

## **Privacy (Appropriately) Reigns Supreme: R v. Marakah**

In an increasingly digital age where an innumerable number of text messages are exchanged everyday, many of which contain private and/or socially damning information, the question almost asks itself: are the confidentiality of these messages legally protected? This was the central issue in the 2017 Supreme Court decision of *R v. Marakah* (*R v Marakah* 2017 SCC 59). In *Marakah*, the applicant challenged the admissibility of several condemning text messages retrieved from the phone of his accomplice implicating them both in fire arms trafficking. Section 8 of the Canadian Charter of Rights and Freedoms grants everyone a right to be secure against unreasonable search or seizure; the problem for the crown in *Marakah* was that the text messages were retrieved without a warrant. The court ruled that section 8 grants a reasonable expectation of privacy over text messages, even when they are found on someone else's phone, to the effect that they cannot be accepted as evidence unless they are obtained lawfully, i.e. with a warrant. An important ramification of this decision is that the protection is not limited to text messaging and reasonably extends to various sorts of instant messaging, and so the section 8 protection established in *Marakah* is remarkably broad.

As a result, *Marakah* is a landmark decision; it is indicative of the Canadian legal systems assimilation to a hyper-technological reality where the digital realm is just as legitimate as the physical realm. In fact, more confidential information is communicated digitally than physically, so affording legal protection to text messages seems to be a step in the right direction. Under the regime established by *Marakah*, the contents of your cell phone are arguably afforded just as much protection as the contents of your home, both requiring a warrant to be accessed. To the overwhelming majority of Canadians, this is a good thing. Most of our private messages, images and documents are stored online. One could learn more about you by reading all of your instant messaging conversations, including those conversations on ubiquitously used apps like WhatsApp, Instagram and Facebook messenger for example, than they could from poking around in your room. Chief Justice McLachlin (as she then was) even pointed out that text messaging conversations are analogous to private conversations behind closed doors, to highlight their confidential nature. The norms of modern society corroborate her view. Surely, it is frowned upon to look through even a close friends text messages without their permission. Surely still, it is frowned upon in most instances to look over a friends shoulder as they text. If

there exists a societal consensus on the confidential nature of instant messaging and a natural inclination to disapprove of a violation of this privacy, then why is there a concern with the decision?

The answer is obvious; it affords legal protection to those using instant messaging as a vehicle for criminal activity. Often times, instant messaging records will be crucial evidence in building a case against criminals, and so requiring a warrant will render the process more onerous and place an increased burden on the already encumbered criminal justice system. But the concern does not end there, as warrants will be obtained only in certain cases. The strongest argument in favour of critics of the decision are situations where vulnerable individuals, such as children, who are often victims of crime that rely on instant messaging, come to the police with evidence of such crimes on their phones, but are unable to introduce that evidence in a court of law because the perpetrator has a reasonable right to privacy. In such scenarios, it might be impossible to mount a case against the most pernicious criminals in the country because of what many might characterize as a technicality.

But is it really a technicality? Perhaps not, depending on ones inclinations. To me, privacy is a fundamental right appropriately protected by the Charter, and as we've just seen, its protection might even have harmful effects, yet it remains necessary in an age of growing instantaneous communication. Whether one approves of the decision in *Marakah* hinges solely on the belief of whether the law should cater to the vast majority of law abiding citizens, or if it should be designed to aid in apprehending the criminal minority. As difficult as it might sound, the correct decision is in prioritizing privacy at the cost of making criminal activity more accessible. The world is trending digitally, and if the most intimate details of our lives are being captured on the digital record at an increased rate, then the law is correct in proactively providing them with a broad blanket of protection.