File Number: 37518

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL OF NEWFOUNDLAND AND LABRADOR)

BETWEEN:

SEAN PATRICK MILLS

Appellant
(Respondent/Appellant by Cross Appeal)

and

HER MAJESTY THE QUEEN

Respondent
(Appellant/Respondent by Cross Appeal)

and

DIRECTOR OF PUBLIC PROSECUTIONS, ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL OF ALBERTA, DIRECTEUR DES POURSUITES CRIMINELLES ET PÉNALES DU QUÉBEC, CANADAIN CIVIL LIBERITIES ASSOCIATION, CRIMINAL LAWYERS' ASSOCIATION, CANADIAN ASSOCIATION OF CHIEFS OF POLICE, SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY AND PUBLIC INTEREST CLINIC

Interveners

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(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)

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Table of Contents

PART I – OVERVIEW AND STATEMENT OF FACTS 1
A. Overview 1
B. Facts 1
PART II – POSITION ON THE QUESTION IN ISSUE 1
PART III – ARGUMENT 2
A. Undercover interactions do not require a warrant or wiretap 2
i. Undercover work is not an “interception” 2
ii. Part VI is about surveillance technology, not private communications 2
iii. Written undercover work is also not an interception 3
iv. Requiring pre-authorization for undercover work is unprincipled and unworkable 4
B. Saving a copy of an electronic conversation is not an interception 6
i. *Jones* is dispositive of the question of whether using SnagIt is an interception 6
ii. Using technology to copy a message is not determinative 7
iii. Normatively there is no infringement of privacy 8
PART IV – COSTS 10
PART V – ORDER SOUGHT 10
PART VI – TABLE OF AUTHORITIES 11

PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. Part VI of the *Criminal Code* is not engaged by an undercover police officer simply speaking to another person. This is true whether they speak face-to-face, over the phone, or through written electronic messaging. Part VI is equally not engaged where the police make a copy of written communications they have lawfully received beforehand. This method of preserving evidence is not the kind of technological interference with communicational privacy that the definition of "intercept" encompasses, as this Court's recent guidance in *Jones* makes clear.

2. Online undercover work is essential to the safety of Canadians, and, in particular, the safety of our most vulnerable youth. The sound proactive police work seen in this case does not engage Part VI. The trial court's interpretation of these provisions is wrong, needlessly compromises the effective investigation of crime in a digital era, and should be definitively rejected.

B. Facts

3. The DPP makes no submission on the facts.

PART II – POSITION ON THE QUESTION IN ISSUE

4. The DPP intervenes to make two key points on the intersection of wiretapping principles and electronic undercover police work. Specifically, the DPP submits that: (i) undercover communications, whether spoken (when unrecorded) or written, are not interceptions, and no judicial authorization is required for police, such as Officer Hobbs, to communicate with a suspected sexual predator through their undercover online persona; and (ii) the generation of a copy of previously received written communications, whether a screen capture program or otherwise, is not an interception under Part VI of the *Criminal Code*.

PART III – ARGUMENT

A. Undercover interactions do not require a warrant or wiretap

i. Undercover work is not an "interception"

5. Police officers acting in an undercover capacity are allowed to meet and interact with other people, just like any individual in our society. In doing so, they see and hear things that their interlocutors mean to convey to the person they *thought* they were interacting with, not the police. Fundamentally, that is how undercover investigations work. This does not engage Part VI. Deception is not interception.[1]

6. To the contrary, it has been canon for forty years that police acquisition of information through the mechanism of undercover work does not infringe privacy rights and is not an "intercept" as defined in Part VI of the *Criminal Code*.[2] As the Québec Court of Appeal recently held: [3]

> Le fait que l'un des interlocuteurs est un agent de l'État sans que l'appelant ne le sache ne constitue pas, non plus, une "interception". [emphasis added]
>
> [The fact that one of the interlocutors is an agent of the state without the appellant knowing it does not make it an "intercept"]

ii. Part VI is about surveillance technology, not private communications

7. The legislative scheme in Part VI of the *Criminal Code* is not concerned with state *participation* in private communications, but with the state's *surreptitious interception* of these

[1] *R. v. Beairsto*, 2018 ABCA 118 at para. 24.
[2] *R. v. McQueen,* [1975] A.J. No. 3242, 25 C.C.C. (2d) 262; *R. v. Singh*, 1998 CanLII 4819 (BC CA), 127 C.C.C. (3d) 429; *R. c. Blais*, 2017 QCCA 1774 at paras. 13-21, application for leave to appeal filed, SCC 38053; *Beairsto* at paras. 24-25; E. G. Ewaschuk, *Criminal Pleadings and Practice in Canada*, 2nd ed. (Toronto: Thomson Reuters Canada, 1988, loose-leaf), pt. II at ch. no 4:10:20 (Online: WestLawNext Canada (date accessed: April 26, 2018)).
[3] *Blais* at para. 21.

communications through the use of surveillance technologies.[4] In *Duarte,* Justice La Forest put it succinctly:

> A conversation with an informer does not amount to a search and seizure within the meaning of the *Charter*. Surreptitious electronic interception and recording of a private communication does.[5]

8. It is thus settled law that undercover police work does not *per se* constitute an interception and does not require prior judicial authorization of any form. This Court cemented that understanding with its comprehensive interpretation of Part VI in *Jones*. That decision identified three hallmarks of "interception" that guide and inform our understanding of whether specific police conduct engages Part VI. Specifically:

- "The word "intercept" denotes an interference between the sender and recipient in the course of the communication process.";[6]
- "… interception relates to actions by which a third party interjects itself into the communication process in real-time through technological means.";[7] and
- "… the policy motivating Part VI was a concern with the use of intrusive surveillance technologies and their impact on citizens' privacy."[8] [emphasis added]

9. Therefore, read purposively, the essential meaning of "intercept" does not apply to normal spoken or written interactions between undercover officers and their targets.

iii. Written undercover work is also not an interception

10. The principles governing oral undercover communications apply equally when suspects and undercover officers communicate through written electronic messaging. No *surreptitious* surveillance takes place and there is no *interference* with the communication process. The accused

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[4] *R. v. Duarte,* [1990] 1 S.C.R. 30 at paras. 7, 18, 24, 28, 50; *R. v. Wong,* [1990] 3 S.C.R. 36 at para. 13.
[5] *Duarte,* at para. 50.
[6] *R. v. Jones*, 2017 SCC 60 at para. 69.
[7] *Jones* at para. 72.
[8] *Jones* at para. 73.

himself creates the permanent written record by typing out the message and sending it. He knows and intends that this record will be stored in multiple places: his messaging account, the recipient's messaging account, and likely the physical devices of both communicants.[9]

11. Moreover, there is no technological *interference*, because the making of a "permanent electronic recording" is *the very nature of the medium* the parties have chosen to use. Parties to written electronic communications know and reasonably expect that copies of those messages will be received and reside on the recipient's messaging accounts and devices. Even more importantly, with mediums like text, email, and Facebook messages, the sender *knows* that the recipient can retrieve, re-read, and print-out those messages. With most written electronic media, the full "conversation log" or transcript is stored on each of the participants' devices, and a copy is fixed and readable on those devices unless and until it is deliberately erased.

12. Thus, the privacy concerns animating *Duarte* do not arise with written exchanges that are *inherently* recorded, just as they do not arise with unrecorded spoken interactions. In both cases the reasonable normative expectations of the people communicating are met. Properly interpreted, "intercept" does not include undercover communications that create fixed, potentially permanent, electronic records as part of the chosen communication medium. An undercover officer does nothing to infringe the privacy of a person they message with. Part VI does not apply.

iv. Requiring pre-authorization for undercover work is unprincipled and unworkable

13. One anomaly in the decision below requires further comment. The trial judge curiously found that the police ought to have sought authorization by March 22nd when they knew the appellant was aware of "Leanne's" age and that he had "potentially inappropriate" interest; The trial judge would have also required the police to obtain a general warrant to search their own databases for records relating to the appellant.[10] However, the criminal content of the private communications is irrelevant to the analysis of whether prior judicial authorization is required.[11] There is no principled basis for distinguishing between the communications made before this point and after. If what the police did in this case is characterized as an interception then, on the

[9] *R. v. Ghotra,* [2015] O.J. No. 7253 (S.C.J.) at para. 125; *R. v. Allen,* 2017 ONSC 1712 at para. 63.
[10] Reasons for Judgement (Charter), at para. 44.
[11] *Duarte* at para. 41; *Wong* at para. 19.

appellant's analysis, the police ought to have sought authorization before *any* communications were exchanged.

14. Such a path of reasoning would be fatally flawed. Imposing a requirement to obtain prior judicial authorization to merely enter into an exchange of written communications with a suspect would effectively shut police out of proactive investigations into crimes that take place in "electronic spaces", like child luring, drug trafficking, and terrorist radicalization. At the preliminary stages of such investigations, prior to any communications being exchanged, it is often impossible to establish the requisite grounds to believe an offence will be committed.[12] An authorization could not issue in these circumstances.

15. Moreover, many contemporary drug investigations involve some form of electronic messaging between the drug trafficker and his customers.[13] Officers need to behave like normal drug-buyers and respond in a timely, direct way to incoming text messages from suspected dealers.[14] The impracticality of holding-off on these communications, and making an application for a one-party consent wiretap to a provincial court judge, is manifest. The opportunity will dissipate before any authorization could be obtained.

16. The effect of the trial judge's approach would be to put undercover police work out of business. In rebuffing the early attempts to constitute undercover police work as a form of "interception", Clement J.A. of the Alberta Court of Appeal astutely warned that the root purposes of Part VI – namely control over surreptitious electronic surveillance – must be kept squarely in mind lest society needlessly handicap its ability to fight pernicious forms of crime:[15]

> … if these matters are not kept in mind in interpreting Section 176.16(1), its applicability could be extended to absurd lengths and hamper normal police investigation to an extent that would seriously jeopardize the public interest in the detection of crime.

[12] *Criminal Code,* s. 184.2(4).
[13] See e.g. *R. v. Abboud,* 2012 ONSC 3862 at paras. 14-29; *R. v. Reid,* 2016 ONSC 954.
[14] See e.g. *Beairsto* at para. 2-6; *R. v.* Knox, 2013 ONCJ 484, [2013] O.J. No. 4269 at para. 4.
[15] *McQueen* at para. 17.

To the extent that the trial court's judgment below, and the appellant in this Court, may suggest that judicial pre-authorization is required for online undercover work, they are mistaken, and this Court should say so. The investigative practices that caught the sexual predator in this case are constitutionally sound and did not require judicial authorization under Part VI.

B. Saving a copy of an electronic conversation is not an interception

17. If an undercover officer's receipt of written electronic messages does not constitute an "intercept" for the purposes of Part VI of the *Criminal Code,* then neither does making a copy of the received message by way of a screen capture program. A person who makes a copy of an electronic message he or she was *meant to have* is simply not 'intercepting' that communication. Both common sense, and this Court's comprehensive interpretation of the language and purpose of Part VI in *Jones*, shows that Part VI is not engaged in this context.

i. *Jones* is dispositive of the question of whether using SnagIt is an interception

18. In *Jones,* a telecommunication company accessed copies of text messages lawfully stored on its server, made copies, and downloaded those for the police pursuant to a production order. This Court found that the disclosure of these messages – which necessarily involved using technology to copy them – did not constitute an "interception" for the purposes of Part VI.[16] Distinguishing between *interception* and *disclosure* of private communications this Court stated:[17]

> Part VI is particularly concerned with regulating the use of intrusive investigative technologies and their impact on citizens' privacy, not the protection of private communications at large. [emphasis added]

19. In this case, Cst. Hobbs, the *intended recipient* of the messages, made an electronic copy of the *already-received* and *already-stored* messages on his computer for the purposes of preserving the evidence. This is no more an interception than what happened in *Jones*.

20. In both cases, the parties lawfully in possession of the communications made a copy of them, in the exact same form they were received. Like *Jones,* there was no interference in the

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[16] *Jones* at para. 81.
[17] *Jones* at para. 60.

communication process: the message was not snatched from the transmission stream but rather had already been received, displayed and stored elsewhere in the recipient's electronic devices. The only difference is that in this case – and all cases where an undercover officer has communicated with a suspect by electronic messaging – the state was *already lawfully in possession* of the messages and their informational content. No 'seizure' from a third party needed to be authorized.

ii. Using technology to copy a message is not determinative

21. Just as the involvement of private communications *per se* does not engage Part VI, neither does the use of technology to make the copy. Rather, whether or not the technology in question amounts to an intercept requiring Part VI authorization "comes down to the specific investigative technique used by the police, and whether that technique constitutes an interception of private communications."[18]

22. Some form of technology is inherently necessary to create a copy of any written electronic communication, regardless of the circumstances in which police come into receipt of it. Saving an email to a computer folder uses technology, but it is not intrusive and bears none of the hallmarks of surveillance. Playing a voicemail for someone is not an interception, photocopying a letter is not an interception, and using SnagIt to take a photo of text you can bring up on *your* computer from *your* messaging account is not an interception. Each example employs a technology, but none possess the essential ingredient to interception: *interference* with the communicating parties' reasonable expectations as to who will have the information, and in what form.

23. Indeed, as Cromwell J. wrote in *Telus*, as adopted by the Court in *Jones*:[19]

> …I think it is clear that there are many ways to acquire the content of a communication that could not be thought of as an interception.

24. In this case, both the appellant and the trial judgement appear to ignore the fact that the police copied pre-existing records of the written communications between the appellant and the undercover officer – ones that were automatically generated on the police officer's covert Facebook and email accounts. Although the police did not retain the original copies of the written

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[18] *Jones* at para. 78.
[19] *R. v. Telus Communications,* 2013 SCC 16 at para. 155, quoted with approval in *Jones* at para. 71.

communications sent to them, they were *lawfully in possession* of the contents of those communications, in fixed written form, when the impugned copies were made.

25. The intention of police to save the written electronic messages people send them – that are both vital evidence of crime and in some case *the crime itself* – does not transform the normal, unaltered, receipt of those messages into an "interception".

26. Similarly, the fact that the police later deactivated the Facebook and email accounts where those messages would otherwise have been permanently stored does not retroactively transform the *copying* of those messages through the screen capture process into an interception.

27. Contrary to the Appellant's assertion, this Court's decision in *Telus* does not assist him.[20] *Telus* does not stand for the proposition that the mere acquisition of private communications by the State constitutes *per se* an interception for the purposes of Part VI of the *Criminal Code.* In that case, the police sought a general warrant to obtain copies of text messages communication between two *other* individuals from Telus on a prospective basis. Without some kind of judicial authorization, the police would not have been able to otherwise access the content of the communications. The Court in *Telus* was concerned about *what kind* of authorization is necessary for the police to obtain the messages. In the present case, the police were *already* in possession of the messages at the time they used SnagIt. No prospective judicial authorization is required.

28. The fundamental characteristic of "interception" – namely technological interference in the communications process – is simply absent.

iii. Normatively there is no infringement of privacy

29. All of Part VI comes under the title: "Invasion of Privacy". These provisions are only concerned with conduct that invades privacy. As *Jones* makes clear, the fact that state actors deal with the substance of private communications in some way is insufficient to bring Part VI into play.[21] When state actors do not step outside the norms of privacy and do not *interfere* with the communicational process, their actions are not captured by the definition of "interception".

[20] Appellant's factum at para.
[21] *Jones* at note 78.

30. This, in turn, requires one to ask whether the specific technique in question infringes a reasonable expectation of privacy. Asking that normative question is dispositive of the invocation of Part VI in this case:

> *Would someone engaging in a Facebook chat with another person think that their correspondent has access to a copy or record of their communications?*

31. The answer is obviously “yes”. And privacy is not infringed where the parties get exactly the communication experience they agreed to and understood. A correspondent in a written chat on Facebook, or a similar online platform, <u>expects</u> <u>and understands</u> that their counterpart in the communication has a copy of it that they can look at, print or otherwise access it after the fact.

32. Indeed, in this case, the police could have gone into their Facebook account or email program to view the messages, print them out, download them as image files, or photograph them onscreen at any time, and the sender knew that. No one would reasonably feel covertly watched by those actions – they do not constitute ‘technological surveillance’ in any sense of the concept. Making a digital image of text which was already created, transmitted, displayed and stored as digital image of text, has no normative impact.

33. As is so often the case with *Charter*-protected rights, the context matters immensely in drawing the lines between permitted conduct and privacy infringement. Here, the inherent nature of the medium of communication chosen by the parties, and our understanding of the norms surrounding it, lead inescapably to the conclusion that the police have done nothing wrong.

34. The accused in this case may not have known the police were using SnagIt, but he did know that his co-communicator had a copy of the conversation on their screen and retrievably stored in their Facebook account. The existence of one more copy changed nothing. There was no interception. Part VI does not apply to this investigative technique.

PART IV – COSTS

35. The DPP does not seek costs, and requests that no order of costs be made against her.

PART V – ORDER SOUGHT

36. As permitted by Abella J.'s order, counsel for the DPP will make oral argument at the hearing of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at the City of Ottawa, this 9th day of May, 2018.

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PART VI – TABLE OF AUTHORITIES

AUTHORITIES	PARAGRAPH
Statutory Authorities	
Criminal Code, R.S.C. 1985, c. C-46, s. 184.2(4)	14
Jurisprudence	
R. v. Abboud, 2012 ONSC 3862	15
R. v. Allen, 2017 ONSC 1712, [2017] O.J. No. 4239	10
R. v. Beairsto, 2018 ABCA 118	5, 6, 15
Blais c. R., 2017 QCCA 1774	6
R. v. Duarte, [1990] 1 S.C.R. 30	7, 12, 13
R. v. Ghotra, [2015] O.J. No. 7253 (S.C.J.)	10
R. v. Knox, 2013 ONCJ 484, [2013] O.J. No. 4269	15
R. v. Jones, 2017 SCC 60	1, 8, 17-21, 23, 29
R. v. McQueen, [1975] A.J. No. 3242, 25 C.C.C. (2d) 262	6, 16
R. v. Reid, 2016 ONSC 954	15
R. v. Singh, 1998 CanLII 4819 (BC CA), 127 C.C.C. (3d) 429	6
R. v. Telus Communications, 2013 SCC 16	23, 27
R. v. Wong, [1990] 3 S.C.R. 36	7, 11
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