# No Reasonable Expectation of Privacy in Case of Online Child Luring

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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.'"

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