

No Reasonable Expectation of Privacy in Case of Online Child Luring

May 17, 2019

An undercover police officer of the Royal Newfoundland Constabulary posed online as a 14-year-old girl to catch Internet child lurers and then waited for adult strangers to message her. Sean Mills reached out to this fictitious girl using Facebook Messenger and Hotmail and over the next two months sent her several messages, including intimate pictures. He was then arrested in a public park where he had arranged a meeting with her.

The record of Mr. Mills' conversations with the fictitious girl was introduced at trial, prompting a Charter application for exclusion of the evidence. Mr. Mills argued that this technique by the undercover police officer – all conducted without a warrant – amounted to a search and seizure of his online communications under s. 8 of the Charter. A majority of the Supreme Court of Canada held last week that this technique did not engage s. 8 since Mr. Mills could not have had a reasonable expectation of privacy in these circumstances.

No Expectation of Privacy When Communicating with Unknown Children

To claim s. 8 protection, an accused must show a subjectively held, and objectively reasonable, expectation of privacy in the subject matter of the search. All justices agreed that Mr. Mills had a subjective expectation of privacy in this case. The more difficult question was whether this subjective expectation was objectively reasonable.

A majority of the justices of the Court held that such an expectation could not have been objectively reasonable and that s. 8 of the Charter was not engaged. A sole justice held that the circumstances warranted a reasonable expectation of privacy and that s. 8 was engaged, but refused to exclude the evidence under s. 24(2) of the Charter.

Among the justices holding that there was no objectively reasonable expectation of privacy, the largest contingent held that adults could not reasonably expect privacy online when communicating with someone they believed to be a child who was a stranger to them. Such an expectation could not exist given the vulnerability of children to sexual crimes, especially over the Internet. The justices reiterated that “enhancing protection to children from becoming victims of sexual offences is vital in a free and democratic society.”

As for the need for a warrant, the court held that no judicial authorization was required here since there was no potential breach of privacy. The undercover police had not intruded upon a conversation between individuals unknown to them, nor sifted through various communications before they recognized the illicit relationship. Rather, this innovative technique allowed police to know from the outset – before any potential privacy breach – that the adult they had caught was conversing with a “child” who was a stranger to him. There was therefore no s. 8 breach.

No Expectation of Privacy with the Recipient of Written Communication

Another group of justices similarly held that there was no objectively reasonable expectation of privacy in this case. However, they based their decision on the medium of communication used rather than the nature of the relationship between the parties. They held that there was no breach of s. 8 when undercover officers communicated with an individual in writing, since it was not reasonable to expect that one’s written messages would be kept private from the intended recipient – even if the intended recipient turned out to be an undercover officer.

Furthermore, no warrant was required since the police officers did not surreptitiously create a permanent record of oral conversations. Rather, Mr. Mills himself chose to communicate over Facebook Messenger and email, where he himself rendered his communications into a permanent record. The police did not create or intrude upon this recording in breach of an expectation of privacy, but rather were its intended recipients. Mr. Mills unwittingly engaged in criminal conduct with someone who turned out to be a police officer, and as the Court has held, “the Charter cannot be invoked ‘to protect us against a poor choice of friends.’”

By

[Taha Hassan](#), [Kevin McGivney](#), [Ira Parghi](#)

Expertise

[Appellate Advocacy](#), [Cybersecurity](#), [Privacy & Data Protection](#), [Disputes](#)

BLG | Canada's Law Firm

As the largest, truly full-service Canadian law firm, Borden Ladner Gervais LLP (BLG) delivers practical legal advice for domestic and international clients across more practices and industries than any Canadian firm. With over 725 lawyers, intellectual property agents and other professionals, BLG serves the legal needs of businesses and institutions across Canada and beyond – from M&A and capital markets, to disputes, financing, and trademark & patent registration.

blg.com

BLG Offices

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749

The information contained herein is of a general nature and is not intended to constitute legal advice, a complete statement of the law, or an opinion on any subject. No one should act upon it or refrain from acting without a thorough examination of the law after the facts of a specific situation are considered. You are urged to consult your legal adviser in cases of specific questions or concerns. BLG does not warrant or guarantee the accuracy, currency or completeness of this publication. No part of this publication may be reproduced without prior written permission of Borden Ladner Gervais LLP. If this publication was sent to you by BLG and you do not wish to receive further publications from BLG, you may ask to remove your contact information from our mailing lists by emailing unsubscribe@blg.com or manage your subscription preferences at blg.com/MyPreferences. If you feel you have received this message in error please contact communications@blg.com. BLG's privacy policy for publications may be found at blg.com/en/privacy.

© 2024 Borden Ladner Gervais LLP. Borden Ladner Gervais LLP is an Ontario Limited Liability Partnership.