## Case In Point

# Supreme Court of Canada Recognizes Reasonable Expectation of Privacy in Digital Communications

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There has been significant discussion of the Supreme Court of Canada's decisions in *R v Jones* and *R v Marakah* – cases in which the Court recognized a reasonable expectation of privacy in text messages that police obtained from others. In *Jones*, the police obtained messages from a telecom company and in *Marakah* the police obtained messages from a recipient's phone.

At their broadest, *Jones* and *Maraka*h are clearer than ever recognition that the *Charter* protects digital communications although digital communications are not easily controlled or kept secret. Justice Cote said it well in *Jones*:

Here, as in Spencer and TELUS, the only way to retain control over the subject matter of the search vis-à-vis the service provider was to make no use of its services at all. That choice is not a meaningful one. Focusing on the fact that Mr. Jones relinquished direct control vis-à-vis the service provider is accordingly difficult to reconcile with a purposive approach to s. 8. Canadians are not required to become digital recluses in order to maintain some semblance of privacy in their lives.

Recognizing this particular, highly-normative basis for *Jones* and *Marakah* is essential to properly understanding what these cases might mean for rights and entitlements of organizations that hold the digital information of others – including employers who hold the digital information of their employees. In contrast to the above statement, the Supreme Court of Canada has already recognized that employees have a meaningful choice as to whether they use a work system for their private dealings. In *R v Cole*, Justice Fish said the following about employee Cole's choice:

In this case, the operational realities of Mr. Cole's workplace weigh both for and against the existence of a reasonable expectation of privacy. For, because written policy and actual practice permitted Mr. Cole to use his work-issued laptop for personal purposes. Against, because both policy and technological reality deprived him of exclusive control over — and access to — the personal information he chose to record on it.

*Jones* and *Marakah* do not detract from this statement and, if anything, invite the law to develop in a way that gives even greater emphasis to employee choice and its impact on privacy and corporate data security. Corporate data security is all about choosing the right medium – the right tool – for the purpose. Our right as citizens to text without state interference is quite a different thing.

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