

Ontario Court of Appeal Says There is No Reasonable Expectation of Privacy in a Text Message

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10 August 2016

The smartphone has quickly become one of the fastest-selling electronic gadgets in history, with some estimates indicating that more than 50% of all adults own one. The rise of the smartphone has resulted in text messaging becoming one of the more dominant and preferred methods of communication. In 2014 alone, 561 billion text messages were sent worldwide. The ubiquitous use of text messaging services has given rise to important questions concerning the ownership rights attaching to sent messages, and the extent to which individuals can reasonably expect their text messages to remain private.

The Ontario Court of Appeal has recently delivered an important decision on the issue of privacy rights and text messages. In *R. v. Marakah*, 2016 ONCA 542 (CanLII), the Court heard an appeal from Nour Marakah's convictions on multiple firearms offences relating to trafficking. At the underlying trial, evidence relied upon by the Crown included text messages the accused had sent to his co-accused, which police obtained from the co-accused's iPhone without a warrant. Mr. Marakah brought a challenge pursuant to Section 8 of the *Charter of Rights and Freedoms* (the right to be secure against unreasonable search or seizure) seeking to exclude from evidence the text messages sent to his co-accused, which the Crown asserted implicated Mr. Marakah in the alleged trafficking. Mr. Marakah was unsuccessful in having the text messages excluded from evidence at trial, and appealed his conviction to Ontario's top Court on the grounds that, *inter alia*, the evidence obtained through a search of his co-accused's cellphone ought to have been excluded.

In a 2-1 decision, Justice James MacPherson on behalf of the majority ruled that there is no reasonable expectation of privacy in a text message once it has been sent and received by the intended recipient. Justice MacPherson endorsed the reasoning of Justice Laurence Pattillo in a pre-trial application, who decided that the text messages would not be excluded from evidence, which was as follows:

"...I accept that the sender of a text message has a reasonable expectation of privacy in its contents after it has been sent but before it reaches its intended destination. This would include text messages stored in a service provider's data base. Once the message reaches its intended recipient, however, it is no longer under the control of the sender. It is under the complete control of the recipient to do with what her or she wants. In my view, there is no longer any reasonable expectation of privacy in the sender."

Justice LaForme dissented, noting that a typical exchange of text messages is a private communication between two people, which is essentially a modern version of a conversation that can contain as much private information as an oral conversation. He rejected the Crown's position that a person cannot maintain a reasonable expectation of privacy in a text message once it reaches the intended recipient just because he or she loses the ability to control or regulate access to copies of the message. He would have allowed the appeal, ordered the text messages to be excluded from evidence, and entered acquittals on all charges.

Given the major impact this decision has on privacy rights of individuals, which is contrary to the recent British Columbia Court of Appeal decision in *R. v. Pelucco*, 2015 BCCA 370 (CanLII) in which that Court held that there was a reasonable expectation of privacy in a text message, we can expect that the Supreme Court of Canada may wish to wade into the debate in the near future. Indeed, lawyers for Mr. Marakah have already filed a notice of appeal to the Supreme Court of

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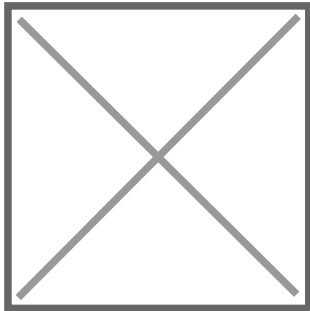
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The text of the decisions in *R. v. Marakah* and *R. v. Pelucco* can be accessed [here](#) and [here](#).

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