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-

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PART I: STATEMENT OF FACTS

A. OVERVIEW

1. The luring provisions in the *Criminal Code* were intended to "close the cyberspace door before the predator gets in to prey."[1] Online undercover operators aim to stand at that door – and only answer when someone knocks. They cannot get pre-authorization when they do not know who will come calling. They cannot wait for a child to answer, and hope she calls for help. In luring investigations and beyond, the police must have the ability to proactively investigate crime, within the reasonable boundaries of s. 8 protection. Those boundaries were not crossed here.

B. STATEMENT OF FACTS

2. The Attorney General for Ontario takes no position on the facts of this case.

PART II: POINTS IN ISSUE

3. The Attorney General for Ontario advances three points in this appeal:

    1. There is no reasonable expectation of privacy in the specific context of this case. Section 8 of the *Charter* is not engaged. This Court should avoid making a categorical statement that all text communications do or do not attract a reasonable expectation of privacy.

    2. Preservation by the recipient of an electronic record created and transmitted by a sender does not constitute an intercept for the purposes of Part VI of the *Criminal Code*. Even where the recipient is an undercover police officer.

    3. The practical implications of the appellant's position would be devastating for the investigation and prevention of internet child exploitation.

[1] *R. v. Legare*, 2009 SCC 56, [2009] 3 S.C.R. 551, at para. 25.

PART III: BRIEF OF ARGUMENT

A. REASONABLE EXPECTATION OF PRIVACY IS CONTEXT SPECIFIC

(i) Proper approach

4. The appellant argues all text communications are inherently private and that a reasonable expectation of privacy is established based on a sender's mere hope that the recipient will keep messages private. This categorical approach is a radical departure from our rich s. 8 jurisprudence and the broad "totality of circumstances" test developed by this Court to adapt to changing societal norms and expectations.[2]

5. Text communications may be private. They may not. Neither *TELUS*[3] nor *Marakah* established that text communications are always private or sheltered by s. 8.[4] *Marakah* dealt with known accomplices and texts exchanged between specific phone numbers. *TELUS* examined interference between senders and recipients, again in relation to texts on target phones. *Mills* is about online communications originating in a social media bulletin board between total strangers. Not the same.

6. In circumstances akin to *Mills*, courts across the country have applied the totality of circumstances test, adapted carefully to the online undercover context, and have found that no reasonable expectation of privacy exists.[5] Consistent with *Marakah*, the privacy analysis in such cases has examined:[6]

- Existence and duration of any prior relationship

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[2] *R. v. Marakah*, 2017 SCC 59, [2017] 2 S.C.R. 608, at para. 10; *R. v. Spencer*, 2014 SCC 43, [2014] 2 S.C.R. 212 (S.C.C.), at paras 16-18; *R. v. Patrick*, 2009 SCC 17, [2009] 1 S.C.R. 579, at paras. 26-27; *R. v. Edwards*, [1996] 1 S.C.R. 128, at paras. 45-46.
[3] *R. v. TELUS Communications Co*., 2013 SCC 16, [2013] 2 S.C.R. 3.
[4] *R. v. Ghotra*, [2015] O.J. 7253 (S.C.), at para. 124.
[5] *Ghotra*, at paras. 115-131; *R. v. Graff*, 2015 ABQB 415, at paras. 51-65; *R. v. Allen*, 2017 ONSC 1712, at paras. 37-53.; *R. v. N.S.J.*, 2014 BCSC 2658.
[6] See references at note 7, and *R. v. Merritt*, 2017 ONSC 1648, at paras. 68-90.

- "Location" of initial and subsequent communication (e.g. open social media platform)
- Degree of restrictions on preservation or dissemination of communications agreed upon by participants or imposed by technology

7. These factors offer a flexible framework for assessing privacy in changing digital milieu. Applied in *Mills*, they demonstrate that the appellant's hope for privacy was just that. Mere hope. Public posting featuring deceit. No prior relationship. No knowledge of the identity of the recipient. No understanding between parties as to restrictions on audience or use. No reasonable expectation of privacy.

8. The appellant fears that a failure to recognize a reasonable expectation of privacy in this online luring investigation context, and this case, means the end of privacy in a digital age. That fear is unfounded. The factors in the totality of circumstance test are fluid, not fixed, and spectrum-based, not binary. That is how courts continue to arrive at fair and adaptive results in a variety of s. 8 contexts, including this one.

(ii) Directions to destroy or to keep a communication private are not necessarily indicative of a reasonable expectation of privacy

9. In *Marakah,* the majority noted that the sender's request that his messages be destroyed was indicative of an expectation of privacy in that case.[7] A direction to erase should not be seen as categorically enhancing privacy claims. Context is important here. While in *Marakah*, such a direction between co-perpetrators may have appeared privacy-enhancing, the present context provides a good example that such directions do not necessarily indicate a heightened privacy expectation.

[7] *Marakah*, at para. 23.

10. In luring cases, a direction to destroy messages, or hide them from potential adult supervisors, looks a lot like the "don't tell" warning that oftentimes follows child sexual abuse. The messages are the offence in luring. The sender is telling the child victim to destroy evidence of a criminal offence. This act may amount to a further criminal offence. Such directions also demonstrate the lack of control that an individual has over the content of their sent messages.[8] Our s. 8 frameworks should not incentivize directing children, or any victims, to destroy evidence of criminal acts.

B. PART VI IS NOT ENGAGED

11. The police are not required to obtain a Part VI authorization before they can engage in undercover text communications. Part VI was intended to prevent state **interference** with private communications.[9] Where the state is the intended recipient of a text communication, and there is no act of interference, such as converting a temporary oral expression into a permanent digital recording, or intruding into the transmission stream, there is no intercept. *Mills* is not alone in this conclusion. Appellate Courts in Alberta and Quebec have similarly found that, absent interference or intrusion, Part VI does not apply.[10] Lower courts too have applied *Duarte* to confirm that Part VI is not engaged when the sender is deceived about the recipient's identity but there is nothing surreptitious in the recorded form of a communication.[11]

[8] Note that in this case, the "child" expressly told the appellant she would get in trouble if her dad found the messages: *Respondent's Record*, Tab #6, p. 221.
[9] *R. v. Jones*, 2017 SCC 60, [2017] 2 S.C.R. 696, at para. 69; *R. v. McQueen*, (1975), 25 C.C.C. (2d) 262 (Alta. S.C. (App. Div.)), at p. 265.
[10] *R. v. Duarte*, [1990] 1 S.C.R. 30, applied in *R. v. Beairsto*, 2017 ABCA 225, at paras. 21-25; *R. v. Blais*, 2017 QCCA 1774, at paras. 13-21; *R. v. Singh* (1998), 127 C.C.C. (3d) 429 (B.C.C.A.), at paras. 3-6.
[11] *Ghotra*, at paras. 102-114; *Graff*, at paras.54- 66; *Merritt*, at paras. 43-47; *N.S.J.*, at paras. 65-71; *Allen*, at paras. 54-64.

***(i) The misinterpretation of* Duarte**

12. The appellant and some intervenors take the position that *Duarte* prohibits the police from engaging in undercover text communications with individuals online. This argument misunderstands *Duarte. Duarte* did not require that the police obtain a Part VI authorization before they could engage in any undercover communications. On the contrary, LaForest J. stressed the importance of undercover operations.[12] Undercover operations necessarily involve deception.

13. Risk analysis is not dead. Some kinds of risk are acceptable, others are not. Neither s. 8 nor Part VI protects an individual against the risk that a co-conversationalist could be an informer, or a police officer. *Duarte* held that Part VI "has nothing to do with protecting individuals from the threat that their interlocutors will divulge communications that are meant to be private. No set of laws could immunize us from that risk."[13]

14. The risk of talking to an undercover officer is one the Canadian public has long accepted in the balance of privacy and law enforcement interests. The risk of an officer taking an ephemeral, secret, spoken, word and converting it to a permanent electronic recording is a "risk of a different order."[14] The state would be recording and transmitting something we thought was whispered and fleeting; creating something that did not exist.[15] The making of a new, different, permanent record is the surreptitious conduct that so grossly inflated the privacy threat in *Duarte*.

15. No similar conversion or creation takes place in an undercover online communication. Here, the police put up a picture and a name and then waited. The

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[12] *Duarte*, at paras. 23, 49-50.
[13] *Duarte*, at para. 21.
[14] *Duarte*, at paras. 21-22, 31-32.
[15] *Ghotra*, para. 106; *Merritt*, at para. 101.

appellant contacted the undercover officer. He typed out messages, and had an opportunity to edit and evaluate. He pressed send. He posted a message on a "wall." He decided how he wanted to be seen and remembered. He knew that his words, in the exact form he created and sent them, would be memorialized in the unknown recipient's account, on any device he/she wanted to use, and for anyone he/she wanted to show, as long as he/she wanted to keep or print or copy them.[16] It all started with a "friend" request. As noted in *Duarte*: "…the Charter is not meant to protect us against a poor choice of friends. If our "friend" turns out to be an informer, and we are convicted on the strength of his testimony, that may be unfortunate for us."[17] Unfortunate, but not unconstitutional.

(ii) The use of Snagit is not an interception

16. The appellant alleges that the "intercept" that triggered Part VI in this case is the use of "Snagit," a program that captured and stored screenshots of the recipient's end of the text communications.[18] That makes no sense. If taking snapshots of recipient-end screens is the interference complained of, the simple solution would be for police to preserve the communications in the platform in which they were received. Then there is no intercept, according to the appellant, and police would be free to rely on the communications in criminal proceedings without engaging Part VI.

17. The appellant's argument places form over substance. This Court has emphasized the need for accurate contemporaneous record-keeping in the digital search world.[19] If we

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[16] *Ghotra*, at para. 105.
[17] *Duarte*, at para. 50.
[18] *Appellant's Factum,* at paras. 48-52.
[19] *R. v. Fearon*, 2014 SCC 77, [2014] S.C.R. 621, at para. 72; *R. v. Vu*, 2013 SCC 60, [2013] 3 S.C.R. 657, at para. 70.

have recording programs or tools that make exact capture possible, we improve accountability and allow for a fair analysis. The use of Snagit, or similar programs, to accurately capture evidence, should be promoted. The privacy analysis should stay focused on the state receipt of information, not on the minutiae of the technologies used to fairly preserve evidence.

C. IMPLICATIONS OF THE APPELLANT'S POSITION

i) The appellant would foreclose preventative policing

18. The internet age has brought unprecedented opportunities. For good, and for bad. It has created an unprecedented platform for child exploitation.[20] Recognizing the potential harm in internet exploitation of our most vulnerable citizens, this Court has forcefully emphasized the importance of exactly the type of undercover proactive internet investigation conducted in this case.[21] Yet the appellant claims that this approach is unconstitutional and cannot be sanctioned.

19. The appellant and CLA claim there are alternative options for police investigating online exploitation: judicial authorizations once talk turns sexual, or s. 184.4 wiretap orders. Neither suggestion is workable.

20. The appellant argues that investigators should engage in communications with potential targets, and apply for judicial authorizations once the conversation turns sexual.[22] This approach is internally inconsistent, illogical, incompatible with the purpose of the luring provisions, and impossible to employ.

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[20] *Legare*, at para. 1.
[21] *R. v. Levigne*, 2010 SCC 2, at para. 25.
[22] *Appellant's Factum* at paras. 50-51, 53.

- Inconsistent: The appellant's approach is inconsistent with his view that the reasonable expectation of privacy analysis should be content neutral[23] and should protect all text communications from the state.

- Illogical: The approach proceeds from the false premise that the police *could* rely on communications obtained without a warrant as grounds for a subsequent warrant or authorization. If the appellant's assertions are accepted and all online communications are automatically private, and the recording of messages by the recipient constitutes an intercept, the police would have no constitutional way to obtain grounds for judicial pre-authorization.

- Incompatible with the nature and aims of the luring offence: Luring is an inchoate offence that captures the early stages of preparation for and facilitation of sexual offences against children.[24] These provisions enable law enforcement to intervene to stop conduct before an express invitation or hands-on sexual offence is attempted. Once an offender shows sexually explicit material, invites sexual activity, or arranges a meeting for sexual contact, he has committed an additional criminal offence.[25] The appellant's approach pulls in the entirely opposite direction, requiring law enforcement to wait until luring has already occurred or has already led to the further sexual violation of a child before the state can act.

- Impossible: It is untenable to rely on children as the sole gatekeepers against internet luring. The appellant's approach hinges on unreliable assumptions that children will know when they are being lured and report predators to the police. The approach cannot work because:
    - Online conversations operate on unpredictable timetables. An online predator may groom for an extended time, or spring suddenly to sexual requests or pressures, leaving no time for police to seek a judicial authorization.[26] There is no pause button for a child victim.

    - Predators feed on the isolation and vulnerability of some young people. Often, unfortunately, children do not or cannot tell.[27]

    - Children may not tell because they may not realize what is happening. Predators may build trust through compliments, expressions of friendship,

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[23] *Appellant's Factum* at paras. 32, 38; See also *R. v. Wong*, [1990] 3 S.C.R. 36 at p. 49-50; *R. v. Orlandis-Habsburgo*, 2017 ONCA 649 at para. 45.
[24] *Legare*, paras. 25-26.
[25] *Criminal Code*, R.S.C. 1985, c. C-46, s. 171.1 [making sexually explicit materials available to a child]; s. 172.2 [agreement/arrangement for sexual offence against a child]; s. 173(2) [indecent act]; s. 152 [invitation to sexual touching].
[26] See for example *R. v. Jarvis* (2006), 211 C.C.C. (3d) 20 (Ont. C.A.) at para. 4.
[27] See for example *Legare*, where the victim's sister answered a phone call from Mr. Legare (at para. 12).

> interest in social life or talents, or suggestions of intimacy that are not explicitly sexual.[28] A child cannot be expected to anticipate the endgame.

21. The Intervener CLA suggests this Court find comfort in the possibility that investigators could obtain a s. 184.4 authorization. Section 184.4 is unavailable in these circumstances. First, as stated above, there is no "intercept" to authorize, since there is no state interference with the communication sent directly to an officer. Second, the police again must rely on a child to disclose the communications and threat of imminent harm. Third, an authorization under s. 184.4 is only available where police demonstrate reasonable and probable grounds to believe that the authorization is "immediately necessary to **prevent** an offence…"[29] Police cannot prevent online luring with undercover investigations; they can only preserve records of the ongoing offence, hopefully standing in the place of a child. Section 184.4 is no solution.

22. There are no workable solutions by which judicial pre-authorization procedures can be welded into the online undercover child luring operation context. Unable to satisfy the preconditions for a Part VI authorization, investigators are left with few, equally untenable, reactive alternatives. Investigation of luring offences would depend completely on the mere hope that child victims will report individuals who may attempt to lure them. That cannot be what the Canadian public calls reasonable.

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[28] *Legare*, paras. 28-31; *R. v. Woodward*, 2011 ONCA 610, at paras. 9, 40-43.
[29] *Criminal Code*, R.S.C. 1985, c. C-46, s. 184.4 [emphasis added].

ii) Safeguards are already in place

23. Online undercover investigations are not the Wild West. They do not require a new oversight regime such as that established for "Mr. Big" plays in *Hart.*[30] Police engaging in proactive investigations are monitored, perhaps more so than in any other context. They receive and preserve reviewable records of all interactions with targets. They are subject to arguments of abuse of process and entrapment and are called upon to justify their conduct in that regard.[31] They must obtain judicial authorization to step into the home of a target, or to examine his or her device(s). If police overstep the boundaries of s. 8 protection, or interfere with private communications, their conduct, or misconduct, will be evaluated and addressed.

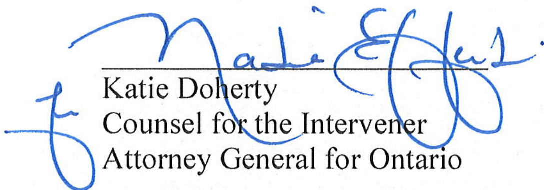
PART IV: SUBMISSIONS ON COSTS

24. The Attorney General for Ontario makes no submissions as to costs.

PART V: ORDER REQUESTED

25. The Attorney General for Ontario respectfully requests the appeal be dismissed.

ALL OF WHICH is respectfully submitted, by



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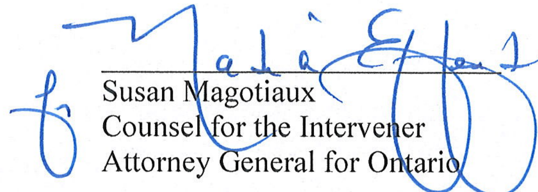

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DATED this 10 day of May, 2018

[30] *R. v. Hart*, 2014 SCC 52, [2014] 2 S.C.R. 544; *Appellant's Factum*, paras. 71-73. The analogy is inapt. Online undercover investigations into child exploitation do not exploit vulnerabilities of suspects. There is no need for aggressive or manipulative conduct to produce admissions or provoke offending.

[31] See for example *R. v. Ghotra*, 2016 ONSC 5675; *R. v. Gerlach*, 2014 ONCJ 646; *R. v. Argent*, 2016 ONCA 129.

PART VI: TABLE OF AUTHORITIES

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LEGISLATION	**Para No.(s)**
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