SUPREME COURT OF NOVA SCOTIA
Citation: *R v Burns*, 2014 NSSC 436

Date: 2014-12-11
Docket: CRH No. 414664
Registry: Halifax

Between:

Her Majesty the Queen

v.

Timothy Burns

Restriction on Publication: Section 486.4 of the *Criminal Code of Canada*

Judge:	The Honourable Justice Peter P. Rosinski
Heard:	November 25 and 26, 2014, in Halifax, Nova Scotia
Counsel:	Glenn Hubbard, for Her Majesty the Queen Stanley MacDonald, Q.C., for Mr. Burns

By the Court:

Introduction

> "At base, a fair trial is a trial that appears fair, both from the perspective of the accused and the perspective of the community. A fair trial must not be confused with the most advantageous trial possible from the accused's point of view: *R. v. Lyons*, [1987] 2 S.C.R. 309, at p. 362, per La Forest J. Nor must it be conflated with the perfect trial; in the real world, perfection is seldom attained. A fair trial is one which satisfies the public interest in getting at the truth, while preserving basic procedural fairness to the accused."
>
> [per McLachlin J., as she was in *R v. Harrer* [1995] 3 SCR 562 at para.45]

Background

[1] Mr. Burns is charged that he committed a sexual assault upon KJA in the early morning hours on June 16, 2011. The Crown alleges that the complainant was so intoxicated that she was unable to consent to sexual activity, yet Mr. Burns commenced to penetrate her vagina with his penis, until the complainant realized what was occurring, and adamantly advised him she was not consenting.

[2] His trial is scheduled for December 15 – 19, 2014 before a judge and jury.

[3] The complainant and Mr. Burns were known to each other. On the same day, but after the alleged assault occurred, the complainant sent text messages from her mobile telephone to Mr. Burns. Mr. Burns sent text messages using his mobile

telephone to the complainant. The Crown wishes to introduce these at trial as evidence of admissions on the part of Mr. Burns.

[4] The complainant reported the alleged incident to police around midnight on June 17 - 18, 2011. Cst. Parasram authored an initial officer's report in which he noted that, according to KJA, Mr. Burns had sent texts to KJA apologizing, and suggesting that they move on.

[5] On June 23, 2011 the complainant provided a videotaped police statement to Det. Cst. Lisa MacDonald, who on June 28, 2011, seized the complainant's phone. At the time, none of the text messages from KJA to Mr. Burns were visible on her phone. The complainant believed that her phone had automatically deleted those messages. In September 2011, police carried out a forensic analysis of her telephone. The only text messages found on her phone were those that she alleges were sent to her by Mr. Burns.

[6] One would expect her text messages to be apparent on examination of Mr. Burns' mobile phone, however he admitted in his November 8 and 9, 2011 statements to the police, that he had deleted all of the text messages he received from, and sent to, the complainant regarding this matter.

[7] Neither of their service providers are able to retrieve the text messages in question. Therefore, the text messages that the complainant acknowledges she sent to Mr. Burns are irretrievable and unavailable for trial.

[8] Thus, what remains as potential evidence at the trial are only the text messages from Mr. Burns to the complainant, and their respective recollections of what was the content of KJA's texts to Mr. Burns.

The Motions Herein

[9] Mr. Burns argues that the destruction by KJA, or unacceptable negligence regarding their loss by police, of the text messages [existing June 16, 2011 on the complainant's mobile phone] constitute a breach of his right to make full answer and defense pursuant to Section 7 of the *Charter of Rights*. He also argues that his right to a fair trial will be violated pursuant to s. 11(d) of the Charter of Rights as interpreted in *R. v. Harrer* [1995] 3 SCR 562.

[10] As a remedy, he seeks either a stay of proceedings in relation to the criminal charge herein; or a court order excluding them from being presented as evidence by the Crown: i.e. the existing text messages; any references that Mr. Burns made to them in his police statement on November 8, 2011; and that KJA not be permitted to refer to them in her testimony at trial.

The Evidence before the Court

[11] The Defence presented its evidence first. It presented KJA as its witness. The Defence suggested in its prehearing brief that she "deliberately deleted all text messages on her telephone, save for those which she alleges were sent to her by Mr. Burns on June 16, 2011". The Defence also suggested that it will "prove on a balance of probabilities that [the complainant] did not tell the truth about this issue when she testified at the preliminary inquiry on November 20, 2012".

[12] The Defence presented Constable Duane Flynn, who is an officer with the Royal Canadian Mounted Police, and acknowledged by both Crown and Defence to be properly qualified as an expert to give expert opinion evidence regarding "forensic analysis of seized cell phones and computer systems for the recovery of data". I reviewed his curriculum vitae (Exhibit VD-3) and note that he has also been previously qualified as an expert in this respect by other Courts. I was satisfied that he is qualified to give the general expert opinion sought.

[13] Lastly, the Defence presented the lead investigator in relation to the sexual assault allegation, Det. Constable Lisa MacDonald.

[14] The Crown has tendered a redacted transcript of Mr. Burns November 8 and 9, 2011 police statements [with consent of/waiver by the Defence]; and presented

Cst. Parasram as its only witness. A number of exhibits were also tendered, as was an Agreed Statement of Facts, Exhibit VD-8, pursuant to s. 655 of the Criminal Code.

Position of the Parties

Defence Position

[15] The Defence argues Constable Flynn's evidence contradicts the complainant's suggestion that her outgoing text messages to Mr. Burns on June 16, 2011 must have been automatically deleted as a result of limited memory space availability in her phone. They suggest that the only reasonable remaining conclusion is that she deliberately deleted them.

[16] The Defence argues that Mr. Burns was unaware of any potential police investigation or other reason why he should not have, on June 16, 2011, deleted all of the outgoing and incoming text messages between he and the complainant. He also deleted all other social media site contact references between the two at that time.

[17] In summary, the Defence position is: had the text messages not been deliberately deleted by the complainant before her phone was provided to the

police, her phone would still contain them, and they would be able to be reproduced by the Crown and provided as disclosure to the Defence. The Defence suggests the Supreme Court of Canada decision in *R. v. Carosella,* [1997] 1 S.C.R. 80 is applicable, and that therefore there is a breach of s. 7 regarding Mr. Burns' inability to make full answer and defence as a result of the deliberate destruction of those text messages. The Defence further argues that had Cst. Parasram seized, or at least viewed, KJA's phone on June 17 – 18 when he met her as the initial police contact, he would have preserved or at least have recorded, the content of KJA's texts to Mr. Burns. Not having done so is unacceptable negligence on his part.

[18] The Defence notes that, as Justice Abella stated for the court in *R. v. Telus Communications Co.,* 2013 SCC 16 at paragraph 5: "text messaging is, in essence, an electronic conversation". Consequently given that only the incoming text messages from Mr. Burns are available on the complainant's mobile phone, the Court only has one side of the "conversation." Therefore, it would unduly compromise his right to have a fair trial, to permit a jury to consider Mr. Burns' text messages as evidence, based on *R. v. Harrer* [1995] 3 SCR 562.

[19] The Defence argues that <u>if</u> the Court concludes:

A. The complainant deliberately destroyed her text messages to Mr. Burns;
B. The destruction of those texts was designed to "defeat the processes of the

court";

C. The destruction of those text messages obstructed the course of justice; or

D. The complainant subsequently lied under oath at the preliminary inquiry regarding the manner in which the text messages were lost;

then, a stay of proceedings is the appropriate remedy, citing *R. v. Babos*, 2014 SCC 16 where the Court, at para. 31:

> "… recognized that there are rare occasions – "the clearest of cases" – when a stay of proceedings for an abuse of process will be warranted… These cases generally fall into two categories: one – where state conduct compromises the fairness of an accused's trial [the "main" category]; and two – where state conduct creates no threat to trial fairness, but risks undermining the integrity of the judicial process [the "residual" category].

[20] At this juncture, for completeness, I would add the entirety of paragraphs 32 and 33:

> 32 The test used to determine whether a stay of proceedings is warranted is the same for both categories and consists of three requirements:
>
> 1) There must be prejudice to the accused's right to a fair trial or the integrity of the justice system that "will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome" (*Regan*, at para. 54);
>
> 2) There must be no alternative remedy capable of redressing the prejudice; and
>
> 3) Where there is still uncertainty over whether a stay is warranted after steps 1) and 2), the court is required to balance the interests in favour of granting a stay, such as denouncing misconduct and preserving the integrity of the justice system, against "the interest that society has in having a final decision on the merits" (ibid., at para. 57).
>
> 33 The test is the same for both categories because concerns regarding trial fairness and the integrity of the justice system are often linked and regularly arise in the same case. Having one test for both categories creates a coherent

> framework that avoids "schizophrenia" in the law (O'Connor, at para. 71). But while the framework is the same for both categories, the test may -- and often will -- play out differently depending on whether the "main" or "residual" category is invoked

[21] The Defence argues that a stay of proceedings pursuant to Section 24 (1) of the *Charter of Rights*, as opposed to exclusion of the evidence, is most appropriate because "this case involves prejudice to the accused's right to a fair trial and an affront to the integrity of the justice system".

[22] If the Court finds that exclusion of the text messages evidence is appropriate pursuant to Section 24(1) of the *Charter of Rights* [see Justice Rothstein's comments for the Court in *R. v. Bjelland* 2009 S.C.C. 38 at paragraphs 18 – 20, 23 and 26], the Defence argues that any references in Mr. Burns videotaped statement to the police should also be excluded because there is a temporal and contextual connection between the tainted text messages and the statement of Mr. Burns –*R. v. Wittwer*, 2008 SCC 33.

Position of the Crown

[23] The Crown argues that the Defence's reliance on the Supreme Court's decision in *Carosella* is misplaced because that case is distinguishable; viz. the evidence there was deliberately destroyed by a third party agency.

[24] I should interject here that it appears from a reading of the majority decision that they were well aware of this distinction, which would apply if the *Stinchcombe* standard of disclosure were in issue, but that they went on to find that even on the lesser *O'Connor* regime standard of production of records in the hands of third parties:

> It is clear that the file would have been disclosed to the Crown…even if the somewhat higher *O'Connor* standard relating to production from third parties applied, it was met in this case. Once the material satisfied the relevance test of *O'Connor*, the balancing required in the second stage of the test would have inevitably resulted in an order to produce; confidentiality had been waived by the complainant and the Crown consented to production" – para. 41 per Sopinka J.

[25] Importantly however, not only the majority, but also the minority, found that although the sexual assault crisis center is a third-party, which had no obligation to preserve evidence for prosecutions or otherwise, nevertheless:

> Essentially, in these circumstances, **the *Charter* is engaged by the fact of the prosecution itself. Where the Crown pursues a prosecution which would result in an unfair trial, this constitutes State action for the purposes of the *Charter*.** This situation differs considerably from that in which the accused merely makes a request for disclosure from the Crown. It remains to determine the standard which should be applied in answering in **the key question at issue in this case: when does the unavailability of material previously held by a third party translate into a violation of an accused's rights?"**
>
> Paragraph 70 per L' Heureux –Dubé, J.
>
> [my emphasis added]

[26] On closer review therefore, the general principle that emerges, is that the *Charter* may be engaged by the mere fact of the prosecution proceeding, and

specifically that if the Crown pursues a prosecution which would result in an unfair trial, as a result of the unavailability of material and relevant evidence, this constitutes State action for the purposes of analysis of an alleged breach of an accused's rights under the *Charter of Rights*.

[27] Regarding the Defence argument that the unavailability of KJA's text messages to Mr. Burns creates a significant unfairness leading inevitably to a finding of a breach of Section 7 of the *Charter* [i.e. full answer and defense], the Crown argues that the evidence does not support the suggestion that the complainant intentionally deleted her outgoing text messages to Mr. Burns.

[28] They also dispute that the loss of KJA's text messages renders the trial otherwise so "unfair" as to constitute a breach of Section 7 of Mr. Burns' right to make full answer and defense. More specifically, they argue that the loss of the evidence of the complainant's outgoing text messages to Mr. Burns is not so prejudicial as to justify a stay of proceedings or exclusion of the evidence.

[29] They point out that, although the Supreme Court of Canada acknowledged in *Bjelland* the test under Section 24(1) requires that an accused establish that their trial would be "unfair", in order to seek a stay of proceedings or exclusion of evidence, specifically a Court must be satisfied that:

> 21… **[In relation to the Crown's failure to disclose evidence] an accused must generally show "actual prejudice to [his or her] ability to make full answer and defence**"(*R v O'Connor* [1995] 4 S.C.R. 411 at paragraph 74) **in order to be entitled to a remedy under Section 24(1)**.
>
> …
>
> 23 **Apart from ensuring trial fairness, there is one other circumstances in which late disclosed evidence might be excluded. That is where to admit the evidence would compromise the integrity of the justice system.**
>
> …
>
> 25 As L'Heureux-Dubé J., for the majority, stated in *O'Connor*, at para. 83:
>
> > In such circumstances [of late or insufficient Crown disclosure and a consequent s. 7 breach], the court must fashion a just and appropriate remedy, pursuant to s. 24(1). **Although the remedy for such a violation will typically be a disclosure order and adjournment, there may be some extreme cases where the prejudice to the accused's ability to make full answer and defence or to the integrity of the justice system is irremediable. In those "clearest of cases", a stay of proceedings will be appropriate.**
>
> 26 … **Of course the prejudice complained of must be material and not trivial**. For example, the exclusion of evidence may be warranted where the evidence is produced mid-trial after important and irrevocable decisions about the defence have been made by the accused. Even then, **it is for the accused to demonstrate how the late disclosed evidence would have affected the decisions that were made. For purposes of trial fairness, only where prejudice cannot be remedied by an adjournment and disclosure order will exclusion of evidence be an appropriate and just remedy.**
>
> [my emphasis added]

[30] The Crown thus argues that the Defence has not met the high threshold for the unfairness required [see also Justice Fish's dissent, Binnie and Abella JJ concurring, at paragraphs 43 – 47].

Assessment of the evidence before the court

[31] To recap, in support of its application for a stay of proceedings, or exclusion of evidence, pursuant to s. 7 of the Charter of Rights or s. 11(d) of the Charter of

Rights, the defence presented the testimony of KJA, the complainant, Cpl. Duane Flynn's expert evidence, and the testimony of Detective Constable Lisa MacDonald, the officer in charge of the investigation. The defence also presented exhibits. In response, the Crown called the evidence of Constable Amit Parasram, and tendered Mr. Burns' redacted police statements.

[32] Counsel also presented the Court with an Agreed Statement of Facts.

[33] The credibility or believability of a witness is comprised of two major components: their honesty in attempting to testify to the best of their ability, and the reliability of their testimony.

[34] In assessing credibility, a court may believe all, none, or some, of a witness' evidence. It is entitled to accept parts of a witness's evidence and reject other parts. It can accord different weight to different parts of the evidence that it has accepted. It should examine the testimony for its internal and external consistency.

The testimony of Constable Amit Parasram

[35] After 10 months of training, he has been an officer with HRP (Halifax Regional Police) since June 20, 2010. His testimony was credible.

[36] At 9:01 p.m. on June 17, 2011, he was dispatched to the QEII hospital in Halifax in response to a call by one of the sexual assault nurse examiner (SANE)

staff, that a so-called “rape kit” was ready for pickup. He did not expect to encounter the complainant there, but was not unduly surprised that she was still there when he arrived at 11:01 p.m. He spent approximately one hour with the complainant and her sister. He seized the “rape kit” at 12:16 a.m., and at 12:55 a.m. telephoned the complainant, which led him to recover items of clothing at 1:17 a.m. Those garments were considered to be a potential source of evidence, which he considered could be lost or compromised if not seized.

[37] While he met the complainant at the hospital, he became aware that there were text messages between Mr. Burns and the complainant relevant to this offence, and that they were characterized as Mr. Burns apologizing and suggesting that they move on.

[38] He indicated that he did record the mobile phone numbers for the complainant, 902–240–855X; as well as for Mr. Burns, 902–791–0421. He did not seize the phone because as the initial investigator, in cases of sexual assaults, they are trained not to take statements from victims, but rather only gather preliminary information that then can be forwarded to the major crime unit, whose investigators will contact complainants and then carry out a formal investigation. He noted that this limited level of preliminary involvement, was not however

intended to prevent him as an initial investigator from seizing evidence that could be lost, or the integrity of which would otherwise be compromised if not seized.

[39] He was asked why he did not either seize the complainant's phone, or at least view the images and record in writing their content, including date and time, when he had the opportunity to do so in the early morning hours of June 18, 2011.

[40] He responded that he did not seize the phone because he was not the ultimate investigator, and because it was the complainant's phone. He could not recall viewing the phone/texts, but noted that he would have made a record of that if it had happened.

[41] I infer that he did not consider the continued existence of the text messages to be at risk. Other potential sources did exist to retrieve the text messages: seizure of Mr. Burns' phone; possibly the records of the service providers. He did not recall telling the complainant to preserve the messages, and I infer that he did not do so. I further infer that he did not do so because he knew that the complainant continued to require the phone, and he could reasonably expect her to want to preserve the text messages. He also knew that a major crime unit investigator would be contacting the complainant within a short period of time, and they would then have the opportunity to seize the telephone.

[42] KJA testified that, after meeting with the Constable, that she intended to provide the telephone to the police. In direct examination, she confirmed that the text messages she had sent to Mr. Burns were still on her telephone when she met with the Constable :

> "Q -And as of Friday, June 17, when you spoke with Constable Parasram, the text messages that you sent to Mr. Burns on June 16 were still on that telephone. Correct?
>
> A- Correct" – pg. 17 (12) transcript August 6, 2014

[43] In cross examination, she confirmed that she did not recall exactly when the text messages that she had sent to Mr. Burns were no longer on her phone, so that at the time she met with the constable she did not know whether those texts were still on her phone:

> "Q-… those messages could have been deleted any time after June 16. Is that your understanding?
>
> A- Correct
>
> Q-Okay. So you don't actually recall when those text messages you sent to Mr. Burns were no longer on your phone?
>
> A- That's correct.
>
> Q-Okay. So at the time that you met with Constable Parasram on the evening of June 17, is it fair to say you have no idea whether or not the texts you sent to Mr. Burns were even on your phone?
>
> A- I don't know." –pg. 84(5) transcript.

[44] In redirect, Mr. MacDonald asked KJA to refer back to her preliminary inquiry evidence which went as follows:

> "Q-Well, if you, as of the time that you decided to go to the police… which apparently would have been sometime Friday evening…
>
> A- Yes
>
> Q-… Were your text messages to Tim Burns still on your telephone?
>
> A- Yes.
>
> Q-They were?
>
> A- Yes."

[45] He then asked KJA on August 6, 2014:

> "Q-you agree that you said that at the preliminary inquiry?
>
> A- Yes.…
>
> Q-Your testimony, at that point, was unequivocal. Correct?
>
> A- Correct.
>
> Q-And, in fact, I asked you that earlier today; if, in fact, your text messages to Tim Burns were still on the telephone when you met with Constable Parasram.
>
> A- Right.
>
> Q-Are you changing that?
>
> A- I'm not changing that. I just didn't remember today, having been three years after.
>
> Q-What do you mean? What did you remember?
>
> A- **I don't remember if… today, sitting here, I did not remember exactly if the messages were on my phone, so I did not say "yes" or "no". I think I said I didn't know**.
>
> Q-But I believe you testified in direct examination that you did know that, in fact, they were on your phone when you went to see Constable…
>
> …
>
> Q-… I asked you if, when you had seen Constable Parasram, your text messages to Tim Burns of June 16 were still in your phone. And you said "yes"
>
> A- and what was my response?

Q-You said "yes"

A- "Yes"? Okay.

Q-**So what is your evidence on this point**?

A- **Did I say "yes" earlier this morning, and I said "yes" here**?

Q-**Yes**.

A- **Then I guess the answer is "yes".** – pp.86-88 transcript.

[my emphasis added]

[46] In direct examination KJA also stated:

"Q-… So you met with Constable MacDonald, provided an audiotape – videotaped statement. During the time that you talked to Constable MacDonald, were the text messages that you exchanged with Mr. Burns on June 16 still on the telephone?

A- Are you asking if my messages were still there or if his messages were still there?

Q-All of the messages.

A- I don't recall if all the messages were still there.

Q-Okay. And do you… **So do you specifically recall if the text messages sent by Mr. Burns to you were on your telephone on June 23**?

A- **Yes, they still were**.

Q-Okay. **Do you recall if the text messages that you sent to Mr. Burns on June 16 were still on your telephone then**?

A- **I do not recall**" – p.22 transcript, August 6, 2014.

[my emphasis added]

[47] Neither the testimony of Constable Parasram, nor that of KJA, suggest that on June 17 – 18, 2011, Constable Parasram requested to see her telephone or saw any of the text messages thereon. I find as a fact that it is so.

Detective Constable Lisa MacDonald

[48] She has been a police officer for 17 years, and with the HRP sexual assault section of the Major Crime Unit since June 2011. She had her first brief contact with the complainant on June 21, 2011 when she was assigned the case. A meeting was set up for June 23. In preparation, she reviewed the initial investigator's report which included references to text messages from Mr. Burns "apologizing for an incident that took place and that they should move on".

[49] She met KJA on June 23, 2011, and took a videotaped statement from her. The complainant consented to having her phone analyzed and the phone was seized. There is divergent evidence apparent as to when the phone was seized.

[50] At this juncture, I note that in relation to when her phone was seized, KJA stated in her direct testimony:

> "Q-… **when did you turn that telephone over to the police in 2011**?
>
> A- I don't know the exact dates. Sorry.
>
> Q-Just to refresh your memory on that, you indicated at the preliminary inquiry in November 2012 that you turned it over to Lisa MacDonald on the day that you were interviewed by her.
>
> A- **I did turn it over to Lisa MacDonald**.
>
> Q-**And was that on the day that you provided your statement to her**?
>
> A- **I honestly… can't recall**.
>
> Q-You can't recall.

A- **No. But if that's what I said in my original statement, then that's still true.**

Q-And I can tell you that you were interviewed by Lisa MacDonald on June 23, 2011.

A- Okay

Q-All right. Now, do you recall when you got the telephone back from Constable Lisa MacDonald?

A- No, I do not.

Q-It was analyzed in September 2011, by Cpl. Flynn. Does that refresh your memory as to when you may have gotten it back?

A- No.

Q-**Do you have any recollection of when you got it back**?

A- **No**.

Q-Did you get it back?

A-Yeah." – pp. 12 – 13 transcript August 6, 2014.

[my emphasis added]

…

Q- And if you look through those records [Exh. VD-1]… there are text messages sent and received from your telephone…. Right up until June 28th. Any explanation for that?

A- No.

B- Do you believe that you may have turned your phone over to the police on June 28th?

C- Possibly [p. 77 transcript]

[51] Generally, I found Cst. MacDonald's evidence credible.

[52] Constable MacDonald testified that KJA had her phone with her when she gave her videotaped statement on June 23, 2011. She stated that the complainant consented to having the phone seized that day and later analyzed. Constable MacDonald does not recall if she took the battery out of the phone. I infer that she

did not do so, because she had made no notation of it, did not recall it by memory, and it is something that if she did so, she would likely have recorded it. Cpl. Flynn testified that to preserve the evidence on a mobile phone one should remove the battery, so that there is no interference from other electrical devices or the Internet.

[53] A review of exhibit VD-1, shows calls were made from and received by that telephone up until June 28, 2011.

[54] Had the battery been removed on June 23, 2011, before Constable MacDonald turned it over to Cpl. Flynn in the technology section on June 28, 2011, (where he placed it in a shielded room, preventing any interference with the phone) the phone would have been inoperable. Perhaps, "incoming calls" might still register in the Bell Aliant records-exhibit VD 1. Thus, the existence of "incoming" calls showing in exhibit VD 1 between June 23 and July 2, 2011 do not necessarily mean the phone was still operable during that time.

[55] While one might expect there to be such a record of "incoming" calls from other phones showing in exhibit VD 1, one would not expect there to be any further record of outgoing calls or texts made (sent) after June 23, 2011, if the phone had been seized on June 23, 2011, regardless of whether the battery had been removed or not.

[56] An examination of exhibit VD-1, reveals that both outgoing telephone calls and text messages were made and sent respectively from the complainant's phone (19 telephone calls ending at 9:56 a.m. Eastern Standard Time June 28, 2011; 94 text messages the last one being sent at 8:52 a.m. Eastern Standard Time June 28, 2011) .

[57] Although I did not have the benefit of testimony from properly qualified personnel at Bell Aliant to interpret them, the Bell Aliant records, which have been produced and relied upon as reliable by both parties, suggest that Constable MacDonald did not seize the complainant's mobile phone until June 28, 2011. Given the complainant's general reference to it being turned over to Det. Constable MacDonald, and the fact that Det. Constable MacDonald testified that she did not turn the phone over to the technology section until June 28, 2011, I find it more likely than not that the phone was not seized and rendered inoperable until June 28, 2011 (as also confirmed by Det. Constable MacDonald's "Assistance Request Technological Crime" form dated June 28, 2011), and that day it was turned over to Cpl. Flynn, who rendered it inoperable and shielded from outside interference until his return of it to Det. Constable MacDonald on September 30, 2011.

[58] Moreover, on a review of the evidence, I am satisfied, it is more than likely than not, that the complainant's text messages to Mr. Burns remained undeleted on her phone at the time she encountered Constable Parasram.

[59] The messages in issue were sent by KJA around 12:00 noon on June 16, 2011. She met the Constable around midnight June 17 – 18, 2011. Given the short interval, it is not likely that any auto delete function in the phone would have deleted her messages to Mr. Burns between June 16 and June 18, 2011.

[60] A review of the complainant's testimony, referred to above, that she stated at the preliminary inquiry that her text messages remained undeleted on her phone on June 17, 2011, and her acceptance on August 6, 2014 that "then I guess the answer is 'yes'", which I find credible, also supports my conclusion.

[61] More controversial is how and when those text messages were deleted.

The testimony of KJA

[62] At this hearing K JA was called by the defence counsel, who requested, and with Crown consent, was permitted, to ask leading questions.

[63] Is it more likely than not that KJA deliberately deleted her own text messages to Mr. Burns regarding the alleged offence?

(i) **Did the evidence of KJA about this change over time, and specifically within her own testimony?**

[64] Defence counsel extensively examined her. The excerpts attached as Appendix "A" hereto are of note.

[65] In assessing whether K JA's evidence varied as between her preliminary inquiry evidence, and that of August 6, 2014, and whether it varied as between the entirety of her testimony on August 6, 2014, the appropriate starting point is those aspects that defence counsel have focused upon.

[66] Defence counsel suggested that KJA's testimony changed as follows:

A. Initially she testified generally that solely the auto delete function of the phone was responsible for deletion of all text messages from her phone, which were not present on her phone when examined by Cpl. Flynn;

B. Then she testified specifically that after she noticed there were text messages absent on her phone, which she would have expected to be present, leading her to conclude that the phone was auto deleting, she

began to manually delete other text messages, in order to preserve the text messages sent to her by Mr. Burns; and

C. Finally, she conceded that she would likely have deleted manually "a large number" of text messages from her phone after June 16, 2011, in order to preserve the text messages sent to her by Mr. Burns.

[67] Defence counsel also suggests that during her testimony she was evasive and selective in some of her specific responses, which render her testimony less credible.

[68] Defence counsel submits that K JA deliberately lied, in her testimony, both at the preliminary inquiry hearing and during this hearing. Counsel argues that should the court make such a finding, then based upon the evidence that the court does accept, it should properly conclude that KJA deliberately deleted from her phone her text messages to Mr. Burns.

[69] A review of Appendix ``A`` reveals that:

A. At the preliminary inquiry in November 2012 when she was asked for "any explanation" for why there were no text messages from her to Mr. Burns on her phone, she testified that the auto delete function on her phone would cause deletions "because the memory is only so

large". She also testified at the preliminary inquiry in response to the question, "incoming text messages delete outgoing text messages…:

Q. - But does it not delete other incoming messages like messages that have come in earlier?;

A. -Yes, but I was trying to keep my phone clear… I wanted to keep messages clear so that I could keep a hold of the messages from Mr. Burns". She was also asked "so then how in the world did those text messages from you to him disappear?", and answered: "I have a lot of friends…". Collectively these answers are representative of her position. As she pointed out in her testimony on August 6, 2014, at the preliminary inquiry she was not specifically asked if she deleted text messages from her phone, other than those she sent to Mr. Burns; and in relation to those she specifically denied deleting them. She also made reference to her manual deletion of text messages on her phone when she testified "I was trying to keep my phone clear… I wanted to keep messages clear so that I could keep a hold of the messages from Mr. Burns". Her reference at the preliminary inquiry to "I have a lot of friends", was linked to her testimony on August 6, 2014 by explaining that; "I meant that people were texting me… [Q-Meaning

> that as you received all those texts, then those text messages to you from you to Tim Burns, automatically deleted?] Yes". Moreover, she stated: "I didn't use the word "deleted", but I did say that 'I tried to keep my messages clear'"

I conclude that KJA's testimony on these points as between the preliminary inquiry and the hearing before me are not inconsistent, in the strict sense of the word. She mentioned both that the auto delete function and her "trying to keep my phone clear" manual interventions were responsible for text message deletions from her phone.

B. When specifically asked on August 6, 2014, she gave greater detail. She was also asked: ``Q - And when you started your testimony today, you didn't think that you had ever deleted any text messages; A- I couldn't recall anything ". She was asked: "Q-the subject of deletion of text messages from your telephone by automatic means was discussed at length on November 20, 2012… And that didn't refresh your memory about you having deleted any text messages?; A- I feel like I wasn't questioned about that topic". She admitted that she had manually deleted text messages, but was adamant that she did not do so in relation to any text messages between herself and Mr. Burns.

She testified that: "once it had deleted those messages [her texts to Mr. Burns] I started to delete incoming messages… I can't testify that I deleted all of them [June 17 – June 23, 2011], but I did delete some of them [how many messages did you delete?] I don't know". When she was asked why she would not have earlier remembered the deletion of over 300 text messages in the. June 17 – June 23, 2011, she testified: "I wouldn't say that [i.e. that she shouldn't have had any difficulty remembering that number of text messages without being prompted]. It's not like you sit down and delete all of them. You delete them as they come in." As to when she noticed that the phone had deleted all the messages, she testified at the preliminary inquiry, and adopted at trial her answer, that it was "when I gave the phone to [Det. Constable] Lisa MacDonald." She also testified that she decided she wanted to retain the text messages for the police after she spoke to Constable Parasram around midnight June 17 – 18 2011. Thus, at some uncertain point forward she would have been vigilant in attempting to keep her phone clear by manually deleting any text messages that weren't automatically deleted by the phone. She reiterated that she had to keep her phone on for work purposes, and

> "didn't realize that it would delete all of the messages" until she gave the phone to Det. Constable Lisa MacDonald.

I conclude that, as noted above, KJA had introduced the subject of manual deletions by herself at the time of the preliminary inquiry, and that her more specific answers on August 6, 2014 do not lead to a finding that her testimony was inconsistent as between the preliminary inquiry and August 6, 2014 on this point. I bear in mind that the uncontradicted evidence of KJA, which I accept, is that she has not seen the results of the September 30, 2011 forensic analysis of her phone by Cpl. Flynn [page 23 (1) transcript August 6, 2014]. Thus, it is likely that, both at the time of the preliminary inquiry and on August 6, 2014, she would not have fully appreciated the importance of the deletion of text messages other than those as between herself and Mr. Burns.

C. My latter comment may also explain, in part, why until defence counsel's questions referencing the large number of her manual deletion of text messages after June 16, 2011, KJA`s attention may not have been focused upon those deletions. Moreover, her consistent testimony is that the phone`s auto delete feature, and her manual deletions accounted for the deletion of text messages. She has consistently testified that the text messages she sent to Mr. Burns were

> not manually deleted by her, thus inferentially they must have been deleted by the auto delete feature of her phone.

[70] I conclude that KJA's testimony, as between the preliminary inquiry hearing and the August 6, 2014 hearing, is not inconsistent, as suggested by the defence. I bear in mind that at this hearing, defence counsel had the continuous opportunity to cross-examine its own witness, the complainant in this case, by asking leading questions. The defence stated its position in writing in its pre-hearing brief. The defence was attempting to elicit answers from KJA, that would tend to demonstrate that she deliberately deleted her text messages to Mr. Burns, and deliberately lied at the preliminary inquiry hearing. While I found KJA's testimony could, at times, be seen as "defensive", her answers were generally responsive to the questions asked, but also reflected an intention to answer questions with no more elaboration than necessary. Moreover, even on their face, her answers are not inconsistent.

[71] I find that the testimony of KJA was not inconsistent as between the preliminary inquiry hearing and the hearing on August 6, 2014, or within the confines of her testimony on August 6, 2014.

(ii) **Is the evidence of K JA externally consistent with the other evidence which I accept?**

[72] At this juncture, I will summarize my factual findings thus far. An incident occurred between K JA and Mr. Burns in the early morning hours of June 16, 2011 at his apartment. The allegation is that he had nonconsensual sexual intercourse with her at a point when she was heavily intoxicated. In response, she sent text messages to him, and he to her, in the early afternoon of June 16, 2011. KJA went to the QE2 hospital where she was assessed by SANE (sexual assault nurse examiner) nurses who called HRP to come and retrieve a so-called "rape kit". Constable Parasram was dispatched, and had contact with KJA at the hospital for approximately an hour around midnight June 17 – 18 2011. KJA had her phone with her. The Constable did not request to see her phone or seize it. At that time all the text messages between K JA and Mr. Burns remained visible on her phone. The Constable did seize her items of clothing at approximately 1:17 AM on June 18, 2011. On June 21, the date of her assignment to the case, Detective Constable Lisa MacDonald contacted KJA and a meeting was scheduled for June 23, 2011. On the latter date KJA provided a statement to Det. Constable MacDonald. By that date, all of the text messages from KJA to Mr. Burns were no longer visible on her phone. Although KJA testified that she could not specifically recall when her texts to Mr. Burns were deleted, she did state that they were deleted before "I gave the phone to Lisa MacDonald". Det. Constable MacDonald testified that she

could not recall if on June 23, 2011, she had seen text messages on KJA's phone, but did recall KJA said that her texts to Mr. Burns were no longer there, "but not why". KJA showed her phone to Det. Constable MacDonald at that time, but did not turn it over for seizure by Det. Constable MacDonald until June 28, 2011. Shortly thereafter, Det. Constable MacDonald placed the phone in a shielded room in HRP office space. On September 30, 2011, the phone was examined by a member of the technology section, Cpl. Duane Flynn. He returned the phone to Det. Constable MacDonald that same day, who in turn returned the phone to KJA. The whereabouts of the phone at present are unknown. KJA did later begin to use a different phone.

[73] Defence counsel sought to rely on the expert opinion and findings of Cpl. Duane Flynn who was qualified to give an opinion evidence regarding the "forensic analysis of cell phones and computer systems for the recovery of data". His CV is Exhibit VD-3.

[74] In a nutshell, the defence suggests that Cpl. Flynn's evidence puts the lie to KJA's testimony that she did not deliberately delete her text messages to Mr. Burns.

[75] His evidence was uncontradicted that, once the phone was turned over to Det. Constable MacDonald, and placed in a shielded room, whatever text messages were present on the phone would be able to be retrieved. Thus, the state of the phone on June 28, 2011 would have been preserved and available for his analysis. On September 30, 2011, he retrieved text messages from KJA's phone by way of screenshots of those messages using the ZRT technology. Extraction of data otherwise was not possible with the technology he was then using.

[76] On June 28, 2011, the only text messages that remained on K JA's phone, were the following:

> **June 12, 2011 –**
>
> Tim: Well you should be coming to hang out because I miss you and I'm leaving soon
>
> Tim: You should come visit for a bit before I leave
>
> Tim: BTW come visit tonight
>
> Tim: Well you need to come chill next week
>
> Tim: BTW you need to come chill tomorrow at five
>
> Tim: I'm doing some painting today. I might be going to NB for the summer. Then Québec for all next year! Yay! When do you head south?
>
> Tim: Don't worry about it, have fun!
>
> **June 15, 2011**
>
> Tim: Rainnn
>
> Tim: Rawr ha ha I just got my bike fixed. Now I feel like I need fenders
>
> Tim: Why did you do your hair?
>
> Tim: Skid party? Working from good sounds good
>
> Tim: Don't know. Is must be that msg I ignored on fb ha ha

Tim: Hmm

Tim: What does the 20 get ya

Tim: I see

June 16, 2011

Tim: I'm sorry [12:13 PM]

Tim: I suck [12:14 PM]

Tim: I know. I was hammered and crazy. I understand completely and I hate myself. I hope that you are okay. I don't expect forgiveness. [12:19 PM]

Tim: Can we agree to part ways? I feel terrible about taking advantage of you and don't want to be able to be a reminder of that hurt. I'm sorry and I hope that life turns out well [12:27 PM]

Tim: I can't agree more. Goodbye [12:34 PM]

[77] There are seven texts from Mr. Burns to KJA on June 12, 2011. There are eight texts from Mr. Burns to KJA on June 15. There are five texts from Mr. Burns to K JA on June 16, 2011. Exhibit VD-1 confirms that between 1:00 a.m. – 1:36 p.m., on June 16, 2011, KJA sent 13 text messages in total, to unidentified recipients.

[78] Cpl. Flynn was asked whether it was more likely than not that text messages were manually deleted, and he concluded that it was the case in relation to K JA's phone on the following bases:

(i) The fact that a comparison on June 12, 2011 of the Bell Aliant bill record VD-1 [showing 73 text messages that day] and the remaining seven text

messages left on K JA's phone, suggests 66 text messages were manually deleted.

(ii) The fact that a comparison on June 16, 2011 of the Bell Aliant bill record VD 1 [showing 53 text messages that day] and the remaining eight text messages left on K JA's phone, suggest 45 text messages (incoming and outgoing) were manually deleted.

(iii) The fact that only some of the June 12 text messages were deleted, but all of the June 13 and June 14, and some of June 15 and some of June 16 text messages were deleted, suggest that it is more likely than not inconsistent with the auto deletion feature of the phone – or otherwise, it is more likely than not the result of manual deletion.

(iv) A hypothetical was put to him. Of all the texts incoming arising on June 16, 2011, only the five text messages [1 message was split so there are actually six sent, but I will refer to them as five complete text messages] sent by Mr. Burns to KJA remain on her phone, but none of her messages that day are present on analysis. He concludes it is more likely than not that KJA's messages were deleted manually rather than by the auto deletion feature of the phone.

[79] He noted that in all his examinations of cell phones, he has never seen one where only the texts from one person to another incoming are preserved, with no other outgoing or incoming texts surviving on the phone for examination.

[80] In cross-examination, he conceded that in some of the older phones, such as of the same vintage as the Samsung Instinct, outgoing messages are deleted, before incoming messages are deleted, and that that might explain why Mr. Burns' messages incoming are present on K JA's phone and her messages to him outgoing are not. However, he went on to state that the phone's auto deletion would not account for why there are no other text messages at all present outgoing or incoming on KJA's phone. He concluded "I would expect to see more texts outgoing", and therefore also considered this outcome on KJA's phone to be the product of manual deletion.

[81] He also had the benefit of analyzing in August 2014 another Samsung Instinct mobile phone, VD-5, located at the household of KJA's parents in August 2014. He noted that text messages could be deleted on mobile phones generally either manually (maliciously or innocently] or automatically by the phone, usually if the "flash memory" of the phone was becoming exhausted. He acknowledged a number of variables would affect whether and when phones would overwrite existing text messages(i.e. automatically delete), and in what order, including

whether outgoing messages would be overwritten first. The other components of the phone that required flash memory would obviously reduce the available flash memory for text messages – for example: software, (initially installed by Samsung and possibly the service provider, and that later installed by the user by way of applications] photos and videos, call logs, contacts and calendar information. The "in phone" memory usage to date("used" versus "available") could be viewed by checking under the "settings" in most phones. In a rough attempt to compare the "in phone" available capacity of VD-5 and KJA's phone [which as I noted cannot be found] he concluded that KJA's phone "should have been able to hold more than 22 text messages" before the auto delete function started to delete either incoming or outgoing messages. He stated that "it would be abnormal" that there were only 21 text messages remaining on the phone he examined, which he presumed would have been the status of the phone when turned over to police, particularly since there were only messages from Mr. Burns to K JA on the phone.

[82] He admitted that his opinion is vulnerable because he does not know what happened to the phone between June 16 when the messages were purportedly sent and received by KJA and Mr. Burns, and its being placed in a shielded room at HRP office space [which I found to be as of June 28, 2011].

[83] He similarly conceded that he does not know what are the specific auto delete feature and parameters of the [Samsung Instinct] mobile phone that KJA had, which he analyzed on September 30, 2011. He agreed that a Samsung engineer or someone similarly familiar with the device would be required to provide such information to the court.

[84] I find the testimony of KJA to be credible. She testified that her phone, from her experience, had an auto delete function, which deleted outgoing text messages upon arrival of incoming text messages, and that at some point it would also delete incoming text messages.

[85] She testified that: the auto delete feature deleted her text messages to Mr. Burns; she manually deleted numerous incoming and outgoing text messages otherwise, in order to ensure that the text messages from Mr. Burns were not auto-deleted from her phone.

[86] I do not doubt the sincerity, and honesty, of Cpl. Flynn. He did his best to assist the court in addressing the question of whether it was more likely than not that KJA manually deleted from her mobile phone her own text messages of June 16, 2011 to Mr. Burns. However, I find I cannot give much weight to his opinion.

[87] He was qualified to give opinion evidence regarding the "forensic analysis of cell phones and computer systems for the recovery of data". However, as he conceded, he is not familiar with the auto deletion feature of the Samsung Instinct mobile phone in question. Therefore , he was only able to state his belief about the existence and operation of the auto deletion feature of the phone in issue in this hearing. He was not able to give any reliable opinion about the operation of the auto deletion feature of the phone.

[88] Therefore, a number of his answers to the questions put to him, as to whether was more likely than not that a number of factual circumstances were consistent with manual deletion of text messages, can be given little weight.

[89] Moreover, I note that the weight that can be given to his opinion is also diminished by virtue of the fact that he did not appear to be aware that KJA admitted that she deliberately deleted incoming and outgoing text messages, other than her June 16, 2011 text messages to Mr. Burns. His opinion in relation to the June 12, 13, 14, and June 15, 2011 messages that they were more likely than not "manually deleted" therefore really adds little to assist in determining whether KJA's text messages to Mr. Burns on June 16 were manually deleted.

[90] KJA's manual deletion of incoming and outgoing text messages from before and after June 16, 2011 (in order to preserve the incoming text messages from Mr. Burns on June 16) could easily account for the odd distribution or absence of text messages observed by Cpl. Flynn on KJA's phone.

[91] It was suggested to him that the phone was seized on June 23, 2011. However, his attention was not directed to the Bell Aliant record VD 1 , and what effect the numerous text messages sent and received between June 23 and June 28 would have had on an examination of the phone as of June 28, 2011, and by extension how that would impact on his opinions given at this hearing. Presumably he would have to make certain assumptions about how many text messages were manually deleted, in order to opine on whether the auto deletion feature would have been prevented from being triggered, presuming that he was aware of the parameters of the auto deletion feature.

[92] In conclusion, on its own , his opinion evidence is insufficient to establish that KJA manually deleted her text messages to Mr. Burns as argued by the defence.

[93] Having regard to KJA's evidence, and an assessment of her credibility according to the established factors [see my comments in *R v RDDG*, 2014 NSSC

78 at para. 117], I find her evidence internally consistent, and externally consistent with independent evidence that I accept.

[94] Thus, I find KJA's evidence, to be more likely than not credible in relation to whether she manually deleted her June 16, 2011 text messages to Mr. Burns. She did not manually delete her texts to Mr. Burns.

The defence position

Unacceptable Police Negligence – s. 7 Charter Violation

[95] Mr. Burns position may be summarized as follows:

A. The testimony of KJA was that she believed that her June 16 afternoon text messages to Mr. Burns were still present on her phone when she met Constable Parasram around midnight June 17 – 18 2011. During his one hour contact with K JA at the QE2 hospital the Constable became aware that there were text messages from KJA to Mr. Burns apologizing to her and suggesting they move on. He did not request to see her phone, and the text messages thereon from her to Mr. Burns and Mr. Burns to her, nor did the Constable seize the phone at that time. The Constable did however seize clothing from KJA at 1:17 AM. Moreover, he did consider the existence of Mr. Burns text

messages important enough to include in his initial investigators report (completed at 4:19 AM June 18, 2011). His report was reviewed by Detective Constable Lisa MacDonald, of the major crime unit on June 21, 2011. She contacted KJA and set up a meeting for June 23, 2011, at which time she took a videotaped statement from KJA. KJA's testimony was that she did not notice that her text messages to Mr. Burns had vanished from her phone until she gave the phone to Detective Constable MacDonald. KJA testified that in order to preserve the text messages from Mr. Burns to her, she deleted text messages from her phone between June 17 and June 23, 2011, the latter date which she understood to be when Detective Constable MacDonald seized her phone. She testified that: "I have no idea when they were deleted. Could have been any time between the 16th and 23rd," – page 59(20) transcript August 6, 2014 [I found as a fact that her texts to Mr. Burns were deleted at some point between June 16 and 23, 2011. I also found as a fact that the phone was seized on June 28, 2011 – the implication being that KJA continued to delete messages up to June 28, 2011];

B. The defence submits that the Constable was unacceptably negligent in not either seizing the phone, or at least viewing the text messages and recording them in his notebook, when he met KJA at the QE2 hospital – citing Justice Sopinka's reasons for the majority in *R. v. La* [1997] 2 SCR 680 at para. 17:

> **This court recognized that the crown's duty to disclose gives rise to an obligation to preserve relevant evidence** in *R. v. Egger* [1993] 2 SCR 451 at page 472, where we noted that the crown may be obliged to retain blood samples beyond the three-month statutory period. In order to comply with the disclosure requirements resulting from *Stinchcombe* (No. 1);

And at paras. 19 – 21:

> A similar principle was expressed in *R. v. Chaplin* [1995] 1 SCR 727 at para. 25: in situations in which the existence of certain information has been identified, then the crown must justify nondisclosure by demonstrating either that the information sought is beyond its control, or that it is clearly irrelevant or privileged'. **This obligation to explain arises out of the duty of the crown and the police to preserve the fruits of the investigation. The right of disclosure would be a hollow one if the crown were not required to preserve evidence that is known to be relevant**. Yet despite the best efforts of the crown to preserve evidence, owing to the frailties of human nature, evidence will occasionally be lost.… **Where the crown's explanation satisfies the trial judge that the evidence has not been destroyed or lost owing to unacceptable negligence, the duty to disclose has not been breached**. Where the crown is unable to satisfy the judge in this regard, it has failed to meet its disclosure obligations and there has accordingly been a breach of s.7 of the Charter. Such a failure may also suggest that an abuse of process has occurred, but that is a separate question. **It is not necessary that an accused establish abuse of process for the crown to a fail to meet its s. 7 obligation to disclose.** In order to determine whether the explanation of the crown is satisfactory, the court should analyze the circumstances surrounding the loss of

> the evidence. **The main consideration is whether the crown or the police(as the case may be) took reasonable steps in the circumstances to preserve the evidence for disclosure**. One circumstance that must be considered is the relevance that the evidence was perceived to have at the time. The police cannot be expected to preserve everything that comes into their hands on the off chance that it will be relevant in the future. In addition, even the loss of relevant evidence will not result in a breach of the duty to disclose if the conduct of the police is reasonable. But as the relevance of the evidence increases, so does the degree of care for its preservation that is expected of the police.
>
> [my emphasis added]

The defence argues that a stay of proceedings, or an exclusion of Mr. Burns text messages to K JA, including any reference thereto in his police statement are appropriate remedies.

Deliberate Destruction of Evidence – s. 7 Charter violation

A. The defence argues that the evidence has shown that KJA deliberately deleted her own text messages of June 16, 2011 to Mr. Burns, and that she lied about that at the preliminary inquiry, and at this hearing.

B. The defence cites Justice Sopinka's comments in *R. v. Carosella* [1997] 1 SCR 80 at para. 26:

> The entitlement of an accused person to production either from the crown or third parties is a constitutional right. See *R. v. Stinchcombe*… and *R. v. O'Connor*. Breach of this right entitles the accused person to a remedy under s. 24(1) of the Charter.

At paragrah 36:

> The foundation for the crown's obligation to produce material which may affect the conduct of the defense is that failure to do so would breach the constitutional right of the accused to make full answer and defence. As summarized in *R v Egger*…

At paragraph 40:

> It follows from the foregoing that if the material which was destroyed meets the threshold test for disclosure or production, the appellant's Charter rights were breached without the requirement of showing additional prejudice.

And at paragraph 56:

> The justice system functions best and instills public confidence in its decisions when its processes are able to make available all relevant evidence which is not excluded by some overriding public policy. Confidence in the system would be undermined if the administration of justice condoned conduct designed to defeat the processes of the court. The agency made a decision to obstruct the course of justice by systematically destroying evidence which the practices of the court might require to be produced. This decision is not one for the agency to make. Under our system, which is governed by the rule of law, decisions as to which evidence is to be produced to admit it is for the courts. It is this feature of the appeal in particular that distinguishes this case from lost evidence cases generally.

The defence also relies upon, as instructive in relation to cases of unacceptable negligence regarding the crown's duty to disclose, the decision of the court in *R. v. F.C.B.*, 2000 NSCA 35, particularly at para. 10.

Right to a "fair" trial would be violated – s. 11(d) Charter

[96] Lastly, the defence relies upon the principles in *R v. Harrer*, [1995] 3 SCR 562, which clarifies that even in the absence of a breach of s. 7 of the Charter, accused persons may rely on the right in s. 11(d) to a "fair" hearing. As explained by Justice LaForest for the Court:

> 21- I should add that, had the circumstances been such that the admission of the evidence would lead to an unfair trial, I would have no difficulty rejecting the evidence by virtue of the Charter. I would not take this step under s. 24(2), which is addressed to the rejection of evidence that has been wrongfully obtained. Nor would I rely upon s. 24(1) , under which a judge of competent jurisdiction has the power to grant such remedy to a person who suffered a Charter breach as the court considers just and appropriate. Rather, I would reject the evidence on the basis of the trial judge's duty, now constitutionalized by the enshrinement of a fair trial in the Charter, to exercise properly his or her judicial discretion to exclude evidence that would result in an unfair trial.
>
> 22-I shall, however, attempt to put more flesh on this approach because the argument was strongly advanced that since there was no breach of the Charter in obtaining the evidence, a prerequisite to the power to exclude evidence under 24(2) of the charter, there was no Charter-based jurisdiction to exclude evidence. The difficulty with this contention is that it fails to appreciate the full nature of a fair trial. As I mentioned, while s. 24(2) is directed to the exclusion of evidence obtained in a manner that infringed a Charter right, it does not operate until there is a Charter breach. What we are concerned with here is not the remedy for a breach, but the manner in which a trial must be conducted if it is to be fair.
>
> 23-The law of evidence has developed many specific rules to prevent the admission of evidence that would cause a trial to be unfair, but the general principle that an accused is entitled to a fair trial cannot be entirely reduced to specific rules.… In *Thomson Newspapers*, supra, I attempted to explain that this approach as a necessary adjunct to a fair trial as guaranteed by s. 11(d) of the Charter… I went on to further explain, as I had in *Corbett*, supra, that the common-law principle had now being constitutionalized by the Charter's guarantee of a fair trial under. 11(d) of the Charter.…
>
> 24-The effect of s. 11(d) then is to transform this high duty of the judge at common-law to a constitutional imperative… In a word, there is no need to resort to s. 24(2) or s. 24(1) for that matter. In such circumstances, the evidence is

> excluded to conform to the constitutional mandate guaranteeing a fair trial, i.e. to prevent a trial from being unfair at the outset.

[97] I have not lost sight of the argument that an "abuse of process" would result if the text messages from Mr. Burns to KJA were admitted into evidence either on the basis that "state conduct" (i.e. the negligence of Cst. Parasram has compromised the fairness of Mr. Burns' trial); or where "state conduct" does not create an unfairness, but that the mere continuation of the prosecution "risks undermining the integrity of the judicial process" (i.e. the deliberate deletion of her text messages by KJA) – *R. v. Babos* 2014 SCC 16 at paras. 30 – 41; see also *R. v. Bjelland* [2009] 2 S.C.R. 651: "under s. 24(1), where the evidence was obtained in conformity with the Charter, its exclusion is only available as a remedy where its admission would result in an unfair trial, or would otherwise undermine the integrity of the justice system" per Rothstein, J. for the majority.]

[98] The defence argues that Mr. Burns would be subjected to an unfair trial if his text messages to KJA, and any references in his police statement thereto, were admitted into evidence before the jury. The defence argues that there has been a s. 7 Charter breach here [either the deliberate destruction of her text messages by KJA; or unacceptable negligence by the police in not preserving KJA's text messages to Mr. Burns when they had the opportunity to do so], but in any event

there will be a s. 11 (d) breach if that evidence is admitted because the probative value is significantly outweighed by the prejudicial effect on Mr. Burns' fair trial rights because "without the full context" of KJA's text messages to Mr. Burns, the jury will be left with an incomplete, and therefore dangerously distorted, picture regarding the meaning of Mr. Burns' text messages to KJA.

The position of the Crown

[99] Its counsel argues that KJA did not deliberately destroy her text messages to Mr. Burns. He also submits that her text messages to Mr. Burns could have been auto-deleted before she encountered Constable Parasram around midnight June 17 – 18, 2011. If the messages were not there, there could not be any negligence by the Constable.

[100] Even if the text messages were still there, the Constable did not act in an unacceptably negligent manner. Moreover, counsel questioned whether the recognized duty to preserve evidence for disclosure purposes, extends to items such as the cell phone of KJA, which were not shown to, or handled, or seized by the police until some later point in time, during which interval the evidence had been lost [in this case text messages from the phone].

[101] Crown counsel further submits that even if the court concludes that KJA deliberately deleted her text messages to Mr. Burns, particularly if her motive was to preserve his text messages to her, and that there was unacceptable police negligence in not seizing her phone on June 18, 2011, there is nevertheless no sufficient prejudice to the fair trial rights of Mr. Burns, such that the evidence should be excluded or a stay of proceedings granted. He suggests that KJA had no more duty to preserve evidence than did Mr. Burns, who also deleted all text messages, from and to KJA, from his mobile phone on June 16, 2011, long before he was contacted by police on July 21, 2011.

[102] Crown counsel argues in relation to the "fair trial rights" aspect, including the implications in *R. v. Harrer*, that the probative value of Mr. Burns' text messages to KJA outweighs the prejudicial effect on his fair trial rights, because although the jury will only have his portion of the "conversation", the jury will also hear from KJA as to her recollection of her text messages to Mr. Burns which prompted his responses. KJA will be cross examined on her recollection. Mr. Burns police statement will be put before the jury, in which he acknowledges the content of some of her text messages to him. The Crown relies on a number of cases dealing with the admissibility of, for lack of a better word "partial statements" – *R. v. Ferris* [1994] 3 SCR 756; *R. v. Yates* 2011 ABCA 43; *R. v.*

MNP 2012 MBQB 61; *R. v. Soulliere* [2013] OJ No. 3174 (Prov. Ct.) *R. v. Rafferty* 2012 ONSC 742. Counsel suggests that the concern regarding fairness is more properly oriented to scrutinizing situations of "partial statements" by a person as opposed to "partial conversations", the latter of which we have in this case.

[103] In summary, Crown counsel suggests that, the admission of Mr. Burns' text messages to KJA will not render his trial unfair.

A Question by the Court to Counsel

[104] At the hearing I also inquired of counsel, regarding their positions on whether, presuming the text messages, and associated references in Mr. Burns police statement, were not permitted into evidence, would KJA and Mr. Burns (if he testified) in their testimony at trial, still be entitled to refer to the text messaging in any event based on their recollection of the text message contents? I indicated to counsel that Justice Abella at para. 5 in *R. v. Telus Communications Co.*, 2013 SCC 16, stated: "Text messaging is, in essence, an electronic conversation. The only practical difference between text messaging and the traditional voice communications is the transmission process." However, I note that if Mr. Burns and KJA had spoken on the telephone, there would be no record

of what they said, and at trial they would both be permitted to, and have to, testify from recollection as to what they said.

[105] Crown counsel took the position that KJA, and Mr. Burns if he testified, should be entitled to refer, from recollection, to the text messages sent and received by each of them. He noted that in his police statement it is Mr. Burns who brings up the text messages. Thus, if the exclusion of Mr. Burns' text messages (and any references in his police statement) was not prompted as a result of any State conduct, therefore there is no reason to exclude the witnesses from referring to the text messages. I observe here that I only have a redacted copy of Mr. Burns' police statements in evidence. There are no references therein to support the Crown assertion that Mr. Burns was first to bring up his text messages.

[106] Moreover, Crown counsel says the evidence is highly probative, since it is Mr. Burns' statements regarding the time of alleged incident. Counsel further argues any prejudice to the fair trial rights of Mr. Burns, would be minimal since effectively KJA, and Mr. Burns if he testifies, will be on equal ground, if the evidence (the text messages as visible on the phone and referred to in Mr. Burns' police statement) is excluded, but the witnesses are still permitted to testify as to their recollection of the text messaging between KJA and Mr. Burns.

[107] Defence counsel took the position that "it's all or nothing". He suggested that KJA had an advantage because she could refresh her recollection from Mr. Burns' text messages to her. Mr. Burns did not have that advantage in relation to the text messages from her to him. I observe here that Mr. Burns' recollection of what was said June 16, 2011, was not prompted to attention until he became aware of the police investigation on July 21, 2011. KJA would have preserved her recollection by way of her police statement given June 23, 2011.

[108] Defence counsel also expressed a concern that there is a danger that witnesses will refer to the excluded real evidence, namely the mobile phone and text messages thereon, which given the circumstances at trial at the time could require a mistrial be declared.

Should the defence motions, made pursuant to ss. 7, 11(d) , 24(1) and the common-law jurisdiction of the court to control its own process, be permitted and an abuse of process be found, or alternatively evidence excluded?

[109] It may be helpful to summarize my factual findings to this point.

[110] I found that KJA's phone was seized by Det. Cst. MacDonald on June 28, 2011, and that KJA did not deliberately (manually) delete her text messages of June 16, 2011, to Mr. Burns.

[111] KJA alleges a sexual assault by Mr. Burns in the early morning hours of June 16, 2011. That afternoon there was an exchange of text messages between the two. Around midnight June 17 – 18, 2011, KJA was at the QEII hospital. SANE nurses had collected a so-called "rape kit" and requested police attend to seize it. Constable Parasram attended, and spent one hour with KJA and her sister. He became aware that Mr. Burns had sent text messages to KJA apologizing and suggesting that they move on. He did not seize her phone or request to see her phone (which might allow him to view the text messages on her phone, and to make a written copy of them in his notebook). At some point between June 17 – 18, and June 23, 2011, KJA's text messages to Mr. Burns were deleted from KJA's phone. There are no means of replicating them. Mr. Burns also deleted them from his phone. KJA has some independent recollection of what she texted to Mr. Burns. She was not specifically asked if her recollection would be improved if she referred to Mr. Burns' texts to refresh her memory.

Unacceptable Negligence-Section 7 Charter Violation

[112] I am unaware of any reported decision, in which the police have been found unacceptably negligent in similar circumstances. No court has gone as far as to say that the circumstances in the case at Bar meet the threshold for effectively imposing an obligation of disclosure or production on the Crown for evidence that

"should have been seized", breach of which is a breach of s. 7 of the Charter. Most recently our Court of Appeal dealt with an allegation of "unacceptable negligence" and loss of evidence which had been in the possession of the police (taser video) in *R. v. Boliver*, 2014 NSCA 99, per Bryson, JA. at paras. 32 – 34. Some courts have concluded that a failure to seize or secure evidence may amount to negligence which could underpin a claim of prejudice to an accused's right to make full answer and defence: *R. v. Abukar*, 2009 ABPC 136; *R. v. Shewchuk*, 2014 ABPC 14; *R. v. Gill*, 2014 SKQB 176.

[113] I conclude that the law has not gone that far, nor should it. There was no duty on the Constable to view the text messages and seize the phone. Not having viewed the texts or seized the phone, the phone and necessarily the text messages on that phone, were not transformed into "fruits of the investigation", and therefore no latent obligation of disclosure or production crystallized until June 28, 2011 when the phone was seized.

[114] Even presuming that, on June 17 – 18, 2011 the phone was then effectively in the hands of the police, thus crystallizing a later obligation of disclosure or production, in the circumstances I do not find that Constable Parasram's actions or inactions cumulatively amount to negligence, much less so, to unacceptable negligence.

[115] I conclude that it was reasonable for the Constable to make a notation of the evidence as he did, as there was no material risk identified in the evidence, to suggest that the text messages would not survive on KJA's phone until a major crime unit investigator could meet with her. I infer that the Constable would have known or believed that the text messages may also be available by seizing Mr. Burns' phone, or possibly by accessing production orders to obtain records from service providers. I infer that the Constable was aware that KJA needed her phone for work, and given the reality of the modern and personal importance of mobile phones, he would have been reluctant to deprive her of the phone. The Constable was also acting in accordance with an established protocol for sexual offense allegations, that intends to limit the amount of investigation done by the initial officer receiving the complaint. At his level of experience, the Constable may understandably, and quite properly in this case in my view, have been deferential to the strict wording of the protocol.

[116] The onus to prove a s. 7 Charter breach is upon Mr. Burns. I also note that the onus to prove an abuse of process lies on Mr. Burns: *R. v. Hart*, 2014 SCC 52 at para.113.

[117] The Constable acted reasonably in the circumstances. I reject the defence argument (lost evidence/s. 7 Charter) as a basis for the remedies sought.

Deliberate Destruction of Evidence – s.7 Charter Violation

[118] I concluded it more likely than not that, KJA turned her phone over for seizure to Detective Constable MacDonald on June 28, 2011, and she did not deliberately delete her text messages to Mr. Burns. Therefore, I reject the defence argument(destroyed evidence/s. 7 Charter) as a basis for the remedies sought.

Violation of the Right to a "Fair" Trial – Common Law remedy and violation of s. 11(d) Charter

[119] The onus to prove a breach of the right to a fair trial (s. 11(d) Charter) is upon Mr. Burns.

[120] The onus to prove a violation of the right to fair trial under s. 11(d) of the Charter, is on the person arguing there is a violation, as s. 11(d) is a subset of the general principle ("Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice") contained in s. 7 of the Charter.

[121] In his brief, Mr. Burns argues "should this Honourable Court conclude that there was no [Section 7] Charter breach, there remains a discretion to exclude the remaining text messages on the basis of trial fairness. Specifically, it is submitted

that the text messages must be excluded as their inclusion at trial would undermine the right of Mr. Burns to a fair trial, which is clearly enshrined in the Constitution… Aside from the conduct of the police and [KJA], there is also the simple issue of the unfairness that would emanate from the use of a part of an alleged admission, without the full context of those comments that make up the alleged admission."

[122] Having put the basis for his relief as falling under s. 11(d) of the Charter, Mr. Burns would therefore place the onus of establishing a violation of that section on himself. However, I note that the Crown would be the party attempting to introduce that evidence at trial. If Mr. Burns objected at trial, that the probative value of that evidence is outweighed by its prejudice to the right to a fair trial caused to the accused by its admission, the onus to establish its admissibility would be on the Crown.

[123] Because there is a risk in this case of conflating the analysis that is to be applied to an argument that the admission of certain evidence at trial would violate the right to a fair trial as contained in s. 11 (d) Charter, with the analysis that would apply to an exercise of discretion by a trial judge in considering whether the probative value of a piece of evidence is outweighed by its prejudice to the right to

a fair trial, I will briefly address the differences, and why Mr. Burns' reliance on *Harrer* is unnecessary, and inappropriate.

[124] At common law, a trial judge has a discretion to assess whether the probative value of a piece of evidence outweighs its prejudicial effect on the right to a fair trial, and to exclude evidence if this standard is not met.

[125] In *R. v. Seaboyer* [1991] 2 SCR 577, the court was faced with determining whether ss. 276 and 277 [the so-called "rape shield" provisions] of the Criminal Code at that time "exclude evidence, the probative value of which is not substantially outweighed by its potential prejudice?" per McLachlin J, as she then was, for the majority (at para. 45).

[126] In commenting on the common-law rule, Justice McLachlin stated:

> 39 The law of evidence deals with this problem by giving the trial judge the task of balancing the value of the evidence against its potential prejudice. Virtually all common law jurisdictions recognize a power in the trial judge to exclude evidence on the basis that its probative value is outweighed by the prejudice which may flow from it.
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> 40 Professor McCormick, in McCormick's Handbook of the Law of Evidence (2nd ed. 1972), put this principle, [page610] sometimes referred to as the concept of "legal relevancy", as follows at pp. 438-40:
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> **Relevant evidence, then, is evidence that in some degree advances the inquiry, and thus has probative value, and is prima facie admissible. But relevance is not always enough. There may remain the question, is its value worth what it costs? There are several counterbalancing factors which may move the court to exclude relevant evidence if they outweigh its probative**

value. In order of their importance, they are these. **First**, the danger that the facts offered may unduly arouse the jury's emotions of prejudice, hostility or sympathy. **Second**, the probability that the proof and the answering evidence that it provokes may create a side issue that will unduly distract the jury from the main issues. **Third**, the likelihood that the evidence offered and the counter proof will consume an undue amount of time. **Fourth**, the danger of unfair surprise to the opponent when, having no reasonable ground to anticipate this development of the proof, he would be unprepared to meet it. Often, of course, several of these dangers such as distraction and time consumption, or prejudice and surprise, emerge from a particular offer of evidence. **This balancing of intangibles -- probative values against probative dangers -- is so much a matter where wise judges in particular situations may differ that a leeway of discretion is generally recognized.**

41 **This Court has affirmed the trial judges' power to exclude Crown evidence the prejudicial effect of which outweighs its probative value in a criminal case,** but a narrower formula than that articulated by McCormick has emerged. In Wray, supra, at p. 293, the Court stated that the judge may exclude only "evidence gravely prejudicial to the accused, the admissibility of which is tenuous, and whose probative force in relation to the main issue before the court is trifling". More recently, **in *Sweitzer v. R.,*** [1982] 1 S.C.R. 949, at p. 953, an appeal involving a particularly difficult brand of circumstantial evidence offered by the Crown, **the Court said that "admissibility will depend upon the probative effect of the evidence balanced against the prejudice caused to the accused by its admission**". In *Morris*, supra, at p. 193, the Court without mentioning Sweitzer cited the narrower Wray formula. But in *R. v. Potvin,* [1989] 1 S.C.R. 525, La Forest J. (Dickson C.J. concurring) affirmed in general terms "the rule [page611] that the trial judge may exclude admissible evidence if its prejudicial effect substantially outweighs its probative value" (p. 531).

42 **I am of the view that the more appropriate description of the general power of a judge to exclude relevant evidence on the ground of prejudice is that articulated in Sweitzer** and generally accepted throughout the common law world. It may be noted that the English case from which the Wray formula was adopted has been superseded by more expansive formulae substantially in the language of Sweitzer.

43 The Canadian cases cited above all pertain to evidence tendered by the Crown against the accused**. The question arises whether the same power to exclude exists with respect to defence evidence. Canadian courts, like courts in most common law jurisdictions, have been extremely cautious in restricting the power of the accused to call evidence** in his or her defence, a reluctance founded in the fundamental tenet of our judicial system that an innocent person must not be convicted. **It follows from this that the prejudice must substantially outweigh the value of the evidence before a judge can exclude evidence relevant to a defence allowed by law.**

[my emphasis added]

[127] Justice L'Heureux-Dube for herself and Gonthier J., in dissent, similarly commented:

> 225 Significant for our purposes is the long-recognized discretion in the trial judge to exclude otherwise relevant evidence. Hence, a determination that something is relevant does not answer the further question whether, regardless of its relevance, there exists some rule or policy consideration that nevertheless mandates exclusion of the proffered evidence.
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> …
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> 226 **There are many reasons why relevant evidence may be excluded and such exclusions play a significant and important role in the traditional law of evidence.** Some evidence is excluded in order to protect values that our society holds dear. Other evidence may be excluded because of its inherent unreliability. **As well, evidence will be excluded if it distorts rather than enhances the search for truth**. **McCormick**, McCormick's Handbook of the Law of Evidence (2nd ed. 1972) at pp. 439-40, quoted in J. A. Tanford and A. J. Bocchino, "Rape Victim Shield Laws and the Sixth Amendment" (1980), 128 U. Pa. L. Rev. 544, at p. 569, **sets out four reasons for the exclusion of this latter type of "prejudicial" evidence**:
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> - **First**, the danger that the facts offered may unduly arouse the jury's emotions of prejudice, hostility or sympathy. **Second**, the probability that the proof and the answering evidence that it provokes may create a side [page 693] issue that will unduly distract the jury from the main issues. **Third**, the likelihood that the evidence offered and the counter proof will consume an undue amount of time. **Fourth**, the danger of unfair surprise to the opponent when, having no reasonable ground to anticipate this development of the proof, he would be unprepared to meet it.
>
> 227 Any of these four reasons would seem to encompass evidence of prior sexual activity. As La Forest J. (dissenting on other grounds) put it in ***R. v. Corbett***, [1988] 1 S.C.R. 670, at p. 714:
>
> - **The organizing principles of the law of evidence may be simply stated. All relevant evidence is admissible, subject to a discretion to exclude matters that may unduly prejudice, mislead or confuse the trier of fact, take up too much time, or that should otherwise be excluded on clear grounds of law or policy.**
>
> [my emphasis added]

[128] *Harrer* was recently cited with approval by Justice Moldaver in *R. v. Hart*, 2014 SCC 52 at para. 88:

> However, it must be remembered that trial judges always retain a discretion to exclude evidence where its admission would compromise trial fairness (see *R. v. Harrer* [1995] 3 SCR 562). This is because "the general principle that an accused is entitled to a fair trial cannot be entirely reduced to specific rules" (ibid. at para 23).

[129] *Harrer* dealt with a scenario where Ms. Harrer was under investigation while in the United States about her possible criminal involvement in Canada relating to the escape of her boyfriend while he was being held for extradition to the United States. She was tried in Canada, on the basis of statements she made to the authorities in the United States. Initially, she was acquitted, but the court of appeal found the exclusion of her statement to authorities in the United States was in error, and ordered a new trial. The Supreme Court dismissed her appeal.

[130] In that context, Justice LaForest, for seven of the nine justices who heard the case, stated:

> 21 **I should add that, had the circumstances been such that the admission of the evidence would lead to an unfair trial, I would have had no difficulty rejecting the evidence by virtue of the Charter**. I would not take this step under s. 24(2), which is addressed to the rejection of evidence that has been wrongfully obtained. Nor would I rely on s. 24(1), under which a judge of competent jurisdiction has the power to grant such remedy to a person who has suffered a Charter breach as the court considers just and appropriate. **Rather, I would reject the evidence on the basis of the trial judge's duty, now constitutionalized by the enshrinement of a fair trial in the Charter, to exercise properly his or her judicial discretion to exclude evidence that would result in an unfair trial.**

22 I shall, however, attempt to put more flesh on this approach because the argument was strongly advanced that since there was no breach of the Charter in obtaining the evidence, a prerequisite to the power to exclude evidence under s. 24(2) of the Charter, there was no Charter based jurisdiction to exclude evidence. The difficulty with this contention is that it fails to appreciate the full nature of a fair trial. As I mentioned, while s. 24(2) is directed to the exclusion of evidence obtained in a manner that infringed a Charter right, it does not operate until there is a Charter breach. **What we are concerned with here is not the remedy for a breach, but with the manner in which a trial must be conducted if it is to be fair.**

23 **The law of evidence has developed many specific rules to prevent the admission of evidence that would cause a trial to be unfair, but the general principle that an accused is entitled to a fair trial cannot be entirely reduced to specific rules**. In R. v. Corbett, [1988] 1 S.C.R. 670, a majority of this Court made it clear that a judge has a discretion to exclude evidence that would, if admitted, undermine a fair trial; see also *R. v. Potvin*, [1989] 1 S.C.R. 525. Similarly, Sopinka, Lederman and Bryant, The Law of Evidence in Canada (1992), at p. 401, conclude that "if the admission of certain evidence would adversely affect the fairness of an accused's trial, the evidence ought to be excluded" (emphasis added). **In *Thomson Newspapers*,** supra, **I attempted to explain that this approach is a necessary adjunct to a fair trial as guaranteed by s. 11(d) of the Charter** in the following passage, at p. 559:

- . . . there can really be no breach of the Charter until unfair evidence is admitted. Until that happens, there is no violation of the principles of fundamental justice and no denial of a fair trial. **Since the proper admission or rejection of derivative evidence does not admit of a general rule, a flexible mechanism must be found to deal with the issue contextually. That can only be done by the trial judge**.

I went on to further explain, as I had in *Corbett*, supra, that the common law principle had now been constitutionalized by the Charter's guarantee of a fair trial under s. 11(d) of the Charter. At page 560, I continued:

- The fact that this discretion to exclude evidence is grounded in the right to a fair trial has obvious constitutional implications. The right of an accused to a fair hearing is constitutionalized by s. 11(d), a right that would in any event be protected under s. 7 as an aspect of the principles of fundamental justice (see *R. v. Corbett*, per Beetz J., at p. 699, and my reasons, at pp. 744-46; Dickson C.J. does not really comment on this issue).

24 **The effect of s. 11(d), then, is to transform this high duty of the judge at common law to a constitutional imperative**. As I noted in Thomson Newspapers, at p. 563, judges must, as guardians of the Constitution, exercise this discretion where necessary to give effect to the Charter's guarantee of a fair trial. **In a word, there is no need to resort to s. 24(2), or s. 24(1) for that matter. In such circumstances, the evidence is excluded to conform to the constitutional**

mandate guaranteeing a fair trial, i.e., to prevent a trial from being unfair at the outset.

[131] Justice LaForest's comments in *Thompson Newspapers Ltd. v. Canada* [1990] 1 SCR 425, must be seen in context:

> 212 In this country, where the question of immunity falls to be determined under the principles of fundamental justice, I think we can achieve a more flexible balance between the interests of the individual and that of the state. In a case like this, where the statute does not provide for the evidence to be admitted, there can really be no breach of the Charter until unfair evidence is admitted. Until that happens, there is no violation of the principles of fundamental justice and no denial of a fair trial. **Since the proper admission or rejection of derivative evidence does not admit of a general rule, a flexible mechanism must be found to deal with the issue contextually.** That can only be done by the trial judge.
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> 213 **Such an approach can be traced to the common law. In *R. v. Corbett*, supra**, dissenting on another point, I endeavoured to elaborate upon the broad lines of the flexible approach to ensuring a fair trial flowing from the fundamental postulates of the law of evidence which, at p. 714, **I summarized as follows: "All relevant evidence is admissible, subject to a discretion to exclude matters that may unduly prejudice, mislead or confuse the trier of fact, take up too much time, or that should otherwise be excluded on clear grounds of law or policy"** (emphasis added); see generally at pp. 713-15. Lamer J., on this point speaking for a unanimous Court, had expressed a similar view in Morris v. The Queen, [1983] 2 S.C.R. 190, at p. 201. Over time, of course, many of the decisions made pursuant to this principle have become fixed rules.
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> 214 In R. v. Corbett, supra, a majority of this Court held that this judicial discretion to exclude unduly prejudicial evidence could be applied in relation to evidence of convictions made admissible in evidence by s. 12 of the Canada Evidence Act; see in [page560] addition to my reasons (pp. 729-40), those of Dickson C.J. (Lamer J. concurring), at p. 697, and Beetz J., at p. 699. **As I indicated in R. v. Potvin, supra, Dickson C.J. concurring, this discretion to exclude evidence where its prejudicial effect substantially outweighs its probative value is ultimately grounded in the trial judge's duty to ensure a fair trial.** As I there explained, that is the view now accepted by the House of Lords; see R. v. Sang, [1980] A.C. 402. The requirement of a fair trial has in other areas moved the courts to reject evidence to ensure an accused a fair trial, though it would otherwise have been admissible; see Lucier v. The Queen, [1982] 1 S.C.R. 28.

215 **The fact that this discretion to exclude evidence is grounded in the right to a fair trial has obvious constitutional implications.** The right of an accused to a fair hearing is constitutionalized by s. 11(d), a right that would in any event be protected under s. 7 as an aspect of the principles of fundamental justice (see R. v. Corbett, per Beetz J., at p. 699, and my reasons, at pp. 744-46; Dickson C.J. does not really comment on this issue). **But this does not, any more than does the common law, prevent the admission in evidence of matters that are damaging to the accused as opposed to unfair.** What it may do is to encourage the flexibility which some judges were (wrongly in my view) reluctant to exercise at common law; see in this context R.J. Delisle, "Evidence -- Judicial Discretion and Rules of Evidence -- Canada Evidence Act, s. 12: Corbett v. The Queen" (1988), 67 Can. Bar Rev. 706.

216 **I see no reason why an approach like that in the now constitutionalized rule adopted in the case of prejudicial evidence should not be extended to derivative evidence which, like other prejudicial evidence within the rule, can only be dealt with having due regard to the need to balance the right of the accused and that of the public in a specific [pg. 561] context**. In my view, derivative evidence that could not have been found or appreciated except as a result of the compelled testimony under the Act should in the exercise of the trial judge's discretion be excluded since its admission would violate the principles of fundamental justice. **As will be evident from what I have stated earlier, I do not think such exclusion should take place if the evidence would otherwise have been found and its relevance understood.** There is nothing unfair in admitting relevant evidence of this kind, a proposition consistent with the cases under s. 24(2) of the Charter. **The touchstone for the exercise of the discretion is the fairness of the trial process.**

217 In *R. v. Corbett,* too, I dealt with the manner in which the evidence of convictions should be dealt with in relation to a fair trial, in a passage that is clearly relevant to derivative evidence as well. I stated, at p. 745:

- If the appellant's broader argument is based on the notion that, to ensure a fair trial and impartial jurors, evidence of the previous convictions of an accused should always, as a matter of law, be excluded because of their prejudicial effect and in spite of their probative value, I cannot agree. It is true that s. 11 of the Charter constitutionalizes the right of an accused and not that of the state to a fair trial before an impartial tribunal. But "fairness" implies, and in my view demands, consideration also of the interests of the state as representing the public. Likewise the principles of fundamental justice operate to protect the integrity of the system itself, recognizing the legitimate interests not only of the accused but also of the accuser. To accept the appellant's argument would be to ignore those considerations.

- In my view, the recognition of a discretion to exclude evidence when its probative value is overshadowed by prejudicial effect ensures that the

> legitimate interests of both the public and the accused are taken into account. Justice and fairness demand no less and expect no more.
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> I should add that the Chief Justice took a similar approach, though he was more strongly disposed [page562] towards the admission of relevant evidence in that specific context. The precise balance that should apply is one, of course, that will require development over time.
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> …
>
> Conclusion
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> 220 I conclude, then, that the use of derivative evidence derived from the use of the s. 17 power in subsequent trials for offences under the Act does not automatically affect the fairness of those trials. It follows that complete immunity against such use is not required by the principles of fundamental justice. **The immunity against use of actual testimony provided by s. 20(2) of the Act together with the judge's power to exclude derivative evidence where appropriate is all that is necessary to satisfy the requirements of the Charter.**

[132] These comments in the various cases, clearly indicate a general principle that, although notionally an accused person is entitled to a "fair" trial, the entitlement is limited to a fundamentally fair trial, and not the most advantageous trial possible.

[133] Furthermore, it is accepted that a "fair" trial is a trial it satisfies the public interest in getting at the truth, but at the same time preserving basic procedural fairness for the accused –*Harrer* at para 45 and *Bjelland* at para.22.

[134] There is a difference between the cost of benefit analysis done in the exercise of discretion regarding an assessment of the probative value as opposed to prejudicial effect that a piece of evidence may have on the fair trial rights of an accused, and trial fairness concerns that arise generally because of concerns such

as the process by which the evidence was obtained, (e.g. in the Supreme Court of Canada decisions *Harrer*; *Thomsen Newspapers* and *R. v. White* [1999] 2 SCR 417, primarily involving the admissibility of statements; more recently stated by the court in *R. v. Pearce*, 2014 MBCA 70 at para. 61). The various differences are neatly captured by Justice Watt's decision in *R. v. Spackman* 2012 ONCA 905 at paras. 99 – 118.

[135] He pointed out at para. 118:

> Where the basis on which the exclusionary discretion is invoked is a claim that the prejudicial effect of the evidence exceeds its probative value, the balancing exercise brushes up uncomfortably close to the jury's function of weighing the evidence. A trial judge, invited to exercise his or her exclusionary discretion on this basis, must be careful not to invade the jury's territory. In a similar way, in assessing the potential prejudicial effect of evidence, a trial judge must take into account and not underestimate the jury's ability to understand and follow limiting instructions- *R v Corbett* [1988] 1 SCR 670 at pp 692 – 693.

[136] Courts must still distinguish between, the constitutional imperative that an accused must not be subjected to a fundamentally unfair trial, and the specific exercise of discretion which is focused on a weighing of prejudicial effect and probative value [para. 213 *Thomson Newspapers*; and paras. 40 and 226 *Seaboyer*] which process is "an adjunct to a fair trial as guaranteed by s.11(d) of the Charter…" [per LaForest J. para. 23 in *Harrer*].

[137] Thus, one can conclude that, not every assessment of the probative value and prejudicial effect of a piece of evidence has been catapulted to the status of constitutionalized inquiry. In what would be rare situations, that specific assessment could conclude with a finding that not only is the probative value of the evidence the Crown is attempting to tender overborne by its prejudicial effect on the fair trial considerations in play in the specific case, but it may also be seen to be a violation of s. 11 (d) of the Charter.

[138] The kinds of prejudicial have been identified by the Supreme Court of Canada in *Seaboyer* (at paras. 40 and 226) as including:

(i) The danger that the facts offered may unduly arouse the jury's emotions of prejudice, hostility or sympathy.

(ii) The probability that the proof and the answering evidence that it provokes may create a side issue that will unduly distract the jury from the main issues.

(iii) The likelihood that the evidence offered and the counter proof will consume an undue amount of time.

(iv) The danger of unfair surprise to the opponent when, having no reasonable ground to anticipate this development of the proof, he would be unprepared to meet it.

[more recently identified as the dangers of moral prejudice(bad personhood) and reasoning prejudice(a jury is confused about what is important, and distracted to ancillary matters) per Justice Watt in *Spackman*]

[139] In the case at Bar the defence is arguing that, introduction of Mr. Burns' text messages to KJA, without the jury having the benefit of K JA's text messages to Mr. Burns, would lead the jury to a dangerously distorted picture, because the text messages from Mr. Burns, standing alone, are not capable of intelligible meaning by the jury. This is the unfairness advanced, or that remains in the wake of my conclusions that KJA did not deliberately delete her text messages to Mr. Burns and that Cst. Parasram was not negligent in his failing to view or seize KJA's mobile phone on June 17 – 18, 2011.

[140] I find that on the evidence available to me, the admission of Mr. Burns' text messages to KJA, and by implication his statements about the text messaging between the two on June 16, 2011(the defence having conceded that the statement is voluntary and Charter compliant), would not render the trial unfair. Moreover,

placing the text messages before the jury, would not place before them evidence, the probative value of which is outweighed by the prejudicial effect to the fair trial rights of Mr. Burns- See *R. v. Seaboyer* [1991] 2 SCR 577 at paragraphs 37 – 45, and its progeny.

[141] The probative value of Mr. Burns text messages is substantial, because they are his complete statements, made in writing, to KJA, and accurately preserved, and are made shortly after the time of the alleged offence. There has been no suggestion that any of his relevant text messages are not before the Court.

[142] The prejudicial effect to the fair trial rights of Mr. Burns, is not material. Arguably there is prejudice associated with the introduction of Mr. Burns' text messages, without those of KJA being similarly available.

[143] Defence counsel argues prejudice because the jury will be deprived of a significant portion of the context of Mr. Burns' statements, as a result of their not having available for inspection the written text messages of KJA, to which he was responding.

[144] As to what was said by KJA in her text messages, the jury will have available to it as Crown evidence, the testimony of KJA, including her cross examination by defence counsel, and the references in Mr. Burns' police statement

to what he recalled on July 21, 2011, that KJA wrote to him in text messages on June 16, 2011.

[145] I recognize that in relation to the probative value/prejudice assessment, I am only deciding the threshold question of "whether the evidence is worthy of being heard by the jury" – *R. v. Hart*, 2014 SCC 52 at para. 98 per Moldaver J. However, I am deciding a question of admissibility. Although this is a defence motion premised on s. 11(d) Charter, which normally places the onus on the accused, to have excluded as evidence in the trial the text messages and references in the police statement of Mr. Burns, the evidence here will be presented at trial by the Crown, and it is therefore the Crown upon which such onus to prove admissibility lies in this hearing-at para. 26, *R. v. Ferris* (Alta.CA) per Conrad JA, affirmed [1994] 3 SCR 756. That onus on the Crown includes persuading the court that the probative value of the evidence outweighs its prejudicial effect.

[146] The defence argument is that the evidence is unworthy of being heard by the jury because, without a source that would accurately and reliably demonstrate the texts that KJA sent to Mr. Burns on June 16, 2011, the jury will have a dangerously distorted picture of the meaning of the texts sent by Mr. Burns to KJA. It suggested in its written argument that "this would be similar to the crown

attempting to introduce the answers given during an interrogation by the police, without the accompanying questions by the police officer(s)."

[147] In the jurisprudence, this issue has been argued in relation to attempts to have admitted as evidence, conversations which are incomplete, either because one or both parties' statements were not entirely overheard or recorded. Representative cases include:

> 1-*R. v. Ferris* [1994] 3 SCR 756, affirming (1994) 27 C.R. (4th) 141 (Alta. CA)
>
> 2-*R. v. Rafferty* 2012 ONSC 742 at para 6;
>
> 3- *R. v. Assoun* 2006 NSCA 47 at paras.189-196;
>
> 4-*R. v. Knapczyk* 2014 ABCA 255 at para. 25.

[148] In *R. v. Ferris* (1994) 27 C.R. (4th) 141, Justice Conrad for the majority stated:

> 16-… In this case, the factual question is whether or not there is a statement discernible of meaning. Authenticity of the words is not in issue – meaning is.
>
> …26-in this case, however, it is not a question of whether the utterance was given. Here words were spoken. What is in issue here is whether or not the words were capable of meaning, for without meaning they have no relevance.
>
> …27-… However, because the Crown's case makes it clear words were spoken before and after, and the utterance was incomplete, it is impossible to ascertain the meaning of the words.

[149] The majority concluded that the trial judge erred in admitting the accused's "I have been arrested…. I killed David" statement made during a telephone call to the accused's father, and ordered a new trial. They did so because the trial judge did not point out in his instructions to the jury "the danger that they may have been incomplete statements, and may not really be an admission" (at para. 48).

[150] Justice McClung, in dissent, disagreed:

> Ms. Duckett has referred us to a passage from Wigmore where the authors promote the total exclusion of incomplete utterances. But no case authority is provided and they have been regularly admitted in Canada…. To refuse the relevance of incomplete utterances or writings because the aggregate text might lead elsewhere would have declined relevance to John Wilkes Booth's diary [because 18 pages were torn out], the Rosetta Stone fragment, and the Dead Sea Scrolls – para. 77.

[151] Ultimately, this inquiry is fact driven. It is fueled by considerations of probative value and prejudice to the fair trial rights of an accused. The text messages from Mr. Burns to KJA on June 16, 2011 are sufficiently capable of meaning, and expected to be probative at trial, which probative value is not outweighed by any prejudicial effect on Mr. Burns' fair trial rights.

[152] I conclude that the Crown has met the onus, and shown that the probative value of Mr. Burns text messages to KJA outweighs the prejudice to his fair trial rights, should the text messages be admitted as evidence. Therefore the June 16,

2011 text messages sent by Mr. Burns to KJA are admissible if presented at the instance of the Crown.

[153] As this assessment is fact sensitive, I would entertain a revisiting of my conclusions, should the circumstances during the trial warrant it. I recognize that admission of the text messages may require an instruction to the jury, similar to that identified in *Ferris*.

Conclusion

[154] In spite of the notable effort, excellent materials provided to the Court, and the very able submissions by Mr. MacDonald, I dismiss the motions by the defence.

Rosinski, J.

Appendix "A" [August 6, 2014 transcript]

> Q-Back in June 2011 did you know how to delete text messages from your telephone?
>
> A- I don't know…
>
> Q-Have you ever deleted text messages from any telephone you've ever owned?
>
> A- I don't know. Possibly.
>
> Q-Well, maybe I should be more specific. Have you ever deleted text messages from any telephone that you ever possessed?

A- Not to my recollection" – p.14 transcript, August 6, 2014

…

Q-And can you explain why those text messages from you to Tim Burns on June 16 were not there?

A- Yes

Q-Why?

A- Because… I don't know if it's the model of phone or some way that my phone is set up, but **this phone, as messages come in, incoming text messages, the first thing it does is delete my outgoing messages**. So as new texts come in from other conversations, old outgoing text messages are deleted and **then old income text messages are deleted**.

Q-Okay. So just so we have this straight, the telephone that you had in June 2011 would delete older outgoing text messages as newer incoming text messages were being received.

A- Yes

Q-And are you saying that as newer text messages were being received, some incoming text messages would also be deleted?

A- Yes, after a period of time.

Q-And are you saying that that occurred by automatic… That this occurred automatically because of how your phone worked?

A- Yes

Q-Do you know how many text messages your telephone would save at any given time?

A- I do not – p. 24 – 25 transcript August 6, 2014

…

Q-Given that [there would have been text messages received by her phone in April and May 2011] do you have any explanation as to why when Sgt. Flynn analyzed your telephone there were absolutely no outgoing messages on your telephone?

A- No, I do not.

Q-And given what you've just said, do you have any explanation as to why there were absolutely no other incoming text messages on your telephone, except for those from Tim Burns between June 12 and 16?

A- No, I do not." – Page 25 – 26 transcript August 6, 2014

…

"Q-All right. And are you saying that it's your understanding that the reason why there were no other text messages on your telephone was because your telephone automatically deleted all other text messages?

A- My telephone does automatically delete text messages.

Q-No, I'm not asking if it does. I'm asking if it's your understanding that it did delete all those other text messages.

A- It did delete text messages.

Q-So let me ask you this. **After you had the text exchange on June 16 with Tim Burns, okay, that's the subject of this court proceeding today, did you text with any other person**?

A – Yes… [Her sister]…

Q-And given your understanding of how your phone works and how incoming messages will delete outgoing messages, **can you explain why there are no text messages on your telephone from your sister when it's analyzed by Cpl. Flynn**?

A-Yes

Q- Why?

A- I think that I was trying to control the amount of incoming messages and outgoing messages.

Q-What do you mean?

A- I mean that **I was trying to make sure that the messages from Tim Burns stayed there, so I was deleting messages as they came in**.

Q-**But I thought you testified earlier today that you don't have any recollection of ever deleting any text messages.**

A- **I said that I didn't recall specifically**.

Q-And so has your recollection improved in the last half hour?

A- Yes. **You prompted me to remember something**. Thank you.… I recall that I knew that I had to keep the messages from Mr. Burns on my phone. I knew that my phone deleted, automatically, old messages. So as messages were coming in, I was probably deleting them.

Q-What do you mean "probably"?

A-"Probably", as in, I don't remember specifically doing it, but that sounds like something I would do to maintain the messages that I needed.

Q-What messages did you need?

A- I needed the messages from Mr. Tim Burns.

Q-Did you need the messages that you sent him?

A- Probably.

Q-Why didn't you save those?

A- Because I didn't know how to save them.

Q-Well, how did you know to save the ones that were coming in?

A- **I was just attempting to save them. I didn't know if I could**." – pp.28 – 29 transcript, August 6, 2014

…

"Q-So are you saying today that between June 16 and June 23 when you turned the phone over to Constable MacDonald, that you deleted every other text message that you received from June 16-23?

A – I wouldn't confirm that I deleted every message.

Q-Then do you know why they don't appear on your phone?

A- No, I do not.

Q-… Are you able to confirm today that you deleted every other text message between June 16 and June 23 that you sent to anyone?

A – I don't feel comfortable confirming that.

Q-You testified at the preliminary inquiry on November 20 of 2012. Correct?

A- I don't remember the date, but I do remember the inquiry.

…

Q-And do you recall being asked similar questions in relation to what happened to those text messages, as you're being asked today?

A- I do

Q-… **At no time on November 20, 2012 did you say that you yourself, deleted any text messages from your telephone. Can you explain that**?

A- No, I cannot.

Q – Do you agree with me that on November 20, 2012 when you were asked questions about how text messages ended up being deleted from your phone, you only said, at that point, that they were deleted automatically by your phone? Do you agree with that?

A- Are you saying that's what I said?

Q-Yes.

A- **I don't recall what I said**.

Q-I have a transcript here and you're welcome to read it.…

A- **If that's what's in the transcript, then there's nothing else I can say**.

Q-**I'm just going to read to you from pages 132 and 133 of the preliminary inquiry transcript**. You were asked at line 13:

> Q-So when the police did their scan and search of the text messages, they found text messages that they say were from Tim Burns to you.
>
> A – Yes.
>
> Q – But they say that **they didn't find any text messages from you to him**.
>
> A-Right.
>
> Q-**Do you have any explanation for that**?
>
> A-Sure.
>
> Q-What is it?
>
> A-**As you have incoming text messages, the phone deletes your old outgoing text messages automatically**.
>
> Q-Incoming text messages delete outgoing text messages?
>
> A-Yes, because the memory is only so large.'

Q-Do you recall saying that?

A- I don't recall saying that but it's there, so…

Q – So at no… In that context, **you didn't say anything about you having deleted any text messages. Correct**?

A- **Did you ask me if I deleted any text messages**?

Q-Yeah. I actually did ask you.

A – **Did you ask me if I deleted any text messages or text messages from myself to Tim Burns**?

Q – Yeah. I asked you specifically at the preliminary inquiry if you deleted text messages from yourself…

[Next come references to the preliminary inquiry transcript]

> Q-So at page 134 of the transcript, you are asked at line 18, "did you delete any of the text messages that you sent to Tim Burns, yourself, manually delete them?" Answer – "absolutely not"

A-Correct.

Q – And, that's correct is it?

A – Yes.

Q-You didn't delete… **Your testifying under oath here today, as you did back in November 2012, that you did not delete, manually, any text messages that you sent to Tim Burns**.

A- **That is correct**.

Q-**And you're saying that those text messages from you to Tim Burns were deleted by operation of your telephone**.

A-Correct.

Q-Do you recall that you would've exchanged text messages with Tim Burns not only on June 16 but June 12, 13th, 14th, 15th? Do you recall that?

A- I don't recall those messages.

Q-… The text messages that Tim Burns sent to you on those dates are in the police report. Okay? But the text messages that you sent to him on those dates are not in the police report. They haven't been recovered. Okay?

A- Okay

Q-Do you have any explanation for that?

A- No.

Q-You say that occurred by operation of your telephone?

A – Yeah. Yes.

Q-… Let me ask you just open ended. **You've said today that you believe that you would have deleted text messages from a telephone on or after June 16**.

A- Yes.

Q-To try to preserve the text messages from Tim Burns to you. Correct?

A-**Correct**

Q-**You'd agree with me that at no point during the preliminary inquiry did you say that. Correct**?

A – **Did you ask me**?

Q – I didn't ask you specifically… **I didn't ask you specifically if you had deleted any other text messages. Okay? But you were asked why certain text messages didn't appear in your telephone any longer. Right**?

A – I don't understand the question.

[Next Mr. MacDonald produces the preliminary inquiry transcript, so the witness can read to herself]

…

Q-Okay.… If you recall before we broke, I was asking you whether or not at the preliminary inquiry you testified that you had deleted any text messages, as you have today. You said today that you believe that you deleted text messages from your telephone back in June 2011. Not specifically the ones you sent to Tim Burns, but other text messages. Okay? And I'm asking you if, at the preliminary inquiry, you testified to that. All right? And so I'm going to read to you from the transcript. And… You can follow along in your copy… [p. 45 transcript]

> Q-So when the police did their scan in search of the text messages they found messages that they say were from Tim Burns to you
>
> A- Yes
>
> Q-**But they say that they didn't find any text messages from you to him**
>
> A- Right.
>
> Q-**Do you have any explanation for that**?
>
> A- Sure
>
> Q-What is it?
>
> A- **As you have incoming text messages, the phone deletes your old outgoing text messages automatically**.
>
> Q-Incoming text messages delete outgoing text messages?
>
> A- Yes, because the memories only so large…
>
> Q-**But does it not delete other incoming messages like messages that have come in earlier**?
>
> A- **Yes, but I was trying to keep my phone clear**.
>
> Q-What do you mean?
>
> A- **I wanted to keep messages clear so that I could keep a hold of the messages from Mr. Burns**.
>
> Q-Well, if you… As of the time that you decided to go to the police… Okay, which apparently would've been sometime Friday evening… Were your text messages to Tim Burns still on your telephone?
>
> A- Yes
>
> Q-… so when did you decide that you wanted to retain text messages for the police?
>
> A- After I spoke with the police on Friday [June 17 – 18, 2011]

Q-Right. **So then how in the world did those text messages from you to him disappear**?

A- **I have a lot of friends**.

Q-So you didn't shut your phone off, leave it off so that the police could get the proper record of what was in it?

A- No. I needed to keep it on because of work. I didn't realize that it would delete all of the messages.

Q-When did you find that out?

A- When I gave the phone to Lisa [Constable MacDonald]

Q-**Did you delete any of the text messages that you sent to Tim Burns yourself, manually delete them**?

A- **Absolutely not**.

…

Q-I don't understand how those [from Tim Burns to her] could survive but your text messages would be deleted

A- It saves the incoming before it saves the outgoing, so it will get rid of outgoing before it will get rid of incoming.

…

Q-If you decide on Friday [June 17, 2011] that you're going to retain these text messages… And all of the text messages exchanged between you and Tim Burns are still there… Right?

A- Right.

Q-you give the phone to the police on June 23

A- Yes

Q-**I don't understand why only the text messages that were outgoing would be deleted.**

A- **Because as I said before, as messages come in, older messages, specifically outgoing messages, are deleted automatically by the phone**.

[From August 6, 2014 testimony]

Q-… and over the course of all those questions and answers, did you say at any time that you had deleted any text messages from your phone?

A- Did you ask me?

Q-You were asked for an explanation as to why text messages had been deleted from your telephone. Right?

A- **I was asked for an explanation as to why the text messages between myself and Mr. Burns, so the outgoing messages from myself, were not there**.

Q-Right

A- **I did not delete those messages. You did not ask me about any other text messages**. You did not ask me about messages from other people. The whole topic of this, the whole subject is messages between myself and Mr. Burns, is it not?

…

A- We are talking about text messages on my phone… But you're asking me about messages between myself and Mr. Burns. You're not asking me about other messages. In fact, **I even said that I was doing my best to save the messages from Mr. Burns**.

Q-Where is that?

The Court- It's page 134 line 11

A- Yeah

…

At page 134 line 3-11 of the preliminary inquiry transcript we find:

> Q-Incoming text messages delete outgoing text messages?
>
> A-Yes, because the memory is only so large… The memory is only so large within the phone.
>
> Q-But does it not delete other incoming messages, like messages that had come in earlier?
>
> A-**Yes, but I was trying to keep my phone clear**.
>
> Q-What do you mean?
>
> A-**I wanted to keep messages clear so that I could keep a hold of the messages from Mr. Burns**.
>
> …
>
> [August 6, 2014]

Q-Right. Did you say that you had deleted any messages in order to do that?

A- No. **You didn't ask me if I deleted any messages. But I said to you very clearly that I was trying to keep my phone clear**. And I had already stated that the phone deletes old messages. So what would that indicate to you?

Q-Okay. It doesn't indicate that you deleted any messages.

A- **You never asked me if I deleted any messages**.

[p. 51]…

A- You've asked me today if I deleted incoming text messages and, "yes."

Q-And you're saying that you did.

A- Yes

Q-And back in November 2012, we were talking about incoming text messages and how…

A- Did you ask me if I deleted them?

Q-… And the impact that they had on deletion of other text messages. Correct?

A- That's what we were talking about.

Q-And did you ever say that you deleted any text messages during that time?

A- I did not say that I deleted any text messages.

Q-**And you're saying that the reason for that was because I didn't ask you specifically that question**?

A- **That's your job**.

…

Q-You were asked the question of how your phone ended up with just simply the text messages from Tim Burns to you. Correct?

A- Yes

Q-**And you're only explanation at that time was that because that's how your phone worked, because of memory capacity**.

A- **No. So that last question you asked, are you referring to the messages between Mr. Burns and myself, or all other text messages after the event**?

Q-… **We're looking for an explanation as to why your telephone only had text messages from Tim Burns to you**.

A- And the answer for that is because as messages came into the phone, old outgoing messages are deleted first.

Q-That's your answer today?

A- **That is my answer. It has been my answer the entire time**.

[p. 53]...

A-Why are there no other text messages on that phone other than the ones that Tim Burns sent me?...

A- **Because I must have deleted them in order to keep the messages from Mr. Burns**.

Q-**That's not what you said at the preliminary inquiry is it**?

A- **That is what I said, because I said I tried to keep my phone clear. It's right there**.

Q-Well, you were asked what you mean by that, but you didn't say that you deleted text messages yourself.

A- **I didn't use the word "deleted", but I did say that I tried to keep my messages clear**.

Q-Well, your explanation, in fact, was… When I asked you, how in the world could all of those text messages have been deleted, you said, I have a lot…

[**referencing the preliminary inquiry transcript at page 135**]:

> Q-How in the world did those text messages from you to him disappear?
>
> A-I have a lot of friends.
>
> Q-So you didn't shut your phone off, leave it off so that the police could get the proper record of what was in it?
>
> A-No, I needed to keep it on because of work. I didn't realize that it would delete all the messages.
>
> Q-When did you find that out?
>
> A-When I gave the phone to Lisa [Constable MacDonald]…
>
> Q-Did you delete any of the text messages that you sent to Tim Burns yourself, manually delete them?

A- **There. You asked me if I deleted any messages… I sent between Mr. Tim Burns and myself and I said "no". That is true**.

…

Q-So let's go back to line 7 [Referring to page 135 line 7 preliminary inquiry transcript]:

> Q-So then how in the world those text messages from you to him disappear?
>
> A-I have a lot of friends.

Q-What did you mean by that?

A- I meant that people were texting me

Q – Meaning that as you received all those texts, then those text messages to you, from you to Tim Burns, automatically deleted.

A- Yes.

Q-I see. Despite your efforts to keep the phone clear.

A- Right

Q-**So did you not keep the phone clear**?

A- **Well I did my best**.

…

A- Yeah. **Once it had deleted those messages [her texts to Mr. Burns], I started to delete incoming messages**.

...

Q-**So let's just make sure you hundred percent clear here. You deleted some text messages from your telephone that's what you're saying today. But you did not physically delete your text messages to Tim Burns**.

A – Yes [p.59]

…

Q-**And when you started your testimony today, you didn't think that you had ever deleted any text messages**?

A- **I couldn't recall anything**.

Q-Would you agree with me that the subject of deletion of text messages was brought up with you obviously in November 2012?

A- The subject of deletion of text messages between myself and Mr. Burns was brought up…

Q-**The subject of deletion of text messages from your telephone by automatic means was discussed at length on November 20, 2012**.

A- By automatic means, yes, it was.

Q-Sure it was. **And that didn't refresh your memory about you having deleted any text messages**?

A- **I feel like I wasn't questioned about that topic**. [p. 63(2) August 6, 2014 transcript].

…

Q-And during those dates and times [June 17 – June 23, 2011], did you delete subsequently, or as you were sending and receiving them, all of those text messages sent and received June 17-23, 2011?

A- I can't testify that I deleted all of them, but I did delete some of them.

Q-Do you have any explanation as to why none of those text messages show up on the analysis of your telephone?

A- No, I do not

…

Q-Well, **how many messages did you delete**?

A- **I don't know** [p. 66 August 6, 2014 transcript]

…

Q-So according to that [exhibit VD1] would you agree with me that you physically deleted at least 308 text messages [between Friday, June 17 and Wednesday, June 22, 2011]?

A- I wouldn't agree to the full 308… Because, as I said before, the phone still deletes some of them automatically. **But I would have deleted a large amount of them**.

Q-That's what you're saying now? You would have deleted a large amount of those yourself?

A- yes

Q-**Of how many**?

A- **I can't say**.

…

Q-… **Do you think that the deletion of 300… Over 300 text messages**, potentially, would be a large number?

A – Large.

Q-**Something that you wouldn't have any difficulty remembering without being prompted.**

A- **I wouldn't say that. It's not like you sit down and delete all of them. You delete them as they come in.**

Q-But your memory has gotten miraculously better, would you agree, over the last two hours?

A- I wouldn't say it's gotten better [p. 75, August 6, 2014 transcript].