's case, "for every *Charter* breach that comes before the courts, many others may go unidentified and unredressed because they did not turn up relevant evidence leading to a criminal charge" (*Grant* 2009, at para. 75). This concern is ever present where police

may be inclined to dilute exigent circumstances in the name of preventing a risk of serious harm occurring, even if that risk is remote, uncertain, or never materializes at all. The long-established presumption against warrantless searches, and the need to respect the bounds of any clearly circumscribed exceptions to this rule, remain vital prerequisites to ensuring s. 8 is not categorically whittled away.

[357] Balancing the *Grant* 2009 factors in this case, both the first and second strongly favour exclusion. In such a case, this Court has noted that the third factor "will seldom if ever tip the balance in favour of admissibility" (*Le*, at para. 142; *Paterson*, at para. 56). On balance, we are satisfied that the administration of justice would be brought into disrepute by the admission of this evidence. The evidence should be excluded.

IV. Disposition

[358] We would allow the appeal, set aside the appellant's convictions, and enter acquittals.

Appeal dismissed, KARAKATSANIS, MARTIN *and* MOREAU JJ. *dissenting.*

Solicitors for the appellant: Hicks Adams, Toronto; Daley, Byers, Toronto.

Solicitor for the respondent: Public Prosecution Service of Canada, Ontario Regional Office, Toronto.

Solicitor for the intervener the Attorney General of Ontario: Ministry of the Attorney General, Crown Law Office — Criminal, Toronto.

Solicitor for the intervener the Director of Criminal and Penal Prosecutions: Director of Criminal and Penal Prosecutions, Montréal.

Solicitor for the intervener the Attorney General of Alberta: Alberta Crown Prosecution Service, Appeals and Specialized Prosecutions Office, Calgary.

Solicitors for the intervener the National Council of Canadian Muslims: Paliare Roland Rosenberg Rothstein, Toronto; National Council of Canadian Muslims, Ottawa.

Solicitors for the intervener the Criminal Lawyers' Association (Ontario): Stockwoods, Toronto; Savard Foy, Toronto.

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

Solicitors for the intervener the Criminal Trial Lawyers' Association: Wolch Wilson Jugnauth, Calgary; Pringle Law, Edmonton.

Solicitors for the intervener the British Columbia Civil Liberties Association: Pringle Law, Vancouver; British Columbia Civil Liberties Association, Vancouver.

Solicitors for the intervener the Trial Lawyers Association of British Columbia: Peck and Company, Vancouver.

Solicitors for the intervener the Independent Criminal Defence Advocacy Society: MN Law, Vancouver; Harper Grey, Vancouver.