

Do Employees Have an Expectation of Privacy in Their Text Messages?



Originally published in Roper Greyell LLP's *RG Information Update* of September 2016

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Information and evidence obtained from social media or electronic communications is playing an increasingly important role in the workplace, but employers must be conscious of employee privacy rights. As a result, the Ontario Court of Appeal's recent decision regarding whether there is a reasonable expectation of privacy in sent text messages is of particular interest to employers.

In *R. v. Marakah*, the Court of Appeal considered the use of sent text messages as evidence in the criminal context. In a 2-1 decision, the Court of Appeal upheld the lower court decision and found that the accused had no "reasonable expectation of privacy" in sent text messages.

The Facts

Police executed search warrants and seized the cell phones of Mr. Marakah and a co-accused. The cell phones contained text messages implicating the two accused in gun trafficking. Mr. Marakah argued that the search of the cell phones violated his Charter rights. The judge agreed with respect to his cell phone, but did not agree regarding the text messages Mr. Marakah sent to the co-accused. Those messages were discovered on the cell phone belonging to the co-accused.

The Court concluded that senders of text messages do not expect that their messages will remain private in the hands of a recipient. The Court said:

There is, in my view, a lack of empirical evidence to support a conclusion that senders of text messages have a presumptively reasonable expectation, from an objective standpoint, that their text messages will remain private in the hands of the recipient.

Mr. Marakah has filed an appeal to the Supreme Court of Canada. The matter is tentatively scheduled for the spring of 2017.

Is Marakah consistent with recent law?

Marakah is in many ways contrary to the recent trend with respect to privacy rights. In its 2015 decision, *R. v. Pelucco*, the British Columbia Court of Appeal held that an accused does have an expectation of privacy in sent text messages because the sender of a text message will ordinarily have a reasonable expectation that a text

message will remain private in the hands of its recipient. The Ontario Court of Appeal in Marakah rejected this proposition. The reasonableness of this proposition will almost certainly weigh heavily in the Supreme Court of Canada's deliberations on this matter.

Marakah also runs contrary to the Supreme Court of Canada's 2012 decision in another criminal case, *R. v. Cole*, where the Court found that employees have a reasonable expectation of privacy respecting the content of computers provided for work practices.

What does this mean for employers?

Marakah is a welcome development for employers. Sent text messages may become valuable evidence in a range of workplace situations, including cases involving breach of restrictive covenants, the theft of private information or trade secrets, and in workplace harassment investigations.

Employers should stay tuned as Marakah proceeds to the Supreme Court of Canada. With the recent rise of "sexting" and much-publicized incidents of the public dissemination of very personal images, the Supreme Court's upcoming decision is likely to have wide-ranging consequences. Criminal law decisions, such as Marakah and Cole, often have implications for workplaces. For example, Cole had a trickle-down effect whereby courts and tribunals emphasized an employee's reasonable expectation of privacy in the workplace.

In the meantime, a well-drafted and consistently enforced policy can help to dispel an employee's expectation of privacy in the workplace, including with respect to text messages. We recommend the following:

1. Implement workplace technology policies with regard to the use of social media and the use of employer technology, and/or "bring your own device" policies.
2. Review and update your current technology policies.
3. Get legal advice before taking steps regarding text message evidence.

Disclaimer: While every effort has been made to ensure accuracy in this article, you are urged to seek specific advice on matters of concern and not to rely solely on what is contained herein. The article is for general information purposes only and does not constitute legal advice.

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