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 -

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Interveners

FACTUM OF THE INTERVENER
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RULES 37 AND 42 OF THE *RULES OF THE SUPREME COURT OF CANADA*

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FACTUM OF THE INTERVENER

PART I – OVERVIEW AND FACTS

Overview

1. As technology continues to advance, so too have our means of communication. Electronic conversations have now become as prevalent as their oral and written counterparts. Significantly, electronic communications offer the parties a degree of anonymity previously unheard of. Not surprisingly, this has resulted in positive and negative consequences for society.

2. This appeal concerns the latter. The rise of the internet has afforded criminals a new manner in which to commit pre-existing offences. It has also created crimes unique to the online world. The luring provisions are but one example. Online predators, cloaked in the internet's anonymity, seek out strangers to facilitate the commission of sexual offences. The strangers they seek are the most vulnerable in our society – children.

3. This Honourable Court has repeatedly addressed the reasonable expectation of privacy we hold in our various means of electronic communication and in our electronic conversations themselves. With this appeal, the Court is called upon to assess whether online predators have a reasonable expectation of privacy in their electronic communications with the strangers they target as victims.

4. It is the position of the Attorney General of Alberta that the existing jurisprudence does not support the finding of a reasonable expectation of privacy in such circumstances. Such a finding would adversely impact effective law enforcement online and endanger the safety of children in the community.

Statement of Facts

5. In February 2012, Constable Hobbs created a Hotmail account for a fictitious 14-year-old girl ("Leann"). He also created a Facebook page and profile containing background information

that she was a local high school student. A profile picture from the internet was used for her accounts. "Leann" did not make any Facebook "friend" requests.[1]

6. The Appellant sent "Leann" a Facebook message asking about her profile picture. They exchanged messages over the next two days. Aware of her age, he asked to see more pictures and inquired if she was open to meeting new friends to hang out with. Two days later, he sent his cell phone number and asked what she was doing on the weekend. He lied and said he was 23 years old (he was 32). He continued to send her emails until his arrest two months later at the place he had arranged for them to meet.[2]

7. In total, there were 186 contacts between the Appellant and "Leann". The content of the communications was "quite graphic" and included a photograph of a penis.[3] Constable Hobbs used "Snagit" (a commonly used software program available to the public) to ensure that all of the information on the screen was captured in his communications with the Appellant.[4]

Trial Judge's Ruling

8. The trial judge held that police should have sought a section 184.2 authorization (to capture the chat and email communications) and a general warrant (for the Facebook page and photographs and to perform the additional data searches) at the point they became aware of the Appellant and his potentially inappropriate interest in a 14-year-old girl. The ensuing two months of surveillance without authorization violated section 8 of the *Charter*.[5] The trial judge declined to exclude the evidence and found the Appellant guilty of luring.[6]

Newfoundland Court of Appeal

9. The Court of Appeal held that a section 184.2 authorization was not required because there was no intercept. Where there is direct communication between two people, the intended recipient cannot be characterized as having "intercepted" a communication meant for that person even if he or she is a police officer. The use of the "Snagit" program did not alter this finding because making

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[1] *R v Mills*, 2014 CanLII 76044 at paras 3-4 (NLPC)
[2] *R v Mills*, 2014 CanLII 76044 at paras 5, 9-10, 21, 36-38 (NLPC)
[3] *R v Mills*, 2015 CanLII 13412 at para 45 (NLPC)
[4] *R v Mills*, 2015 CanLII 13412 at paras 6-7 (NLPC)
[5] *R v Mills***,** 2013 CanLII 74953 at paras 1, 13, 44 (NLPC)
[6] *R v Mills*, 2014 CanLII 2052 at para 14 (NLPC); *R v Mills*, 2014 CanLII 76044 at para 45 (NLPC)

a copy of a received message (on paper or electronically) could not be characterized as an interception.[7]

10. The Court of Appeal also confirmed that there was no other basis upon which to establish a section 8 breach because any subjective expectation of privacy was not objectively reasonable. The Appellant, who used social media to communicate and share information with a person he did not know and whose identity he could not confirm, must have known that he lost control over any expectation of confidentiality that he appeared to hope the recipient would exercise. The Court distinguished his communications from those where a reasonable expectation of privacy would exist.[8]

PART II – ISSUES

Question in Issue #1 Did the Appellant have a reasonable expectation of privacy in the communications?

Question in Issue #2 Did the seizure of the communications breach section 8 of the *Charter*?

Question in Issue #3 If section 8 were breached, what is the appropriate remedy?

Intervener's Position with regard to Questions #1 and #2

The Attorney General of Alberta will focus on the issues raised in the first two Questions. It is the Alberta Attorney General's position that there is no reasonable expectation of privacy in the electronic conversations between online predators and the strangers they target as victims.

[7] *R v Mills*, 2017 NLCA 12 at paras 10-18
[8] *R v Mills*, 2017 NLCA 12 at paras 19-24

PART III – ARGUMENT

11. Almost 10 years ago, in *R v Alicandro*, the Ontario Court of Appeal identified just some of the dangers posed by the internet to children. Doherty J.A. noted that:

> … [It] is a medium in which adults can engage in anonymous, low visibility and repeated contact with potentially vulnerable children. The Internet can be a fertile breeding ground for the grooming and preparation associated with the sexual exploitation of children by adults.[9]

12. Within months, this Court acknowledged those dangers in *R v Legare*. Writing for this unanimous Court, Fish J. confirmed that:

> We are concerned on this appeal with legislation adopted by Parliament to shut that door on predatory adults who, generally for a sexual purpose, troll the Internet for vulnerable children and adolescents. Shielded by the anonymity of an assumed online name and profile, they aspire to gain the trust of their targeted victims through computer "chats" — and then to tempt or entice them into sexual activity, over the Internet or, still worse, in person.[10]

13. In light of its decision in *R v Marakah*, this Court is now called upon to determine whether the electronic conversations of online predators are constitutionally protected thereby requiring police to obtain judicial authorization prior to receiving such conversations from victims or from the undercover operations designed to protect the children targeted.[11]

Questions #1 and #2 – Reasonable Expectation of Privacy and Section 8

14. It is the position of the Alberta Attorney General that the electronic conversations between online predators and the strangers they target as victims are not entitled to protection under section 8 of the *Charter*.[12] The online predator has no reasonable expectation of privacy in such conversations regardless of whether the recipient is a child or an undercover officer. Nor does the use of undercover officers convert the conversations into "intercepts" under Part VI of the *Code*.

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[9] *R v Alicandro*, 2009 ONCA 133 at para 36 leave to appeal to SCC refused 2000 CarswellOnt 5358

[10] *R v Legare*, 2009 SCC 56 at para 2

[11] *R v Marakah*, 2017 SCC 59 [*Marakah*]

[12] *Canadian Charter of Rights and Freedoms*, s 8, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11

15. In *Marakah*, this Court held that electronic conversations can attract a reasonable expectation of privacy in certain circumstances. It also confirmed, however, that this did not inevitably lead to the conclusion that such exchanges always attract a reasonable expectation of privacy.[13] To claim section 8 protection, a claimant must establish a reasonable expectation of privacy in the subject matter of the search (the person subjectively expected it would be private and this expectation was objectively reasonable). Whether a claimant's expectation is objectively reasonable is assessed in the totality of the circumstances.[14]

Subjective Expectation of Privacy

16. In *Marakah*, this Court confirmed that the requirement that a claimant establish a subjective expectation of privacy is not "a high hurdle".[15] Not surprisingly, the accused's subjective expectation of privacy in *Marakah* was never in serious dispute. He gave evidence that he expected the recipient (his criminal accomplice) to keep the contents of their electronic conversation private and that he had asked him numerous times to delete the text messages from his cell phone.[16]

17. In *R v Jones*, this Court confirmed that a relatively modest evidentiary foundation will be sufficient to establish a subjective expectation of privacy, and that it can be inferred from the circumstances without an accused testifying.[17] One can envision scenarios where such an expectation could be inferred from the circumstances without evidence from the accused. Such inferences may be available depending upon the nature of the relationship between the parties or the form and content of their communications.

18. Such an inference will not be readily available, however, from the circumstances surrounding an online predator's electronic conversations with the strangers he targets as victims. In these circumstances, as is evident in the context of luring, the online predator is not communicating with family members, friends, colleagues, or accomplices. Nor is he communicating with trusted financial advisers, medical professionals, or religious leaders. He is

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[13] *Marakah*, *supra* note 11 at para 55
[14] *Ibid* at paras 9-12
[15] *Ibid* at para 22
[16] *Ibid* at para 23
[17] *R v Jones*, 2017 SCC 60 at paras 19-22

communicating with strangers that he hopes and believes are children for the sole purpose of facilitating the commission of a sexual offence.

19. The location and content of the online predator's electronic communications will similarly fail to provide circumstances from which a subjective expectation of privacy can be inferred. The online predator approaches his targets in a medium offering the anonymity relied upon to escape detection. To conceal his true identity, he hides behind usernames and passwords. He cloaks his conversations in lies and deceit. Far from revealing core biographic information, he lies about personal details such as his name, age, occupation, and marital status.[18] He knows that the recipient of his communications is a stranger. While he may ask that this recipient keep his messages private, he appreciates that such an expectation is nothing more than wishful thinking.

20. In some circumstances, appellate and trial courts have declined to find a subjective expectation of privacy.[19] Given the nature of the offence, it is hardly surprising that such results have also been reached in the context of the luring.[20]

21. Given all of these factors, an inference of a subjective expectation of privacy is not readily available from the circumstances of the online predator. Such an accused seeking the protection of section 8 will likely be required to testify to provide the necessary evidentiary foundation for such a finding.

Objectively Reasonable Expectation of Privacy

22. To engage section 8, however, the online predator's subjective expectation of privacy must also be objectively reasonable. In the context of electronic conversations, factors such as the place of the search, the private nature of the conversation (whether the informational content reveals details of the claimant's lifestyle or information of a biographic nature), and control over the subject matter have been found to be relevant in assessing whether it was reasonable for a claimant to expect privacy.[21]

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[18] See *R v Legare*, *supra* note 10 at para 8; *R v Paradee*, 2013 ABCA 41 at paras 3, 12
[19] See *R v Beairsto*, 2018 ABCA 118 at paras 27-28; *R v Merritt*, 2017 ONSC 1648 at paras 68-78
[20] See *R v Allen*, 2017 ONSC 1712 at paras 37-53 [Tab 1]; *R v Graff*, 2015 ABQB 415 at paras 51-66
[21] *Marakah*, *supra* note 11 at paras 24-45

23. Not surprisingly, trial judges have rejected an online predator's claims of an objectively reasonable expectation of privacy.[22] It is at this stage of the analysis that the online predator faces what may best be described as an insurmountable burden. The circumstances which make it difficult to draw an inference of a subjective expectation of privacy – the nature of the relationship between the parties, the medium over which the communication occurs, and the content of the conversations – renders such expectations unreasonable.

24. A key consideration is the nature of the relationship between the parties. The online predator is communicating with a stranger. He has no idea who he is actually speaking to, what their views may be in regards to privacy, or whether they are maintaining a record of the conversation.[23] The fact that the online predator elects to move from a public chat room to a private discussion will not render any expectation of privacy objectively reasonable. The online predator is simply going from "a public chat room where he had no idea who he was communicating with to a private chat with a total stranger".[24]

25. Another key consideration is the identity of the intended recipient of the online predator's communications. As noted, it is difficult to envision an objectively reasonable expectation of privacy in the communications between online predators and the strangers they target as victims. It is even more difficult, if not impossible, to envision an objectively reasonable expectation of privacy where that target is a child.

26. It is unreasonable for a stranger to expect any type of confidentiality or privacy in his communications with children. Significantly, children are taught from an early age not to speak to strangers on the street and to immediately report any unwanted communication to a trusted adult. It is reasonable to assume that their parents and caregivers, aware of the dangers facing children in cyberspace, are providing similar cautions with respect to their online activities and attempting to monitor same.

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[22] See *R v Allen*, *supra* note 20 at paras 37-53 [Tab 1]; *R v Graff*, *supra* note 20 at paras 51-66; *R v Ghotra*, [2015] OJ No 7253 at paras 123-131 [Tab 2]. See also *R v Merritt*, *supra* note 19 at paras 79-104

[23] See *R v Ghotra*, *supra* note 22 at paras 127-128 [Tab 2]

[24] *Ibid* at para 126 [Tab 2]

27. Online predators are well aware of the heightened risk each time they hit the "send" button on their computer or smartphone to an intended victim. It is but one reason they take such extensive steps to conceal their true identities in such circumstances.

The Significance of Undercover Operations

28. The above analysis applies equally where the online predator is, in fact, communicating with undercover officers. Cyberspace has presented a new arena for criminal activity. It has also "infinitely expanded the opportunity for predators to attract or ensnare children".[25] In response, law enforcement now effectively "walks the beat" on the internet and utilizes undercover operations in an effort to prevent, detect, and investigate crime.

29. A requirement that police obtain judicial authorization prior to engaging in electronic conversations with online predators would render the technique ineffective and endanger the safety of children. The purpose of section 172.1 of the *Code* is to "close the cyberspace door before the predator gets in to prey".[26] The opportunity to close this door would be significantly narrowed, if not lost, if prior judicial authorization was a precondition to such conversations.

30. This Court has acknowledged the use and suitability of online undercover operations to combat the luring offence:

> In structuring the provision as it did, Parliament recognized that the anonymity of an assumed online profile acts as both a shield for the predator and a sword for the police. As a shield, because it permits predators to mask their true identities as they pursue their nefarious intentions; as a sword (or, perhaps more accurately, as a barbed weapon of law enforcement), 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.[27]

31. The judiciary has also recognized that the use of these undercover operations are particularly important where children are the targets of online predators:

> … [P]olice officers posing as young persons is almost the exclusive manner in which this provision is enforced. This is hardly surprising. Children cannot be expected to police the Internet. The state is charged with the responsibility of

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[25] *R v Paradee*, *supra* note 18 at para 12
[26] *R v Legare*, *supra* note 10 at para 25; *Criminal Code*, RSC 1985, c C-46, s 172.1. See also *R v Paradee*, *supra* note 18 at para 11
[27] *R v Levigne*, 2010 SCC 25 at para 25

> protecting its children. That responsibility requires not only that the appropriate laws be passed, but that those laws be enforced.[28]

32. The fact that police engage in deceit does not, and should not, engage Part VI of the *Code* thereby requiring police to obtain a section 184.2 authorization. As the Alberta Court of Appeal recently noted, "deception does not amount to an interception".[29]

33. Over 35 years ago, Lamer J. confirmed that:

> … It must also be borne in mind that the investigation of crime and the detection of criminals is not a game to be governed by the Marquess of Queensbury rules. The authorities, in dealing with shrewd and often sophisticated criminals, must sometimes of necessity resort to tricks or other forms of deceit ….[30]

34. Significantly, he also recognized scenarios where the nature of the relationship between an undercover officer and an accused and the content of their communication could result in the exclusion of an accused's statements:

> … That a police officer pretend to be a lock-up chaplain and hear a suspect's confession is conduct that shocks the community; so is pretending to be the duty legal aid lawyer eliciting in that way incriminating statements from suspects or accused; … .[31]

35. The electronic communications received by undercover officers in the luring context (easily distinguishable from the above) do not fall within the definition of "intercept" as contemplated by sections 183 and 184.2 of the *Code*.[32] There is no surreptitious recording of the communication and no interference between the originator of the communication and the intended recipient. Nor is the communication acquired from a transmission stream; it is acquired when it is received on the intended recipient's device. The use of a software program to make a copy of the electronic communications received in a written and non-ephemeral format also fails to fall within the definition of "intercept" as contemplated in Part VI of the *Code*.

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[28] *R v Alicandro*, *supra* note 9 at para 38. See also *R v Haniffa*, 2017 ONCJ 780 at paras 18-20; *R v S (NJ)*, 2014 BCSC 2658; *R v Chiang*, 2012 BCCA 85 at para 19

[29] *R v Beairsto*, *supra* note 19 at para 24

[30] *Rothman v The Queen*, [1981] 1 SCR 640 at p 697

[31] *Ibid*

[32] *Criminal Code*, RSC 1985, c C-46, ss 183, 184(1), 184.2

36. This Court's decision in *R v Duarte*, properly considered in light of the ongoing advancements in technology, also fails to support the proposition that undercover investigations in the context of luring automatically constitute "participant surveillance" thereby requiring prior judicial authorization under section 184.2. Significantly, in *Duarte*, it was the surreptitious recording of the communication that engaged the *Charter*, not the conversation itself.[33]

Conclusion

37. Online predators do not have a reasonable expectation of privacy in their electronic conversations with the strangers they target as victims. In the luring context, this applies whether the recipient of the communication is an actual victim or an undercover police officer. The use of undercover officers in these circumstances does not require prior judicial authorization. Nor does an officer's use of a screenshot program to capture the electronic conversation. Neither constitutes an "intercept" within the meaning of Part VI of the *Code*.

PART IV – COSTS

38. The Intervener makes no submissions regarding costs.

PART V – REQUEST TO PRESENT ORAL ARGUMENT

39. This Court previously granted the Intervener five minutes to present oral argument.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Calgary, Alberta, this 9th day of May, 2018.

Jennifer Watt as Agent

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COUNSEL FOR THE INTERVENER

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[33] *R v Duarte*, [1990] 1 SCR 30 at p 48. See also *R v Ghotra*, *supra* note 22 at para 82

PART VI – TABLE OF AUTHORITIES AND LEGISLATION

Authorities	**Cited at Paragraph No.**
***R v Alicandro*,** 2009 ONCA 133, 95 OR (3d) 173 at paras 36, 38	11, 31
***R v Beairsto*,** 2018 ABCA 118, 2018 CarswellAlta 593 at paras 24, 27-28	20, 32
***R v Chiang*,** 2012 BCCA 85, 316 BCAC 238 at para 19	31
***R v Duarte*,** [1990] 1 SCR 30 at p 48	36
***R v Graff*,** 2015 ABQB 415, 2015 CarswellAlta 1187 at paras 51-66	20, 23
***R v Haniffa*,** 2017 ONCJ 780, 2017 CarswellOnt 1822 at paras 18-20	31
***R v Jones*,** 2017 SCC 60, [2017] 2 SCR 696 at paras 19-22	17
***R v Legare*,** 2009 SCC 56, [2009] 3 SCR 551 at paras 2, 8, 25	12, 19, 29
***R v Levigne*,** 2010 SCC 25, [2010] 2 SCR 3 at para 25	30
***R v Marakah*,** 2017 SCC 59, [2017] 2 SCR 608 at paras 9-12, 22, 23, 24-45, 55	13, 15, 16, 22
***R v Merritt*,** 2017 ONSC 1648, 2017 CarswellOnt 21204 at paras 68-78, 79-104	20, 23, 28, 29
***R v Mills*,** 2013 CanLII 74953 (NLPC) at paras 1, 13, 44	8
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***R v Mills*,** 2014 CanLII 76044 (NLPC) at paras 3-4, 5, 9-10, 21, 36-38, 45	5, 6, 8
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***R v S (NJ)*,** 2014 BCSC 2658, 2014 CarswellBC 4316	31
***Rothman v The Queen*,** [1981] 1 SCR 640, [1981] SCJ No 55 at p 697	33, 34

TAB	**Authorities – Reproduced**	Cited at Paragraph No.
1	*R v Allen*, 2017 ONSC 1712 at paras 37-53	20, 23
2	*R v Ghotra*, [2015] OJ No 7253 at paras 82, 123-131	23, 24, 36

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