Court File No.: 37518

IN THE SUPREME COURT OF CANADA
(On Appeal from the Court of Appeal of Newfoundland and Labrador)

BETWEEN: Sean Patrick Mills

Appellant

AND: Her Majesty the Queen

Respondent

AND: Director of Public Prosecutions, the Attorney General of Ontario, the Director of Criminal and Penal Prosecutions of Québec, the Attorney General of British Columbia, the Attorney General of Alberta, the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic, the Canadian Civil Liberties Association, the Criminal Lawyers' Association and the Canadian Association of Chiefs of Police

Interveners

FACTUM OF THE INTERVENER
Canadian Association of Chiefs of Police

Pursuant to Rules 47 and 55 of the Rules of the Supreme Court of Canada

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PART I: OVERVIEW OF THE POSITION OF THE CANADIAN ASSOCIATION OF CHIEFS OF POLICE

1. The *Criminal Code* offence of internet luring is an insidious crime where predatory adults can engage in anonymous, hidden, and repeated contacts with children for illicit sexual purposes. An offender who is charged with this offence may not meet the victim, yet the harm caused to the child through the communications alone can potentially be just as severe and long-lasting.

2. This fact was recognized by Gorman Prov. J. in *R. v.* Carter, [2018] N.J. No. 28 (NL PC), when he states at paragraphs 1 and 2 of his decision on sentence:

> How does a person in Newfoundland and Labrador commit sexual offences against children living in another country without having ever met them? The Internet. The Internet provides sexual abusers of children with world wide access to children and a degree of anonymity which their predecessors could never have imagined. How is the judiciary to respond?
>
> In my view, Canadian judges must recognize that they are dealing with a type of sexual abuse of children which is unprecedented, ongoing, and worldwide: a form of sexual abuse never imagined by our predecessors. A request by a sexual offender that a child in his presence perform a sexual act should no longer be seen as any different as a request to do so online. In many instances the latter is worse because of how difficult it is to prevent. Thus, we must recognize that the online sexual abuse of children can at times be as serious as the personal sexual abuse of children.

3. Recognizing that this type of sexual abuse against children was without precedent, Parliament enacted section 172.1 of the *Criminal Code*. As stated by Fish J. in *R v. Levigne, 2010 SCC 25* at paragraph 24, section 172.1 of the *Criminal Code* was enacted to "identify and apprehend predatory adults who, for generally illicit sexual purposes troll the Internet to attract and entice vulnerable children and adolescents". Fish J. goes on to state in paragraph 25 that the section was structured as it was "because it permits investigators, posing as children, to cast their lines in internet chat rooms, where lurking predators can be expected to take the bait – as the appellant did here".

4. The police use of undercover officers to investigate this crime has proven to be an effective investigative technique. Section 172.1 not only allows

the police to use undercover officers to identify and apprehend predators, but the section also acts as a shield because the arrest of a predator is not contingent upon a child being harmed and the crime reported to the police.

5. The Canadian Association of Chiefs of Police (CACP) has a vested interest in the issues being raised in this appeal. If this Honourable Court rules that a predator has a reasonable expectation of privacy in their communications with a victim and that a Part VI authorization is required when undercover officers utilize this technique, it will effectively hamstring the ability of the police to proactively enforce this section of the *Criminal Code*. It will allow online predators to victimize children without fear of police detection. The onus would then be placed on the child or parent to report the crime, which runs counter to Parliament's intention when enacting this legislation.

6. The CACP is concerned that if this Honourable Court rules that online predators can make a claim that their online communications with undercover officers are protected under section 8 of the Charter, that by extension claims for Charter protection will also be made on communications sent to the victims of this offence. This very scenario was described by Moldaver J. in his dissent in *R. v. Marakah*, [2017] SCC 59 at paragraph 168:

> In sum, as I read her reasons the Chief Justice effectively holds that *everyone* has a reasonable expectation of privacy in text message conversations, even when those conversations are on another person's phone. As such, under her all-encompassing approach to standing, even a sexual predator who lures a child into committing sexual acts and then threatens to kill the child if he or she tells anyone will retain a reasonable expectation of privacy in the text message conversations on the child's phone. Likewise, an abusive husband who sends harassing text messages to his ex-wife and threatens to harm her and their children if she goes to the police will retain a reasonable expectation of privacy in the text message conversations on the wife's phone.

7. Indeed, the victims of many criminal offences where the *actus reus* includes an electronic communication may find themselves unable to pass the threatening message over to the police without the police first obtaining a warrant. This would be an illogical consequence to the ruling being sought by the Appellant in this Appeal.

PART II: INTERVENER'S POSITION ON APPEAL

8. The CACP supports the Respondent's position that the Appellant did not have a reasonable expectation of privacy in his communications with the undercover officer and that a Part VI authorization was not required.

9. The CACP will address whether the Appellant had an expectation of privacy in his communications with "Leann". The CACP will also make submissions on how requiring the police to obtain a Part VI authorization is not only irrational and unrealistic but that it also will create a public safety issue.

PART III: STATEMENT OF ARGUMENT

A. Is there a reasonable expectation of privacy?

10. The Newfoundland and Labrador Court of Appeal ruled that the Appellant did not have a reasonable expectation of privacy in his communications with "Leann" as stated by Welsh J.A. at paragraph 23 of her reasons for Judgement:

> [23] In this case, the analysis focuses on the third and fourth headings identified in Spencer; that is, Mr. Mills' subjective expectation of privacy in his communications with "Leann" and whether that subjective expectation was objectively reasonable in the circumstances. Mr. Mills was using electronic social media to communicate and share information with a person he did not know and whose identity he could not confirm. On an objective analysis, as the sender of such communications, Mr. Mills must have known that he lost control over any expectation of confidentiality that he appears to have hoped would be exercised by the recipient of the messages. He took a risk when he voluntarily communicated with someone he did not know, a person he was not in a position to trust. Any subjective expectation of privacy Mr. Mills may have had was not objectively reasonable. In the absence of a reasonable expectation of privacy, section 8 of the *Charter* was not engaged.

11. The CACP's position is that the decision of the NLCA that the Appellant's communications with "Leann" were not private communications is correct in law. Any subjective expectation of privacy that the Appellant may have had was not objectively reasonable because the Appellant did not know and could not confirm the identity of the recipient of his communications.

12. The fact that the sender and the recipient of the messages were unknown to one another was also a pivotal factor in the child luring decisions of *R. v. Allen,* 2017 ONSC 1712 and *R v. Ghotra,* [2015] O.J. No. 7253 (ON SC).

13. In *Allen, supra,* Di Tomaso J. stated in paragraph 51:

> [51] Far from disclosing an expectation of privacy, I find the evidence establishes that Mr. Allen, as did the applicant in *Graff*, gambled in talking to "Jenny". In *Graff*, the court held that while the applicant gambled or hoped that the chat and other material and information he sent would remain private, he had no basis upon which to form a subjective or objectively reasonable expectation of privacy in the circumstances. I find Mr. Allen to be in exactly the same circumstances as the applicant in *Graff*. I find Mr. Allen had no basis upon which to form a subjective or objectively reasonable expectation of privacy in the circumstances: see *R. v. Ghotra*, *supra*, at para. 128.

14. Likewise in *Ghotra, supra*, Durno J. stated in paragraph 128:

> [128] I do not accept that when strangers are communicating in a private chat room that, as Mr. Gold argued, "you expect this person to keep your remarks to herself and she expects you to keep her remarks to yourself and if either engage in betrayal or recording it's exactly the same thing as a phone call." It is difficult to see on what basis those conclusions could be reached when the applicant had no idea with whom he is speaking. The applicant had no idea what that person's views were in regards to privacy, or whether that person maintained a record of their conversation beyond the time it remained on her computer or whether she would make copies. He was dealing with a person who at that time was anonymous, if she was fourteen she had lied about her age when she opened her Yahoo account, or as Mr. Gold submitted in argument, he thought he was conversing with an adult who was lying about her age and many other facts.

15. The CACP submits the Appellant is incorrect when he states at paragraph 14 of his Factum that this Honourable Court's ruling in *Marakah, supra* leaves no doubt that the Appellant had a reasonable expectation of privacy in his communications.

16. The CACP submits that while this Honourable Court in *Marakah, supra,* did find that a person can have a reasonable expectation of privacy in the

messages sent to the recipient's phone, this finding depends on the totality of the circumstances. At paragraphs 4 and 5 of this decision McLachlin C.J.C. stated:

> 4. I conclude that, depending on the totality of the circumstances, text messages that have been sent and received may in some cases be protected under s. 8 and that, in this case, Mr. Marakah had standing to argue that the text messages at issue enjoy s. 8 protection.
>
> 5. The conclusion of a text message conversation *can*, in some circumstances, attract a reasonable expectation of privacy does not lead inexorably to the conclusion that an exchange of electronic privacy (see Moldaver J.'s reasons, at paras. 100 and 167-68); whether a reasonable expectation of privacy in such a conversation is present in any particular case must be assessed on those facts by the trial judge.

17. The facts in *Marakah, supra,* which led to this Honourable Court's finding are readily distinguishable from the facts in this appeal and in child luring cases generally. In *Marakah, supra,* Mr. Marakah, who was the sender of the texts, knew the recipient Mr. Winchester. They were more than mere acquaintances. It is submitted that the relationship between the two men impacted this Honourable Court's ruling that Mr. Marakah exercised control over the subject matter of the search. As stated by this Honourable Court at paragraph 45, "By choosing to send a text message by way of a private medium to a designated person, Mr. Marakah was exercising control therein."

18. The Appellant, who lied about his age, may have hoped he was talking to a fourteen year old girl. But as stated by Durno J. in *Ghotra, supra*: "Hoping and having a reasonable expectation of privacy are not synonymous in this context" (paragraph 129).

19. The Appellant had no way of verifying the veracity of any of "Leann's" representations. This is the risk that one takes when communicating with strangers on the internet. This widespread deceit by parties to a communication on the Internet was also commented upon by Pardu J.A. in *R v. Morrison,* 2017 ONCA 582 at paragraph 60:

> 60. The mere fact of a representation is no indication of its reliability or credibility and does not lead inexorably to the conclusion that the recipient believed it. Some representations are inherently doubtful, even in the absence of evidence to the contrary. Representations on the **internet** are notoriously unreliable. As put by Dawson J. in *R. v. Pengelley*, 2010

> ONSC 5488, 261 C.C.C. (3d) 93 (Ont. S.C.J.), at para. 17, "nothing may be as it appears on the **internet** where **deception** is rampant." There is simply no expectation that representations made during **internet** conversations about sexual matters will be accurate or that a participant will be honest about his or her personal attributes, including age. Indeed, the expectation is quite the opposite, as true personal identities are often concealed in the course of online communication about sexual matters. In the present case, there is evidence that *Morrison* himself made a misrepresentation about his age on his Craig's list advertisement.

B: The Part VI Authorization

20. The Appellant submits that the police must obtain a Part VI authorization when the police use undercover officers to seek out and communicate with predators through the Internet. The Appellant adopts the trial judge's ruling that the police should have broken off their communications with the Appellant mid-way through the investigation and applied for a section 184.2 one party consent wiretap authorization.

21. The CACP agrees with Welsh J.A.'s reasons for Judgement that a Part VI authorization was not required. The CACP submits that if this Court rules that a Part VI authorization is required, then such a ruling would effectively shut down the use of this investigative technique because the police would not be able to meet the statutory requirements of section 184.2 of the *Criminal Code*. When applying for a section 184.2 authorization the police must have reasonable grounds to believe that an offence has been or will be committed. The CACP submits that the police cannot get an authorization at the onset of a child luring investigation because they do not have the reasonable grounds. If a judicial authorization was granted the accused would challenge it at trial on the basis that the police were on a fishing expedition. Furthermore, the suggestion by the trial judge that police would be able to use their initial "unauthorized" communications in their grounds to obtain the Part VI authorization is not supported in law.

22. The suggestion by the trial judge that the police could cease their communications with a suspect part way through the conversation and obtain a Part VI authorization is both impractical and dangerous to public safety. There is no guarantee that the police would be able to re-engage the target after breaking off communications for the length of time it takes to obtain the Part VI authorization.

23. It must also be recognized that any delay by the police in arresting a predator places other children at risk of being sexually abused. The Internet provides predators with worldwide access to children. It also allows a predator to have multiple contacts and victims at the same time. The following cases illustrate the ease with which a predator can move from victim to victim and why there is an immediate risk to public safety when a predator remains active while the police attempt to obtain a Part VI authorization:

- ***R. v. Groves*, 2015 ONSC 2590**: Police identified 17 victims between the ages of eleven and sixteen. Police found evidence that the accused had a spreadsheet of over one thousand mostly girl's names where he appeared to be keeping track of each of the girls, who he was to them including his aliases, his age and if they webcammed with him.

- ***R. v. Carter*, [2018] N.J. No. 28 (NL PC)**: Through child luring, the accused committed sexual offences against four girls in the U.K., one who was described as special needs. He was also involved in 137 transactions involving chats with teenage girls.

- ***R. v. Johnson*, 2009 ABCA 79**: Accused was engaged in over 5,000 internet communications with teenage girls over a period of 4-5 months.

- ***R. v. Miller*, 2011 ABPC 354**: The offender engaged in explicit conversations with over 300 girls over a period of 16 months.

24. The risk to public safety in delaying an investigation is also illustrated by the fact that children can be targeted and subjected to sexual abuse by a predator within minutes of their first contact. The CACP submits that it is unconscionable to unnecessarily interrupt an investigation and consequently expose any child to the risk of being sexually abused once a predator has been identified by the police. The following cases are just some examples of how quickly a child can be victimized by an online predator:

- ***R. v. Blanchard*, [2003] O.J. No. 5510 (ON SC) (UC officer)**: Court says the communications became sexual "very early on". The first communication from the accused was, "Hi, want to chat with a 25 year old horny guy?" (para. 19). Within 23 minutes of the chat starting, the offender sent

a picture of his clothed erection (para 20). A nude picture followed 27 minutes later, then he invited the person he believed to be a 12 year old girl to touch herself for a sexual purpose (paras. 21-23).

- ***R. v. Moodie*, [2009] O.J. No. 4576 (ON SC) (UC officer)**: The opening line was sexual (para 2). The offender provided a picture of his fully erect penis within 30 minutes (para. 5).

- ***R. v. Symes*, [2005] O.J. No. 6041 (ON CJ) (UC officer)**: Within three minutes, the offender messaged, "... I'm hoping to kind of have, to connect with a younger girl about your age. I just think it would be fun, lots of fun. I'm totally opening to do whatever maybe even fulfilling any dirty naughty fantasy you might have ..." (para. 7).

- ***R. v. Thain*, 2009 ONCA 1022 (UC officer)**: The offender asked the victim when she would be 14, "then proceeded immediately to explicit sexual talk" (para. 14).

Conclusion

25. Moldaver J., in his vigorous dissent in *Makarah*, *supra*, questioned the reasoning utilized in the majority judgment. At paragraph 100 Moldaver J. stated:

> 100 From the standpoint of policy, granting Mr. Marakah standing in these circumstances would vastly expand the scope of persons who can bring a s. 8 challenge. The Chief Justice, speaking for a majority of the Court, adopts an approach to s. 8 that has no ascertainable bounds and threatens a sweeping expansion of s. 8 standing. This carries with it a host of foreseeable consequences that will add to the complexity and length of criminal trial proceedings and place even greater strains on a criminal justice system that is already overburdened. Worse yet, expanding the scope of persons who can bring a s. 8 challenge risks disrupting the delicate balance that s. 8 strives to achieve between privacy and law enforcement interests, particularly in respect of offences that target the most vulnerable members of our society, including children, the elderly, and people with mental disabilities. In my view, the logic of the Chief Justice's approach leads inexorably to the conclusion that a sexual predator who sends sexually explicit text messages to a child, or an abusive partner who sends threatening text

> messages to his or her spouse, has a reasonable expectation of privacy in those messages on that child or spouse's phone. With respect, I cannot accept this result.

26. The situation envisaged by Moldaver J. in *Makarah*, *supra*, is exactly where we find ourselves on the facts of this present case. This appeal provides this Honourable Court with the opportunity to clarify *Makarah*, *supra*, and to ensure that the "delicate balance" between the privacy concerns of individuals and the protection of the public are properly defined.

27. While police officers must obviously act within the constitutional parameters defined by this Honourable Court the CACP emphasizes that policing is an eminently practical exercise – to protect the public and to keep Canadians safe. Therefore, the CACP advocates for a common sense approach to the application of privacy principles. The facts of this present case do not demand constitutional protection – the police simply set up a Facebook page and the Appellant chose to initiate contact with what he thought was an underage girl. It was the Appellant who tried to lure this young girl into a sexual relationship. The police did not use any investigative techniques that they knew to be illegal nor did they flagrantly disregard the law.

28. The CACP submits that the following comments of Rowe J. in *Makarah*, *supra*, are particularly applicable to the facts of this case:

> I would say only that principle and practicality must not be strangers in the application of s. 8 or we might well thwart justice in the course of seeking to achieve it.

PART IV: SUBMISSION ON COSTS

25. There are no submissions as to costs.

PART V: ORDER SOUGHT

26. The CACP submits the judgment of the Newfoundland and Labrador Court of Appeal should be upheld.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 8th day of May, 2018.

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