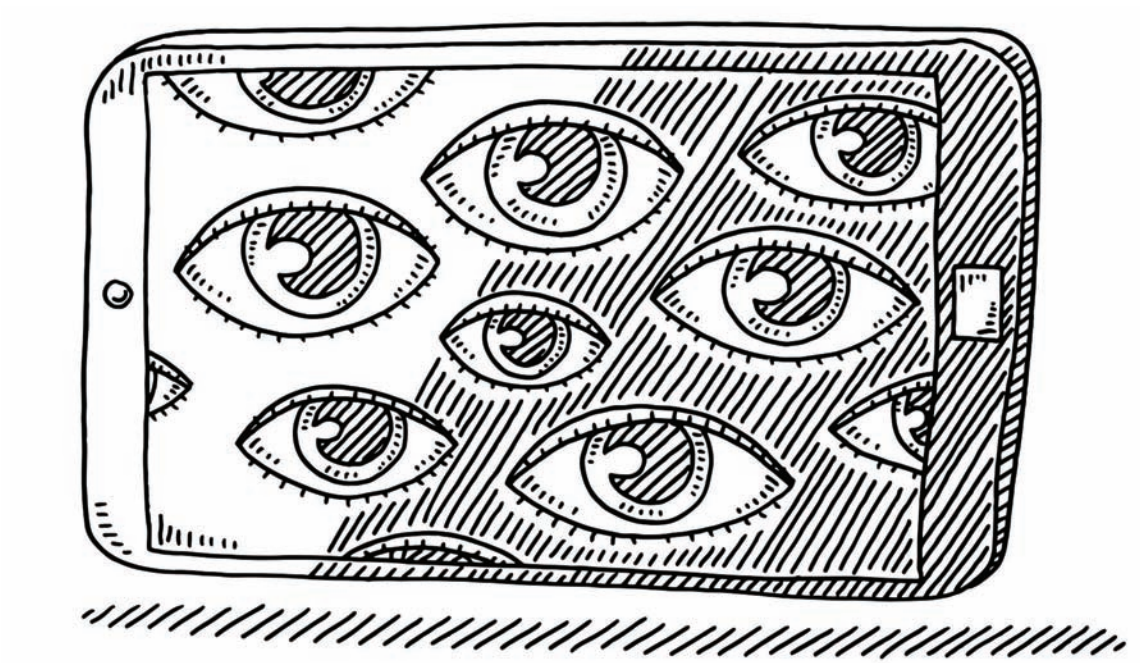
Focus CRIMINAL LAW

Appeal court says texts to recipient not private

Jill Presser



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The next time you send a text message to your spouse or best friend or colleague thinking that the communication is private, think again. It may not be. The Court of Appeal for Ontario has decided, in *R. v. Marakah* 2016 ONCA 542, that the sender of a text does not have a reasonable expectation of privacy in the message in the hands of the recipient. This means that once our text messages (or any communications sent through media that create digital records of our words) arrive on the other end, they are vulnerable to search and seizure by the police. And we cannot constitutionally challenge the search, seizure, or use of those communications.

In *Marakah*, in the course of investigating illegal gun trafficking, police seized the cellphones of both Nour Marakah and his co-accused. The phones contained text messages between the two that implicated them in gun trafficking. At a pre-trial hearing, Marakah brought successful challenges to the constitutionality of the searches of his home and cellphone under s. 8 of the *Charter*. The evidence obtained through those unconstitutional searches was excluded under s. 24(2) of the *Charter*. However, the judge, Ontario Superior Court Justice Laurence Pattillo, held that Marakah did not have standing to challenge the search of co-accused's cellphone because he did not have a reasonable expectation of privacy in the text messages extracted from the co-accused's phone. The texts seized from the co-accused's cellphone were admitted in evidence. They formed the bulk of the Crown's case. On the strength of that evidence, Marakah was convicted of multiple firearms offences.

The majority of the Court of Appeal for Ontario (Justices James MacPherson and Jean MacFarland) agreed with the trial judge, Justice Brian O'Marra. They found that Marakah did not have a reasonable expectation of privacy in his messages in the co-accused's phone. Of central importance to the majority's holding was the fact that the sender of a text loses control over what happens to the message once it is received. They held that because the choice of medium resulted in a permanent record of the communication that the sender could not control, there could be no reasonable expectation of privacy in that communication.

By contrast, in a strong dissenting opinion, Justice Harry LaForme recognized that text messages are the modern equivalent of private communications that have always been seen by the courts as private. Justice LaForme's decision echoed the decisions of the British Columbia Court of Appeal in *R. v. Pelucco* 2015 BCCA 370 and *R. v. Craig* 2016 BCCA 154. These decisions recognized that text and other online digital messages do attract a reasonable expectation of privacy for the sender, even once they are in the hands of the receiver. The B.C. Court of Appeal recognized that the medium through which private communications occur should not generally change whether or not we reasonably expect the communication to be private.

A further appeal by Marakah will be heard by the Supreme Court of Canada in March 2017. The issues raised by his appeal are extremely important, and not just because text messages are currently private in B.C. but not in Ontario; and not just in the context of digital communication for nefarious and criminal purposes. The issues raised in *Marakah* are crucial more generally to our evolving understanding of what is and is not private in our digital era. The nature of communication between private individuals is changing rapidly with the exponential development of communications technology. No longer are people predominantly exchanging their ideas orally and locally. Private communications occur throughout the globe via digital networks. They are now often text-based and automatically recorded. They live in the digital device of the sender, the receiver, in the records of the Internet service provider and on the server. As a result, the content of our private communications are easily disseminated in their original form.

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It is a reality today that we must communicate digitally. As a result, we necessarily create automatic records of our communications. Contrary to the holding of the *Marakah* majority, the choice not to send text messages and to communicate in other ways is not a meaningful choice in 2016. This means that we will send digital messages, and we will create records of our communications that we cannot control.

If only communications that we can completely control were considered private, we would have a sadly impoverished private sphere. Nothing would be private anymore. But our jurisprudence has long recognized that privacy should be defined normatively, with reference to how much space we aspire to keep free from the prying eyes of the state. A normative definition of privacy means that, in a digital world, the ability to control what happens to our communications cannot determine whether they are private or not. It is to be hoped that the Supreme Court adopts a normative approach and upholds the lived experience of regular Canadians who communicate via text, by recognizing that privacy is still a social norm.

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Lawddities

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Creepy clowns no joke to law enforcement

Just in time for Halloween, clowns are becoming a problem. Five high school students from Montgomery, Ohio were charged with inducing panic after inviting a clown organization, called "Clown Clan," to their school, reports cincinnati.com. The arrests are part of an increasing phenomenon of people in public wearing gruesome clown masks, sometimes carrying real or realistic-looking weapons and perpetrating public mischief. Butler County Sheriff Richard K. Jones warned that anyone involved in clown-related criminal activity would be arrested and charged accordingly. "We have added patrols and deputies at various schools and bus stops throughout the county," Jones said. "I just want to make those who decide to partake in this malicious activity aware, you will go to jail." Other police are scrutinizing laws to deal with the clown threat, such as Covington, La. "There are several laws," says Covington police Chief Tim Lentz. "Of course, wearing a mask in public when it's not Halloween, Mardi Gras or one of the special events, but when you go to a school and disrupt it, it's against the law and you can be charged with terrorizing." – **STAFF**