SUPREME COURT OF CANADA

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Case in Brief: *R. v. Mills*

Judgment of April 18, 2019 | On appeal from the Court of Appeal of Newfoundland and Labrador
Neutral citation: 2019 SCC 22

If someone has sexual conversations with a child they don't know online, they can't expect their messages to stay private from the police, the Supreme Court has ruled.

In 2012, a police officer created fake Facebook and Hotmail accounts pretending to be "Leann," a 14-year-old girl. Mr. Mills contacted "Leann." He was 32, but pretended to be 23. Over the next two months, he sent "Leann" several messages and emails, including a photo of his penis. Police used software to take screenshots of all the communications. Eventually, Mr. Mills asked to meet "Leann" in a public park. He was arrested and charged with child luring. This is the crime of talking to an underage person online (or using a cellphone) to try to take advantage of them sexually.

During his trial, Mr. Mills argued that police weren't allowed to run the undercover operation that led to his arrest. He said they needed a judge's permission. He said they breached his *Charter* right to privacy because they didn't have permission. Because of the breach, he said the evidence shouldn't be allowed in court. This would mean his conversations with "Leann" couldn't be looked at.

Privacy rights are found in Section 8 of the *Canadian Charter of Rights and Freedoms*. The *Charter* is part of Canada's Constitution. Section 8 says that "everyone has the right to be secure against unreasonable search or seizure." This means the state can't search or take something private without permission. To show a breach of privacy rights, a person has to show that they should have been able to expect something would be kept private. This is called a "reasonable expectation of privacy." Part of this is subjective (that is, the person actually thinks the thing should be private). Part of it is objective (that is, most other people would agree it should be private). The state can still search or take something someone reasonably expects to be private. But it has to have permission. Permission can be from a judge (like a warrant). It can also be given if the law directly says so.

In this case, the police said it wasn't reasonable for Mr. Mills to expect his conversations with "Leann" would be kept private. They said they didn't need permission to run the undercover operation or to screen-capture the conversations.

The trial judge agreed with Mr. Mills that police should have had a judge's permission to do some things. The judge said it was okay for the police officer who posed as "Leann" to capture their conversations on Facebook and Hotmail. But using software to save screen-caps of the conversation was an additional step. They should have gotten permission to do this. But the judge said the evidence should be allowed anyway, and Mr. Mills was found guilty. The Court of Appeal said the police didn't need a judge's permission. It said Mr. Mills couldn't expect privacy when he was messaging a child he didn't know.

All the judges at the Supreme Court agreed that Mr. Mills should be found guilty.

The majority said that Mr. Mills didn't have a reasonable expectation of privacy. He couldn't have expected that his messages would be kept private when he was talking to a child he didn't know. (If he did know the child, then the conversations might be private.) In this case, the police knew for sure Mr. Mills didn't know "Leann," because they invented her. That meant there was no chance of a privacy breach. There was no reason a judge shouldn't look at the messages Mr. Mills sent to "Leann" to decide if he was guilty. This case involved online messages, but the majority said text messages would also be treated the same when it comes to privacy rights.

All the judges at the Supreme Court agreed courts shouldn't just look at whether something is *actually* private. (Just because something is exposed doesn't mean it isn't private anymore.) Instead, they should look at what a person *ought* to be able to expect to be private in our society. Most judges agreed it isn't reasonable to expect this kind of conversation would be kept private.

The Court decided two other cases involving privacy rights in the months before this one: *R. v. Reeves* in December 2018 and *R. v. Jarvis* in February 2019. It decided another case about child luring, *R. v. Morrison*, in March 2019.

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Breakdown of the Decision: ***Majority:*** Justice Russell Brown dismissed the appeal (Justices Abella and Gascon agreed) | ***Concurring:*** Justice Andromache Karakatsanis would have dismissed the appeal because it was not reasonable to expect that the messages would be kept private from the intended recipient, even if that recipient was an undercover police officer (Chief Justice Wagner agreed) | ***Concurring:*** Justice Michael Moldaver agreed with the reasons of both Justices Brown and Karakatsanis, and would have dismissed the appeal | ***Concurring:*** Justice Sheilah Martin said police needed permission and Mr. Mills' privacy rights were breached, but the evidence should be allowed anyway, and so she would have also dismissed the appeal

More information (case # 37518): Decision | Case information | Webcast of hearing

Lower court rulings: application to exclude evidence (not available online), trial, sentence (Provincial Court of Newfoundland and Labrador) | appeal (Supreme Court of Newfoundland and Labrador – Court of Appeal)