Trending Issues in Search Warrant Challenges

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TRENDING ISSUES IN SEARCH WARRANT CHALLENGES

1. INTRODUCTION

This paper will address a number of developing issues in search warrant challenges, some of which push the outer boundaries of *Charter* protections as we currently understand them. We live in a rapidly changing world where people are constantly plugged in with reams of intimately private information always at their fingertips on some portable electronic device or other. We also physically live and share space in new and different co-operative ways. Detached single-family living is well and truly a thing of the past for a significant portion of city dwellers. This paper will explore how traditional search and seizure concepts have (or have not) adapted to deal with emergent social issues with a particular emphasis on establishing a reasonable expectation of privacy and the need for a flexible, perhaps even creative, approach to comport with changing social norms.

2. IS THERE PRIVACY AFTER SEND?

"Merry Christmas": so read the first text message sent on December 3, 1992, by British Engineer Neil Papworth.[1] Who knew that this humble beginning would mushroom into an industry now predicted to generate revenues of $1.279 trillion between 2014 and 2018?[2] The number of text messages sent and received worldwide is expected to reach 15 trillion in 2016.[3] As of 2013, Canadians were already sending an average of 270 million text messages a day.[4] Of course, messaging technology is not limited to text or SMS (short message service) messages. There is an ever growing number of internet-based applications that permit instant communications among individuals or groups of individuals.[5] However, no matter the mechanism or the App used, the result is still instantaneous, personal, electronic communication in written or pictorial format. In our respectful view, the format or platform for the communications ought not to matter much. It is the substance that should matter, i.e., the focus of the inquiry should be whether the communication provides a window into the core of personal information that persons have a right to keep private. Form should never be permitted to triumph over substance.

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1 Chris Gayomli, "The Text Message Turns 20: a Brief History of SMS", online: The Week <http://theweek.com/articles/469869/text-message-turns-20-brief-history-sms> accessed 31 January 2016.

2 Ann Brenoff, "OMG! The First Text Message Was Sent 23 Years Ago Today", online: The Huffington Post < http://www.huffingtonpost.com/entry/omg-happy-23rd-birthday-to-the-text-message_us_565dcdefe4b079b2818bcb5a> accessed 31 January 2016.

3 Paul Withers, "Tyntec predicts surge in IP-based messaging this year", online: Mobile News <http://www.mobilenewscwp.co.uk/2013/01/23/tyntec-predicts-surge-in-ip-based-messaging-this-year> accessed 31 January 2016.

4 Based on statistics from the Canadian Wireless Telecommunications Association, in Ottawa, Ontario.

5 IMessage, Snapchat, WhatsApp, Twitter, and Instagram are but a few examples.

Historically our legal system has jealously guarded private communications in spoken form.[6] Text communication, which self-generates a record that can even survive deletion, presents new challenges in the application of established search and seizure doctrine. Text and other electronic methods of communication provide a virtual potential bounty of information for law enforcement on the one hand while they also have the potential to annihilate individual privacy on the other. The law must keep pace with technological advancement and establish a balance between the competing interests of law enforcement and privacy. Mr. Justice La Forest put it this way in the seminal case of ***R. v. Wong***, [1990] 3 S.C.R. 36 at para.9:

> ..... Dickson C.J. observed in *Hunter v. Southam Inc.,* [1984] 2 S.C.R. 145, at p. 155, that constitutional provisions aimed at protecting individual rights and liberties must be interpreted as providing a continuing framework for the legitimate exercise of government power. These observations remind one ***that the broad and general right to be secure from unreasonable search and seizure guaranteed by s. 8 is meant to keep pace with technological development, and, accordingly, to ensure that we are ever protected against unauthorized intrusions upon our privacy by the agents of the state, whatever technical form the means of invasion may take.***[7] [Emphasis added]

How, then, are the courts responding to the text messaging revolution and the question of privacy interests in messages (and other things) that have been sent? There are a number of trial level decisions that fall into two distinct camps. The cases that focus on the proprietary control aspects of the ***Edwards***[8] factors unsurprisingly conclude that there is no privacy expectation in a sent message once control has been relinquished. The cases that evidence a more purposive approach, which focus on the nature of text messages as private communications with the natural attendant privacy expectations, come to the opposite conclusion.

In ***R. v. S.M.,*** 2012 ONSC 2949 at para.17, Nordheimer J. concluded that the accused maintained an "ongoing privacy interest" in text messages located on another person's phone. He wrote, at paras 24 and 25:

6 See for example ***R. v. Duarte***, [1990] 1 S.C.R. 30.

7 See also ***R. v. Tessling***, 2004 SCC 67 at para.30 and ***Telus Communications***, 2013 SCC 16 at para. 33.

8 ***R. v. Edwards***, [1996] 1 S.C.R. 128 at para.45.