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R. v. Telus Communications Co.: Judicial Authority to Obtain Text Messages

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The manner in which individuals choose to communicate with one another can have a profound impact on the state's ability to obtain those communications. When a gun trafficker picks up his cell phone to contact his supplier, the choice he makes between placing a phone call or sending a text message may determine whether and by what means the communication is obtained by the police. Private telephone conversations are susceptible to interception under the authority of a wiretap authorization, while cell phone records containing text messages may be produced to the police by way of production order or general warrant. The availability of a general warrant as an investigative tool and the issue of its essence as something between a wiretap authorization and a production order is currently before the Supreme Court of Canada in the matter of ***R. v. TELUS***[2].

Where the police wish to *intercept* private telephone conversations, they must do so in accordance with the wiretap authority set out in Part VI of the *Criminal Code*. There are, of course, strict preconditions to receiving Part VI wiretap authorization, along with strict terms and conditions for the use of the authorization.

There are means other than *interception* through which the police may obtain private communications, for example, cell phone records held by the service provider may be obtained by way of a production order pursuant to s.487.012 of the *Criminal Code*. The preconditions of a production order are far less onerous than those of the more common Part VI authorizations. Most notably, "investigative necessity" is not a precondition to the issuance of a production order. Cell phone records typically provide subscriber information and call detail information. Some records, however, also include information with respect to text messages, including the content of the text message. A significant limitation on a production order is one where it authorizes production of records only for a concluded period of time (i.e., the records must exist at the time the order is issued). In that respect, the authority is purely retrospective.

The police are not, however, limited to retrospective seizure of text messages. They may seek judicial authorization—by way of a general warrant and assistance order—requiring a cell phone service provider to produce text messages generated in respect of a subscriber's account on a *prospective* basis, according to a schedule set out in the warrant. For example, a general warrant

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[2] ***R. v. Telus Communications Co.,*** [2011] O.J. No. 974, March 4, 2011 (Sproat J.) Ontario Superior Court of Justice

and assistance order may require a cell phone provider to provide the police with call detail records and text messages for a named subscribed every day for a specified duration.

This procedure has recently survived a challenge. In ***R. v. TELUS***, the Ontario Superior Court of Justice ruled on an application brought by TELUS Communications Company seeking to quash a general warrant and assistance order that required TELUS to provide text messages in respect of two subscribers on a rolling, prospective 24-hour cycle. TELUS argued that the general warrant was tantamount to an interception of private communication within the meaning of s.183 of the *Criminal Code*, and that therefore a Part VI authorization was required to obtain records of the content of text messages.

TELUS's position was essentially two-fold. First, owing to the technical aspects of its text message delivery system, it was possible that certain text messages would be produced to the police pursuant to the warrant before they were read by or even delivered to the subscriber. Second, TELUS contended that "interception" does not necessarily mean that the communications are obtained by police in real time; therefore, the fact that the warrant required once-daily production rather than "real time" production did not take the production outside of the realm of an interception.

The Court disagreed. At paragraph [49] of his reasons, Sproat J. observed that the General Warrant did not "in any sense seize, catch, stop or interfere with the progress of the text message from sender to receiver," owing to the fact that the general warrant applied only to text messages already stored on TELUS's computer database. He further held that the independence of TELUS's recording and retention of text messages from the warrant-imposed obligation to produce the messages to the police necessarily meant that the text messages were not intercepted as a result of the general warrant.

The Court in ***TELUS*** observed that it is the function of Parliament to consider whether text messages should be treated differently from other types of business records, and Parliament is in the best position to determine whether the Part VI authorization paradigm—with its rigorous preconditions—ought to be applied to the obtaining of text messages.

Parliament is indeed considering the scope of police power and judicial authority to compel cell phone service providers to provide police with records and data kept in respect of its subscribers. Bill C-30, entitled "*Investigating and Preventing Criminal Electronic Communications Act,*"[3] does not contain amendments to s.487.01 that would prevent the use of a general warrant in requiring prospective production of text messages. It would appear that Parliament is not contemplating the curtailment of the scope of s.487.01 to prevent the provision from being used—as it was in ***R. v. TELUS***—to obtain text message content prospectively.

Furthermore, while the bill provides new production orders to compel the production of data relating to the transmission of communications, nothing in the proposed legislation would restrict the authority that presently exists under s.487.012 of the *Criminal Code* to use a production order to obtain text messages retrospectively.

The matter of ***R. v. TELUS*** is now before the Supreme Court of Canada. The appeal is scheduled to be heard on October 15, 2012.

[3] Bill C-30 was introduced and had its first reading on February 14, 2012. It is currently being considered by the Standing Committee on Justice and Human Rights before its second reading.