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ARTICLE

SCC Recognizes Expectation of Privacy in Text Message Conversations

In the recent seminal decision *R. v. Marakah, 2017 SCC 59*, the Supreme Court of Canada (the "SCC") established that Canadians have a reasonable expectation of privacy in the text messages they send, even after they have been received by the recipient. The majority opinion, which led 5-2 but with heavy dissent, recognized the privacy implications of electronic messaging in a ruling that is likely to have significant impact on both police investigations and individuals' privacy rights.

Background

The case involved an accused who had sent text messages to his accomplice regarding illegal firearm transactions. These texts were recovered from the accomplice's phone and subsequently used by the police to convict the accused of multiple firearms offences. Although the trial judge considered the search of the accomplice's phone to be unreasonable, the recovered text messages were permitted as evidence against the accused.

The SCC Decision

The SCC reversed the lower court's decision and concluded that the accused had a reasonable expectation of privacy in the text messages that he sent to his accomplice and therefore had the necessary standing under section 8 of the *Canadian Charter of Rights and Freedoms* (the "Charter") to challenge the police's search of the accomplice's phone and use of the text messages as evidence. The prosecution agreed that the search was unreasonable and the SCC concluded that the evidence collected should be excluded, ultimately resulting in the charges against the accused being dropped.

Reasonable Expectation of Privacy in Text Messages

In reaching the determination that text messages can attract a reasonable expectation of privacy, the SCC undertook analysis of the four-part test it had previously developed:

1. What was the subject matter of the alleged search?
2. Did the claimant have a direct interest in the subject matter?
3. Did the claimant have a subjective expectation of privacy in the subject matter?
4. If so, was the claimant's subjective expectation of privacy objectively reasonable?

Firstly, the SCC determined that the subject matter of the search at issue was not the accomplice's phone from which the text messages were recovered or the servers on which they are stored, but rather the "electronic conversation" — viewed holistically — between the accused and the accomplice.

From there, the SCC tackled the question of the accused's reasonable expectation of privacy in the text messages he sent to his accomplice. It was clear that the accused expected that the recipient keep the text messages he received private, but was that expectation objectively reasonable? In evaluating the reasonableness, the SCC looked at three factors further discussed below: (i) the place of the search, (ii) the private nature of the subject matter, and (iii) control over the subject matter.

i. Place of the Search

What is the place of an electronic text message conversation? The SCC determined that, unlike traditional methods of communication involving physical documents, electronic conversations such as text messages do not occupy a physical place; rather, they create "private chat rooms" between individuals. These rooms, although electronic, are the place of the search and this suggests there would be a reasonable expectation of privacy in text messages.

ii. Private Nature of Text Messages

The SCC concluded that given the intrinsic private nature of texting wherein individuals specifically choose the recipient of their texts and are more inclined to discuss personal matters, it is reasonable to expect these private interactions to remain private.

iii. Control over Text Messages

Finally, and most importantly, the SCC analyzed the notion of control over text messages once they are sent. Both the prosecution and the dissenting judges believed that once control over a message is lost — when it is received by another party capable of disclosing it — the reasonable expectation of privacy of the message is also lost. The majority of the SCC disagreed and stated that the risk that the contents of a text message can be disclosed does not negate a reasonable expectation of privacy in such an electronic conversation. In essence, a person does not lose control over the information simply because another person possesses it or can access it. The SCC made a comparison to its previous decision in *R. v. Cole*, where it ruled that an employee maintained a reasonable expectation of privacy in the subject matter contained on his work-issued laptop, over which he did not have exclusive control.

The dissenting judges believed that control is a crucial contextual factor and, accordingly, the accused's lack of control over the accomplice's phone was fatal to his reasonable expectation of privacy in the text messages. In response, the majority determined that by choosing to send a text message by way of a private medium to a designated person, the sender has sufficient control over the electronic conversation and moreover, control is merely one factor to consider.

Implications

This case comes with potentially important implications. The dissenting opinion highlighted concerns that the majority's approach expands too broadly the scope of those who can bring a section 8 Charter challenge to police search and seizures, which may result in an overburdened criminal justice system. The SCC, however, firmly stated that the protection of privacy in electronic conversations "should not be lightly denied".

It is important to highlight that the SCC did not determine that all text message conversations are protected from police searches. Rather, it concluded that an individual who sends text messages has a reasonable expectation of privacy in the contents of that electronic conversation and therefore the individual has the necessary standing to challenge the validity of a police seizure of those text messages, which are ultimately obtained from another person's phone. Moreover, where the police obtains a valid warrant to either intercept a text message in transit or search an individual's phone, the use of the text messages as evidence will be acceptable. The SCC also noted that the case and its findings did not concern messages posted to social media feeds, conversations occurring in crowded online chatrooms or comments posted on message boards.

In this ruling, the SCC adopted an approach that safeguards privacy even within the increasingly electronic world in which Canadians interact. The ruling is likely to have broad implications for privacy interests and can potentially be applied to other forms of digital communication such as e-mails, instant messages and direct messages on social media, as they all essentially have the same form and function as text messages. Messages that are encrypted or are password protected will favour a greater expectation of privacy and Canadians now have the right to expect their text messages will be private.

It should be noted that the SCC followed the same reasoning in another case, *R. v. Jones*, 2017 SCC 60, which was released the same day and also concerned the seizure of text messages by the police.

12012 SCC 53.

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