

**May 31, 2013**

## The Supreme Court of Canada Continues to Struggle with 21<sup>st</sup> Century Technology

By Margaret Truesdale\*

The Supreme Court of Canada has rendered a number of judgments over the course of the last year which grappled with the application of laws to 21<sup>st</sup> century technology. In *R v Cole*<sup>1</sup> the Court considered whether a person had any reasonable expectation of privacy in the contents of a computer laptop, owned by an employer, in the context of a criminal investigation. In *Rogers Communications Inc v Society of Composers, Authors and Music Publishers of Canada*<sup>2</sup> and *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*<sup>3</sup> the Court had to grapple with the intellectual property ramifications of the myriad of ways that Canadians use technology to access music, videos, and other copyrighted materials.

In the recent case of *R v Telus Communications*<sup>4</sup> the Court considered whether text messages sent between cell phones was to be afforded the same protection from interception as voice communications. The intercept provisions in the *Criminal Code* were introduced in 1973-1974. At that time it would have been beyond the anticipation of the legislature that in the not too distant future many Canadians would be in possession of personal communication devices that would permit not only voice telephone calls but also text messages and Internet access. The fact that the Supreme Court of Canada had to struggle with the application of legislation first introduced in the 1970s to 21<sup>st</sup> century technology is demonstrated by the fact that there are three separate judgments given in *R v Telus*.

The case arose when police relied on a general warrant to require Telus to provide text messages for certain subscribers for a prospective two week period. The police did not seek a warrant under the separate provisions for authorization of a wiretap, which have additional requirements not necessary for a general warrant. A wiretap is required to “intercept” private communications and the majority and dissent disagreed whether the correct interpretation of “intercept” captured the technique used in this case.

The majority imported the principle of technological neutrality from copyright law into the criminal law context in order to interpret “intercept” for the purposes of a wiretap authorization. It reasoned that the scope of protection afforded to private communication should not be dictated by the technology used to transmit such communications. Text messaging should be treated similarly to traditional voice communication because the

---

\*with assistance from Summer Student Robin McNamara

<sup>1</sup> 2012 SCC 53

<sup>2</sup> 2012 SCC 35

<sup>3</sup> 2012 SCC 34

<sup>4</sup> 2013 SCC 16



PERLEY-ROBERTSON,  
HILL & MCDUGALL LLP/s.r.l.

two forms of communication share important features. Like voice communication in a private setting, text messaging is intended to be conversational, transmission is generally instantaneous, and there is an expectation of privacy in the communication.

A concurring opinion reached the same conclusion as the majority but for different reasons. Instead of relying on a strict definition of “intercept”, they resolved the dispute on the grounds that the technique used in this case was “substantively equivalent” to an intercept.

The dissent distinguished between the interception of private communications and the disclosure of private communications. This distinction was considered fundamental to the purpose and to the scheme of the wiretap provisions. The police did not “intercept” the subscribers’ messages when Telus turned over copies of sent and received messages it had stored in its databases. Telus “disclosed” the communications that were stored. The investigative technique authorized by the general warrant was not an interception of private communications.

Most Canadians who use text messaging would likely intuitively agree that text messages are deserving of privacy protection. However, the case only specifically addresses police power to *prospectively* recover text messages. This was only possible because Telus, unlike other cell phone providers, stored messages in a database for a certain amount of time. The disclosure of past messages – if they were lawfully stored by a service provider – would not necessarily be covered by the reasoning of this case.

*Margaret R. Truesdale is a lawyer in our Business Law Group. Margaret can be reached at 613.566.2820 or [mtruesdale@perlaw.ca](mailto:mtruesdale@perlaw.ca). To view her bio, please [click here](#).*