

CANADA / JUDGMENT

R. v. Losch

2025 BCSC 852

COURT

Supreme Court of British Columbia

DECIDED

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2025 BCSC 852 R. v. Losch

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Losch,

2025 BCSC 852

Date: 20250422

Docket: 95517-2; 95517-5;

95517-6; 95517-7

Registry: Abbotsford

Rex

v.

Gary Donald Losch

Before: The Honourable Justice Dley

Oral Ruling on Voir Dire No. 3

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Place and Dates of Hearing:

Abbotsford, B.C.

March 27 & 31, 2025

April 1-2 & 7, 2025

Place and Date of Judgment:

Abbotsford, B.C.

April 22, 2025

[1] THE COURT: In my reasons for judgment on Voir Dire No. 3, I will be referring to the transcript of the recordings involving Ms. Tetz and Staff Sergeant Brown-John. To ensure that there is consistency in the quotes that I refer to, I will refer to Staff Sergeant Brown-John as "Combrow" in the transcript.

Introduction

- [2] Section 8 of the Canadian Charter of Rights and Freedoms [Charter] gives everyone the right to be secure against unreasonable search or seizure.
- [3] The issue in this voir dire is whether the sender's s. 8 Charter rights are engaged or breached when the recipient consents to disclosing their electronic communications to police.
- [4] Mr. Losch argues that his s. 8 Charter rights were breached when the police, acting without a warrant, obtained photographs, messages and voicemails from his girlfriend's phone. Mr. Losch maintains that he had a reasonable expectation of privacy in his communications with his girlfriend and therefore the police obtained them unlawfully.
- [5] The Crown argues that any subjective expectation of privacy was not objectively reasonable and, in any event, the police were justified in obtaining the evidence because his girlfriend consented to disclosing the communications.
- [6] Mr. Losch applies for the following rulings:
- a) that he has standing to challenge the search of Ms. Tetz's phone and the seizure of the contents on her phone;
 - b) that the search and seizure of the information on Ms. Tetz's phone was unlawful and therefore breached his s. 8 Charter rights; and
 - c) that all of the evidence obtained from the breach be excluded pursuant to s. 24(2) of the Charter.

Background Facts

- [7] Mr. Losch is charged with second degree murder of Ms. Gauthier and interfering with, or offering an indignity to her remains.
- [8] Ms. Gauthier was reported missing to the Abbotsford Police on July 30, 2017. She was last seen with Mr. Losch on July 27 when the pair were dropped off in the Mission area of Sylvester Road and Dale Road. Ms. Gauthier was accompanying Mr. Losch for the purposes of assisting him in tending to his marihuana grow, which was located in a rugged, and difficult to access forested area.
- [9] The Abbotsford police had interviewed a number of people who provided information relevant to Ms. Gauthier's last known movements and her association with Mr. Losch.
- [10] In August 2017, Ms. Tetz and Mr. Losch had been in an on-and-off-again boyfriend/girlfriend relationship for about six years. Ms. Tetz was living with her stepsister, Rhonda and her son. Mr. Losch had no fixed residence. Ms. Tetz and Mr. Losch saw each other generally on a daily basis, but he was not allowed to attend at her home.
- [11] The police went to what was believed to be the area of the grow on August 2, but saw no signs of Ms. Gauthier. The investigation continued as a missing person file. Mr. Losch was a person of interest.
- [12] On August 8, Staff Sergeant Brown-John spoke to Ms. Tetz by phone and asked questions about Ms. Gauthier and Mr. Losch. Ms. Tetz advised that Mr. Losch regularly went to the grow and would take others with him, including Ms. Gauthier. The officer told Ms. Tetz that she was not interested in the marihuana grow, but rather her focus was with respect to Ms. Gauthier's welfare. At pages 3-4 of the transcript the following was said (starting at line 31 on page 3):

[Combrow]: Okay. And you and Gary live together, right?

[Answer]: Yes.

[Combrow]: Okay. So, Dina, this girl has -

Mm-hmm.

[Combrow]: - been missing now since July 27th so -

[Ms. Tetz]: Oh my goodness.

[Combrow]: - that is a really long time.

[Answer]: Yes.

[Combrow]: Yes. And it is the information that I have received that she was going to go to Gary's grow out in, umm, Mission. Okay.

[Tetz]: Grow.

[Combrow]: Now it's my understanding that you've been out to that grow with Gary. And I'm going to be honest I don't care about the grow I don't care at all all I want to know is where it is because I fear that this girl is up there and she's either stuck or she's been attacked by wild life, umm, there's cougars and bears in the area.

[Tetz]: Yeah no.

[Combrow]: Umm, so do do you can you give me the description of where it is?

[Tetz]: All I know is it's off of Sylvester Road.

[13] Staff Sergeant Brown-John described Ms. Tetz as being pleasant and cooperative. Ms. Tetz indicated that she was concerned about the missing person.

[14] On August 10, Staff Sergeant Brown-John returned and had a more detailed conversation with Ms. Tetz, who provided information including the following:

- she and Mr. Losch saw each other almost every day and also spoke on the phone;
- Mr. Losch made his income from selling marihuana;
- Mr. Losch had a marihuana grow that was accessed via a logging road. There was a gate at the trail that went up a hill and through bush and trees;
- on July 26, Mr. Losch told her that he was taking Ms. Gauthier to the grow the following day;
- July 27 was Ms. Tetz's birthday. In the afternoon, she spoke with Mr. Losch on the phone and he wished her happy birthday. He told her that he and Ms. Gauthier were watering and fertilizing the crop. He said that Ms. Gauthier was on her way home; and
- on July 28, Ms. Tetz and Mr. Losch got together. He told Ms. Tetz that Ms. Gauthier had worked hard and done a good job.

[15] Ms. Tetz reviewed her call log and noted that Mr. Losch had called her on July 21 and 28. She also found a message from July 31, where Mr. Losch said that he received text messages from the police saying they were looking for Ms. Gauthier. During the discussion, Staff Sergeant Brown-John asked if she could look at Ms. Tetz's call log to get a better understanding of the times when Mr. Losch had called. Ms. Tetz agreed, as set out on pages 36-37 of the recorded transcript.

[16] On page 36, starting at line 19:

[Combrow]: Mm. Okay. What do you think happened to Chelsey?

[Tetz]: I think somebody picked her up.

[Combrow]: And why do you say that?

[Tetz]: Because she's been gone so long. She wouldn't be on, uh, missing - I don't think she would go missing on her parents like that. Just, having them worry about her. She's -

[Combrow]: How do you think she got home on the twenty-seventh?

[Combrow]: How do you - and this is you know or you think?

[Tetz]: I think.

[Combrow]: You think? Do you have any idea? Did anyone - uh, did Gary tell you how they all got home?

[Tetz]: No.

[Combrow]: And did you ask?

[Tetz]: No.

[Combrow]: So I guess uh, what I need to do is just kind of, I know it's kind of hard 'cause you said you're still confused right now. But you're saying that in the afternoon, you usually talk to Gary in the late afternoon?

[Tetz]: Mmhm.

[Combrow]: And that on July twenty-seventh, the day he was gonna go water the crop.

[Tetz]: Mmhm.

[Combrow]: He calls you?

[Tetz]: Yeah.

[Combrow]: And he wishes you happy birthday?

[Tetz]: Yeah. . . .

[Combrow]: Would it be in your phone when he called?

[Tetz]: Mmhm.

[Combrow]: In your phone log?

[Tetz]: Mmhm.

[Combrow]: Yeah? Would I be able to see that? Then you might be able to understand the times a little bit better?

[Tetz]: Yeah.

[Combrow]: Would that be okay?

[Tetz]: I'll go get my phone.

[Combrow]: Sure. That would be great. And then, maybe we can try and figure out the times.

[Tetz]: Yeah.

[Combrow]: Thanks for helping me out. It might help us if we look at your call log.

[Tetz]: Yeah.

[17] Staff Sergeant Brown-John knew that she had no authority to seize Ms. Tetz's phone. She asked if she could take pictures of Ms. Tetz's phone with respect to the July 31 message. Ms. Tetz agreed.

[18] On August 15, Staff Sergeant Brown-John went back to Ms. Tetz's home and asked if the contents of her phone could be downloaded because Ms. Gauthier was still missing and the phone contents could assist in finding her. Ms. Tetz consented and signed a consent form. Staff Sergeant Brown-John explained the consent form to Ms. Tetz. The officer had no concerns about Ms. Tetz's understanding regarding consent.

[19] The form contained the following provisions. The form is entitled "Consent to search an electronic device or internet account". It states:

I, Dina Tetz, do hereby voluntarily give my consent and authorize the Abbotsford Police Department to:

Search for evidence.

[20] The form refers to a cellphone and states:

The cell phone to be searched belongs to Dina Tetz and I have control over it by virtue of own since 2015

[21] The form states:

If anyone else has access to / uses this / these device(s) please list them here:

Answer:

No one else does have access.

[22] The form goes on to state:

The account(s) to be searched belong(s) to Dina Tetz and I have sole ownership of this / these accounts. If anyone else has access to / uses this / these accounts, please list them here:

The answer is:

No one else does

[23] The form then goes on to state:

I give my consent to this search knowing that:

1. I am under no obligation to consent to this search;
2. If I consent to the search, I maintain my ability to withdraw that consent at any time during the search.

3. I fully understand that if any of the items listed above are found to contain evidence, or if anything else is found that could produce evidence of a criminal, federal or provincial offence, that the items may be subject to seizure, and I may be arrested, charged and prosecuted.
4. I am of sound operating mind, and sign this consent voluntarily and without having been coerced, threatened or promised any advantage, by a police officer or anyone else.

[24] The consent is signed by Dina Tetz, and dated August 15, 2017.

[25] Staff Sergeant Brown-John had planned to return the phone to Ms. Tetz later that afternoon. She took the phone back to the Abbotsford Police office. There, Special Constable Ward was only able to extract partial data from Ms. Tetz's phone because of software limitations.

[26] Staff Sergeant Brown-John contacted Ms. Tetz's nephew and advised that she would not be able to return the phone until the following day. Staff Sergeant Brown-John took a further 119 photographs from the phone contents, including various messages exchanged between Mr. Losch and Ms. Tetz.

[27] On August 16, Special Constable Ward extracted photographs from the phone's SIM card. He also took photographs of all messages on the cellphone, which included exchanges between Mr. Losch and Ms. Tetz and other conversations. On the same day, Ms. Gauthier's body was located. Staff Sergeant Brown-John contacted Ms. Tetz and indicated that the police would continue to hold her phone. Ms. Tetz said that she understood.

[28] On August 18, Staff Sergeant Brown-John turned the phone over to Sergeant Grewal of the investigating IHIT unit. Staff Sergeant Grewal confirmed that further analysis could be done with respect to the phone and the decision was made to send it to the RCMP Ottawa lab.

[29] In the meantime, Ms. Tetz resorted to using the house phone, which proved to be problematic, because she was unable to text messages. She left a message for Staff Sergeant Brown-John seeking the return of her phone. Staff Sergeant Brown-John was on vacation, but on August 24, she forwarded the request to Detective Mitchell who had indicated that a replacement phone was to be provided at Ms. Tetz's request.

[30] On August 25, Sergeant Cryer met with Ms. Tetz and explained to her that after the police had completed their download, her phone would be useless and that a replacement phone would be provided. Ms. Tetz agreed to, and was provided with a replacement phone. Ms. Tetz signed a document entitled "Relinquishment of Claim". Sergeant Cryer testified that the form confirmed that Ms. Tetz was relinquishing the phone (the form was actually a release of liability).

[31] On December 13, 2017, contents of the cellphone were extracted by the Ottawa Technological Crime Unit. The extraction contents were subsequently produced as a readable report referred to as the Cellebrite report. The report captured messages, including voice-to-text messages, and photographs sent from Mr. Losch to Ms. Tetz between June 6, 2015, to August 13, 2017. In addition, the data extraction included approximately 200 voicemails from Mr. Losch to Ms. Tetz between August 1, 2015, and August 13, 2017.

The Law

[32] On this application, the onus lies with Mr. Losch to show, on a balance of probabilities, that he had a reasonable expectation of privacy in the materials downloaded from Ms. Tetz's phone. If he does not satisfy his burden, then he has no standing and s. 8 of the Charter is not engaged.

[33] If Mr. Losch discharges his burden, then the onus shifts to the Crown to prove, on a balance of probabilities, that the search was authorized and carried out in a reasonable fashion.

[34] If the Crown discharges its burden, then there is no s. 8 breach. If the Crown fails to discharge its burden, then the inquiry shifts to a determination under s. 24(2) of the Charter as to whether the evidence should be excluded.

[35] In *R. v. Marakah*, 2017 SCC 59 at para. 1, the Court posed the following questions with respect to the privacy of electronic communications:

Can Canadians ever reasonably expect the text messages they send to remain private, even after the messages have reached their destination? Or is the state free, regardless of the circumstances, to access text messages from a recipient's device without a warrant?

[36] Chief Justice McLachlin, writing for the majority, decided (at para. 4) that:

depending on the totality of the circumstances, text messages that have been sent and received may in some cases be protected under s. 8

[37] At para. 5, the Chief Justice further stated:

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.

[38] The inquiry into the private nature of the information is not as to what is actually revealed, but rather on what personal or biographical information may potentially be revealed: *Marakah* at paras. 31-32.

- [39] Electronic conversations form a zone of privacy which are safe from state intrusion through the protections provided in s. 8 of the Charter. The zone of privacy extends beyond the sender's mobile device and can include electronic conversations with others: *Marakah* at para. 37.
- [40] Control is one element to consider in the totality of the circumstances. To some degree, the sender has lost control over the information once it is transmitted, because there is a risk that the recipient may disclose the communication. However, that does not mean that the sender accepts the risk that the state will intrude upon an electronic conversation absent such disclosure: *Marakah* at paras. 38-40.
- [41] Although decided before *Marakah*, the comments in *R. v. Pelucco*, 2015 BCCA 370, are compelling and recognize the importance of assessing the totality of the circumstances. At para. 65, the Court stated:
- [65] While there will be situations in which the content of the text message or the situation negative these ordinary expectations, it seems to me that the social norm is to expect that text messages remain private communications between the sender and recipient.
- [42] *Pelucco* recognized that a sender cannot have absolute confidence that the communication will remain private. That view was confirmed in *Marakah* at para. 55, where the Court stated:
- [55] Th[at] is not to say, however, that every communication occurring through an electronic medium will attract a reasonable expectation of privacy and hence grant an accused standing to make arguments regarding s. 8 protection. On the facts of this case, Mr. *Marakah* had a reasonable expectation of privacy in the electronic conversation accessed through Mr. *Winchester's* device; different facts may well lead to a different result.
- [43] In *R. v. Vickerson*, 2018 BCCA 39 at paras. 53-56, the Court noted that the sender of a text message does not always have a reasonable expectation of privacy. The Court also referred to *Pelucco* as standing for the proposition that a person cannot have a reasonable expectation of privacy over communications in the face of a lawful search. At para. 56, the Court stated:
- [56] the majority holding in *Pelucco* is expressly inapplicable to situations of a lawful search. At para. 49, *Groberman J.A.* notes:
- [49] A person cannot have a reasonable expectation that messages on another person's cellphone will remain private in the face of a lawful search of the device.
- [Emphasis added in *Vickerson*.]
- [44] All important is the factual matrix which is unique to each case: *Vickerson* at para. 43.
- [45] The totality of the circumstances are assessed within the following framework:

- 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?

[46] Standing will only be granted if the answer to the fourth question is yes: Marakah at paras. 11-12.

[47] While there has been a good deal of commentary in subsequent cases regarding the majority decision in Marakah, it still remains the leading authority. R. v. Campbell, 2024 SCC 42, confirms the approach taken by the majority in Marakah.

Did Ms. Tetz Consent to Disclosing the Contents of her Phone?

[48] On the questions of whether Mr. Losch has standing or whether the police acted lawfully in seizing the phone, how the police came into possession of the phone is a critical issue.

[49] While they were together, Mr. Losch showed Ms. Tetz pictures of his marihuana grow with him and others depicted. She recalled one of the photographs being of Ms. Gauthier. Ms. Tetz was aware that Mr. Losch showed pictures of his marihuana grow to others, both from his phone and from a CD in his computer.

[50] Ms. Tetz expected that her conversations with Mr. Losch would be private.

[51] During the voir dire, Ms. Tetz testified about her interactions with police officers on August 8, 10, 15 and 25, 2017.

[52] Ms. Tetz had met Ms. Gauthier previously. She had also met Ms. Gauthier's young children, whom she thought were about one and three years old respectively - they were in a stroller then. Ms. Tetz was aware that Ms. Gauthier went to Mr. Losch's grow with him. She recalled being told by Mr. Losch that Ms. Gauthier was going up to the grow on July 26.

[53] Ms. Tetz became aware that Ms. Gauthier had gone missing. She was upset because of her concern for Ms. Gauthier's children and the worry caused for Ms. Gauthier's family. Ms. Tetz was also aware that Ms. Gauthier had last been seen in the company of Mr. Losch.

[54] At the time Ms. Tetz was giving information to Staff Sergeant Brown-John, she was doing so because she was concerned about Ms. Gauthier and her family. Ms. Tetz was the only person who used her phone. She believed that there was evidence on her phone that would help the police find Ms. Gauthier. She provided the police with permission to access her Facebook account.

[55] Ms. Tetz testified that she knew she had a choice as to whether or not to allow the police to secure information from her phone. She was aware that the police were interested in Mr. Losch. Ms. Tetz was not concerned that there was evidence that might be harmful to her.

- [56] Staff Sergeant Brown-John had no concerns that Ms. Tetz understood what she was doing when she gave the police access to her phone. She explained what the police were going to do with the phone and Ms. Tetz agreed to that.
- [57] Ms. Tetz understood that her phone would be returned to her, but after she gave the phone to Staff Sergeant Brown-John on August 15, she was then advised that the police were going to keep her phone and supply her with a replacement. Ms. Tetz testified that she agreed to give her phone to the police and she never changed her mind. She knew from speaking to Staff Sergeant Brown-John that she could change her mind about providing her consent; she never changed her mind.
- [58] Ms. Tetz said that she knew the police were subsequently investigating how Ms. Gauthier died and who was responsible. She knew that the police were going to use evidence from her phone, but was not aware as to what evidence might be used. She was aware that pictures from the grow would be utilized to ascertain Ms. Gauthier's presence there.
- [59] Ms. Tetz became aware that Ms. Gauthier was dead before Sergeant Cryer came with the replacement phone. She consented to the police continuing to use her phone. She said, "I was okay with it." Ms. Tetz again said that she wanted to help Ms. Gauthier's family and her boys to find out what had happened. Ms. Tetz believed that there was evidence on the phone and that some of that evidence was about Mr. Losch.
- [60] Ms. Tetz was skilfully cross-examined with respect to providing consent for the police using her phone. She indicated that she was not aware that she could insist for the return of her phone instead of a replacement. Her preference would have been to get her old phone back. Ms. Tetz said that she did not want to be trouble for the police. Ms. Tetz testified that she did not want to get into trouble and so she helped the police. She said that Staff Sergeant Brown-John asked a lot of questions and some of the questions confused her. Ms. Tetz thought she had to sign the relinquishment form on August 25 in order to get the new phone from Sergeant Cryer.
- [61] There were some inconsistencies in Ms. Tetz's testimony. For example, she said that Staff Sergeant Brown-John had asked if she, Ms. Tetz, could take a photo or print out messages from her phone. However, I am satisfied that she was simply mistaken as to who was going to take the photo or do the printing. Staff Sergeant Brown-John was clear in her testimony that she was the one who asked to take the photographs.
- [62] There are times where a single inconsistency in a witness's testimony is so stark that it renders the entire testimony unreliable. There are other times when a number of inconsistencies may have some or little effect on the entirety of the testimony. Upon assessing the whole of the evidence, the trier of fact may accept some, none, or all of a witness's testimony.

- [63] I was impressed with Ms. Tetz. She was earnest in her desire to answer all of the questions posed in court. There were times when she stumbled, but I do not attribute those moments to a lack of credibility or a lack of reliability. These events occurred almost eight years ago, and it is understandable that some details have been clouded with the passage of time or forgotten.
- [64] However, on the key aspects of Ms. Tetz's testimony, her evidence was consistent, reliable, and believable. When Ms. Tetz says that she agreed to give the police her phone and its contents, she did so because she was concerned about the welfare of Ms. Gauthier. She was aware that the phone had evidence which could assist the investigators and that there was evidence touching Mr. Losch.
- [65] The Crown must show, on a balance of probabilities, that Ms. Tetz consented to what would otherwise be an unauthorized search or seizure of her phone. The factors in the context of a waiver - but as applicable here - that the Crown must satisfy were summarized in *R. v. Wills*, [1992] O.J. No. 294, 1992 CanLII 2780 (Ont. C.A.) at page 25:
- 1) that there was an express or implied consent;
 - 2) the giver of the consent had the authority to give the consent in question;
 - 3) the consent was voluntary and not as a result of police oppression, coercion, or other external conduct which took over the freedom to choose whether or not accede to the police request for access;
 - 4) the giver of the consent was aware of the nature of the police conduct for which consent was being requested;
 - 5) the giver of the consent was aware of their right to refuse or permit the police to engage in the conduct requested; and
 - 6) the giver of the consent was aware of the potential consequences of giving the consent.
- [66] There was no pressure, deceit, or trickery employed by the police so as to convince Ms. Tetz that she should provide her phone and its contents to them. She was clear and unequivocal. She wanted to help locate Ms. Gauthier and find out what happened to her. Ms. Tetz believed that there was evidence on her phone that could assist the police in their investigation, initially with respect to the missing person complaint and subsequently, with respect to Ms. Gauthier's death.
- [67] Ms. Tetz was aware that she did not have to consent and that her consent could be revoked at any time. I am satisfied that Ms. Tetz was fully informed of all the factors set out in *Wills*, and that it was an informed consent that permitted the police to first, take photographs of entries on her phone, and subsequently, to download and extract its contents.

- [68] Staff Sergeant Brown-John was careful to ensure that Ms. Tetz was aware of her rights and also that she was aware of her jeopardy in the event the disclosure revealed criminal activity on her part. Staff Sergeant Brown-John was not aggressive, pushy, or otherwise acting in a manner that suggested, directly or indirectly, that Ms. Tetz should disclose the contents of her phone. To the contrary, the officer was soft-spoken, polite, and patient.
- [69] Sergeant Cryer's evidence, standing on its own, would not be convincing, particularly if she had been the first officer seeking consent or, to put it another way, if she had been standing in the shoes of Staff Sergeant Brown-John. The best Sergeant Cryer could say was that she explained matters as she did in her usual practice. However, it was apparent that Sergeant Cryer did not understand the relinquishment form that she presented to Ms. Tetz. That form was anything but an acknowledgment of consent. I place little weight on Sergeant Cryer's evidence.
- [70] In looking at the whole of the evidence, I conclude that Ms. Tetz consented to the police taking possession of her phone and its contents. It mattered not to her whether it was the Abbotsford police or the RCMP.
- [71] Ms. Tetz was motivated by her desire to assist the police in locating or finding out what happened to Ms. Gauthier. I am satisfied the initial consent given to Staff Sergeant Brown-John was never revoked.
- [72] Based on the totality of all the evidence, I am satisfied that Ms. Tetz knew the police were going to access information from her phone and she consented to it. She was aware that she could revoke her consent at any time and she chose not to.
- [73] It matters not that Sergeant Cryer's view of the contents of the relinquishment form were incorrect. It is the substance of the evidence that counts, not the form. Ms. Tetz gave her consent freely and voluntarily and never revoked that consent.

Does Mr. Losch have Standing?

- [74] The question as to whether Mr. Losch has standing for a s. 8 Charter challenge focuses in on the last factor set out in *Marakah*: Was Mr. Losch's subjective expectation of privacy objectively reasonable?
- [75] In *R. v. Reeves*, 2018 SCC 56, the Court commented on the significance of providing consent for state access to a private device, and thereby impacting the protections afforded under s. 8 of the Charter. At para. 13, Justice Karakatsanis stated:
- [13] Further, "the essence of a seizure under s. 8 is the taking of a thing from a person by a public authority without that person's consent" (emphasis added) In contrast, valid consent acts as a waiver of the claimant's s. 8 rights. In such cases, there is no search or seizure within the meaning of the Charter, even though the claimant would ordinarily enjoy a reasonable expectation of privacy in the thing the police have taken or inspected .

[76] In *R. v. Mills*, 2019 SCC 22 at para. 36, the Court commented on the need for a taking before police conduct amounted to a search or seizure:

Further, the police conduct does not amount to a search or seizure -- the police did not take anything from the accused or intrude on a private conversation; the undercover officers simply received messages sent directly to them.

[77] In some respects, the reasoning in *Mills* is applicable here, because the police did not take anything from Ms. Tetz. The police received the information that she gave them.

[78] The term "taking something" must be informed within the context of the event. For example, if a person was to hand an item to another, it is correct to say that the recipient has taken the item given. However, that is different from a person taking an item without the other person's consent. The latter example would be an objectionable taking because there would be no consent. The former example would not amount to an objectionable taking because it was a consensual giving and receiving.

[79] Ms. Tetz could have simply described the photos and read out the messages to Staff Sergeant Brown-John. That would, for all intents and purposes, be the same as allowing the officers to take photographs of the same contents or downloading them. Either way, the contents were being voluntarily disclosed. The accurate record provided through the photographs and download would be preferable to a verbal recitation.

[80] This is not a case where a party has disclosed the contents of a shared device. It is important to distinguish between those instances where there has been a disclosure of a shared device, such as in *Reeves*, or entry into shared premises, as opposed to the disclosure of a recipient's own private device. There is no suggestion that Ms. Tetz's phone was shared by Mr. Losch. This was her own private phone and she could do with it as she pleased.

[81] Ms. Tetz did not need permission from Mr. Losch to share the contents of her phone. She was quite entitled to share communications or the data on her phone with anyone. There was no special relationship between her and Mr. Losch that prohibited that kind of disclosure.

[82] Similarly, Mr. Losch was just as entitled to disclose his phone and its data to others without first securing Ms. Tetz's approval. That is the reality of everyday life.

[83] Ms. Tetz had control of her phone. To suggest that she needed Mr. Losch's consent to do what she wished with the phone and its contents would effectively turn the control of her phone over to Mr. Losch. To follow that reasoning, Ms. Tetz would not have the ability to discard or transfer her phone unless Mr. Losch consented. That would defy logic and common sense.

- [84] This is not a case of state intrusion. The police were open and honest with Ms. Tetz as they sought her assistance in their investigation. She cooperated, knowing that there was evidence on her phone that would assist, and knowing there was evidence regarding Mr. Losch.
- [85] The facts here are unlike those in other cases where the police have intercepted private communications or seized communications from one party to the electronic communications without first obtaining judicial authorization. This is a case of disclosure by consent.
- [86] The communications do reveal some aspects of Mr. Losch's lifestyle with respect to his involvement in the marihuana drug trade. However, Staff Sergeant Brown-John already knew that before she spoke to Ms. Tetz and before she obtained the communications from the phone. It was not information that was of interest to the police, other than in the course of gathering information as it related to the missing person complaint.
- [87] In making those comments, I am mindful that a s. 8 analysis is concerned about the privacy of the thing being searched. There is no relevance to the legality or illegality of the items sought: *R. v. Spencer*, 2014 SCC 43 at para. 36.
- [88] With respect to the question of consensual disclosure, the comments of Doherty J.A. in *R. v. Orlandis-Habsburgo*, 2017 ONCA 649 are persuasive:
- [34] I have considerable difficulty with the submission that s. 8 is engaged if the police look at information in which an accused has a legitimate privacy interest, even if that information is brought to the police by an independent third party acting on its own initiative. On that approach, s. 8 would be engaged if a "whistleblower" took confidential documents belonging to her employer to the police to demonstrate the employer's criminal activity. Must the police refuse to look at the documents to avoid violating the employer's s. 8 rights? As Duarte teaches, it is one thing to say that Canadian values dictate that the state's power to decide when and how it will intrude upon personal privacy must be carefully circumscribed, and quite another to say that an individual's private information is cloaked in the protection of s. 8 no matter how that information comes to the police.
- [89] In *R. v. Hayer*, 2022 BCSC 747, the deceased victim's mother had provided her consent for the police to download her phone which contained threatening text messages. The accused argued that the text messages were obtained in breach of his s. 8 rights. The court at paras. 34-37 summarized the following:
- 1) information known in advance of any intentional privacy breach is relevant to the assessment as to whether there was a reasonable expectation of privacy;

- 2) the assessment of a reasonable expectation of privacy is more than a factual inquiry and involves normative considerations which, in the usual course, mean that it is reasonable for the sender of private messages to expect those to remain private in the recipient's account and not be shared; and
- 3) there are exceptions that rebut the normative considerations.
- [90] In *Mills* at para. 20, the Court held that the question of whether an expectation of privacy was objectively reasonable engaged "a normative question about when Canadians ought to expect privacy, given the applicable considerations."
- [91] In *Mills*, the Court balanced the individual's right to privacy against the protection of vulnerable children. The Court held, in all of the circumstances, any subjective expectation of privacy would not be objectively reasonable.
- [92] Here the issue does not concern a vulnerable person as contemplated in *Mills*, but rather the question as to when Canadians ought to expect privacy in the given circumstances. The court must balance the individual's right to be left alone and the public's interest in protection.
- [93] Most recently in *R. v. P.M.*, 2025 ONCA 208, the Court confirmed that the Supreme Court of Canada had not conclusively decided whether s. 8 is engaged where a recipient of electronic communications voluntarily discloses those communications. Although the Court decided to leave the issue for another day, it made the following comments:
- [54] Since *Knelsen*, the Supreme Court has reiterated in *Campbell* that there is no "automatic" rule of standing for text messages, and "[w]hether 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"
- [55] The ultimate bar against which a reasonable expectation of privacy is measured is whether, in a particular set of circumstances, the public's interest in being left alone by government must give way to the government's interest in intruding on an individual's privacy in order to advance its goals, notably those of law enforcement. Decisions considering when an individual has a reasonable expectation of privacy have also described this concept in terms of what expectations of privacy should be protected in a free, democratic, and open society, balancing the individual's right to be left alone and the community's interest in protection
- [56] As was observed by Doherty J.A. in the passage quoted above from *Orlandis-Habsburgo*, there is much to commend the proposition that reasonable and informed Canadians would not expect the sender of text messages to have an expectation of privacy in text messages voluntarily sent to the phone of a complainant, when the complainant reports a criminal offence committed by the accused to police, and gives the police the phone and permission to extract data from it because the complainant believes the texts will provide evidence of the offence. Or, if the accused has a residual expectation of privacy in sent texts in this context, the combination of the complainant making a statement to police alleging a

criminal offence committed by the accused and providing consent for the police to extract texts on the complainant's phone between the accused and the complainant may well be sufficient to render the warrantless search reasonable [emphasis in original]

- [57] However, I would leave this issue for another day. The assessment of whether there is a reasonable expectation of privacy in text messages in a given set of circumstances is a highly fact dependent determination
- [94] Ms. Tetz's consent only allowed the police to see what Mr. Losch sent to her and what was on her phone. Her consent did not extend to allow police access to Mr. Losch's device. She was not waiving Mr. Losch's right to privacy.
- [95] In the context of the missing person investigation, and subsequently the investigation into Ms. Gauthier's death, it was not objectively reasonable for Mr. Losch to expect that Ms. Tetz would not consent to reveal relevant information from her phone to police: see *R. v. Phagura*, 2019 BCSC 1638 at paras. 57-62.
- [96] The analysis is shaped by the question posed in *Mills* as to whether Canadians ought to expect privacy in the circumstances that arise here; namely, that the information was initially accepted by police in the course of a missing person investigation.
- [97] The relevant situation was the missing person investigation. It overrode ordinary expectations of privacy. Mr. Losch was entitled to expect that his conversations would remain private and that the police would not search his communications without authorizations. However, I conclude that it was not objectively reasonable to have an expectation of privacy in the context of Ms. Tetz voluntarily disclosing those communications on her device in order to assist in locating Ms. Gauthier.
- [98] In *Marakah*, the accused had sent text messages discussing the illegal trafficking of firearms to his accomplice. The police seized and accessed the contents of both phones. The police intruded upon the communications. That is not the case here, because Ms. Tetz consented to disclosing the communications to the police. She had an interest in doing so. She was concerned about the whereabouts of Ms. Gauthier and wanted to help her family find out what had happened to her.
- [99] Based on the totality of the circumstances, I conclude that while Mr. Losch had a subjective expectation of privacy, that subjective expectation was not objectively reasonable. Ms. Tetz was free to disclose communications on her device.
- [100] Accordingly, s. 8 of the Charter is not engaged and Mr. Losch has no standing to assert his right to the protections he has sought.

Was the Phone Seizure Unlawful?

- [101] The police could have sought and received judicial authorization to access information from either or both Ms. Tetz and Mr. Losch as it related to the search for Ms. Gauthier. It does not appear that the police were aware that the Missing Persons Act, S.B.C. 2014, c. 2,

and the Missing Persons Regulation, B.C. Reg. 111/215, provided an avenue by which they could have secured information relevant to the missing person investigation. The failure to use the statutory authority to access records is of no moment in these circumstances, because consent was given.

- [102] Regardless of whether Mr. Losch has standing, the search and possession of Ms. Tetz's phone was not unlawful. As Groberman J.A. noted in *Pelucco* at para. 49, s. 8 of the Charter is not engaged where there has been a lawful seizure. If the police had secured judicial authorization to seize the phone, that would have been a lawful taking. I fail to see how a voluntary disclosure of the same device and its contents would amount to a different result. There was nothing that the police did in receiving the information that amounted to unlawful conduct.
- [103] I have concluded that Ms. Tetz provided her consent for the police to access electronic communications that she had with Mr. Losch. The police did not intrude into the conversation, nor did the police take or seize the electronic communications. All of those were given to the police, who were simply reacting and responding to Ms. Tetz's invitation. Ms. Tetz wanted the police to access the information on her phone because she believed that it would assist the investigation into Ms. Gauthier's disappearance and death.
- [104] This is not a case of intrusive state involvement. The voluntary disclosure by Ms. Tetz of her phone and its contents result in the conclusion that the warrantless search and seizure was reasonable.

Summary

- [105] I have concluded that the subject matter of the seizure was the electronic conversation between Mr. Losch and Ms. Tetz. Mr. Losch subjectively expected the conversation to be private. Ms. Tetz consented to the police accessing the conversation on her phone so as to assist in locating a missing person, Ms. Gauthier, and then to determine what had happened to her.
- [106] On the totality of these circumstances, I conclude that Mr. Losch's expectation of privacy was not objectively reasonable. Accordingly, s. 8 of the Charter is not engaged and Mr. Losch had no standing.
- [107] I also conclude that because of the consent provided by Ms. Tetz, that there was no state intrusion and therefore, no lawful search or seizure. As a result, the warrantless search and seizure was reasonable.

"Dley J."

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